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# Amending Constitutional Amendment Rules

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## AMENDING CONSTITUTIONAL AMENDMENT RULES

RICHARD ALBERT<sup>†</sup>

*No part of a constitution is more important than the rules that govern its amendment. Given the important functions served by formal constitutional amendment rules, we might expect constitutional designers to entrench them against ordinary amendment, for instance by requiring a higher-than-usual quantum of agreement for their amendment or by making them altogether unamendable. Yet relatively few constitutional democracies set a higher threshold for formally amending formal amendment rules. In this Article, I demonstrate that existing written and unwritten limits to formally amending formal amendment rules are unsatisfactory, and I offer modest textual entrenchment strategies to insulate formal amendment rules against ordinary formal amendment in constitutional democracies where the constitutional text exerts an appreciable constraint on political actors. I draw from historical, theoretical and comparative perspectives to suggest that two principles—intertemporality and relativity—should guide constitutional designers in designing formal amendment rules in constitutional democracies.*

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## I. INTRODUCTION

No part of a constitution is more important than the rules that govern its amendment and its entrenchment against it.<sup>1</sup> In constitutional democracies, formal constitutional amendment rules constrain political actors<sup>2</sup> by entrenching procedures for altering the constitutional text.<sup>3</sup> Amendment rules thereby distinguish constitutional law from ordinary law,<sup>4</sup> the former generally requiring more onerous requirements to change than the latter.<sup>5</sup> Amendment rules also precommit successor political actors,<sup>6</sup> create a popular check on the judicial branch,<sup>7</sup> channel popular will into institutional dialogue,<sup>8</sup> and express constitutional values.<sup>9</sup> Perhaps their most important function, however, is to serve as a corrective device: amendment rules authorize political actors to update the constitutional text as time and experience expose faults in its design and as new challenges emerge in the constitutional community.<sup>10</sup>

Amendment rules are fundamental to constitutionalism. Whereas constitutional rules generally set the “rules of the game in a society,” amendment rules more profoundly establish the “rules for *changing* the rules.”<sup>11</sup> As Akhil Amar has observed, amendment rules “are of unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced.”<sup>12</sup> Frank Michelman has similarly suggested that “perhaps the idea of a constitution requires absolute entrenchment of an amendment rule, which in turn at least relatively entrenches everything else.”<sup>13</sup> We know, of course, that courts, parliaments and presidents routinely alter constitutional meaning informally without a corresponding alteration to the constitutional text.<sup>14</sup> Yet the prevalence of informal amendment does not obviate the need to entrench amendment rules for the functional reasons of written constitutionalism.

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<sup>1</sup> JOHN BURGESS, *I POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 137 (1891).

<sup>2</sup> Xenophon Contiades & Alkmene Fotiadou, *Models of Constitutional Change*, *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* 417, 431 (Xenophon Contiades ed., 2012). Unless otherwise stated, hereafter I use “amendment rules” to refer to formal constitutional amendment rules, “amendment” to refer to formal amendment, and “amend” to formally amend.

<sup>3</sup> Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 195, 195 (Tom Ginsburg ed., 2012).

<sup>4</sup> EDWARD SCHNEIER, *CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN* 222 (2006).

<sup>5</sup> ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 39-40 (1999).

<sup>6</sup> JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 101-04 (2000).

<sup>7</sup> Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96, 97 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>8</sup> Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *HARV. L. REV.* 386, 431 (1983).

<sup>9</sup> Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 *MCGILL L.J.* 225, 236 (2013).

<sup>10</sup> Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 *TUL. L. REV.* 247, 275 (2002).

<sup>11</sup> Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY* 319, 319, 321 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) (emphasis added).

<sup>12</sup> Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457, 461 (1994).

<sup>13</sup> See Frank I. Michelman, *Thirteen Easy Pieces*, 93 *MICH. L. REV.* 1297, 1303-04 n.27 (1995).

<sup>14</sup> See Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 929 (2007).

In the Lockean tradition of representative government, amendment rules hold special significance: they legitimize higher and ordinary law as derived from the direct or mediated consent of the governed.<sup>15</sup> The power of amendment is accordingly an “incident of sovereignty,” because it is “supreme within its legal system, even if not omnipotent.”<sup>16</sup> Amendment rules make possible the “fundamental act of popular sovereignty,”<sup>17</sup> and hence raise a paradox that highlights their importance: the amending power is a constituted power subject to the constitution yet it may be used to change the very standards the constitution establishes to constrain the exercise of this delegated authority.<sup>18</sup> Ulrich Preuss states the point: the amending power “is necessary to preserve the flexibility and sustainability of the constitutional order, but it can destroy it by amending the constitution in an anti-constitutional tenor.”<sup>19</sup>

Given the importance of amendment rules, we might expect constitutional designers to entrench them against ordinary amendment, for instance by requiring a higher-than-usual quantum of agreement for their amendment or by making them altogether unamendable. Yet relatively few constitutional democracies set a higher threshold for amending amendment rules. The reason why is unclear. Perhaps constitutional designers do not view amendment rules as special and therefore deserving of heightened entrenchment. Perhaps they recognize the specialness of amendment rules yet entrench them ordinarily on the understanding that amendment rules are implicitly entrenched. Alternatively, the failure to entrench amendment rules against ordinary amendment could simply expose a design flaw thus far undetected.

My purpose in this Article is to advise constitutional designers on how to design amendment rules to protect them against ordinary amendment.<sup>20</sup> I suggest that amendment rules should be harder to amend than other constitutional rules. My recommendations are directed to constitutional designers, not constitutional reformers, insofar as I do not suggest that existing constitutions should be amended to make their own amendment rules harder to amend. In some cases, that would raise a deep irony, particularly in the United States where amending amendment rules to make them harder to amend would require recourse to Article V,<sup>21</sup> which itself “makes it next to impossible to amend the Constitution” on any matter of consequence.<sup>22</sup> I am moreover concerned with only constitutional democracies, not authoritarian, hybrid or sham constitutional regimes where the constitutional text exerts little or no constraint on political actors. It would do no good to make it harder to amend amendment rules in North Korea, for example, a country with a written constitution but without a culture of constitutionalism.

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<sup>15</sup> PETER SUBER, *THE PARADOX OF SELF-AMENDMENT* 21 (1990).

<sup>16</sup> Peter Suber, *Amendment*, in *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 31, 32 (Christopher Berry Gray ed., 2013).

<sup>17</sup> MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 6 (2007).

<sup>18</sup> See Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 *ISR. L. REV.* 429, 430 (2011).

<sup>19</sup> *Id.*

<sup>20</sup> This Article builds on an earlier series of recommendations for constitutional designers engaged in designing amendment rules. See Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 *WAKE FOREST L. REV.* (forthcoming 2014), available at: <http://ssrn.com/abstract=2461507> (last visited Oct. 21, 2014).

<sup>21</sup> U.S. CONST., art. V.

<sup>22</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 21 (2006).

Drawing from historical, theoretical and comparative perspectives, I suggest that constitutional designers should be guided by two principles—intertemporality and relativity—in designing amendment rules. I begin, in Part II, by concretizing the inquiry into amending amendment rules with reference to the Japanese Constitution, where this issue is a current controversy.<sup>23</sup> I also evaluate the textually entrenched forms and limits of amendment rules, and demonstrate that existing amendment rules are not well designed to protect them against ordinary amendment. In Part III, I evaluate the implicit limits to amending amendment rules, namely the distinction between amendment and revision, judicial constitutional review, and unwritten unamendability, and conclude that they are inadequate to defend amendment rules against ordinary amendment. In Part IV, I suggest intertemporality and relativity as textual entrenchment strategies to insulate amendment rules against ordinary amendment. Part V concludes with thoughts for further research into the comparative study of constitutional change.

## II. THE DESIGN OF CONSTITUTIONAL AMENDMENT RULES

Around the democratic world, there is mounting evidence of political actors exploiting formal institutions to achieve non-democratic ends. Georges Liet-Veaux described this phenomenon as “fraude à la constitution,”<sup>24</sup> an effort to conceal the intent to defy the spirit of the constitution by strict and legalistic adherence to the constitution’s textual rules.<sup>25</sup> For example, in Hungary, the governing party has used temporary majorities to deploy procedurally democratic rules to affect democratically objectionable outcomes.<sup>26</sup> In Ecuador, Colombia, Honduras and Venezuela, strong presidents have engaged in similar efforts to effectively replace the constitution using strictly legalistic procedures or appeals to popular sovereignty.<sup>27</sup> In Trinidad & Tobago and in Grenada, political actors have sought to reform their Commonwealth constitutions using procedures that may be justified by reference to formal rules but which arguably undermine the spirit of the constitution.<sup>28</sup> In Egypt, Russia, and Turkey, political actors have resorted to constitutional forms of government that conceal authoritarianism in the trappings of

<sup>23</sup> As a matter of comparative methodology, I have chosen to highlight Canada, India, Japan, South Africa and the United States as the primary points of reference in this Article because they are all constitutional democracies with a modest-to-strong culture of constitutional veneration, the formal or functional separation of powers, and democratic values of transparency, accountability and the rule of law. I also refer variously to constitutional democracies in Europe and South America, and in total cover countries representing all continents except Antarctica.

<sup>24</sup> Georges Liet-Veaux, *La ‘fraude à la constitution’: Essai d’une analyse juridique des révolutions communautaires récentes: Italie, Allemagne, France*, 59 *Revue du droit et de science politique en France et à l’Étranger* 116, 145 (1943).

<sup>25</sup> *Id.*

<sup>26</sup> See Kim Lane Scheppele, *Hungary and the End of Politics*, *Hungarian Globe Mandiner*, May 12, 2014, available at: [http://hungarianglobe.mandiner.hu/cikk/20140512\\_kim\\_lane\\_scheppele\\_hungary\\_and\\_the\\_end\\_of\\_politics](http://hungarianglobe.mandiner.hu/cikk/20140512_kim_lane_scheppele_hungary_and_the_end_of_politics) (last visited Oct. 21, 2014).

<sup>27</sup> See, e.g., Gabriel L. Negretto, *The Constituent Dilemma in Latin America*, *INT’L J. CONST. L. BLOG*, Sept. 8, 2013, available at: <http://www.iconnectblog.com/2013/09/the-constituent-dilemma-in-latin-america> (last visited Oct. 21, 2014); Richard Albert, *When is Coup Legitimate?*, *THE MARK NEWS*, July 13, 2009, available at: <http://pioneers.themarknews.com/articles/358-when-is-a-coup-legitimate/#.VEau-LDF9IF> (last visited Oct. 21, 2014).

<sup>28</sup> See Richard Albert, *An Unconstitutional Amendment in Trinidad & Tobago?*, *INT’L J. CONST. L. BLOG*, Aug. 14, 2014, available at: <http://www.iconnectblog.com/2014/08an-unconstitutional-constitutional-amendment-in-trinidad-tobago> (last visited Oct. 21, 2014); Richard Albert, *Constitutional Reform in Grenada*, *INT’L J. CONST. L. BLOG*, Aug. 20, 2014, available at: <http://www.iconnectblog.com/2014/08constitutional-reform-in-grenada> (last visited Oct. 21, 2014).

democracy.<sup>29</sup> Even in Canada, the governing party has attempted to manipulate amendment rules in order to amend the process for senatorial selection.<sup>30</sup>

The next frontier for these formalist attacks on democratic constitutionalism may be amendment rules. Constitutional designers would be well advised to design amendment rules to resist exploitation by political actors with non-democratic designs. Amendment rules are an obvious target because written constitutions commonly entrench them.<sup>31</sup> Yet written constitutions commonly fail to entrench them against amendment, either because the text does not seek to immunize amendment rules against amendment or because the rules intended to protect them are inadequately designed to achieve that end. In this Part, I show how the design of amendment rules generally fails to protect them from amendment. First, however, I begin with the Japanese Constitution, whose amendment rules are today the target of formal amendment.

