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1. **Unconstitutional Constitutional Amendments [article]**
Israel Law Review, Vol. 44, Issue 3 (2011), pp. 321-342
Barak, Aharon (Cited 252 times)
44 Isr. L. Rev. 321 (2011)
All Matching Text Pages (16)

Turn to page 321
UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS Aharon Barak* This paper deals with the question ofan amendment to the constitution that has been made pursuant to the formal requirements of the constitution but deviates from its basic structure. The paper explores diferent views regarding this question in comparative law. It also exam- ines the applicability ofthe doctrine ofunconstitutional constitutional amendments in Israel. I. PRESENTATION OF THE PROBLEM There is disagreement in comparative constitutional law, primarily in the United States, regarding the justification for **judicial review** of...

the constitutionality of a statute.I For the purpose of this paper, I assume that, in a given legal system, the constitution (expressly2 or impliedly3) recognizes **judicial review** of statutes that violate the provisions of the constitution. The question I wish to deal with is whether that **judicial review** also covers an amendment to the constitution that has been made pursuant to the provisions of the constitution regarding amendment of the constitution.4 It seems that * President (ret.) of the Supreme Court of Israel; Radzyner School of Law, Interdisciplinary Center (IDC), Herzliya. I wish to... thank Professor Ariel Bendor, Professor Alon Harel, Judge Geula Levin, Justice Hanan Melcer, Judge Dr. Yigal Mersel, and Professor Suzie Navot for their helpful comments. I See Daniel Solove, The Darkest Domain: Deference, **Judicial Review**, and the Bill ofRights, 84 IOWA L. REV. 941 (1999); Christopher F. Zurn, Deliberative Democracy and Constitutional Review, 21 LAW & PHIL. 467 (2002); Luc B. Tremblay, General Legitimacy of **Judicial Review** and the Fundamental Basis of Constitutional Law, 23 OXFORD J. LEGAL STUD. 525 (2003); Leighton McDonald, Rights, "Dialogue" and Democratic Objections to... **Judicial Review**, 32 FED. L. REV. 1 (2004); Jeremy Waldron, The Core ofthe Case Against **Judicial Review**, 115 YALE L.J. 1346 (2006); Larry Alexander, Constitutions, **Judicial Review**, Moral Rights, and Democracy: Disentangling the Issues, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 119 (Grant Huscroft ed., 2008); Richard H. Fallon, Jr., The Core of an Uneasy Case for **Judicial Review**, 121 HARV. L. REv. 1693 (2008); David S. Law, A Theory ofJudicial Power and **Judicial Review**, 97 GEO. L.J. 723 (2009); Alon Harel & Tsvi Kahana, The Easy Core Case for **Judicial Review**, 2 J. LEGAL ANALYSIS... 227 (2009). 2 Such as article 93 of the German Constitution. See GRUNDGESETZ FOR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I, art. 93. 3 See Marbury v. Madison, 5 U.S. 137 (1803); CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221 [1995] (Isr.). 4 In principle, one can recognize **judicial review** of the constitutionality of a constitutional amendment without recognizingjudicial review of the constitutionality of a statute. In practice, all legal systems that recognize the former also recognize the latter. 321 #12;

