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INTRODUCTION: AMENDMENT IN EXTREME CONDITIONS

Should constitutions prevent their own amendment during a period of emergency? This question has long confronted constitutional designers around the world, and today continues to be a key question in the making of constitutions. We know from the body of current and historical constitutions that codified constitutional rules can be designed to disable the amendment process for the duration of the crisis, for better or worse. They can forbid constitutional actors from amending the constitution to make it more nimble in generating a response to the moment, just as they can bar constitutional actors from amending the constitution to exploit the crisis. Is this kind of restriction a good idea?

Think back to the September 11 attacks on the United States. President George W. Bush recorded the highest-ever popular approval for any president, reaching ninety percent, as Americans rallied around the flag and put their trust in him to protect them, their loved ones, and their country.[1] Had President Bush and his team proposed a constitutional amendment they believed could help protect the country—for instance, an amendment to limit the Constitution's due process protections for persons suspected of planning or executing the attacks—the amendment could well have passed despite the extraordinary difficulty of amendment in the United States.[2] But should the amendment power have been available during this crisis?

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1. David W. Moore, *Bush Job Approval Highest in Gallup History*, GALLUP (Sept. 24, 2001), https://news.gallup.com/poll/4924/bush-job-approval-highest-gallup-history.aspx.

2. *See* DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006).

Prohibitions on amendment in periods we can broadly label as "extreme conditions" raise critical questions for constitutional law and design. Extreme conditions include emergency, war, siege, regency, or other moments that heighten doubts about whether constitutional actors can deliberate with clarity in the face of extraordinary circumstances. Many constitutions prohibit amendments in these and other periods, yet there is surprisingly little scholarship on whether constitutional clauses prohibiting emergency amendments are worth adopting.

We aim in this Essay to fill a void in the field as to what we call "emergency unamendability." We begin in Part I by introducing this phenomenon,[3] then in Part II we discuss why constitutional actors may wish to limit the amendment power in extreme conditions,[4] before moving in Part III to consider possible constitutional designs to limit but not altogether prohibit the amendment power in extreme conditions.[5] We close with a recognition of the difficulty of addressing the challenges inherent in policing the amendment power by constitutional design alone. We hope in this Essay to encourage further research into emergency unamendability.

I. THREE FORMS OF EMERGENCY UNAMENDABILITY

Since even before the founding of the American republic, constitutions have entrenched various limitations on the power of constitutional amendment. Procedural unamendability regulates the process required to amend a constitution, namely special majorities or quorums, special elections or referendums, or the convening of a constituent assembly. Substantive unamendability disallows amendments to certain principles, institutions, or rules. Temporal unamendability restricts the timing of various steps in the formal amendment process. And emergency unamendability freezes the constitution in designated periods of crisis.[6]

We are concerned in this Essay only with emergency unamendability. Constitutions impose emergency unamendability in the face of extreme

3. *See infra* Part I.

4. *See infra* Part II.

5. *See infra* Part III.

6. For a general overview of unamendability, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); SILVIA SUTEU, ETERNITY CLAUSES IN DEMOCRATIC CONSTITUTIONALISM (2021). On temporal unamendability, see Richard Albert, *Temporal Limitations in Constitutional Amendment*, 21 REV. CONST. STUD. 37 (2016). On procedural unamendability, see Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014); Richard Albert, *Amending Constitutional Amendment Rules,* 13 INT'L J. CONST. L. 655 (2015). And on substantive unamendability, see Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010).

conditions for governance, for instance, war or succession.[7] Other forms of emergency unamendability involve making and changing constitutions.[8] The purpose of emergency unamendability is to disable the amendment procedure to maintain the status quo out of concern that the pressure of the moment could distort the amendment process, compromise public or legislative deliberation, or make it possible to hijack the constitution itself. In this Part of our Essay, we illustrate the many forms of emergency unamendability.

A. Conflict

Constitutions sometimes impose limits on amendments in periods of conflict.[9] For example, the constitution of Spain makes clear that "[t]he process of Constitutional amendment may not be initiated in time of war or [alarm, emergency and siege (martial law)]."[10] The Portuguese constitution codifies a similar prohibition insisting that "[n]o act involving the revision of this Constitution shall be undertaken during a state of siege or a state of emergency."[11] These rules seek to ensure the integrity of the constitution when the constitution most needs protection.