### A. Formal Amendment and Formal Amendment Rules: A Current Controversy

Modern Japanese constitutional politics offer a current case study to test the theory that amendment rules should be entrenched against ordinary amendment. Article 96 of the Japanese Constitution requires three steps for an amendment: a supermajority vote in each of the houses of the national legislature to propose an amendment; a majority vote by referendum to ratify the proposal; and, once ratified, final promulgation by the Emperor.<sup>32</sup> Considered only marginally above-average in amendment difficulty,<sup>33</sup> the Constitution has not once been amended since its promulgation in 1946,<sup>34</sup> despite reformers long demanding an *independent* Constitution to replace the “American” document imposed by the post-war Allied Occupation.<sup>35</sup> Political actors have recently intensified their calls for constitutional change, specifically to amend both the Constitution’s amendment rules and its Pacifism Clause.<sup>36</sup> Entrenched in Article 9, the Pacifism Clause commits Japan to “forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.”<sup>37</sup>

The incumbent Prime Minister, Shinzo Abe, has long been a proponent of constitutional amendment.<sup>38</sup> As Secretary General of the Liberal Democratic Party (LDP) in 2003, Abe set his sights on the Pacifism Clause, seeking its reinterpretation to authorize the right of collective self-

<sup>29</sup> See generally Ozan O. Varol, *Stealth Authoritarianism*, 100 Iowa L. Rev. (forthcoming 2015), available at: <http://ssrn.com/abstract=2428965> (last visited Oct. 21, 2014).

<sup>30</sup> See Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. (forthcoming 2014), available at: <http://ssrn.com/abstract=2465181> (last visited Oct. 21, 2014). The Supreme Court recently declared those efforts unconstitutional. *In the Matter of a Reference by the Governor in Council concerning reform of the Senate, as set out in Order in Council P.C. 2013-70, dated February 1, 2013*, 2014 SCC 32.

<sup>31</sup> See Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 PUB. CHOICE 37, 37 (2003).

<sup>32</sup> JAPAN CONST., ch. IX, art. 96 (1947).

<sup>33</sup> See DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006).

<sup>34</sup> Yoichi Higuchi, *The 1946 Constitution: Its Meaning in the Worldwide Development of Constitutionalism*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 1, 2 (Yoichi Higuchi ed., 2001).

<sup>35</sup> See Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980, 980-81 (1956).

<sup>36</sup> See Yuka Hayashi, *Japan Leader Charts Path for Military’s Rise*, Wall St. J., Apr. 24, 2013, available at: <http://online.wsj.com/article/SB10001424127887323551004578438253084917008.html> (last visited Oct. 21, 2014).

<sup>37</sup> JAPAN CONST., ch. II, art. 9(1).

<sup>38</sup> See Yshio Okubo, *Constitution Debate Due*, DAILY YOMIURI (Japan), Jan. 8, 2004, available at 2004 WLNR 1714753.

defense.<sup>39</sup> Rewriting the Pacifism Clause had been one of the LDP's founding goals in 1955,<sup>40</sup> and Abe saw his role as helping to achieve this as-yet unfilled objective.<sup>41</sup> When he became Prime Minister for the first time in 2006, he stressed above all his intention to amend the Pacifism Clause.<sup>42</sup> He moved quickly, invited public discussion on the subject,<sup>43</sup> and eventually successfully persuaded the national legislature to pass a law creating referendum procedures.<sup>44</sup> Shortly after the law passed, however, Abe's plans for constitutional renewal stalled when he resigned following the LDP's historic losses in parliamentary elections.<sup>45</sup>

Abe was elected again in 2012, and has since revived the LDP's plans for constitutional change.<sup>46</sup> He campaigned on twin pledges to renounce the Pacifism Clause and to relax the amendment threshold.<sup>47</sup> Abe's plan was to proceed in two steps: first, to amend the amendment rules from the onerous supermajority required in both houses of the legislature to a more easily achievable simple majority; and then to target the Pacifism Clause.<sup>48</sup> The LDP's two-step plan to amend the Japanese Constitution was a transparent attempt to do what it could not do in one.<sup>49</sup> But Abe's plan met with strong opposition,<sup>50</sup> notably from Japanese constitutional scholars who

<sup>39</sup> *LDP Majority Would be Victory in General Election: Abe*, JAPAN POL'Y & POL., Sept. 29, 2003, available at: 2003 WLNR 1745740.

<sup>40</sup> Masami Ito, *LDP Returns with All its Old Baggage*, JAPAN TIMES, Dec. 25, 2012, available at: <http://www.japantimes.co.jp/news/2012/12/25/reference/ldp-returns-with-all-its-old-baggage/#.UiX72NJORIE> (last visited Oct. 21, 2014).

<sup>41</sup> *Two Visions for a New Basic Law*, NIKKEI WKLY., May 17, 2004, available at: 2004 WLNR 1721088.

<sup>42</sup> See Normitsu Onishi, *Set to Lead, Japan's Next Premier Reconsiders Postwar Era*, N.Y. TIMES, Sept. 21, 2006, available at: <http://www.nytimes.com/2006/09/21/world/asia/21japan.html> (last visited Oct. 21, 2014).

<sup>43</sup> Kelichi Yamamura & Kiyori Ueno, *Abe Calls for Active Debate on Constitution Revision*, BLOOMBERG, Apr. 25, 2007, available at: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0rIYMMxhkgl&> (last visited Oct. 21, 2014).

<sup>44</sup> Linda Sieg, *Japan Takes Step Toward Revising Constitution*, REUTERS, May 14, 2007, available at: <http://uk.reuters.com/article/2007/05/14/uk-japan-constitution-idUKT27556720070514> (last visited Oct. 21, 2014).

<sup>45</sup> Bryan Walsh, *After Abe's Exit, Will Japan Retreat?*, TIME, Sept. 12, 2007, available at: <http://content.time.com/time/world/article/0,8599,1661074,00.html> (last visited Oct. 21, 2014).

<sup>46</sup> *Shinzo Abe's Sumo-Sized Win*, THE ECONOMIST, Dec. 16, 2012, available at: <http://www.economist.com/blogs/banyan/2012/12/japans-election> (last visited Oct. 21, 2014).

<sup>47</sup> Reiji Yoshida & Ayako Mie, *Abe's Rightism: Campaign Ploy or Governance Plan?*, JAPAN TIMES, Dec. 2, 2012, available at: <http://www.japantimes.co.jp/news/2012/12/02/national/abes-rightism-campaig-ploy-or-governance-plan/#.UiX989JORIE> (last visited Oct. 21, 2014); see generally Lawrence Repeta, *Japan's Democracy at Risk—The LDP's Ten Most Dangerous Proposals for Constitutional Change*, ASIA-PAC J., July 15, 2013, available at: <http://japanfocus.org/-Lawrence-Repeta/3969> (last visited Oct. 21, 2014) (describing the LDP's platform on constitutional change).

<sup>48</sup> Tobias Harris, *Shinzo Abe's Constitution Quest*, WALL ST. J., May 16, 2013, available at: <http://online.wsj.com/article/SB10001424127887323582904578486642338035044.html> (last visited Oct. 21, 2014).

<sup>49</sup> Colin P.A. Jones, *Tweak the Constitution Now, Think Later?*, JAPAN TIMES, June 25, 2013, available at: <http://www.japantimes.co.jp/community/2013/06/25/issues/tweak-the-constitution-now-think-later> (last visited Oct. 21, 2014).

<sup>50</sup> See, e.g., Aurelia George Mulgan, *Abe Rocks Japan's Constitutional Boat*, EAST ASIA FORUM, May 21, 2013, available at: <http://www.eastasiaforum.org/2013/05/21/abe-rocks-japans-constitutional-boat> (last visited Oct. 21, 2014); Linda Seig, *Japan PM's "Stealth" Constitution Plan Raises Civil Rights Fears*, REUTERS, May 1, 2013, available at: <http://www.reuters.com/article/2013/05/01/us-japan-politics-constitution-idUSBRE9400ZT20130501> (last visited Oct. 21, 2014); Editorial, *LDP Out to Undermine Constitution*, JAPAN TIMES, Apr. 18, 2013, available at: <http://www.japantimes.co.jp/opinion/2013/04/18/editorials/ldp-out-to-undermine-constitution/#.UiabNdJORIF> (last visited Oct. 21, 2014).

joined publicly under the banner of “Group Article 96” to protest his efforts.<sup>51</sup> The Group rejects his plan as the “destruction of constitutionalism”<sup>52</sup> and an “abuse of power.”<sup>53</sup> Still, amendments to Articles 9 and 96 continue to loom as a real possibility in Japan as Abe consolidates power.

## B. The Forms and Limits of Amendment Rules

Amendment rules are generally entrenched in one of three ways: ordinarily, specially or absolutely. They are most commonly entrenched under the rules of ordinary amendment and consequently enjoy no greater degree of entrenchment than any other constitutional provision. Political actors therefore need no higher quantum of agreement to amend these fundamental rules than less consequential matters like regulating public access to local water board meetings, as is the case in the Netherlands.<sup>54</sup> Amendment rules in Japan—as in Australia,<sup>55</sup> India,<sup>56</sup> Ireland,<sup>57</sup> and Spain,<sup>58</sup> to name a few—reflect this standard design of amendment rules in constitutional democracies. Less commonly, amendment rules may be specially entrenched under heightened amendment thresholds or they may be absolutely entrenched altogether.<sup>59</sup>

We only exceptionally find constitutions designed to resist or even complicate amending amendment rules. Even constitutions whose text purports to absolutely entrench amendment rules against amendment fail to protect amendment rules. Their entrenchment mechanisms conceal a design flaw that undermines the special or absolute entrenchment of amendment rules, as I will discuss below.<sup>60</sup> In this Section, I illustrate the two main strategies constitutional designers deploy to entrench amendment rules against amendment: absolute entrenchment, known as unamendability, and heightened entrenchment, which I will describe as escalating amendment thresholds. The former is ineffective and the latter is rare yet neither offers a satisfactory solution to the problem of amending amendment rules.

Consider first unamendability. Democratic constitutions sometimes make certain constitutional provisions formally *unamendable* by immunizing them against amendment. The Italian Constitution, for example, states that “the form of Republic shall not be a matter for constitutional amendment.”<sup>61</sup> The French Constitution likewise attempts to foreclose

<sup>51</sup> Yuka Hayashi, *New Headwinds for Constitutional Campaign*, Wall St. J., May 23, 2013, available at: [http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-239526/?mod=wsj\\_streaming\\_latest-headlines](http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-239526/?mod=wsj_streaming_latest-headlines) (last visited Oct. 21, 2014).

<sup>52</sup> Hideaki Ishibashi, *Scholars Form Group to Protest Abe’s Planned Revision of Constitution*, Asahi Shimbun AJW, May 24, 2013, available at: [http://ajw.asahi.com/article/behind\\_news/politics/AJ201305240047](http://ajw.asahi.com/article/behind_news/politics/AJ201305240047) (last visited Oct. 21, 2014).

<sup>53</sup> Reiji Yoshida, *Amending Constitution Emerges as Poll Issue*, JAPAN TIMES, May 3, 2013, available at: <http://www.japantimes.co.jp/news/2013/05/03/national/amending-constitution-emerges-as-poll-issue> (last visited Oct. 21, 2014).

<sup>54</sup> See NETHERLANDS CONST., ch. VIII, arts. 137-142 (1983) (detailing amendment rules); *Id.* at ch. VII, art. 133 (requiring Parliament to regulate public access to water board meetings).

<sup>55</sup> See AUSTRALIA CONST., ch. VIII, art. 128 (1900).

<sup>56</sup> See INDIA CONST., pt. XX, art. 368 (1950).

<sup>57</sup> See IRELAND CONST., art. 46 (1937).

<sup>58</sup> See SPAIN CONST., pt. X, arts. 166-68 (1978).

