

# Constituent Power and Doctrines of Unconstitutional Constitutional Amendments

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## Introduction

Across the world, there exists a growing practice amongst constitutional courts to regard certain constitutional provisions or principles as unamendable. A *prima facie* paradox, this represents what is often seen as an inverse relationship between constitutional endurance and constitutional effectiveness – a means of protecting important subjects from capricious, short-sighted, and occasionally malevolent majoritarianism. However, of the justifications proffered by constitutional courts in ascertaining unamendability, few are more theoretically unsound than that of constituent power theory. This article will critique the use of constituent power as a justification – in theory and in practice – for doctrines of unconstitutional constitutional amendments (or implicit unamendability) by (1) explaining the development of constituent power theory; (2) demonstrating what this article terms the ‘central problem’ with this theory, in the context of implicit unamendability; (3-4) illustrating the central problem by analysing the employment of constituent power in case law around the world, with particular reference to the interpretive canons *generalia specialibus non derogant* and *expressio unius est exclusio alterius*; before (5) offering a rebuttal to recent scholarship defending the viability of constituent power theory and (6) presenting a conclusion.

### 1. Constituent, Constituted and Amendment Powers

Longevity and renown notwithstanding, the theory of constituent power is one of imprecise origin and iterative and incremental development. However, the first dedicated description of, and distinction between, constituent and constituted powers is popularly held to have arisen in the 1789 political pamphlet ‘*Qu’est-ce qui le tier-etat?*’ by Abbe Sieyes; written shortly before – and precipitative of – the French Revolution.<sup>2</sup> To Sieyes, institutions of the state such

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<sup>2</sup> Emmanuel Joseph Sieyes, ‘*Qu’est-ce qui le Tier-Etat*’ (political pamphlet, Paris, January 1789).

as the executive and legislature are empowered by, and must accord in the exercise of their powers to, positive 'fundamental laws', which form the 'first stage of the Constitution.' These 'fundamental laws' are established by 'the will of the nation', whose power exists 'prior to everything' and 'is the law itself'. Indeed, they can only be established – and can only be modified – by the national will, because 'no type of delegated power can in any way alter the condition of its delegation'. Sieyès termed the powers exercised by the institutions of state 'constituted', and the corresponding powers which create and delimit the state, 'constituent'. Accordingly, the general theory of distinction can be summarised as follows:

- i. *Constituent power* – firstly, there is the extraordinary, superior and unlimited 'constituent' power to enact a constitution. This is essentially an extra-legal power with no confines.
- ii. *Constituted power* – secondly, there is the ordinary, inferior and limited 'constituted' power that is delegated by, and administered according to, the constitution. These are essentially legal powers which are necessarily limited.

It is from this foundation that modern exponents of constituent power like Schmitt,<sup>3</sup> Loughlin,<sup>4</sup> Roznai<sup>5</sup> and Patberg have built upon.<sup>6</sup> As the development and increasing volume of academic literature attests, the theory has grown in recent years to become a staple – if not uncontested – concept in constitutional theory.<sup>7</sup>

At first glance, the theory seems capable of simple application: constituted powers, such as the legislature, must abide according to the rules set out in the constitution, established by the constituent power – yet the academic rigour of such a theory becomes stretched when applied to the power of constitutional amendment. Such a power, present in most constitutions, is typically in recognition of the fact that a constitution without change is 'without the means of its conservation.'<sup>8</sup> Yet, the power of amendment in constitutional systems is almost invariably created by the constitution and conferred unto the legislature, or other such representative body.<sup>9</sup> Therefore, the power of amendment is a constituted one. If the amendment power is a constituted one, and constituted powers are intrinsically limited; then it is necessary to also regard the amendment power as limited. Accordingly, constituent power theory can be

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<sup>3</sup> Carl Schmitt, *Constitutional Theory* (3rd edn, Duke University Press 2008).

<sup>4</sup> Martin Loughlin 'The Concept of Constituent Power' (Critical Analysis of Law Workshop, University of Toronto, January 2013).

<sup>5</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (1st edn, Oxford University Press 2017).

<sup>6</sup> Markus Patberg, 'Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment' (2016) 24 *Constellations* 1, 51.

<sup>7</sup> Martin Loughlin, *The Idea of Public Law* (1st edn, Oxford University Press 2004) ch 6.