B. Succession

Constitutions sometimes also prohibit their own amendment in transitions in governance. When the Queen or King is unable to lead, for instance, a constitution may disable the amendment power, as is the case in Luxembourg: "During a regency, no change may be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as

7. *See infra* Sections III.A–B.

8. *See infra* Section III.C.

9. Christian Bjørnskov & Stefan Voigt, *The Architecture of Emergency Constitutions*, 16 INT'L J. CONST. L. 101, 111 (2018).

10. CONSTITUCIÓN ESPAÑOLA Dec. 29, 1978, art. 169 (Spain). This prohibition on the initiation of constitutional reforms in times of war or in circumstances described in Section 116 (states of alarm, emergency or siege) has been interpreted to disallow even reforms already in progress. *See* María del Camino Vidal Fueyo, *Procedures for the Review of Constitutionality of Constitutional Amendments in the Spanish Legal System*, 8 INT'L J. HUM. RTS. & CONST. STUD. 112, 116 (2021).

11. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION], art. 289, English translation available at https://dre.pt/constitution-of-the-portuguese-republic. It has been suggested that this limitation was intended to "guard the republican Constitution against self-proclaimed guardians who, in a decisionist mode, might want to take advantage of exceptional situations created by internal and external threats, to force the introduction of amendments not allowed by the [Portuguese Republican Constitution]." *See* Jónatas E.M. Machado, *The Portuguese Constitution of 1976 – Half-Life and Decay*, *in* ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 273, 284 (Xenophon Contiades ed., 2013) [hereinafter ENGINEERING CONSTITUTIONAL CHANGE].

well as the order of succession."[12] A similar restriction exists in Belgium, whose constitution prohibits various constitutional changes, notably to the King's constitutional powers in a period of regency.[13] These rules are sometimes reinforced by amendments adopted in periods of normalcy that further limit the powers a monarch may exercise in extreme conditions.[14]

C. Making and Changing Constitutions

In addition, constitutions impose restrictions on their amendment in the context of constitutional change. Consider the Cape Verdean constitution. It prohibited amendments within five years of its coming-into-force, giving the constitution time to take root in law and politics before undergoing the possible upheaval of an amendment.[15] The Estonian constitution forbids constitutional actors from reintroducing a failed amendment proposal within one year of its rejection.[16] And, as another example, the Greek constitution establishes a similar prohibition, though it applies to successful amendments: "Revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision."[17] The purpose of these restrictions is to spare the country repeated disruptions and the risks of constitutional fatigue and failure, though sometimes their rigidity triggers informal forms of change outside the formal constitutional amendment process.[18]

II. THE ORIGINS AND PURPOSES OF EMERGENCY UNAMENDABILITY

The story of emergency unamendability begins in ancient Rome. In times of crisis, a trusted person was given absolute power for a temporary period in order to defend the republic.[19] This benign dictator had a duty to

12. CONSTITUTION DU GRAND-DUCHÉ DU LUXEMBOURG Oct. 17, 1868, art. 115.

13. 1994 CONST. (Belg.) art. 197.

14. *See* Jörg Gerkrath, *Constitutional Revision in Luxembourg, in* ENGINEERING CONSTITUTIONAL CHANGE, *supra note* 11, at 229, 244.

15. CONSTITUTION DE LA RÉPUBLIQUE DU CAP VERT, art. 309 (Cape Verde).

16. EESTI VABARIIGI PÕHISEADUS [CONSTITUTION], s. 168 (Est.).

17. 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 110 (Greece).

18. *See* George Tridimas, *Constitutional Convulsions in Modern Greece*, *in* BEHIND A VEIL OF IGNORANCE? POWER AND UNCERTAINTY IN CONSTITUTIONAL DESIGN 169 (Louis M. Imbeau & Steve Jacob eds., 2015). For a discussion of extraconstitutional changes outside the formal amendment process, see Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to* Our Undemocratic Constitution, 55 DRAKE L. REV. 925 (2007) (explaining how amendment energies are redirected through judicial interpretation, legislative action, and political practice when the path to formal amendment is blocked due to amendment hyperdifficulty).

19. ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 109–15 (1999); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 15–28 (1948).

preserve the existing constitutional order.[20] Machiavelli explains that the benign dictator "could not do anything that might diminish the state, as taking away authority from the Senate or from the people, undoing the old orders of the city and making new ones, would have been."[21] The task was clear: protect the polity and ensure that the constitutional order remains intact in the face of the extraordinary pressures of the moment.

The now superseded French constitution of 1946 incorporated the Roman experience. The text specified that "[i]n the event of occupation of all or part of the metropolitan territory by foreign forces, no revision procedure of amendment can be undertaken or continued."[22] The drafters of the constitution had also learned from the experience of the occupation in France during the Second World War.[23] The current French constitution has retained a version of that rule, declaring that "[n]o amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy,"[24] whether the threat is foreign or domestic. The objective of this prohibition—perhaps it is more symbolic than coercive—is to thwart the possibility of amending the French constitution in the event the country once again comes under occupation.[25]

The current French constitution comes close to replicating the Roman experience. It gives the President the power to lead the country through any emergency, importantly in transparent consultation with the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council, and also without undertaking any form of constitutional revision.[26] The Constitutional Council stressed that even if the choice to amend the Constitution rests on consultative and transparent decision-making, no amendment may be made in a period of emergency because the amendment power is disabled in this context.[27] Some choices are just not permissible, according to the Council.[28]

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20. OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 22 (2006).

21. NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY pt. I, ch. 34, at 74 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chi. Press 2009).

22. 1946 CONST. art. 94 (Fr.).

23. *See* Karl Lowenstein, *The Demise of the French Constitution of 1875*, 34 AM. POL. SCI. REV. 867, 871 (1940).

24. 1958 CONST. art. 89 (Fr.).

25. Wanda Mastor & Liliane Icher, *Constitutional Amendment in France*, *in* ENGINEERING CONSTITUTIONAL CHANGE, *supra* note 11, at 115, 115–16.

26. 1958 CONST. art. 16 (Fr.).

27. Conseil constitutionnel [Constitutional Court] decision No. 92-312DC, Sept. 2, 1992, para. 19 (Fr.).

28. *Id.*

The Roman and French models of emergency unamendability raise a critical question about these limitations on constitutional amendment: Why limit the amendment power in these periods of great stress on the state? In this Part, we outline three purposes of emergency unamendability.

A. Protecting Rights

Return to the hypothetical scenario that opened this Essay: an amendment to curtail the due process rights of persons suspected of planning or executing the horrific attacks of September 11. Emergency unamendability is intended to prevent precisely that kind of amendment—an amendment that could potentially violate constitutional rights. Periods of crisis heighten everything in the polity—from emotions to the pace of decision-making—and the concern arises as to whether leaders can be trusted to act rationally in the face of unusually stressful circumstances.

What do we know about how people respond to emergencies? According to two scholars who have studied the exercise of official power during emergencies, "[d]uring an emergency, people panic, and when they panic they support policies that are unwise and excessive."[29] As a result, one could expect a leader to sometimes make the wrong choice when plotting their response to an attack. Another scholar of public law concedes that "[i]f pedantic respect for civil liberties requires government paralysis, no serious politician will hesitate before sacrificing rights to the war against terrorism. He will only gain popular applause by brushing civil libertarian objections aside as quixotic."[30] Emergency unamendability could help check political decisions that might deprioritize rights. It offers what Jon Elster describes as "a perfect protection against impulsive rashness."[31]

Surely it is a difficult balance for any leader to strike. What is the right measure of rights protection when the people and the moment may demand quick and decisive retaliation? Emergency unamendability resolves the tension in the direction of rights. Yet this may not make the path any clearer for a leader charged with the responsibility to protect the polity and its people. Even constitutions themselves sometimes reflect uncertainty about how leaders should respond in this context. The Serbian constitution, for example, insists that "[t]he Constitution shall not be amended in the time of the state

29. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 609 (2003).