<sup>59</sup> See *infra* text accompanying notes 51-79.

<sup>60</sup> See *infra* text accompanying notes 57-79.

<sup>61</sup> ITAL. CONST., pt. 2, titl VI, s.2, art. 139 (1948).

amendments to republicanism: “The Republican form of government shall not be the object of any amendment.”<sup>62</sup> To highlight a few other examples, democratic constitutions also entrench similar amendment rules on violating secularism,<sup>63</sup> diminishing fundamental rights,<sup>64</sup> and compromising federalism.<sup>65</sup> Yet despite their textual insistence to the contrary, these provisions are not really unamendable because they conceal a serious design flaw.<sup>66</sup>

The United States Constitution illustrates this design flaw in its entrenchment of temporarily and constructively unamendable clauses.<sup>67</sup> Under Article V, the Constitution may be formally amended in four ways requiring the approval of national and state institutions.<sup>68</sup> The text states that no formal amendment may be made to the Importation and Census-Based Taxation Clauses until 1808,<sup>69</sup> thus making them both *temporarily* unamendable. The text also states that no formal amendment may be made to the Equal Suffrage Clause without the consent of the state whose Senate suffrage is diminished, thereby effectively creating a form of *constructive* unamendability since no state is likely to agree to reduced power in the Senate.<sup>70</sup> Scholars have interpreted these temporarily and constructively unamendable provisions as actually unamendable.<sup>71</sup> But none is truly unamendable as a matter of formal amendment.

The design flaw springs from their susceptibility to double amendment. Though each clause tries to entrench something against amendment—importation, census-based taxation, equal suffrage—none is *itself* entrenched against amendment. This design law creates the possibility of amending the entrenching clause in order to circumvent the intended entrenchment. Consider the Equal Suffrage Clause, which requires the consent of the state whose suffrage is diminished. Political actors could use Article V first to amend the Equal Suffrage Clause either by repealing it or modifying it, and then second to diminish a state’s equal suffrage without its consent.<sup>72</sup> This double amendment procedure is admittedly a “sly scheme,” writes Akhil Amar,

<sup>62</sup> FRANCE CONST., tit. XVI, art. 89 (1958).

<sup>63</sup> See PORTUGAL CONST., pt. IV, tit. II, art. 288(c) (1976).

<sup>64</sup> See CAPE VERDE CONST., pt. VI, tit. III, art. 313(2) (1980).

<sup>65</sup> See GERMANY CONST., pt. VII, art. 79(3) (1949).

<sup>66</sup> Of course, unamendability cannot survive revolution, see John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENTARY 373, 375 (1985).

<sup>67</sup> I have discussed elsewhere the phenomena of temporary and constructive unamendability. See Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1040-45 (2014).

<sup>68</sup> U.S. CONST. art. V (1789).

<sup>69</sup> *Id.* (“Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.”).

<sup>70</sup> *Id.* (“Provided that ... no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

<sup>71</sup> Scholars have interpreted the Importation and Census-Based Taxation Clauses as unamendable through the year 1808. See, e.g., Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1708 (1997); Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 519 (2011); Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 172 (1910); Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1796 (2005);. Scholars have also interpreted the Equal Suffrage Clause as unamendable. See, e.g., Jack M. Balkin, *The Constitution as a Box of Chocolates*, 12 CONST. COMMENTARY 147, 149 (1995); Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 562 (2002); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 697 n.128 (2011).

<sup>72</sup> See Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J. L. & POL. 21, 69 (1997).

but it would nonetheless “have satisfied the literal text of Article V and would also have comported with the Constitution’s general principle of ongoing popular sovereignty.”<sup>73</sup>

Some constitutions properly entrench the entrenching clause against amendment. For example, the Honduran Constitution entrenches its entrenching clause, and consequently avoids the double amendment tactic.<sup>74</sup> To correct the design flaw evident in amendment rules, constitutional designers starting afresh could entrench against amendment both the amendment rules and the entrenching clause at little additional political cost.<sup>75</sup> To illustrate, consider the German Basic Law, which states that amendments “affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”<sup>76</sup> In order to protect this entrenching clause from amendment, the revised provision would state that “... in the legislative process, the principles laid down in Articles 1 and 20, *or this Article* shall be inadmissible.” This revision only minimally changes the text but works an important substantive change.<sup>77</sup> Even this revision, however, does not reflect the optimal design of amendment rules, as I discuss below in Part IV.

Constitutional designers have less frequently, though no less problematically, deployed a second strategy to specially entrench amendment rules: escalating amendment thresholds. Democratic constitutions sometimes entrench more than one formal amendment procedure, each one deployable against specific constitutional provisions or principles, and disabled as to others. For example, the South African Constitution entrenches three amendment procedures whose use is expressly restricted to certain constitutional provisions.<sup>78</sup> One amendment procedure requires the approval of three-quarters of the National Assembly and two-thirds of the National Council of Provinces; this procedure must be used for amendments to the Constitution’s statement of values as well as the amendment rules themselves.<sup>79</sup> The amendment rules are therefore properly

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<sup>73</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 293 (2006). Even if unamendability falls short of *actual* unamendability, it may still chill repeal efforts, heighten public awareness of the entrenched value and, in any event, the double amendment procedure introduces an additional procedural hurdle to amendment. See Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (unpublished dissertation on file with author). The double amendment strategy arguably circumvents the spirit of the constitution.

<sup>74</sup> HONDURAS CONST., tit. VII, ch. I, art. 373 (authorizing amendment by two-thirds of the National Congress in two subsequent votes) (1982); *id.* at art. 374 (entrenching Article 373, the form of government, national territory, the presidential term and qualifications, and the entrenching article itself against amendment).

<sup>75</sup> Even the Honduran Constitution’s proper constitutional design has not prevented political actors from attempting to circumvent its unamendable provisions. See David Landau, *The Importance of Constitution-Making*, 89 DENV. U. L. REV. 611, 621-29 (2012). But this incident was less a failure of constitutional design than of constitutional democracy. See Andrew Friedman, *Dead Hand Constitutionalism*, 4 MEX. L. REV. 77, 82-83, 94-95 (2010).

<sup>76</sup> GERMAN BASIC LAW, pt. VII, art. 79(3) (1949).

<sup>77</sup> In Germany, scholars generally reject the double amendment tactic as illegitimate. See Virgílio Afonso Da Silva, *A Fossilised Constitution?*, 17 *RATIO JURIS* 454, 458 (2004). The Federal Constitutional Court also possesses the power to invalidate constitutional amendments that violate the text or the spirit of the Basic Law. See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 46-59 (3d ed. 2012). Yet that the conventional view in Germany today rejects double amendment does not mean that it will remain illegitimate tomorrow. This reflects the difficulty: the integrity of the Basic Law’s amendment rules relies on the good faith of the very political actors who might in the future attempt to amend those rules, with or without the support or acquiescence of scholars and jurists. I address this difficulty in Sections III.A and III.C.

<sup>78</sup> SOUTH AFRICA CONST., ch. 4, s.74 (1996).

<sup>79</sup> *Id.* at subsec.74(1).

entrenched. A less exacting procedure—two-thirds approval in both the National Assembly and the National Council of Provinces—must be used to amend the Bill of Rights and matters relating generally to provincial rights.<sup>80</sup> The least exacting threshold—two-thirds approval in the National Assembly—is the default amendment procedure; it must be used to amend all other provisions not specifically assigned to either of the two more exacting amendment procedures.<sup>81</sup>

Canada's amendment rules are similarly specially entrenched in an escalating structure. The Canadian Constitution entrenches five distinguishable amendment procedures, each expressly designated for amending only specific categories of provisions. The unilateral provincial procedure authorizes a province to amend its own constitution.<sup>82</sup> The unilateral parliamentary procedure confers an analogous power to Parliament with respect to Parliament's internal constitution.<sup>83</sup> The parliamentary-provincial procedure requires approval resolutions in Parliament and the legislature of the province(s) affected by the amendment.<sup>84</sup> The fourth procedure is the default multilateral amendment procedure. It must be used to amend everything not otherwise assigned to another procedure; it requires approval resolutions in Parliament and the provincial legislatures of at least seven of the ten provinces representing at least half of their total population.<sup>85</sup> The final amendment procedure—unanimity—requires approval resolutions in Parliament and each of the provincial legislatures.<sup>86</sup> This unanimity procedure applies to specific categories of items in the Constitution of Canada, including the entire escalating structure of formal amendment, which are properly entrenched against double amendment.<sup>87</sup>

Both the Canadian and South African Constitutions create a formal constitutional hierarchy that situates constitutional provisions and principles relative to each other along a scale of ascending amendment difficulty.<sup>88</sup> Some provisions are subject to the default amendment rule, others are amendable only by an intermediate threshold, and still others—notably the amendment rules themselves—are insulated against amendment by the highest threshold. The degree of amendment difficulty rises in proportion to the salience of the entrenched provision; here, the special entrenchment of amendment rules reflects their importance.<sup>89</sup> In contrast to the design flaw generally evident in unamendability, escalating amendment rules avoid the double amendment problem by specially entrenching themselves with heightened thresholds.

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<sup>80</sup> *Id.* at subsec.74(2)-(3).

<sup>81</sup> *Id.* at subsec.74(1).

<sup>82</sup> Procedure for Amending Constitution of Canada, § 45, Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) (hereinafter "*Constitution Act, 1982*").

<sup>83</sup> *Id.* at s.44.

<sup>84</sup> *Id.* at s.43.

<sup>85</sup> *Id.* at s.38(1). This procedure is the exclusive amendment formula for specific items. *Id.* at s.42(1).

<sup>86</sup> *Id.* at s.41.

<sup>87</sup> *Id.*

<sup>88</sup> Another illustrative example is the Bulgarian Constitution, which authorizes the National Assembly to amend all provisions of the Constitution with the exception of certain constitutional items, including amendment rules themselves, which may be amended only by a specially constituted Grand National Assembly. See BULGARIA CONST., Ch. 9, arts. 153, 158 (1991).

<sup>89</sup> This tiered arrangement may increase deliberation on higher-salience political issues, decelerate the pace of formal amendment create higher bargaining costs to achieve a given constitutional change, and it may also moderate the enthusiasm that risk-averse political actors might otherwise have for amending a provision subject to the higher-than-normal formal amendment threshold. See Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in COMPARATIVE CONSTITUTIONAL LAW 96, 103-04 (Tom Ginsburg & Rosalind Dixon eds., 2011).

Yet these escalating amendment thresholds are subject to two limitations of their own. First, they cannot by themselves thwart formally democratic efforts to achieve substantively non-democratic ends. Specifically, escalating amendment thresholds cannot resist the problem that David Landau calls *abusive constitutionalism*, defined as “the use of the mechanisms of constitutional change in order to make a state significantly less democratic than it was before.”<sup>90</sup> Landau focuses on formal constitutional change, and states that “the core problem, then, is that it is fairly easy to construct a regime that looks democratic but in actuality is not fully democratic.”<sup>91</sup> As Landau demonstrates, hybrid regimes in Colombia and Hungary have managed to commandeer democratic institutions to effect formal constitutional change at least superficially consistent with democratic imperatives but actually non-democratic in effect.<sup>92</sup>

The second limitation of escalating amendment thresholds concerns the quality of the supermajorities they require for amendment. Escalating thresholds may not be difficult for upstart political movements to achieve, particularly in the hybrid regimes Landau discusses.<sup>93</sup> But even in truly democratic regimes, escalation offers a weak defense against strong but fleeting and unsustainable majorities that form behind political movements.<sup>94</sup> Temporary majorities may be able to meet the heightened thresholds required to amend amendment rules, but we must interrogate the popular legitimacy of strong majorities that collapse as quickly as they form.<sup>95</sup> These temporary supermajorities are insufficiently durable to legitimately express the considered judgment of the community. Only more permanent supermajorities reflecting the principle of intertemporality—represented by supermajorities that endure for a number of years—can qualify as legitimately representative of the will of the community. The durability of supermajorities will be the basis for my recommendations below in Part IV.<sup>96</sup>

Let us return to Japan. The Constitution establishes only one amendment rule,<sup>97</sup> making Japan’s amendment rules amendable by ordinary amendment. Even were Japan’s amendment rules modified to make them formally unamendable pursuant to the standard design of unamendability, they would not in fact be unamendable, given their susceptibility to double amendment. And even were Japan’s amendment rules specially entrenched under a heightened threshold, for instance as we currently see in Canada or South Africa, they would be susceptible to amendment either with recourse to formal democratic commandeering or by temporary majorities alone. These threats to constitutional democracy are especially problematic in Japan in

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<sup>90</sup> David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 195 (2013).