Turn to page 322

...." " See KEMAL **GOZLER. JUDICIAL REVIEW** OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 23-24 (2008). 322 [Vol. 44: 321 #12; ...ISRAEL LAW REVIEW there is no need for great persuasion in order to show that even those who support **judicial review** of the constitutionality of a ("regular") statute do not necessarily have to recognize the existence of **judicial review** of the constitutionality of a constitutional amendment.5 The latter issue-**judicial review** of the constitutionality of an amendment to the constitution-lies at the foundation of this paper.6 This problem arises both in legal systems whose constitutions include provisions that have been expressly determined to be unamendable ("eternal clauses") and in legal... systems in which there are no express "eternal clauses." II. COMPARATIVE LAW A. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN TURKEY Turkey's Constitution recognizes **judicial review** of the constitutionality of statutes.7 It also includes a number of provisions that cannot be amended ("eternal clauses").' These provisions determine that Turkey is a republic,' a democracy, and a secular and socialist state, governed by the rule of law."o The Constitution contains a general provision dealing with the amendment of the Constitution. Until 1971, the Turkish Constitution did not contain an express... provision regarding the **judicial review** of constitutional amendments. The Turkish Constitutional Court interpreted the silence of the Consti- tution on this issue to mean that it authorized the Court to perform **judicial review** of the constitutionality of an amendment to the Constitution." 5 See United Democratic Movement v. President ofthe Republic ofSouth Africa 2003 (1) SA 495 (CC) (S. Afr.). 6 I assume that the constitution itself is constitutional. When the argument is that the

constitution itself is unconstitutional, additional problems arise that stray beyond the scope of this argument. A good

Turn to page 323
authorities. In its decision of October 12, 1976,'" the Constitutional Court determined that the amendment was not constitutional, 12 Decision of June 16, 1970, No. 1970/31, 8 AMKD 313 (1970), referred to by **GOZLER**, supra note 11, at 40. 13 Decision of Apr. 3, 1971, No. 1971/37, 9 AMKD 416 (1971). **GOZLER**, supra note 11, at 97 quotes the judgment (at 428-29), according to which the constitutional amendment must fulfill the "requirements of contemporary civilization" and must not violate "the coherence and system of the constitution." 14 See **GOZLER**, supra note 11, at 96. 15 TURKISH CONST., 1961, as... amended in 1971, art. 147. 16 Decision of Apr. 15, 1975, No. 1975/87, 13 AMKD 403 (1975), referred to in **GOZLER**, supra note 11, at 42. '7 Decision of Oct. 12, 1976, No. 1976/46, 14 AMKD 134-36 (1976), referred to in **GOZLER**, supra note 11, at 43. 323 #12;

Turn to page 324
amending, inter alia, article 42 of the Constitution, which deals with rights and duties regarding education. The amendment added a provision to the Constitution, according to which: "No one can be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by the law." 18 Decision of Jan. 28, 1977, No. 1977/4, 15 AMKD 106-31 (1977), referred to in **GOZLER**, supra note 11, at 44. '9 Ergun Ozbudun, **Judicial Review** ofConstitutionalAmendments in Turkey, 15 EUR. PUB. L. 533 (2009). 20 Decision of June 8, 1987...), which constitutes a component of the republican nature of the state, which cannot be amended in the Constitution (as determined in article 9 of the Constitution). An additional amendment determined that there should be no **judicial review** of the decisions of the Prosecution Council. Similar to the judgment that dealt with the Council of Judges, the Court determined that the amendment was unconstitutional in its decision of September 27, 1977. In 1982, a new Constitution was enacted in Turkey. Article 148(1) of the Constitution authorized the Constitutional Court to examine the constitutionality of

Turn to page 329
unamendable provisions. In all the cases that it has examined, the Court has determined that the constitutional amendments in question did not violate the eternity clauses of the Constitution.43 E. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN THE U.S. The U.S. Constitution does not include an express provision regarding **judicial review** of the constitutionality of laws. In Marbury v. Madison (1803)," the Supreme Court 40 See JURISTENZEITUNG 35 (1954). For translations of parts of some of the judgments, see Dietze, supra note 37, at 18. See also DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE... FEDERAL REPUBLIC OF GERMANY 48 (2d ed. 1997); 30 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGS- GERICHTS (BVERFGE) [DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] 1 (1970) (Klass case). 41 The source of these provisions is in article 79(3) of the Constitution, which states: "Amendments to this Basic Law affecting the division of the Federation into Lander, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." 42 For analysis of this case, see **GOZLER**, supra note 11, at 56. 43 On certain occasions, dissenting opinions have