30. Bruce Ackerman, *Don't Panic*, 24 LONDON REV. BOOKS (2002).

31. Jon Elster, *Majority Rule and Individual Rights*, *in* THE POLITICS OF HUMAN RIGHTS 120, 146 n.35 (Obrad Savić ed., 2002). Of course, unamendable provisions "do not bind in a strict sense, because extraconstitutional action always remains possible." JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 94 (2000).

of war or emergency."[32] Yet the constitution also recognizes the possibility of "derogation from human and minority rights in the state of emergency or war,"[33] and requires these kinds of constitutional changes to be validated by referendum.[34] The Serbian constitution therefore appears to recognize the risk of overreach in emergencies but requires leaders to seek popular consent for changes that would impact rights. Popular consent in this case is driven likely both by the need for democratic legitimation of extraordinary actions and by mistrust of leaders when the state finds itself under threat.

B. Frustrating Abuses of Power

Closely connected to the purpose of protecting rights is frustrating abuses of power. Violating rights are of course themselves instances of abuse of power. But emergency unamendability intends to cover more than just rights-related ground when it is oriented toward frustrating abuses of power. It is an effort to guard both against rights violations and the concentration of power in the hands of one actor, for instance a president, or a set of related actors, like a parliament. Emergency unamendability prevents constitutional amendments during periods of emergency partly to prevent incumbents from entrenching themselves in power. Incumbents may try to use the emergency to extend their stay in power or to increase their powers over and above what the country's constitutional arrangements permit.[35]

Consider a counterfactual. During the Second World War, United States President Franklin Delano Roosevelt contested and won his third and fourth consecutive elections, despite the conventional constitutional norm that limited presidents to serving no more than two consecutive terms.[36] After his death, the United States quickly amended the Constitution to codify the two-term rule that had until then remained unwritten.[37] But imagine the two-term rule had already been written into the Constitution by the time of the Second World War. On its own, this would not have prevented Roosevelt from running for a third and fourth consecutive term. His congressional supporters could have proposed an amendment to the two-term rule, and their state colleagues could have ratified it, assuming all would have been convinced that the country needed stable and steady leadership during this

32. O Proglašenju Ustava Republike Srbije [Constitution], art. 204 (Serbia).

33. *Id.* art. 203.

34. *Id.*

35. Charles Manga Fombad, *Some Perspectives on Durability and Change under Modern African Constitutions*, 11 INT'L J. CONST. L. 382, 408 (2013).

36. *See* Stephen W. Stathis, *The Twenty Second Amendment: A Practical Remedy or Partisan Maneuver*, 7 CONST. COMMENT. 61, 61, 63 (1990).

37. U.S. CONST. amend. XXII.

global crisis, rather than taking the risk that a new president might not be up to the job of managing the war effort. Emergency unamendability would have prevented a legal amendment to the two-term rule, for better or worse.

C. Preserving the Constitutional Order

History has shown that amendments in emergency contexts sometimes generate a "constitutional revolution."[38] At its core, then, emergency unamendability is concerned with preserving the constitutional order. It seeks to prevent both small changes to the constitution as well as its wholesale abrogation.[39] This was the priority of the benign Roman dictator: minimize harm to the republic, maintain the integrity of the apparatus of the state, and defend the constitution during the emergency. The pressure and uncertainty in moments of crisis put into peril the constitutional order if an amendment is passed without giving sufficient deliberation to the change and its implications for the emergency period and beyond. Hence the prohibition of constitutional amendment during moments of crisis in many constitutions around the world.

To put the threat in other terms, the fear is that a benign dictator might exploit their emergency powers to transform their rule into a malevolent dictatorship unbound in its duration, unbound in its mandate, and unbound even by any rules.[40] Guillaume Tusseau stresses that emergency powers during moments of crisis are meant to preserve and, if necessary, restore the form of the state, the form of the government, and the fundamental values of the constitutional order.[41] Their objective, then, "is nothing else than to restore the conditions in which the state of emergency will no longer be necessary, that is, once again, to abolish themselves."[42] During the emergency, the use of extraordinary powers must be intended to return the country to its pre-emergency circumstances, with a restoration of normal governance and the constitution remaining intact.[43]

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38. For a thorough history and conceptualization of the term, see GARY J. JACOBSOHN & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION (2020).