<sup>91</sup> *Id.* at 200.

<sup>92</sup> *Id.* at 200-03, 208-11.

<sup>93</sup> *Id.* at 227.

<sup>94</sup> Recent developments in Hungary demonstrate the threat of temporary majorities and supermajorities. See Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 TRANSNAT’L L. & CONTEMP. PROBS. 51, 60-71 (2014).

<sup>95</sup> See generally CARL SCHMITT, LEGALITY AND LEGITIMACY 52-53 (Jeffrey Seitzer transl. ed., 2008) (discussing how fleeting majorities may use amendment to extend their power beyond their duration).

<sup>96</sup> See *infra* text accompanying notes 194-211.

<sup>97</sup> JAPAN CONST., ch. IX, art. 96.

light of the misalignment between parliamentarians and the public on the Pacifism Clause: only 50 percent of voters but as much as 89 percent of parliamentarians favor its amendment.<sup>98</sup>

### III. IMPLICIT LIMITS TO AMENDING CONSTITUTIONAL AMENDMENT RULES

Constitutional designers should therefore refrain from replicating the current design of amendment rules in their own democratic constitutions. The standard design does not adequately account for the risk that amendment efforts will target amendment rules themselves. The inadequacy of the current design of amendment rules is reflected in defective constitutional texts, which fall short of their purpose to insulate amendment rules from ordinary amendment.

To be fair, these textual defects are not fatal to the effort to defend amendment rules from ordinary formal amendment. Political actors may invoke theories of implicit limits to formal amendment. In this Part, I evaluate three implicit limits to the ordinary amendment of amendment rules. Each concerns unamendability but it is operationalized in different ways: the distinction between amendment and revision is anchored in theory and is sometimes reflected in the constitutional text but ultimately governed by political practice; judicial constitutional review enforces both written and unwritten unamendability via constitutional interpretation in courts; and political actors make and police claims of unwritten unamendability in the political arena. Although these three limits overlap in material ways, it is useful to disentangle them to the extent possible, while nonetheless recognizing their deep interconnections. I conclude that these three implicit limits are problematic for defending amendment rules from ordinary amendment.

#### A. Amendment and Revision

Faced with a constitutional text that does not specially entrench amendment rules against ordinary amendment, political actors opposed to efforts to amend amendment rules may invoke the distinction between amendment and revision. Both amendment and revision are species of constitutional change. The latter refers to fundamental changes to the constitution typically requiring more exacting procedures than the former, which generally requires a lower amendment threshold and is used for narrow, non-transformative adjustments.<sup>99</sup> Whereas an amendment alters the constitution harmoniously with its spirit and structure, a revision departs from its presuppositions and is inconsistent with its framework,<sup>100</sup> thereby disrupting the continuity of the legal order.<sup>101</sup> The distinction between amendment and revision is largely theoretical, though it is sometimes entrenched in constitutional texts that expressly impose higher thresholds for revision than they do for amendment.<sup>102</sup>

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<sup>98</sup> See Linda Seig, *Japan Voters Split on Revising Pacifist Constitution: Poll*, REUTERS, Jan. 27, 2013, available at: <http://www.reuters.com/article/2013/01/28/us-japan-politics-constitution-idUSBRE90R01M20130128> (last visited Oct. 21, 2014).

<sup>99</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* 238-39 (2d ed. 1996); WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 498 n.4 (2007).

<sup>100</sup> See Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 118 (1893).

<sup>101</sup> See SUBER, *supra* note 15, at 18-20.

<sup>102</sup> See, e.g., AUSTRIA CONST., ch. II, art. 44(3) (1920); SPAIN CONST., pt. X, arts. 166-68 (1978); SWITZERLAND CONST., tit. VI, ch. 1, arts. 192-95 (1999).

For Carl Schmitt, the distinction between amendment and revision concerns the boundaries of amendment authority.<sup>103</sup> Political actors on whom the constitution confers amendment authority may undertake its amendment “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”<sup>104</sup> To amend the constitution is therefore only to make additions, deletions and other alterations “that preserve the constitution itself”<sup>105</sup> with no threat of “offending the spirit or the principles” of the constitution.<sup>106</sup> To revise, in contrast, is to affect major constitutional change to the polity.<sup>107</sup>

In Japan, political actors opposed to amending Articles 96 or even the constitutional values in Article 9 could contend that these changes amount to revision and are consequently not achievable by ordinary amendment but only with a more deliberative or representative form of democratic endorsement.<sup>108</sup> They could moreover argue that the amendment rules in Article 96 cannot be used to amend either Articles 96 or 9 because it applies only to amendments, not revisions.<sup>109</sup> These political actors would nonetheless be forced to concede that although Articles 96 or 9 are not amendable, they are fully revisable, though only with more exacting procedures.

Here is where the theory of amendment and revision would collide with the politics of constitutional law. Though political actors may have compelling reasons anchored in the theoretical distinction between amendment and revision to oppose efforts to amend amendment rules, those reasons are valid only, first, to the extent they are viewed as authoritative in the political arena and, second, where political opponents ultimately recognize the legitimacy of those reasons or acquiesce to them. That this distinction is not textually entrenched in the Japanese Constitution undermines it by reducing it to a matter of constitutional politics. Invoking this distinction in Japan to defend amendment rules against ordinary amendment raises the same question political actors are currently facing in Germany as to the constitutional limits on European integration: what counts as a valid constitutional amendment?<sup>110</sup>

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<sup>103</sup> CARL SCHMITT, *CONSTITUTIONAL THEORY* 150 (Jeffrey Seitzer transl. ed., 2008).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 153.

<sup>107</sup> But sometimes even a total revision must respect the basic premises of the regime *See id.* at 152 (explaining that “total revision” in Switzerland cannot eliminate the state’s democratic foundations).

<sup>108</sup> The distinction between amendment and revision is not acknowledged in either the substantive or rhetorical debate on constitutional change in Japan. Consequently, although political actors use the term “revision” not “amendment” with respect to amending Articles 9 and 96, the actual distinction is mooted since political actors are proceeding as though they are bound by the amendment rules of Article 96. *See* KENNETH L. PORT, *TRANSCENDING LAW: THE UNINTENDED LIFE OF ARTICLE 9 OF THE JAPANESE CONSTITUTION* 19-21 (2010).

<sup>109</sup> JAPAN CONST., ch. IX, art. 96.

<sup>110</sup> In Germany, the Federal Constitutional Court’s decision in the Lisbon Treaty Case has ignited debate about the country’s constitutional identity, the extent to which European integration would change the country’s identity, which political actors should have the authority to alter that identity, and what constitutional procedures if any may be used to alter it. *Compare* Lisbon Treaty Case (2009), 123 BVerfGE 267, *in* KOMMERS & MILLER, *supra* note 77, at 345-48 (ruling that German constitutional identity cannot be altered by treaty or constitutional amendment where the treaty or amendment violates self-determination or sovereignty), *with* Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says “Ja zu Deutschland!”*, 10 German L.J. 1241, 1252-56 (2009) (critiquing the Court’s ruling), *and* Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht’s Epigones At Sea*, 10 German L.J. 1201, 1208-10 (2009) (same).

Whether a constitutional change may be called an amendment or a revision is contestable. For example, although scholars endorsing the distinction between amendment and revision might agree that the United States Constitution *should* protect certain constitutional principles against amendment, they need not agree on precisely which constitutional principles should enjoy this special status. As Melissa Schwartzberg observes, “[e]fforts at restricting the boundaries of constitutional amendment are bound to be challengeable, and reasonable people are likely to disagree about what constitutes an unalterable principle.”<sup>111</sup> Laurence Tribe relatedly suggests that we should expect disagreement about what should and should not be amendable because constitutional vales and identity “cannot be objectively deduced or passively discerned in a viewpoint-free way.”<sup>112</sup> We may agree that the United States Constitution contains unamendable rules, but that is only the first step in distinguishing amendable from revisable provisions. We must also take the harder step to agree on what those unamendable items are.<sup>113</sup> Agreement on the most important principles therefore does not immediately clarify what is amendable or not.<sup>114</sup>

In Japan, political actors must contend with a similar contestability. The strength of the argument that amending Articles 96 or 9 amounts to a revision, not an amendment, would depend on how political actors and citizens evaluate it. Absent a textual signal to the contrary, what Jason Mazzone calls the “practicalities” of the theoretical argument on amendment versus revision threaten to defeat efforts to identify and enforce limits on amendment.<sup>115</sup> Identifying and enforcing these limits falls to the political process and rests on the very actors who would mount an effort to amend a constitutional provision, principle or rule—including amendment rules themselves—that should be entrenched against ordinary amendment. Without a textual limitation distinguishing what is subject to amendment from what is subject to revision, we should therefore not presume that political actors intent on using the modalities of narrow amendment in order to affect a larger revision will self-police, even in constitutional democracies.

## B. Judicial Constitutional Review

Where political actors will not self-police the theoretical distinction amendment and revision, courts have sometimes intervened to enforce the rule that amendment procedures may be used for only modest adjustments while fundamental changes may be accomplished only through revision. For example, in India the Supreme Court has developed the “basic structure” doctrine to enforce unwritten substantive restrictions against amendments that nonetheless conform to the constitution’s explicit procedural requirements.<sup>116</sup> Like the distinction between amendment and revision, this basic structure doctrine is predicated on the theory that amendment cannot be used to transform the constitution or to change its identity.<sup>117</sup> The Court has relied on the basic structure doctrine to prohibit state action that threatens certain fundamental features of

<sup>111</sup> MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 147 (2007).

<sup>112</sup> Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 440 (1983). Tribe has more recently suggested that some principles are too fundamental to be subject to amendment. See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 33-34 (2008).

<sup>113</sup> Unamendable norms may differ across jurisdictions. See Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 338 (2011).

<sup>114</sup> Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 753 (1980).

<sup>115</sup> Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1836 (2005).

<sup>116</sup> GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 197-202 (1999).

<sup>117</sup> S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL’Y 29, 43 (2001).

Indian constitutionalism.<sup>118</sup> These fundamental features include the rule of law, the separation of powers, federalism, secularism and judicial review.

Most notably, the Indian Supreme Court has invoked the basic structure doctrine to invalidate amendments to amendment rules. In 1980, the Court struck down Parliament's effort to make two amendments to the Constitution's amendment rules: one proposed amendment rule held that "no amendment of this Constitution ... shall be called in question in any court on any ground" and the other 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."<sup>119</sup> These amendments, wrote Chief Justice Chandrachud, would have conferred upon Parliament "a vast and undefined power to amend the Constitution, even, so as to distort it out of recognition."<sup>120</sup> To remove all limitations on Parliament's amendment power would "demolish[] the very pillars on which the preamble rests by empowering Parliament to exercise its constituent power without any 'limitation whatever.'"<sup>121</sup> The Chief Justice reasoned that "since the Constitution had conferred a limited amending power on Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. ... The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."<sup>122</sup>

The Court's creation of the basic structure doctrine has invited the criticism that it "has helped itself to so much power ... without explaining from whence its own authority is supposed to come."<sup>123</sup> The doctrine is susceptible to charges of democratic illegitimacy insofar as the Court has asserted the power to review the constitutionality of amendments,<sup>124</sup> despite there being no textual authorization for the Court to exercise this power.<sup>125</sup> In India, amendments are therefore not insulated from judicial review.<sup>126</sup> The Court has accordingly often imposed limits on amendment, holding that amendment is a legislative procedure voidable where it "takes away or abridges" certain fundamental rights,<sup>127</sup> that Parliament cannot exercise its amendment power to damage or destroy the basic structure of the Constitution,<sup>128</sup> and that an amendment will be invalidated where it violates the Constitution's basic structure.<sup>129</sup>

<sup>118</sup> Gary Jeffrey Jacobsohn, *The Disharmonic Constitution*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 47, 60 (Jeffrey Tulis et al. eds., 2010).