<sup>8</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Kessinger Publishing 2004) 16.

<sup>9</sup> It ought to be noted that this is not necessarily true with regard to the constitutional orders of the UK and Ireland, see Part 5 of this article.

employed as a justification for implicit constitutional unamendability: by recognising the amendment power as a limited constituted power, it follows that the amendment power cannot be yielded absolutely and, therefore, that constitutional provisions may be unamendable.<sup>10</sup> Simplicity notwithstanding, however, this syllogistic deduction gives rise to several issues – of which the most serious raise questions about its very ontology.

## 2. The Central Problem

Fundamentally, constituent power theory cannot justify doctrines of implicit constitutional unamendability because it is inherently paradoxical. Under the constituent/constituted distinction, powers of constitutional amendment exist as the latter - they flow from the constitution and are thus limited by it. However, if constituent power is truly an all-powerful extra-legal force without confine,<sup>11</sup> then why can it not be exercised through amendment process? Logically, this is a contradiction - either the constituent power is absolute (and can be exercised through the amendment process) or it is not (and thus cannot be exercised through the amendment process). If the subjects of a constitution want to amend a part of it, then why must they make a new Constitution instead of using the amendment process? By way of analogy, it is the legal equivalent of the omnipotence paradox. Joseph De Maistre – a contemporary of Sieyes – sardonically compared this to suggesting that ‘the people are a sovereign which cannot exercise their sovereignty.’<sup>12</sup> For lack of a better nomenclature, this can be termed the ‘central problem’ of constituent power theory in the context of implicit unamendability.

This is most acutely apparent upon consideration of how such a distinction can be implemented in practice. If constitutional courts are bodies created by the Constitution, then they have no more power or legitimacy in striking down a constitutional amendment than the other constituted power (such as a legislature) which passed it. In a sense, the distinction is self-castrating as it disallows the only viable mechanism for its enforcement.

Theorists such as Arendt and Lindsay have attempted to appease this criticism by arguing that the constituent/constituted distinction is not a clear cut and unequivocal one. Instead, they operate in tandem – constituted powers of the previous regimes more often than not facilitate the constituent power of the new regime. For example, the government of an old regime may create a constitutional convention, charged with designing the new regime<sup>13</sup> This

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<sup>10</sup> Schmitt (n 3).

<sup>11</sup> *ibid.*

<sup>12</sup> Joseph de Maistre, *Study on Sovereignty* (first published 1795, London: Allen & Unwin 1965).

<sup>13</sup> Hannah Arendt, *On Revolution* (1st edn, Viking 1963). See also Adam Lindsay, ‘The Problem of the Absolute and the Paradox of Constitutionalism, or: ‘How to Restart Time with an Inexorable Time continuum’ (2017) 43(10) *Philosophy and Social Criticism* 1022.

argument is persuasive – some constitutions even provide for it.<sup>14</sup> However, does this not also serve to undermine the distinction rather than support it? If it is accepted that the dichotomy of constituent power and constituted power is not clear cut, then surely this weakens the ontological existence of a distinction between them and the necessity of a theory to justify it. If the division is not as clear cut, then this would mean in theory that constitutional courts – constituted bodies – would be able to decide what is or is not a constituted body – a similar contradiction within the theory. This line of criticism can also be found within the closely-related ‘basic structure’ doctrine. Under this theory, provisions which represent a part of the basic structure, or essential feature, of the constitution should not be varied or repealed by amendment.<sup>15</sup> By determining what the basic structures are (and thus deciding which subjects may be shielded from amendment), constitutional courts seemingly exercise a constituent power under the guise of protecting it. Under the constituent/constituted power distinction, the basic structures doctrine in and of itself is a violation. The theoretical tension arising from this paradox can be further made obvious upon examination of how it has been employed in case law with reference to two canons of interpretation.