39. *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 223 (2004) (discussing abrogation and preservation of constitutions during emergencies).

40. Yaniv Roznai & Richard Albert, *Introduction: Modern Pressures on Constitutionalism*, *in* CONSTITUTIONALISM UNDER EXTREME CONDITIONS: LAW, EMERGENCY, EXCEPTION 1, 4–5 (Richard Albert & Yaniv Roznai eds., 2020).

41. Guillaume Tusseau, *The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach*, 97 ARSP: ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 498, 528 (2011).

42. *Id.*

43. *Id.*

This third purpose of emergency unamendability points to the transitional dimension of the Roman model of emergency governance. The benign dictator was understood as a constitutionally bound dictator whose duty was to manage the crisis with fidelity to the constitution. Returning to normal would be accomplished most easily if no fundamental modifications had been made to the constitution. And better still if citizens saw their leaders conforming their own conduct to the constitution rather than using the amendment power to bend the constitution to their own immediate and perhaps fleeting needs of the moment. Amendments could maybe assist the state in surviving the emergency, for instance, an amendment to further protect rights and liberties, or to reinforce the integrity of the separation of powers. But amendments in emergencies could also seek nefarious objectives. That is why so many constitutions ban all amendments during emergencies, whether they are substantively good or bad, to protect the constitution and the state.[44]

III. THREE ALTERNATIVES TO EMERGENCY UNAMENDABILITY

Emergency unamendability has worthy purposes but there may be better ways to fulfill them. Unamendability as a constitutional design raises serious challenges for constitutional democracy insofar as it denies the fundamental power of self-definition that amendment entails, it freezes the constitution and prevents its evolution when new views and values may require change, and it relies on mere words written on paper to contain abuses of power in emergency periods when incumbents may feel they have no other choice in order to protect the polity and its people.[45] Unamendability becomes especially problematic during indefinite or perpetual states of emergency. There is a further risk: Emergency unamendability may provoke recourse to extra-constitutional means of change.[46]

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44. The limitation on constitutional amendment powers during emergency situations such as times of war, application of martial law, state of siege or extraordinary measures is common in some constitutions of Eastern European and African states. *See* Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275, 291 (Sanford Levinson ed., 1995); C.M. Fombad, *Limits on the Power to Amend Constitutions: Recent Trends in Africa and Their Potential Impact on Constitutionalism*, 6 U. BOTSWANA L.J. 27, 36, 51 (2007); EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), REPORT ON CONSTITUTIONAL AMENDMENT 13 (2010).

45. *See* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 194–97 (2019).

46. For an argument that grave dangers require acting outside the constitutional order, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003).

Perhaps, then, constitutional designers ought to consider other mechanisms to constrain constitutional actors in periods of emergency. In this Part, we survey three possible alternatives.

A. Judicial Review of Emergency Amendments

Imagine a jurisdiction whose constitution does not codify any rule of emergency unamendability. In this jurisdiction, constitutional actors are free to amend the constitution in periods of emergency, just as they are in periods of normalcy. Assume that constitutional actors move to amend the constitution in response to external attacks on the land. Assume further that the amendment—let us call it the Expedited Process Amendment—limits the due process protections afforded to persons suspected of planning or executing the attacks. On these facts, assume moreover that a constitutional challenge is brought against the Expedited Process Amendment, featuring a litigant arguing that the amendment is unconstitutional.

In many countries, including the United States, a constitutional challenge to a constitutional amendment would be dismissed for raising a political question, for lack of standing, or perhaps for lack of jurisdiction on the matter.[47] But in various other countries around the world, high courts freely exercise the power to invalidate a constitutional amendment.[48] Even where the amendment is passed properly according to the amendment procedures enumerated in the constitutional text, these courts may still rule that the amendment violates either a written or unwritten constitution-level rule. In these countries, a litigant could challenge the Expedited Process Amendment.