<sup>119</sup> *Minerva Mills Ltd. V. Union of India*, 1981 SCR (1) 206, 238 (1980).

<sup>120</sup> *Id.* at 240.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Pratap Bhanu Mehta, *The Rise of Judicial Supremacy*, 18 *J. DEMOCRACY* 70, 72 (2007).

<sup>124</sup> See JOEL COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* 67 (2012); but see SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* 164-229 (2009) (defending the legitimacy of the doctrine).

<sup>125</sup> Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court*, 11 *AM. U. J. INT'L L. & POL'Y* 47, 68 (1996). The doctrine is also seen, in contrast, as a "shield against predatory subversion of constitutionalism." R. Sudarshan, *Courts and Social Transformation in India*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES* 153, 165 (Roberto Gargarella et al. eds., 2006).

<sup>126</sup> See Burt Neuborne, *The Supreme Court of India*, 1 *INT'L J. CONST. L.* 476, 494 (2003).

<sup>127</sup> See *I.C. Golaknath v. State of Punjab*, 1967 SCR (2) 762, 815 (1967).

<sup>128</sup> See *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, A.I.R. 1973 S.C. 1461 (1973).

<sup>129</sup> See *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299 (1975).

In Japan, however, the Supreme Court appears unlikely to follow the lead of its Indian counterpart in reviewing amendments to amendment rules.<sup>130</sup> The Court has generally been reluctant to exercise its power of judicial review, having invalidated only eight governmental acts through 2011,<sup>131</sup> even though the Constitution expressly confers on courts the right to “determine the constitutionality of any law, order, regulation or official act.”<sup>132</sup> The Supreme Court has resisted calls to clarify the scope of Article 9, specifically with regard to the constitutionality of the Special Defense Forces,<sup>133</sup> opting instead for a doctrine of avoidance.<sup>134</sup> As one observer has written, “it seems clear that Article 9 is not likely to be a constitutional provision enforced with vigor by the Japanese courts.”<sup>135</sup> Japanese courts have instead deferred to the political branches on Article 9,<sup>136</sup> and appear likely to do the same on Article 96.

Japanese constitutional review is perhaps the most conservative in the democratic world.<sup>137</sup> David Law has explained that judges resist exercising their power of judicial review as a result of the formal and informal institutions and practices that sensitize them to the views and preferences of political actors.<sup>138</sup> An additional factor is that judges “tend to view the Constitution not as a law, but more as a political document stipulating political principles.”<sup>139</sup> Judges are therefore reluctant to judicialize politics by bringing political matters into the legal arena.<sup>140</sup> They favor stability and predictability, privilege democratic decisionmaking, and do not see themselves as catalysts of social change.<sup>141</sup> The power of judicial review on some matters has effectively been internalized within the Cabinet Legislation Bureau, which advises political actors on the constitutionality of proposed laws and regulations, an arrangement upheld by the Supreme Court.<sup>142</sup> The claim is not that the Bureau enjoys judicial deference, but rather that its

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<sup>130</sup> See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 98 (2003).

<sup>131</sup> Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 825 (2011).

<sup>132</sup> JAPAN CONST., ch. VI, art. 81.

<sup>133</sup> Toshihiro Yamauchi, *Constitutional Pacifism: Principle, Reality, and Perspective*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 27, 39 (Yoichi Higuchi ed., 2001).

<sup>134</sup> See Michael A. Panton, *Japan’s Article 9: Rule of Law v. Flexible Interpretation*, 24 TEMP. INT’L & COMP. L.J. 129, 163-65 (2010).

<sup>135</sup> Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT’L L. 3, 45 (1996).

<sup>136</sup> Allen Mendenhall, *America Giveth, and America Taketh Away: The Fate of Article 9 After the Futenma Base Dispute*, 20 MICH. ST. INT’L. L. REV. 83, 102 (2011).

<sup>137</sup> DAVID M. BEATTY, *CONSTITUTIONAL LAW IN THEORY AND PRACTICE* 121 (1995).

<sup>138</sup> David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1548-49 (2009).

<sup>139</sup> Shigenori Matsui, *Why is the Japanese Supreme Court so Conservative?*, 88 WASH. U. L. REV. 1375, 1413 (2011).

<sup>140</sup> Tokujin Matsudaira, *Judicialization of Politics and the Japanese Supreme Court*, 88 WASH. U. L. REV. 1559, 1560 (2011). There appears to be an important exception for nonconstitutional issues, where the Court has belied its conservative label. See Craig Martin, *The Japanese Constitution as Law and the Legitimacy of the Supreme Court’s Constitutional Decisions: A Response to Matsui*, 88 WASH. U. L. REV. 1527, 1556-57 (2011).

<sup>141</sup> John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88 WASH. U. L. REV. 1467, 1491 (2011).

<sup>142</sup> Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court’s Constitutional Oversight*, 41 LOY. L.A. REV. 603, 624-25 (2008).

interpretation of contentious political matters, for instance Article 9, has mitigated the pressure on the Court to resolve the questions itself.<sup>143</sup>

Judicial restraint in Japan makes it a credible possibility that political actors could successfully amend amendment rules without any intervening judicial review. Judicial constitutional review is therefore not likely to be invoked as an implicit limit to amending amendment rules where political actors deploy Article 96 to amend the amending clause and Article 9. This inadequate design of Japanese amendment rules leaves these rules susceptible to ordinary amendment. In Japan, as in other constitutional democracies where the judiciary is unlikely to follow the bold steps of the Indian Supreme Court to assert the unwritten power to review the constitutionality of amendments, political actors wishing to defend amendment rules against ordinary amendment need to rely on other strategies to remedy the textual limitations of the constitution's current constitutional design.

### C. Unwritten Unamendability

Political actors could invoke a third limit to amending amendment rules: unwritten unamendability. They could argue that amendment rules are implicitly unamendable and consequently unalterable by ordinary amendment. A constitutional provision or practice may become unwrittenly unamendable over time as it acquires special political or cultural significance. In contrast to the theoretical and sometimes textual distinction between amendment and revision, and likewise in contrast to judicial constitutional review which is enforced by courts, unwritten unamendability derives from the creation of a new constitutional convention.

A constitutional convention develops as a result of a combination of action, agreement and acquiescence by political actors. They are political rules, not legal rules, and are enforced in the political process rather than courts.<sup>144</sup> Conventions simply reflect “what people do,”<sup>145</sup> which suggests that they can change over time and will survive only to the extent that political actors feel bound by them.<sup>146</sup> They can constrain or compel the conduct of political actors given their perception as right or valid in political practice.<sup>147</sup> That a constitutional provision or practice can become unwrittenly unamendable by convention is less developed than the distinction between amendment and revision or the judicial practice of reviewing the constitutionality of amendments on non-procedural grounds. Yet it is potentially a strong defense that political actors can mount to defend amendment rules from ordinary amendment.

How and why an amendable constitutional provision or practice becomes implicitly unamendable is the key to understanding how unwritten unamendability could conceivably protect amendment rules in constitutional democracies generally and in Japan in particular. To illustrate, consider how the unilateral provincial power of amendment in the Constitution of

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<sup>143</sup> David S. Law, *Why Has Judicial Review Failed in Japan*, 88 WASH. U. L. REV. 1425, 1456 (2011).

<sup>144</sup> A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION cxli (Liberty Fund 8th ed. 1915).

<sup>145</sup> GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 217 (1984).

<sup>146</sup> *Id.*

<sup>147</sup> Dicey, *supra* note 144.

Canada grew effectively unamendable.<sup>148</sup> Under Canada's founding constitution, the *British North America Act, 1867* (since renamed the *Constitution Act, 1867*),<sup>149</sup> an amendment could be made only by the Parliament of the United Kingdom.<sup>150</sup> The *Constitution Act, 1867* authorized the individual provinces to amend their own provincial constitution but it conferred no similar power upon Canada to amend the Canadian Constitution.<sup>151</sup> This unilateral provincial power was not expressly unamendable; it was an amendable rule like any other.

In 1949, the United Kingdom passed an amendment, at Canada's request, authorizing the Parliament of Canada to formally amend the Canadian Constitution.<sup>152</sup> With a few exceptions, this amendment gave the Canadian Parliament the same amendment power as to the purely federal subjects of the Canadian Constitution that the *Constitution Act, 1867* had given provinces as to their own provincial constitutions.<sup>153</sup> The provinces objected that the new amendment could allow the Canadian Parliament to unilaterally amend federal institutions of provincial concern, for instance the composition of the Senate or representation in the House of Commons.<sup>154</sup> The 1949 amendment was therefore more complicating than clarifying, but whether a province should retain the power to amend its own constitution was never in doubt. The development of Canadian federalism to that point had allowed no other view but that provinces possessed a sphere of sovereignty immune to the national government and the United Kingdom.<sup>155</sup>

Canada finally formally divested the United Kingdom of its amendment authority in 1982 when federal and provincial political actors agreed to entrench five amendment rules to govern amendments affecting purely federal or provincial subjects, as well as those affecting both levels of government.<sup>156</sup> Federal and provincial political actors had tried on many occasions to design amendment rules that would authorize Canada to amend its own constitution. But they failed each time, over a dozen in total,<sup>157</sup> due largely to disagreement on the right quantum of agreement for provincial consent to an amendment affecting both levels of government.<sup>158</sup>

There was one constant in Canada's efforts for a negotiated settlement on amendment rules: provinces would retain the unilateral power to amend their own constitutions. As early as a

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<sup>148</sup> Another useful Canadian illustration is the development of the constitutional convention of substantial provincial consent for constitutional amendments to matters of federal-provincial concern. See *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

<sup>149</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) (hereinafter "*Constitution Act, 1867*").

<sup>150</sup> Peter W. Hogg, *A Comment on the Canadian Constitutional Crisis*, 6 YALE STUD. WORLD PUB. ORD. 285, 287-88 (1980).

<sup>151</sup> *Constitution Act, 1867*, pt. VI, § 92.

<sup>152</sup> *British North America (No. 2) Act*, ch. 81, 12, 13 & 14 Geo. 6 (1949).

<sup>153</sup> *Id.* at § 1.

<sup>154</sup> William R. Lederman, *Notes on Recent Canadian Constitutional Developments*, 32 J. COMP. LEGIS. & INT'L L. 74, 75-76 (1950).

<sup>155</sup> For a more extended discussion on dual sovereignty in Canada and the evolution of federalism, see Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. (forthcoming 2014), available at: <http://ssrn.com/abstract=2461509> (last visited Oct. 21, 2014).

<sup>156</sup> *Constitution Act, 1982*, *supra* note 82, Part V.

<sup>157</sup> In one of the leading studies on constitutional amendment in Canada, James Ross Hurley details the many failed efforts to patriate the Constitution. See JAMES ROSS HURLEY, *AMENDING CANADA'S CONSTITUTION: HISTORY, PROCESSES, PROBLEMS AND PROSPECTS* 25-60 (1996).

<sup>158</sup> Simone Chambers, *Contract or Conversation: Theoretical Lessons from the Canadian Constitutional Crisis*, 26 POL. & SOC. 143, 146 (1998).