### 3. *Generalia Specialibus Non Derogant*

Firstly, there is the canon *generalia specialibus non derogant*, a maxim of statutory interpretation which precludes the judicial preference of a more general statute over that of a more specific one. For example, a general civil liability statute cannot take precedence over a shipping act which extensively outlines the rules governing collisions at sea. In a constitutional context, this may be conceptually extended to preclude the preference of an implicit and unenumerated finding *within* a text over a literal, plain-meaning interpretation *of* a part of the text that is unambiguous and specific.<sup>16</sup> This can be illustrated through the following examples:

#### *i. India*

The Indian Constitution was originally thought not to imply any limitation upon its amendment power. In *Shankari Prasad Singh Deo v Union of India*, the Supreme Court held that article 368 granted a power of amendment to the Indian Parliament ‘without any exception whatsoever’. The Supreme Court further reasoned that ‘[i]f the constituent authority and the [constituted] legislative authority are two different entities,’ then the many articles which treat them synonymously would become ‘meaningless’.<sup>17</sup>

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<sup>14</sup> Article 411(1), the 2009 Constitution of Bolivia. Article 411(1) provides that total or major reforms of the Constitution be implemented via ‘an original plenipotentiary Constituent Assembly’.

<sup>15</sup> See Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structures Doctrine* (1<sup>st</sup> edn, OUP 2011).

<sup>16</sup> It is in this sense, that the canon shall be referenced in this article.

<sup>17</sup> AIR 1951 SC 458.

This was reaffirmed in *Sajjan Singh v State of Rajasthan*<sup>18</sup> but not with unanimity – Justice J.R. Mudholkar dissented on the grounds that the ‘Constituent Assembly, being the repository of sovereignty,’ did not create ‘a sovereign Parliament on the British model’. Instead, it enacted a constitution of limited government, separated powers and guaranteed fundamental rights. Given that state officials are behoved by oath or affirmation to ‘bear true faith and allegiance’ to the Constitution, he questioned why the parliament was empowered to challenge the will of the Constituent Assembly in modifying ‘basic features’ which were intended to be ‘permanent’.<sup>19</sup> Although this was not the conceptual birth of the basic structure doctrine, which is widely attributed to the German jurist Dieter Conrad,<sup>20</sup> the dissent is nonetheless recognised as the first judicial entertainment of what has come to be known as the basic structure doctrine: the contention that constitutions contain a ‘basic structure’ or set of ‘essential features’ which cannot, and should not, be altered via amendment .

The Supreme Court wavered on the ‘basic structure’ doctrine in *Shankari and Sajjan*<sup>21</sup> but endorsed the theory of constituent power three years later in *Golaknath v State of Punjab* on the issue of fundamental constitutional rights.<sup>22</sup> Drawing further from the constituent/constituted power distinction, it held that because ‘Parliament today is not the constituent body as the constituent assembly was,’ it must, as a ‘constituted body bear true allegiance to the Constitution’ by refraining from amending such basic features. Any arrangement to the contrary, it argued, would be a ‘usurpation of constituent power.’<sup>23</sup> In response, the Indian Parliament passed the Twenty-Fourth Amendment. It attempted to reinstate the unlimited power of Parliament to ‘amend... any provision of this Constitution’.

This was challenged in *Kesavandara Bharati v State of Kerala* and the Supreme Court partially overruled *Golaknath* but upheld the basic structure doctrine.<sup>24</sup> Again, the Parliament resisted and effectively re-passed the Twenty-Fourth amendment via the Forty-Second amendment.<sup>25</sup> Once more – and without subsequent challenge – the Supreme Court unanimously struck down the amendment and upheld the basic structures doctrine in *Minerva Mills Ltd v Union of India*.<sup>26</sup> It stated that the amending power was a ‘limited’ one, conferred upon it by the Constitution – a ‘constituted’ power – and that the parliament, ‘under the exercise of that limited power enlarge that very power into an unlimited power... the donee of a limited

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<sup>18</sup> AIR 1965 SC 845

<sup>19</sup> *ibid*.

<sup>20</sup> Dieter Conrad, ‘Implied Limitations of the Amending Power’ (Lecture given to Law School of Banarus Hindu University, Varansi, February 1965).

<sup>21</sup> *Sajjan Singh v State of Rajasthan* 1965 AIR 845, 1965 SCR (1) 933.

<sup>22</sup> AIR 1967 SC 1643.

<sup>23</sup> *ibid*.

<sup>24</sup> AIR 1973 SC 1461. The Court overruled the interpretation of ‘law’ in *Golaknath* as inclusive of constitutional amendments.

<sup>25</sup> The 1950 Constitution of India, Twenty Fourth Amendment; Forty-Second Amendment.