How a court ultimately rules on a challenge to the constitutionality of the Expedited Process Amendment depends on several factors, including the grounds upon which the court is authorized to invalidate an amendment; the peculiar tradition of constitutional change in that jurisdiction; and the facts surrounding the amendment's adoption, such as whether it is necessary to protect the polity and whether it is properly tailored to achieve its lawful

47. The Supreme Court has declined to hold unconstitutional any amendment to the U.S. Constitution. *See* National Prohibition Cases, 253 U.S. 350, 386 (1920); Leser v. Garnett, 258 U.S. 130, 136 (1922). The Court has moreover held that Congress alone is to rule on ratification disputes involving amendments to the U.S. Constitution. *See* Coleman v. Miller, 307 U.S. 433, 456 (1939).

48. *See* ROZNAI, *supra* note 6, at ch. 2, 8 (examining the invalidation of amendments in Austria, Bangladesh, Belize, Brazil, the Czech Republic, Colombia, Germany, India, Peru, and Ukraine). The judicial power to invalidate amendments is nonetheless not a universally accepted practice; some courts have expressly rejected the authority to review formal amendments. *See* Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639 (2019) (examining France, Georgia, and Turkey as three jurisdictions where courts have, for different reasons, rejected the doctrine of unconstitutional constitutional amendments).

objectives. But just like unamendability raises concerns of democratic legitimacy, so too does the power of judicial review of constitutional amendment. These concerns can of course be assuaged by constitutional designers if the constitutional text expressly authorizes courts to exercise this extraordinary power. Even still, courts may exceed their express authorization where the constitution grants courts only the power to review amendments for their procedural correctness, yet courts in turn transform that limited authority into a plenary power to review not only the procedure but also the content of amendments.[49] What is more, courts may be unlikely to exercise the power to invalidate an emergency amendment given the tendency of constitutional actors—judges included—to "rally around the flag" in times of emergency.[50]

But imagine the court hears the challenge on the Expedited Process Amendment, and ultimately concludes that the amendment violates the constitution's core commitment to due process. The president's response would be critical. They could of course choose to comply with the court's ruling. But in the midst of war, armed with a power both the executive and legislative branches believe helps them protect the country, the president might test the boundaries of their authority—and the court's own—by defying the court's order. Would the legislature stand with the president? How would the people respond at that heightened moment of stress when they are told by their president that this amendment is necessary to protect them? The risk is high that this conflict could lead to a constitutional crisis, or at the very least a constitutional question whose answer would turn on what the president ultimately chose to do. While judicial review of amendments is certainly an alternative to emergency unamendability, it may not be a better one.

B. Self-Destruction Trigger

A second alternative to emergency unamendability is a self-destruction trigger. Where constitutional actors are not prohibited from amending the constitution in response to a crisis, they may freely make amendments in order to manage the crisis and ultimately bring it to an end. This power may give reason to worry that constitutional actors could pass an amendment that might well intend to return the country to normalcy, but that could ultimately

49. The Turkish case illustrates the challenge of distinguishing between procedural and substantive review. *See* Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 322–25 (2011).

50. *See* Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 6 (2005); *see also* Thomas Poole, *Constitutional Exceptionalism and the Common Law*, 7 INT'L J. CONST. L. 247, 257 (2009).

entrench incumbents in power, disadvantage their opponents, or restrict constitutional rights and freedoms after the emergency ends. Put another way, we might well worry that emergency amendments will "stick after the emergency has passed."[51] What can constitutional design do to respond to this potential for executive or legislative overreach?

Consider a self-destruction trigger. Constitutional designers could permit amendments in periods of emergency but require that any emergency amendment expire automatically after a certain period of time. Specifically, the constitution would include a codified rule authorizing constitutional actors to amend the constitution during an emergency but specifying that the amendment self-destructs automatically without any further action by constitutional actors. The appropriate length of time is of course something that constitutional designers would debate. They might even choose to create different expiration periods for different categories of amendments they anticipate constitutional actors would make in the event of an emergency.

The self-destruction trigger is not perfect. For one, it relies on constitutional designers to carefully design the rules about what kinds of emergency amendments are permissible, and for how long they will survive before they elapse. It also presupposes that constitutional actors will agree, in the heat of the moment, that a given emergency amendment qualifies in one category or another of emergency amendment. Because different categories would have different periods of duration, it is likely that incumbents will seek to shoehorn their preferred emergency amendment into the category with the longest lifespan. In addition, this alternative would require constitutional actors to define when an emergency exists, because absent a declaration of emergency, constitutional actors would not be bound by the self-destruction trigger.