1927 Dominion-Provincial Conference, the national government's Minister of Justice suggested an amendment structure that left unchanged the unilateral provincial amendment power.<sup>159</sup> Later in 1935, the House of Commons convened a special committee to "study and report on the best method by which the British North America Act may be amended... ."<sup>160</sup> The Committee was particularly concerned with protecting provincial powers and fundamental rights, searching for guidance on "safeguard[ing] the existing rights or racial and religious minorities and legitimate provincial claims to autonomy."<sup>161</sup> At the Constitutional Conference of 1950, then-Prime Minister Louis St. Laurent stated the federal government's test for designing an amendment framework: it must respect the autonomy of provincial governments, the power of the federal government, minority rights, and it must be sufficiently flexible to allow change when needed.<sup>162</sup> The same principle of provincial sovereignty in provincial matters held throughout subsequent negotiations in the intervening decades.<sup>163</sup> The unilateral provincial amendment power was therefore never in doubt, even amid uncertainty about what amendment structure Canada would eventually adopt. It had become non-negotiable, and therefore unwrittenly unamendable as a result of the entrenchment of a convention as to its fundamentality in Canada.

Like the unilateral provincial formula, Japan's Pacifism Clause may have become unwrittenly unamendable. The Clause traces its beginnings to General MacArthur's three essential requirements for Japan's revised constitution, one of which was the renunciation of war.<sup>164</sup> Despite entrenching an inherited disability,<sup>165</sup> the Clause has become central to Japan's legal and political culture,<sup>166</sup> and so important that it is now seen as constitutive of Japan's constitutional identity.<sup>167</sup> Though the Constitution had been effectively imposed on Japan and the Allies had steered much of the design of the Constitution,<sup>168</sup> "the vast majority of the Japanese citizenry, who felt betrayed by the wartime leadership, quickly embraced the new Constitution,

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<sup>159</sup> Précis of Discussions: Dominion-Provincial Conference, Nov. 3-10, 1927, at 11, *Sessional Paper No. 3*, 18 George V (King's Printer, Ottawa 1928).

<sup>160</sup> Order of Reference, Jan. 28, 1935, in PROCEEDINGS AND EVIDENCE AND REPORT: SPECIAL COMMITTEE ON BRITISH NORTH AMERICA ACT, at iv (King's Printer, Ottawa 1935).

<sup>161</sup> *Id.*

<sup>162</sup> Remarks of Louis St. Laurent, in PROCEEDINGS OF THE CONSTITUTIONAL CONFERENCE OF FEDERAL AND PROVINCIAL GOVERNMENTS, Ottawa, Jan. 10-12, 1950, at 10 (King's Printer, Ottawa, 1950).

<sup>163</sup> See, e.g., Statement by A. Brian Peckford, Nov. 2, 1981, Document 800-15/011, in FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION (Ottawa 1981); Statement of Peter Loughheed, Alberta Proposal: Amending Formula for the Canadian Constitution, Feb. 5-6, 1979, Document 800-10/023, in FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION (Ottawa 1981); Statement of Conclusions, Third Working Session, in FEDERAL-PROVINCIAL CONFERENCE OF 1971 at 2, Feb. 9, 1971; Canadian Constitutional Charter of 1971, art. 54, in SECRETARIAT OF THE CONSTITUTIONAL CONFERENCE, CONSTITUTIONAL CONFERENCE, Victoria, British Columbia, June 14-16, 1971; GUY FAVREAU, MINISTER OF JUSTICE, THE AMENDMENT OF THE CONSTITUTION OF CANADA 38-39 (Ottawa 1965).

<sup>164</sup> Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3 NAT'L TAIWAN U. L. REV. 111, 118 (2008).

<sup>165</sup> George P. Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1537 (2002).

<sup>166</sup> Lawrence W. Beer, *Peace in Theory and Practice Under Article 9 of Japan's Constitution*, 81 MARQ. L. REV. 815, 829 (1997).

<sup>167</sup> Chaihark Hahm & Sung Ho Kim, *To Make "We the People": Constitutional Founding in Postwar Japan and South Korea*, 8 INT'L J. CONST. L. 800, 814 (2010).

<sup>168</sup> The process may have been more collaborative than the conventional wisdom suggests. See Michael J. Kelly, *The Article 9 Pacifism Clause and Japan's Place in the World*, 25 WIS. INT'L L.J. 491, 493 (2007).

including Article 9.”<sup>169</sup> The earliest efforts to amend Article 9 failed for many reasons, chief among them the already overwhelming popular support for the Clause.<sup>170</sup> Subsequent efforts to amend Article 9, from the Hatoyama administration after the Occupation in the 1950s and into the Miyazawa administration in the 1990s, also failed in light of strong public opposition.<sup>171</sup>

The Pacifism Clause seems more strongly entrenched in Japanese political culture than it is in the constitutional text. Almost as soon as it was adopted, the Pacifism Clause began to erode under pressure from the Korean War into which Japan became involved passively, resulting in “a departure from both the letter and the spirit of Article 9.”<sup>172</sup> This change occurred without amendment but with a declarative announcement that Article 9 banned only the offensive use of force.<sup>173</sup> Decades later, the Pacifism Clause has been “reinterpreted creatively to allow the use of some forces,”<sup>174</sup> Japan now spends one of the world’s largest military budgets, and its Self-Defense Forces number 240,000.<sup>175</sup>

Yet even as Article 9’s textual absolutism on war-making has given way to the reality of Japan’s militarism,<sup>176</sup> the Pacifism Clause has become “an anchor of [Japan’s] postwar identity,” the consequence of the “trauma of atomic bombing and catastrophic defeat [that] discredited militarism and created a profound commitment to peace in the new nuclear age.”<sup>177</sup> Not unlike the Second Amendment in the United States, Article 9 is more than a textual rule.<sup>178</sup> It is a “culturally embedded norm” that has “shaped Japanese individual and group identities, social relations, and practices” and which “provides a sense of security in the Northeast region, including China and Korea, where bitter memories of Japan’s wartime aggression still linger.”<sup>179</sup> Amending Article 9 would mark a fundamental change to Japan’s constitutional identity.

How Article 9 has become a super-constitutional norm is as difficult to explain as it is to deny. Part of the answer involves the constitutional text itself. As Mark Chinen observes, “the values implicit in the Constitution have become ingrained in Japanese society over the past 60 years, in part, precisely because of Article 9.”<sup>180</sup> Next to the preambular declaration of popular

<sup>169</sup> Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 MICH. J. INT’L L. 55, 93 (2005).

<sup>170</sup> JOHN W. DOWER, *EMPIRE AND AFTERMATH: YOSHIDA SHIGERU AND THE JAPANESE EXPERIENCE, 1878-1954*, at 433-34 (1979).

<sup>171</sup> See Michael A. Panton, *Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 ASIAN-PAC. L & POL’Y J. 163, 182-84 (2009).

<sup>172</sup> John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, 53 L. & CONTEMP. PROBS. 73, 74 (1990).

<sup>173</sup> J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 19 (2010).

<sup>174</sup> Tom Ginsburg, *Lessons from Democratic Transitions: Case Studies from Asia*, 52 ORBIS 91, 103 (2008).

<sup>175</sup> JEFF KINGSTON, *CONTEMPORARY JAPAN: HISTORY, POLITICS, AND SOCIAL CHANGE SINCE THE 1980S* at 120 (2012).

<sup>176</sup> See Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT’L L.J. 393, 408-18 (1999).

<sup>177</sup> David Arase, *Japan, the Active State?: Security Policy after 9/11*, 47 ASIAN SURVEY 560, 562 (2007).

<sup>178</sup> John W. Traphagan, *Revising the Japanese Constitution*, THE DIPLOMAT, May 17, 2013, available at: <http://thediplomat.com/2013/05/revising-the-japanese-constitution> (last visited Oct. 21, 2014).

<sup>179</sup> Akihiro Ogawa, *Peace, a Contested Identity: Japan’s Constitutional Revision and Grassroots Peace Movements*, 36 PEACE & CHANGE 373, 374 (2011).

<sup>180</sup> Chinen, *supra* note 169.

sovereignty, the Pacifism Clause is seen as the most important part of the Constitution.<sup>181</sup> Part of the answer also involves social assimilation into a culture where pacifism is a point of pride and Article 9 is taught in schools to children.<sup>182</sup> Article 9 has become a legal, social and constitutive norm also as a result of extraordinary public relations efforts, including the creation of a Committee to Popularize the Constitution,<sup>183</sup> which once worked to culturally entrench pacifism as a cultural norm through public lectures, books, free pamphlets and booklets, film and songs.<sup>184</sup>

The entrenchment of the Pacifism Clause in Japanese political culture is also attributable to geopolitics. Akitoshi Miyashita has explored the origin and sustainability of the Japanese cultural norm of postwar pacifism.<sup>185</sup> He concludes that “the extent to which pacifist norms are sustained has a lot to do with Japan’s security environment and domestic political conditions, such as security ties with the United States, threat perception, economic prosperity, and political stability.”<sup>186</sup> Pacifism grew in Japan when the country strengthened its alliance with the United States: as the latter reinforced the former as its guarantor, support for pacifism would likely have been unsustainable without the military security the United States offered Japan.<sup>187</sup> Miyashita acknowledges the role of history in shaping pacifism in Japan, but he concludes that it is the product of powerful norms and cultural forces as well as structural and material realities.<sup>188</sup>

Despite its significance in Japanese political culture, the Pacifism Clause is not formally entrenched against amendment. But political actors could argue that it has become so important that it should be immune to ordinary amendment. Political actors have in the past made a similar argument that Article 9 forever commits Japan to non-militarism.<sup>189</sup> Today the argument could take one of two forms. First, political actors opposed amending the Pacifism Clause could argue that it has by convention acquired the unwritten quality of unamendability given its importance to Japanese political, social and constitutional culture. The development of such convention of unamendability would reflect the historical significance of the Clause to Japan.<sup>190</sup> Given that changing the Pacifism Clause would change not only Japan’s Constitution but more broadly its national identity, political actors might argue that the Clause may be changed only by revision. Alternatively, political actors could concede that the Pacifism Clause is amendable, though suggest that amendment can occur only with a threshold higher than what Article 96 requires; this argument would claim that the Clause is implicitly entrenched against ordinary amendment.

<sup>181</sup> Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT’L & COMP. L. 127, 157 (2004).

<sup>182</sup> See John M. Maki, *Japanese Constitutional Style*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-1967, at 27 (Dan Fenno Henderson ed. 1968)

<sup>183</sup> Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum*, 30 U. PA. J. INT’L L. 267, 304 n.102 (2008).

<sup>184</sup> KOSEKI SHOICHI, THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION 217-22 (1997).

<sup>185</sup> Akitoshi Miyashita, *Where do Norms Come From? Foundations of Japan’s Postwar Pacifism*, 7 INT’L REL. ASIA-PAC. 99, 107 (2007).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 112-13.

<sup>188</sup> *Id.* at 115-16.

<sup>189</sup> See THEODORE MCNELLY, THE ORIGINS OF JAPAN’S DEMOCRATIC CONSTITUTION 149-50 (2000).

<sup>190</sup> See Joseph Jaconelli, *Continuity and Change in Constitutional Conventions*, in THE BRITISH CONSTITUTION: CONTINUITY AND CHANGE 121, 122 (Matt Qvortrup ed., 2013).

Yet the theory of unwritten unamendability is stronger in theory than reality. Although the Pacifism Clause may hold special historical and contemporary significance, it is treated in the constitutional text like all other provisions; it is freely amendable by ordinary amendment. It is also problematic to claim that it should be subject to some form of heightened threshold because the text neither states nor implies such a requirement. There is no effective constraint preventing political actors from proposing or pursuing its amendment, and opponents can point to no constitutional language nor identify any entrenched rule to justify their defense of amendment rules. Amending the Pacifism Clause is achievable through the ordinary amendment process as defined by Article 96, even though the Clause is constitutive value of Japanese political culture.