<sup>26</sup> AIR 1980 SC 1789.

power cannot by the exercise of that power convert the limited power into an unlimited one.’<sup>27</sup> ‘If by constitutional amendment, parliament were granted unlimited power of amendment’ the court continued, ‘it would cease to be an authority under the constitution, but would become supreme over it.’<sup>28</sup>

*ii.* Colombia

The 1991 Constitution of Colombia authorised the Constitutional Court to review constitutional amendments only within ‘the strict and precise terms’ of articles 241 and 379, which ‘exclusively’ limits jurisdiction to ‘errors of procedures’ in the ‘formation or passage’ of any amendments. Incontrovertible language notwithstanding, it was held in opinion C-551/03 that the amendment power is implicitly limited insofar as it cannot usurp the constituent power of the people by amending the Constitution to such a degree that the change proposed more resembles a replacement of, rather than a substitution to, the Constitution.<sup>29</sup> A questionably expansive interpretation of ‘procedural error’ was adopted to include the quantum of substantial change proposed.<sup>30</sup> This was reaffirmed by the Constitutional Court in Opinion C-1040/05, wherein it held that an amendment proposing to grant legislative powers without judicial review to the Council of State was in contravention of the principles of constitutional supremacy, separation of powers and the constituent/constituted power distinction:

‘Congress derives its power to reform the Constitution from the constitution itself. It has a derivative or secondary status [from the constituent power]... If Congress crosses the line between amending the Constitution, and replacing it, it violates its constitutional powers and competence.’<sup>31</sup>

*iii.* Belize

In Belize, section 69 of the 1981 Constitution of Belize allows the National Assembly to ‘alter any of the provisions of this Constitution’, provided that any such alteration accords to the ‘manner specified in the provision’, which is wholly procedural. However, in *Bowen v Attorney General* the Belizean Supreme Court held that there exists, contrary to the unambiguity of article 69, further ‘normative limitations on the power of the National Assembly to make laws, including [constitutional] amendments’ outside of this section.<sup>32</sup> In

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<sup>27</sup> *ibid*, 1798.

<sup>28</sup> *ibid*, 1824.

<sup>29</sup> Sentencia 551/03 09.07.2003. See Carlos Bernal, ‘Unconstitutional Constitutional Amendment in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine (2013) *Int’l J Const L* 339.

<sup>30</sup> Roznai (n 5) 65.

<sup>31</sup> [2].

<sup>32</sup> (Claim No 445 of 2008) BZ 2009 SC 2.

striking down the Sixth Amendment Bill – which purported to exempt recently discovered natural resources from the Constitutional protection of property rights – it held inter alia that the National Assembly, being a constituted power, acted *ultra vires* in attempting to exercise what was in effect a constituent power. In response, the National Assembly sought to dispel doubt by amending section 2 via the Eighth Amendment Act to explicitly state that the only barriers to amendability are the procedural ones outlined in the text of section 69. However, the Supreme Court in *British Caribbean Bank Ltd v AG Belize* nevertheless struck this down as another infringement of constitutional supremacy, the rule of law, and the implied normative limits upon constituted powers.<sup>33</sup>

#### *v* Others

Violations of this maxim can also be seen amongst obiter dicta of constitutional courts across the world. Section 30 of the 1994 Constitution of Argentina grants the Congress power to ‘totally or partially’ amend it, subject only to various procedural conditions outlined in the section. However, in the ‘Rios’ case, the Supreme Court held obiter that any such amendments must – contrary to the specific and unequivocal nature of the text – be implicitly limited to being ‘within the [existing] principles of the Constitution’, including the division between the constituent power and the constituted powers.<sup>34</sup> This reasoning was later echoed (albeit not to the direct resolution of the legal issues) in *Fayt*, wherein the court partially struck down a Constitutional amendment on procedural grounds.<sup>35</sup> In Pakistan, the Supreme Court similarly stated in *Al-Jehad Trust v Federation of Pakistan* that when a conflict arises between an amendment and an existing constitutional provision, it is to be resolved by examining the Pakistani Constitution as a whole – its basic structure and its spirit<sup>36</sup> – thus appearing to suggest that a specific and unambiguous amendment may be overridden by an unspecific and ambulatory tone or spirit pervading the Constitution as a whole.