Turn to page 330
ISRAEL LAW REVIEW determined that such review is appropriate in light of the supremacy of the Constitution. Should **judicial review** of the constitutionality of an amendment to the Constitution be recognized? It appears that the answer is yes, if

the argument is that the amendment to the Constitution is intended to amend the eternity clause according to which the makeup of the Senate-in which each state has two senators regardless of the number of voters in that state45-is not subject to the amendment in article 5 of the Constitution.46 But what about amendments to the Constitution enacted... majority, and whether it had been approved according to the requirements of the constitutional amendment regarding amendment of the Constitution.48 A change in the Court's approach took place in Coleman v. Miller (1939).49 In this case, Congress proposed an amendment to the Constitution. The legislature of Kansas decided that Kansas would oppose the amendment, and notice was legally given. Twelve years later, the legislature of Kansas changed its mind and ratified the decision. The validity of the ratification was under **judicial review**. The Supreme Court of Kansas decided the case on the merits and... decided that the ratification was valid. That decision was attacked in the United States Supreme Court. It was argued that the Kansas legislature could not change its position and that, with the passage of time, the amendment had expired. The Supreme Court refrained from deciding these issues. It determined that the control over the process of amending the Constitution is exclusively in the hands of Congress and that there is no **judicial review** of Congress's decision. Justice Black noted that a constitutional amendment is a "political question" that is not subject to **judicial review**. Justice Black... wrote:0 Article V ... grants power over the amending of the Constitution to Congress alone.... The process itself is political in its entirety, from 45 U.S. CONST., art. I, § 3. 46 See U.S. CONST., art. V: "... no Amendment which may be made prior to the Year One thousand eight hundred and eight shall be in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article...." 47 See **GOZLER**, supra note 11, at 28. 48 See State of Rhode Island v. Palmer, 253 U.S. 350 (1920); Dillon v. Gloss, 256 U.S. 368 (1921); United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett

Turn to page 331

2011] UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS submission until an amendment becomes part of the Constitution, and it is not subject to judicial guidance, control or interference at any point. The scope of this ruling is a matter of controversy." F. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN IRELAND Ireland's Constitution recognizes **judicial review** of the constitutionality of statutes. It has no eternal clauses. It contains a provision regarding the amendment of the Constitution.52 Does it recognize **judicial review** of an amendment to the Constitution that is unconstitutional? The answer... of the Irish Supreme Court is that such review is possible regarding the fulfillment of the formal conditions determined in the Constitution for enacting an amendment to the Constitution. **Judicial review** does not extend to the content of the amendment to the Constitution or its relation to the rest of the Constitution.53 G. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN BRAZIL The Constitution of Brazil (1988) recognizes **judicial review** of the constitutionality of laws. It contains a provision regarding eternal clauses, which states: "No resolution is discussed concerning an amendment proposal... which tends to abolish: 1. the federative form of the state; II. the direct, secret, universal, and periodic vote; III. the separation of the Government Branches; IV. individual rights and guarantees." The Supreme Court views itself as authorized to annul an amendment to the Constitution that violates eternal clauses,54 and it has done so on a number of occasions.5 H. EXPRESS CONSTITUTIONAL PROVISIONS REGARDING **JUDICIAL REVIEW** OF THE CONSTITUTIONALITY OF A CONSTITUTIONAL AMENDMENT We have seen that Turkey's Constitution includes express provisions that authorize the Constitutional Court to examine...); Jeff Rosen, Was the Flag Burning Amendment Unconstitutional?, 100 YALE L.J. 1073 (1990-1991); Raymond Ku, Consensus of the Governed: The Legitimacy of Constitutional Change, 64 FORDHAM L. REv. 535 (1995-1996); Jason Mazzone, Unamendments, 90 IowA L. REv. 1747 (2004-2005). 52 See IR. CONST., 1997, art. 46. 53 See O'Connell,

supra note 24, at 61. 54 Luciano Maia, The Creation and Amendment Process in the Brazilian Constitution, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMs 54, 9 (Mads Andenas ed., 2000). ss Id. 56 See **GOZLER**, supra note 11, at 47. 331 #12;