#### IV. REDESIGNING CONSTITUTIONAL AMENDMENT RULES

The easy fix to the double amendment problem is to absolutely entrench the entrenching rule in order to prevent its amendment. Unamendability, however, is problematic for reasons I have developed elsewhere.<sup>191</sup> Amendment rules should not be immune from amendment but they should be specially entrenched, as I have argued above.<sup>192</sup> Yet amendment rules today inadequately protect themselves against ordinary amendment. The defective design of unamendability and the weak protections of escalating amendment fail to insulate amendment rules against circumvention and fleeting majorities. Each of the three related implicit limits to amendment—the distinction between amendment and revision, judicial constitutional review, and unwritten amendability—raises problems of its own. Unwritten unamendability and the distinction between amendment and revision both require enforcement by the very political actors who would defy it. Judicial constitutional review invites charges of democratic illegitimacy where it is not textually authorized, and it is moreover an unworkable solution in constitutional democracies like Japan with conservative courts. Amendment rules therefore require other ways to defend themselves.

In this Part, I suggest two modest textual entrenchment strategies to protect amendment rules against ordinary amendment. The more advisable strategy is to design amendment rules in conformity with the principles of intertemporality and relativity. Intertemporality, as I define it, counsels a commitment to respecting the considered judgment of the community as expressed over a period of years, and not only at one fixed point in time. We can operationalize intertemporality by requiring sequential approval—multiple votes over multiple years—for amending amendment rules. For its part, relativity counsels a commitment to entrenching amendment rules under higher thresholds than other constitutional provisions. The purpose of relativity is to express the special importance of amendment rules relative to other constitutional provisions. Relativity is operationalized by the escalating structure of amendment rules.

The first strategy I recommend below combines intertemporality with relativity by entrenching sequential approval and escalation in combination, and entrenching their entrenching clauses. Another, though much less advisable, strategy is to entrench the power of judicial constitutional review over amendments, and entrenching its entrenching clause. Either of these entrenchment strategies would better entrench amendment rules against ordinary amendment

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<sup>191</sup> See generally Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 706 (2010) (arguing that formal unamendability is undemocratic).

<sup>192</sup> See *supra* text accompanying notes 1-19.

than the defective texts and implicit limits on which political actors today must rely.<sup>193</sup> The first is preferable, however, because it escapes the countermajoritarian critique of the second.

Although comparative constitutional study sometimes trivializes the constitutional text,<sup>194</sup> in constitutional democracies the text matters because public officials generally try to follow its commands,<sup>195</sup> in contrast to constitutional dictatorships ruling under a façade constitution that betrays great distance between what Jan-Erik Lane calls constitutional *formalia* and constitutional *realia*.<sup>196</sup> Written constitutions in constitutional democracies constrain state action,<sup>197</sup> publicize rights and rules,<sup>198</sup> and help keep political actors accountable to the rule of law.<sup>199</sup> But writtleness alone is not the answer. The challenge of protecting amendment rules is not only to democratize amendment rules;<sup>200</sup> it is to do so in a way that also ensures their procedures reflect the considered rather than fleeting judgment of the constitutional community.

### A. Combining Sequential Approval and Escalation

Escalating amendment rules are insufficient on their own to protect amendment rules against ordinary amendment. The problem would remain, as discussed above,<sup>201</sup> that a particularly strong but fleeting and unsustainable supermajority could meet the higher threshold at any one time. Whether a supermajority endorses a transformative change tells us little about whether change should actually occur.<sup>202</sup> Where a strong supermajority meets the heightened threshold for amending amendment rules we must interrogate whether the support for such a fundamental change is stable and representative of the considered intertemporal judgment of the community. Supermajorities are not created equal: their strength is directly proportional to their stability over time. A sustainable supermajority thus has a greater claim to representativeness than a temporary one. What underpins this view is a theory of transcendent sovereignty that assigns to some combination of previous, present and future political actors—rather than only to the present generation—the shared responsibility for ratifying transformative change.<sup>203</sup>

<sup>193</sup> As Rosalind Dixon and Tom Ginsburg suggest, “constitutional silence may reflect implicit endorsement of existing unwritten constitutional norms.” Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636, 640 (2011).

<sup>194</sup> See Kate O’Regan, *Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa*, 75 MODERN L. REV. 1, 11 (2012).

<sup>195</sup> MURPHY, *supra* note 99, at 14.

<sup>196</sup> JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 9-10 (1996).

<sup>197</sup> See JÁNOS KIS, CONSTITUTIONAL DEMOCRACY 141 (2003).

<sup>198</sup> See LON L. FULLER, THE MORALITY OF LAW 51 (Rev. ed. 1969); Jeremy Waldron, *Principles of Legislation*, in THE LEAST DANGEROUS BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 15, 22 (Richard W. Bauman & Tsvi Kahana eds., 2006).

<sup>199</sup> See ROBERT W. BENNETT & LAWRENCE SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 39 (2011).

<sup>200</sup> Joel I. Colón-Ríos, *The Counter-Majoritarian Difficulty and the Road not Taken: Democratizing Amendment Rules*, 25 CAN. J. L. & JURIS. 53, 73 (2012).

<sup>201</sup> See *supra* text accompanying notes 78-96.

<sup>202</sup> LESTER B. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 208-09 (1942) (“The mere fact that a simple majority, or even an extraordinary majority, desire a change by no means demonstrates that the change will prove beneficial. King Mob may be just as much a despot as a single dictator.”) (internal footnotes omitted).

<sup>203</sup> For a discussion of transcendent sovereignty, see Lior Barshack, *Time and the Constitution*, 7 INT’L J. CONST. L. 553, 554 (2009).

In this study of time and constitutionalism, Jed Rubenfeld theorizes that constitutional self-government entails a necessary temporal dimension.<sup>204</sup> Democratic freedom is today too narrowly understood to require conformity to the will of the “actual people of the here and now.”<sup>205</sup> Democracy exists rather only intertemporally, that is to say over a period of time, and consists “not in governance by the present will of the governed, or in governance by the a-temporal truths posited by one or another moral philosopher, but rather in a people’s living out its own self-given political and legal commitments over time—apart from or even contrary to popular will at any given moment.”<sup>206</sup> Conceiving of democracy as an exclusively presentist enterprise misunderstands that constitutional law is undemocratic when it privileges the will of today’s governed instead of accounting for the will of the governed over time.<sup>207</sup>

This temporal dimension of constitutional self-government counsels a non-presentist view of democratic legitimacy anchored in “the idea of a generation-spanning people acting as a political subject.”<sup>208</sup> On this theory, “written self-government does not demand that new constitutional principles be adopted whenever a majority so wills. It demands the creation of new constitutional commitments only when a people is prepared to make a significant *temporal* commitment to them.”<sup>209</sup> This temporal dimension moreover confirms the view that supermajority choice alone cannot give democratic legitimacy to that choice. Even the “most solemn act of memorialization, backed up by the unanimous vote of every citizen alive at the moment of proclamation, does not guarantee that a nation is in fact committed to the proclaimed purpose or principle.”<sup>210</sup> A single successful supermajority vote satisfying heightened threshold cannot “claim the full authority of a popular commitment unless it succeeds over time: unless it takes and holds.”<sup>211</sup> Democratic structures must recognize that “commitments take time.”<sup>212</sup>

The best design of formal rules to amend amendment rules reflects this intertemporal dimension of democratic and constitutional self-government. It generates sustained popular engagement, and thereby creates the condition for legitimating across time the collective commitment to amending those fundamental rules.<sup>213</sup> We can operationalize intertemporality by requiring sequential approval—multiple votes over multiple years—for amending amendment rules in order to defend amendment rules against ordinary amendment. Sequential approval is a delaying device that precommits political actors, cools passions, invites deliberation and an opportunity to reaffirm or reject constitutional commitment, and it moderates constitutional change.<sup>214</sup> Under sequential approval, it would require at least one initial and one confirmatory vote in order to amend amendment rules.<sup>215</sup> Here is an example of a textual entrenchment

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<sup>204</sup> JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 163-77 (2001).

<sup>205</sup> *Id.* at 11.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 12.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (emphasis in original).

<sup>210</sup> *Id.* at 175-76.

<sup>211</sup> *Id.* at 176.

<sup>212</sup> *Id.* at 175.

<sup>213</sup> See William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 *Tex. L. Rev.* 1965, 1973 (2003).

<sup>214</sup> See ELSTER, *supra* note 6, at 117-25.

<sup>215</sup> Some countries adopt forms of sequential approval. See, e.g., DENMARK CONST., pt. X, §88 (1953); NORWAY CONST., pt. E, art. 112 (1814); SWEDEN INST. OF GOV., ch. 8, art. 14 (1974).

strategy reflecting sequential approval: “An amendment to [amendment rules] shall require the initial and confirmatory approval of two-thirds of each chamber of the national legislature and of a majority of eligible voting citizens in a national referendum. The initial and confirmatory votes shall occur no fewer nor any later than five years apart.”

The interim period above in the sample entrenchment—here, five years—could be shorter or longer, depending on design preferences. It is important, however, that the interim period be neither too short nor too long. If it is too short, it frustrates the purpose of sequential approval, which is to create sufficient time for political actors and voters to engage meaningfully in constitutional deliberation over years before any amendment to amendment rules. If the interim period is too long, the risk becomes what has delegitimized the Twenty-Seventh Amendment in the eyes of many critics, specifically that it lacks contemporaneity between proposal and ratification.<sup>216</sup> The amendment was originally proposed in 1792 and ratified two hundred years later in 1992.<sup>217</sup> Sequential approval must occur within a reasonable amount of time so as to retain contemporaneity between the proposal of an amendment and its eventual ratification.

Sequential approval has three design strengths related to the intertemporal dimension of constitutional self-government. First, the suggested five-year period generally coincides for the most part with intervening executive or legislative elections, or both, between the initial and confirmatory approval,<sup>218</sup> therefore allowing eligible voters to directly or indirectly express their agreement or disagreement both in referendal votes and in executive and legislative elections.<sup>219</sup> Second, sequential approval offers multiple opportunities for public discussion on the proposed amendment of amendment rules, be it in the context of an intervening election, in an initial or confirmatory vote, or during the interim period. Sequential approval also tests the sustainability and sociological legitimacy of the support for amending the constitution’s amendment rules. It demands durable ratifying majorities in order to neutralize the risk that an unstable or unrepresentative majority momentarily captures the amendment process.

But sequential approval alone is insufficient. The principle of relativity, operationalized by escalating amendment rules, can combine with intertemporality to generate a useful defense of amendment rules from ordinary amendment. Specifically, I recommend combining sequential approval with an escalating structure of formal amendment pursuant to which amendment rules would be subject to a higher threshold of amendment relative to other constitutional provisions.

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<sup>216</sup> See, e.g., William Van Alstyne, *What do you Think About the Twenty-Seventh Amendment?*, 10 CONST. COMMENT. 9, 14-15 (1993) (questioning the legitimacy of the amendment); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101, 103-05 (1994) (describing scholarly critiques of the amendment); Ruth Ann Strickland, *The Twenty-Seventh Amendment and Constitutional Change by Stealth*, 26 POL. SCI. & POL. 716, 720-21 (1993) (discussing critiques from scholars and political actors).

<sup>217</sup> Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 678 (1993).

<sup>218</sup> For constitutional states where executive or legislative elections do not occur with regularity within five years, the design of amendment rules can require the dissolution and reconstitution of the national legislature between the initial and confirmatory approval procedures.

<sup>219</sup> Like the Notwithstanding Clause in Canada, this five-year period separating initial and confirmatory votes effectively doubles as a sunset clause. Where political actors and citizens do not confirm the initial vote, the amendment proposal expires. See Lorraine Eisenstat Weinrib, *Learning to Live with the Override*, 32 MCGILL L.J. 541, 562 (1990).