C. Escalating Sunset Rules

A variation on the self-destruction trigger is an escalating sunset rule. Unlike the self-destruction trigger, which automatically repeals the emergency amendment after a period of time has elapsed, the escalating sunset rule does not automatically repeal the emergency amendment, but it does require a higher threshold to extend its application after a pre-determined duration.

Return to the hypothetical Expedited Process Amendment. Assume it has been ratified in a unitary bicameral state according to the given

51. Posner & Vermeule, *supra* note 29, at 617. On the sickness of temporary emergency measures, see Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT'L L. 29 (2016).

constitution's ordinary amendment threshold, which hypothetically requires the approval of two-thirds supermajority of legislators in both chambers of the national legislature. Assume further that the constitution authorizes emergency amendments to expire after sixty days. The end of that period triggers the escalating sunset rule. This rule authorizes constitutional actors to extend the Expedited Process Amendment for another sixty days, but only if the legislature meets a higher threshold than it took to create the amendment. That higher threshold, hypothetically, is a three-quarters supermajority of legislators in both chambers of the national legislature. Once repassed, the newly extended Expedited Process Amendment again expires after sixty days, unless constitutional actors pass it once again with a still higher threshold; in this hypothetical, a four-fifths supermajority of legislators in both houses of the national legislature. Again, the emergency amendment expires after sixty days, and may be revived with a higher threshold of approval, hypothetically in this illustration with the unanimous agreement of legislators in both chambers of the national legislature.

Constitutional designers could codify one of many forms of an escalating sunset rule in the constitution at the time of its coming-into-force or sometime thereafter using the amendment process. The escalating sunset rule would specify the sequence of escalating thresholds required to extend an emergency amendment as well as their associated durations. Whether the duration of time remains steady between each escalating threshold or whether the duration changes at each step, these are choices to be made by the constitutional designers. The point, in either case, is that the rules should be specified in the constitutional text and visible for constitutional actors and the people to see.

Of course, these escalating sunset rules are susceptible to problems similar to the ones that hamper the judicial review of amendment and the self-destruction trigger.[52] But it does offer a third alternative to emergency unamendability to the extent that constitutional designers wish to achieve some of the same purposes of emergency unamendability without incurring its costs.

CONCLUSION: THE LIMITS OF TEXTUAL LIMITATIONS

We began this Essay with a problem: Constitutional changes are sometimes easier to achieve during emergencies.[53] But these emergency amendments should give pause to constitutional actors concerned with

52. *See supra* Sections III.A–B.

53. Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, *in* HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 405, 427 (Dawn Oliver & Carlo Fusaro eds., 2011).

protecting rights and liberties, guarding against the abuse of power, and preserving the integrity of the constitution. One answer to this problem is emergency unamendability. As a constitutional design, emergency unamendability aids in managing different forms of emergency by disabling the amendment process in moments of conflict (for instance war or a state of siege), moments of succession (namely regency or the absence of the executive), and moments of constitution-making and -changing (for example the period immediately following the creation of a constitution or the failed or successful passage of an amendment). Yet unamendability itself presents serious challenges for democratic legitimacy, especially when it limits what constitutional actors can do in periods of emergency to pull the country out of the crisis. We have therefore suggested three alternatives to emergency unamendability for constitutional designers seeking to achieve the protections of emergency unamendability without relying on unamendability. Each of the three alternatives—the judicial review of constitutional amendment, a self-destruction trigger, and an escalating sunset rule—raises problems of its own, of course, but they help assuage some of the concerns with unamendability.

Whether designers elect to codify emergency unamendability or one of its alternatives, the overarching problem remains: They all rely on textual rules to help protect the polity and the people in periods of emergency. Textual rules of course have their own limitations, precisely because they are only words written on paper. Codified constitutional rules can achieve their objectives only if they are reinforced by an underlying political commitment rooted in respect for the rule of law and for the presumably democratic procedures that led to their enactment. Without either, the constitution is nothing more than a façade that is a constitution in name alone.