These examples in case-law evince the widespread disconnect with which doctrines of implicit unamendability predicated on constituent power have to the constitutional texts they are supposedly based upon and found within.

It is accepted that different means of constitutional interpretation accord different degrees of importance to the text and its plain meaning. Whilst this article does argue that the plain meaning of the text should (generally) be preferred to any purposive, harmonious or natural law interpretation, it is nonetheless unnecessary to relegate discussion to this secondary debate: there is a significant difference between extrapolating something substantive from

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<sup>33</sup> (Claim No. 597 of 2011) 11 June 2012.

<sup>34</sup> [1994-C] LL 46, 48.

<sup>35</sup> ‘Fayt’, *Suplemento de Derecho Constitucional*, L.L., 18 de Agosto de 1998 1, 8-9.

<sup>36</sup> PLD 1996 SC 367, 410, 516, 537.

limited text, or substantively expounding upon textual ambiguity; and giving an interpretation which is in brazen contradiction to text which is unambiguous and incontrovertible. The former is to accord a low degree of weight to the text and its meaning; the latter is to disregard both the text and its meaning entirely. The former can be tenable, depending on the circumstances and one's interpretive method. The latter, it is submitted, is untenable. Even Conrad – the founder of the basic structures doctrine – considered the employment of such interpretational ductility in the protection of the essential features of a constitution to be 'extraordinary.' An argument could be mounted to the effect that the courts should ignore the text where its application would lead to an absurd outcome, as they do in constructing statutes – for example, if a constitutional amendment abolished the constitutions. However, this would be to suggest that carefully prescribed procedures, which allow for unlimited power of amendment, are in some way absurd or unnatural.<sup>37</sup> As will be discussed below, this is not the case. Doyle succinctly notes that 'it is not permissible to overwrite one clear provision in favour of an amorphous spirit that has no particular textual foundation'.<sup>38</sup>

It is further accepted that, as constitutions try to incorporate complex and august ideas, values, and philosophies, it would be naïve to accord any text an enormous degree of weight on the basis that it can fully encapsulate and convey such concepts. They cannot, and constitutions should not be parsed as though they were statutes of taxation. Again, however, this simply cannot extend to ignoring or contradicting the text.

Returning to the Central Problem, if the constituent power is all-powerful, and the constituent power is expressed via the text of the constitution; then it is difficult to see how implicit unamendability on the basis of constituent power theory can avoid Washington Williams' charge - it simultaneously disregards the constitution under the pretence of upholding it.<sup>39</sup> If the drafters intended the amendment power to be one which the courts should interpret in such a way as to ensure it keeps pace with changes in society and jurisprudence, then why – in most of the cases outlined above – did they not provide it in more ambiguous, pliable language? This line of reasoning links closely with the next canon of interpretation.

#### 4. *Expressio Unius est Exclusio Alterius*

Secondly, there is the canon *expressio unius est exclusio alterius*. This holds that the express textual inclusion of something of a particular class implicitly excludes other things of that class which are not included – 'to express one thing is to exclude another'.<sup>40</sup> Similarly, in a

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<sup>37</sup> Virgilio Afonso da Silva, 'A Fossilised Constitution?' (2004) 17(4) Ratio Juris 459

<sup>38</sup> Oran Doyle, *Constitutional Law: Text, Cases and Materials* (1st edn, Clarus Press 2008) 461, [17- 12]

<sup>39</sup> George Washington Williams, 'What, If Any, Limitations Are There Upon the Powers to Amend the Constitution of the United States?' (1928) Am. L. Rev. 529, 543.

<sup>40</sup> *Dorval v Dorval* 2006 SKCA 21 (CanLII) [10]; Cameron JA.



constitutional context, this can also extend to precluding implicit unamendability in one of two ways.