Requiring a heightened threshold for amending amendment rules, and moreover insisting on confirmatory approval of the initial approval would yield the following sample amendment rule, recognizing that the details on precise majorities and timing could be tailored to local preferences: “An amendment to [Section entrenching amendment rules] shall become valid when it has received initial and confirmatory approval from each house of the national legislature with a supporting vote of at least 75 percent of its members, followed by a national referendum with a supporting vote of at least 60 percent of eligible voting citizens. The initial and confirmatory approval shall be scheduled no fewer than five years apart. This section shall be amendable by the same requirements of initial and confirmatory approval.” Note that this amendment rule is itself specially entrenched, thereby avoiding the double amendment problem. The purpose of entrenching escalation and confirmation in designing rules to amend amendment rules themselves is to palliate the risk of temporary majorities, to reflect the considered judgment of the community, and to design a transparent process for fundamental constitutional choices.

### B. Entrenching Judicial Constitutional Review

Constitutional designers could alternatively or in addition entrench the judicial power to review amendments. This strategy is less advisable than the first, but it is in any event better than the current defective design of amendment rules. Admittedly, as discussed above in connection with the Indian Supreme Court’s basic structure doctrine, the judicial power to review constitutional amendments is subject to serious criticisms from the perspective of democratic theory.<sup>220</sup> As an empirical matter, it is also true that entrenching judicial constitutional review would not be effective in all constitutional democracies, particularly those with weak constitutional courts, or none at all. Nonetheless, it is an entrenchment strategy that can at least theoretically be deployed to defend amendment rules against ordinary amendment.

Under this textual design strategy, the constitutional text would expressly authorize courts to evaluate the constitutionality of constitutional changes, whether ordinary amendments that amount to no more than fine-tuning the constitution or extraordinary revisions effecting transformative constitutional change. Absent this entrenched power of review, courts in constitutional democracies could of course invoke foreign case law to defend an unwritten power to invalidate amendments, but justifying and legitimizing that power based on non-domestic sources could itself pose a challenge.<sup>221</sup> I therefore suggest exploring textual strategies to justify and legitimate the power internally to the regime. This would not preclude courts from referencing foreign sources to reinforce the judicial power entrenched in the constitutional text.

Consider three textual strategies to entrench the judicial power to review amendments.<sup>222</sup> First, the text may entrench the judicial power to review *only* amendments to amendment rules. Second, the text may entrench the judicial power to review *all* amendments, including those targeting amendment rules. Third, the text may entrench the distinction between amendment and revision, and implicitly or preferably expressly authorize courts to police the boundary

<sup>220</sup> See *infra* Section III.B.

<sup>221</sup> See Yaniv Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, 62 INT’L & COMP. L.Q. 557, 572-74 (2013).

<sup>222</sup> These strategies presuppose that constitutional designers prefer continuous over discontinuous forms of change. See SUBER, *supra* note 15, at 18-20.

separating one from the other. In any case, the entrenching clause should itself be specially entrenched to avoid double amendment. Consider briefly each of these three in turn.

The modest option is to entrench judicial review only of amendments to amendment rules. For example, the entrenching clause could read: “Before it shall be promulgated as a part of this Constitution, any amendment to [the Section on amendment rules] shall be reviewed by the [national court of last resort] for conformity with this Constitution.” This would authorize courts to evaluate whether the proposed amendment is consistent with the presuppositions of the existing constitution and whether political actors have violated its unwritten spirit. This narrow power would be limited to only exceptional amendments that impact amendment rules. Norway adopts a related strategy to protect the “spirit” of the constitution in its design of amendment rules: an amendment “must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution.”<sup>223</sup> This provision is not, however, explicit about the judicial role, nor does it relate exclusively to the amendment of amendment rules.

An alternative is to entrench judicial review of *all* amendment. This would give courts broader power not unlike the unwritten power possessed by the Indian Supreme Court.<sup>224</sup> Under this alternative, the optimal design to defend amendment rules from amendment authorizes the judiciary to review both the form and content of amendment. The South African Constitution provides a useful illustration: “Only the Constitutional Court may decide on the constitutionality of any amendment to the Constitution.”<sup>225</sup> The South African Constitutional Court may therefore invalidate amendments due both to procedural faults in the amendment process and to substantive unconstitutionality. Where a constitutional democracy relies on the judiciary to protect amendment rules, courts should have the power to review more than just form.<sup>226</sup>

A third option is to textually entrench the distinction between amendment and revision, and to authorize courts to judge whether a constitutional change amounts to one or the other. For example, where political actors seek to change amendment rules using *amendment* procedures, the court could invoke the entrenched distinction between amendment and revision to invalidate the amendment and require political actors to pursue the change through *revision* procedures. The Costa Rican Constitution provides a model for this strategy: it establishes less involved rules for amendment than revision, and stipulates that revision requires a Constituent Assembly convened for that purpose.<sup>227</sup> To protect amendment rules in a constitutional democracy using this third strategy, the constitutional text could stipulate that any constitutional change to

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<sup>223</sup> NORWAY CONST., pt. E, art. 112 (1814).

<sup>224</sup> See *supra* text accompanying notes 116-29.

<sup>225</sup> SOUTH AFRICA CONST., ch. 8, art. 167(4)(d) (1996).

<sup>226</sup> Although the Turkish Constitution authorizes the Constitutional Court to review only the form of formal amendments, see Turkey Const., pt. III, ch. 3, art. 148 (1982), the Court has recently expanded its authority to review the content of formal amendment as well. See Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment—The Turkish Perspective*, 10 INT’L J. CONST. L. 175, 197-99 (2012).

<sup>227</sup> COSTA RICA CONST., tit. XVII, arts. 195-96. (1949). A similar distinction exists between partial and total revision, and courts have operationalized it in the same way. See Carlos Bernal-Pulido & Yaniv Roznai, Article Review/Response, *Unconstitutional Constitutional Amendments in the Case Study of Colombia*, INT’L J. CONST. L. BLOG, October 17, 2013, available at: <http://www.iconnectblog.com/2013/10/article-review-response-carlos-bernal-pulido-and-yaniv-roznai-on-unconstitutional-constitutional-amendments> (last visited Oct. 21, 2014).

amendment rules amounts to a revision and consequently requires the more involved process. The best design would also expressly authorize the judiciary to enforce the distinction between amendment and revision, although courts could presumably infer this power from the distinction itself. Yet leaving the enforcement power implicit would make it more susceptible to challenge.

These three modest design strategies address the criticisms leveled at the Indian Supreme Court for creating the basic structure doctrine and exercising its self-conferred power to review the constitutionality of amendments.<sup>228</sup> Although the Indian Supreme Court now possesses the power to invalidate amendments to amendment rules, this extraordinary power was not initially perceived as a legitimate exercise of its authority.<sup>229</sup> That the power was not textually entrenched undermined the Court's claim to it, and observers saw it "as a brazen attempt by the [Court] to rewrite the Constitution."<sup>230</sup> Since then, in the face of institutional failures in the legislative and executive branches,<sup>231</sup> the Court has positioned itself as the guarantor of democracy in India and as the "nation's prime defense against autocracy."<sup>232</sup> Nonetheless, the basic structure doctrine remains deeply problematic,<sup>233</sup> and it stirs continuing doubt about its democratic legitimacy.<sup>234</sup> Insofar as the resistance to the basic structure doctrine derives largely from its unwrittenness,<sup>235</sup> critics could still challenge it as undemocratic or inconsistent with popular sovereignty were the power of judicial review of amendments textually entrenched. But its textual entrenchment would confer legal legitimacy upon it and help disarm their criticisms. And its own special entrenchment would avoid the problem of double amendment.

## V. CONCLUSION

Modern constitutions generally fail to specially entrench amendment rules. I have therefore suggested two modest textual entrenchment strategies for constitutional designers to consider when designing amendment rules: entrenching sequential approval and escalation in combination; and entrenching the power of judicial constitutional review over amendments. Both textual entrenchments should themselves be specially entrenched. These strategies would address the defective design of unamendability and the weak protections of escalating amendment thresholds alone. Although political actors may always invoke implicit limits to amendment to defend amendment rules—the distinction between amendment and revision, judicial constitutional review, and unwritten amendability—each of these raises problems of its own. Unwritten unamendability and the distinction between amendment and revision both require enforcement by the very political actors who would defy these limits, while judicial

<sup>228</sup> See Section III.B.

<sup>229</sup> S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA* 261 (2002).

<sup>230</sup> SUDHANSHU RANJAN, *JUSTICE, JUDOCRACY AND DEMOCRACY IN INDIA* 44 (2012).

<sup>231</sup> Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 33 (2009).

<sup>232</sup> Gerald E. Beller, *Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India*, 36 WEST. POL. Q. 513, 528 (1983).

<sup>233</sup> See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 501 n.34 (1989).

<sup>234</sup> See Venkat Iyer, *The Supreme Court of India*, in *JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS* 121, 168 (Brice Dickson ed., 2007); S.P. Sathe, *Judicial Review in India: Limits and Policy*, 35 OHIO ST. L.J. 870, 870 (1974); P.K. Tripathi, *Rule of Law, Democracy, and the Frontiers of Judicial Activism*, 17 J. INDIAN. LEG. INST. 17, 33-34 (1975).

<sup>235</sup> See KEMAL GÖZLER, *JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS* 93-94 (2008).

constitutional review is susceptible to criticisms of democratic illegitimacy where it is not textually authorized. The textual entrenchment strategies I suggest create more effective and transparent forms of protection for amendment rules.

James Madison questioned whether we could trust such “parchment barriers” to withstand the “encroaching spirit of power.”<sup>236</sup> Written constitutions, after all, are just words and “to think that words can constrain power seems foolish.”<sup>237</sup> Yet in constitutional democracies, the enterprise of self-government relies on texts, whether a master-text or a collection of texts and precedents,<sup>238</sup> not to substitute for democratic practices but to reinforce them.<sup>239</sup> Though they may be written, amendment rules are effective only to the extent they are perceived as legitimate constraints worthy of public acceptance and thereby actually bind political actors. Their legitimacy and constraining force is predicated on social and political support,<sup>240</sup> which in turn increases the instrumental value of the document as a safeguard for democracy.<sup>241</sup> Amendment rules can successfully preside over the “rules of the political game” only where they themselves “avoid becoming the political game.”<sup>242</sup> It is therefore important to protect them.

There remains much to study about amendment rules. In Japan, specifically, it would be fruitful to explore the constitutional history of failed efforts to amend its amendment rules. It would be equally interesting to uncover the drafting history of Article 96, and whether its thresholds were seen as difficult at their origin as they appear today. Beyond the Japanese Constitution, the United States Constitution’s Article V has itself been the target of failed amendment efforts. Constitutional historians could help explain why and how those efforts failed, and what modern constitutional reformers can learn from those failures. Another underexplored question involves whether amendment rules remain necessary in light of the informal mechanisms political actors have innovated to update written constitutions. Though amendment rules today retain at least one important functional purpose—to alter the constitutional text where time and experience reveal errors—the prevalence of informal amendment may in the future obviate their usefulness. I disagree with this view,<sup>243</sup> but further scholarly inquiry into the functions of amendment rules would be valuable.

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<sup>236</sup> THE FEDERALIST No. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>237</sup> Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 3, 7 (Douglas Greenberg et al. eds., 1993).

<sup>238</sup> John Gardner, *Can There be a Written Constitution?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162, 163-66 (Leslie Green & Brian Leiter eds., 2011).

<sup>239</sup> Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181, 222 (2006).

<sup>240</sup> *Id.* at 746.

<sup>241</sup> Mats Lundström, *The Moral Standing of Democracy*, in WHY CONSTITUTIONS MATTER 61, 87 (Niclas Berggren et al. eds., 2000).

<sup>242</sup> Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 745 (2011).

<sup>243</sup> See Albert, *supra* note 9, at 236.