According to a wide application of the canon, constitutions which do not explicitly refer to unamendability should not be interpreted as containing unamendable provisions – if the intention of the constitution-makers were otherwise, then explicit reference would have been made. This was the reasoning of Judge Chua in *Teo Soh Lung v Minister for Home Affairs*, wherein it was held that no part of the Singaporean Constitution is implicitly unamendable.<sup>41</sup> However, as the case-law explored in section 3 has demonstrated, many constituent-power based doctrines of implicit unamendability seem to have been declared contrary to this principle. This is a particularly pertinent criticism to constitutions enacted post 1990, given that the drafters would have been living in an era where explicit unamendability was a well-established and available tool in constitution-making<sup>42</sup>. Even for constitutions enacted before this era, unamendability was in no way an unknown or uncommon concept. From Ancient Athens<sup>43</sup> to Renaissance-era Europe<sup>44</sup> and nineteenth century south America,<sup>45</sup> it has featured in constitutional orders. In short, it is hard to accept that the vast majority of constitutional drafters were unaware of explicit unamendability as an option. Clearly, most were and had opportunity to employ it should they have wished to do so. Although it is accepted that this argument will have only circumstantial applicability to specific constitutions according to its constitutional history, the consequence irrespective of this is that many of the constitutions which have been found to be implicitly unamendable on the basis of constituent-power theory were likely not intended to be so by the drafting constituent power.

According to a narrow application, constitutions which do explicitly reference the unamendability of certain provisions should not be interpreted as also containing other, explicitly unreferenced but similarly unamendable provisions – if the constitution makers considered the amendability of some provisions, then it must be assumed that those not declared unamendable were not intended to be so. However, doctrines of implicit unamendability have been anchored upon provisions in Constitutions which contain other, explicitly unamendable provisions.<sup>46</sup> In Turkey, it was established in decision No 1965/40 that the close link between article 2 and article 1 in the 1961 Constitution meant that the explicit unamendability of article 1 extended to implicitly make article 2 also unamendable.<sup>47</sup>

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<sup>41</sup> (1989) 2 MJL 449, 456-7.

<sup>42</sup> Roznai (n 5) 21.

<sup>43</sup> *ibid* 18-21.

<sup>44</sup> Zoltán Szente, 'The Historic Origins of the National Assembly in Hungary' (2007) 8 *Historia Constitucional* 227, 239.

<sup>45</sup> Article 228, 1830 Constitution of Venezuela.

<sup>46</sup> To date, constituent power theory has not grounded any doctrines of UCA in this way. However, given the growth of both constituent power theory and implicit unamendability, it is very possibly and not unlikely that it can be invoked somewhere.

<sup>47</sup> 4 AMKD 290, 329. (26 September 1965).

Similarly, the Supreme Court of Puerto Rico noted *obiter* in *Berríos Martínez v Roselló González II* that – in addition to the explicitly unamendable articles – there exists other articles which are implicitly unamendable by virtue of their importance to the Constitutional system as a whole.<sup>48</sup> Vile considers this principle to be the most compelling criticism against doctrines of UCA.<sup>49</sup> Again, the Central Problem that is brought to the fore through the difficulty with which it is to accept that the drafting constituent power, in deciding to declare certain provisions explicitly unamendable, equally and intentionally intended other provisions to be unamendable, but declined to declare so explicitly.

Schmitt has written that explicitly unamendable constitutional provisions stand merely as a recognition of the fact that the amendment power is inherently limited and cannot be considered as exhaustive.<sup>50</sup> If Schmitt is correct, then it is unclear why constitutional drafters would bother to deem any provisions explicitly unamendable. When they did bother, it is equally puzzling why they did not just extend the implicitly unamendable provisions. If it is inherently limited there would be no need to state so explicitly.

Paulsen and Child essentially deflect these criticisms by insisting that the amendment power is intrinsically limited – regardless of whether the founders thought so or intended it to be. The ‘Constitution is not a suicide pact’ and the amendment power cannot turn it into one.<sup>51</sup> If it were used to destroy the constitution that creates it, it would lose its *raison d’être*.<sup>52</sup> Their arguments seem to suggest that unamendability (including when it is based upon constituent power) is an obvious and necessary tool of constitution-making, to which an ‘officials-by-stander’ or ‘business-efficacy’ test would readily deem it an implicit constitutional component anyway. In response, it is submitted that whilst implicit unamendability may reinforce the moral value of constitutionalism and can stand as a logical (almost common sense) rule for yielders of the amendment power, this argument does not actually ontologically ground either constituent power theory or doctrines of unconstitutional constitutional amendments based upon it. Its existence is one thing and the merits of employing it another.

##### 5. Roznai’s Framework – a Rebuttal

In the landmark text, *Unconstitutional Constitutional Amendments: the Limits of Constitutional Amendment Powers*, Yaniv Roznai proffers a new framework within which to view constituent power theory as a justification for implicit unamendability. In brief, the power of amendment

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<sup>48</sup> 137 d.p.r. 195 (1994) 201, 221.

<sup>49</sup> John R Vile, ‘Limitations on the Constitutional Amending Process’ (1985) 2 Const. Comment. 373, 383.

<sup>50</sup> Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 152.

<sup>51</sup> Michael Stokes Paulsen, ‘The Constitution of Necessity’ (2003-4) 79 Notre Dame L. Rev. 1257.

<sup>52</sup> Sampson R Child ‘Revolutionary Amendments to the Constitution’ (1926) 10 Const. Rev 27, 28.

should neither be strictly regarded as a constituent nor a constituted power, but as a '*sui generis*'.<sup>53</sup> Constituent Power itself should also be subdivided into two categories:

- i. *Primary Constituent Power* – firstly, there is the unlimited, superior 'principal' constituent power to enact a constitution
- ii. *Secondary Constituent Power* – secondly, there is the limited, inferior 'agent' constituent power to amend a constitution.<sup>54</sup>

To Roznai, the closer that the constitutional amendment power resembles the primary constituent power, then the less it should be constrained. For example, where it is exercised through national referendum – as is the case in Ireland<sup>55</sup> – then it should be subject to no judicial scrutiny, for the entity exercising the power is virtually identical to the entity which enacted the constitution and could enact a new one. The less the power resembles the primary constituent power, then the more it should be constrained – including through doctrines of implicit unamendability. In states where the amendment power is vested in a constituted body – such as a legislature – the judiciary is accordingly justified in devising and applying doctrines of implicit unamendability to the Constitution, on the basis of this distinction between primary constituent power and secondary constituent power.

This is an innovative response to the central problem of the original constituent/constituted powers dichotomy, worthy of the academic attention it has enjoyed in recent years. However, this new framework resolves the problems concomitant to the simplistic constituent/constituted powers distinction only by the introduction of new compensatory theoretical fiction. According to Occam's Razor, the analysis of phenomena should be as efficient as possible – theoretical fiction should be minimised and, where two hypothesis or frames of analysis are available, the one with the fewest assumptions should be preferred. In this respect, Roznai's framework fails to solve the central problem of the constituent/constituted powers distinction directly – instead, it offers only a remedial layer of theoretical fiction to fix or ignore a flawed theoretical foundation. For example, regarding the power of amendment as *sui generis* because it shares similarities with both the constituent power and the constituted power is simply not an efficient means of overcoming the fact that, on the simple basis of the underlying distinction, it is a constituted power. The same can be said of the analysis proffered for the definition of constituent power, the enforceability of implicit unamendability and of a general theory of delegation.<sup>56</sup> For all that Roznai's framework ingenuously offers by way of consolidating and extenuating constituent power

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<sup>53</sup> Roznai (n 5) 110.

<sup>54</sup> Roznai (n 5) 121.

<sup>55</sup> Article 46, 1937 Constitution of Ireland.

<sup>56</sup> Roznai (n 5) 141.

theory in the context of implicit unamendability, its inability to abide by Occam's Razor and to tackle the structural problems renders it of little utility in overcoming the Central Problem.

### Conclusion

The 'Central Problem' of the constituent/constituted power distinction is by no means the only difficulty. Doyle has noted how the academic literature surrounding constituent power – as expounded by later theorists – has oscillated between regarding it as a diachronic entity (such as a group of people) and as a capacity or sheer power, of which the former is more popular but the latter is more preferable<sup>57</sup> For example, if the constituent power is understood as a fixed entity which subsists through time, then we are obliged to chart its existence through time – something which is 'deeply fraught' as the its existence can only be seen is when it is enacting a new constitution. Whilst it has undoubtedly played a formative role in shaping constitutional theory and in enabling understanding of complex issues; its underlying paradoxical nature render both the distinction and the doctrines of unconstitutional constitutional amendments predicated upon it as ontologically unsound and – ultimately – beyond repair. Notwithstanding its recent ascendancy, it is perhaps time that the constituent/constituted power distinction be gracefully abandoned.

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<sup>57</sup> Oran Doyle, 'Populist Constitutionalism and Constituent Power' (2019) 20(2) German Law Journal 167-169.