Turn to page 332

ISRAEL LAW REVIEW tion (of 1980), the Constitutional Court was authorized to examine the questions likely to arise during the process of amending the Constitution.57 Romania's constitution (of 1991) authorizes the Constitutional Court to examine the constitutionality of a bill to amend the Constitution. This is **judicial review** (preview) prior to the enactment of the amendment. The Constitutional Court of Romania has ruled on this issue on a number of occasions.58 The Constitution of South Africa authorizes the Constitutional Court to decide the constitutionality of every amendment to the... Constitution.59 In the same manner in which a constitution may authorize the court to review the constitutionality of a constitutional amendment, the constitution may also revoke such authority from the court. To the extent that the provision that revokes **judicial review** was inserted into the constitution by way of a constitutional amendment, it may encounter the claim- as was in fact set forth in India-that this constitutional amendment is itself unconstitutional. III. LESSONS FROM COMPARATIVE LAW Every constitution has its own problems, and every court has its own powers. However, an examination of... comparative law regarding the constitutionality of amendments to constitutions raises four key issues. First, one must differentiate well between the question whether the court has the authority to perform **judicial review** of the constitutionality of an amendment to the constitution, on the one hand, and the question what the standards for such review are, on the other. Courts have not, for the most part, interpreted the silence of the constitution regarding the issue of the court's authority to perform **judicial review** of the constitutionality of a constitutional amendment as a negation of that authority... not always.60 As we have seen, the U.S. Supreme Court denied itself this authority, defining it as a political question.6' 57 See CONSTITUCI6N POLiTICA DE LA REPOJBLICA DE CHILE [CONSTITUTION], 1980, art. 82(2) (Chile). 58 See **GOZLER**, supra note 11, at 5. 59 S. AFR. CONST., art. 167(4)(d). See also Albie Sachs, South Africa's Unconstitutional Con- stitution: The Transition From Power to Lawful Power, 41 ST. Louis U. L.J. 1249 (1996-1997). 60 See State v. Lennon, [1935] 1 I.R. 170, 198 (Ir.); Abortion Information, [1995] 2 I.L.R.M. 81 (Ir.); Riordan v. An Taoiseach, [1999] I.E.S.C. I (Ir.). 61

Turn to page 333

that it is authorized to examine the constitutionality of an amendment to the Constitution, the Constitution was amended (the 42nd amendment of 1976) in such a way that it was determined that amendments are not subject to **judicial review**.63 In Minerva Mills,64 the Supreme Court of India ruled that this amendment was unconstitutional, as it violated the fundamental structure of the Consti- tution. Such an amendment cannot be made as an amendment to the Constitution. This judicial approach cannot base itself on the court's authority or on the article regarding amendment of the Constitution. It must... intended to fortify the constitution against improper amendments. **Judicial review** is a natural mechanism for protecting eternity clauses in the constitution. **Judicial review** provides (legal) "teeth" to the eternity clause. In this respect, there is no substantive difference between a regular statute that violates the constitution and an amendment to the constitution that violates the eternity clause. Just as **judicial review** is recognized in the first case (a regular statute that violates the constitution) it should also be recognized in the second case (a constitutional amendment that violates the

Turn to page 335

unconstitutional amendments to the constitution concerns the status and role of the

courts in a given society. Is it proper for judges who are not elected directly by the public to annul the decisions of its elected representatives regarding the amendment of the constitution? This question obviously arises regarding the **judicial review** of the constitutionality of a "regular" statute; it arises in full force regarding the **judicial review** of the constitutionality of an amendment to the constitution. On the one hand, it is argued that the boundary of judicial legitimacy should be drawn at the **judicial review** of... issue is essentially political. It concerns the most sensitive aspects of democracy. If **judicial review** of the content of a consti- 69 See supra section II.B. 70 Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789 (India). 71 See COMELLA, supra note 34, at 107. 335 #12;

2. **The Scope and Limitation of the Amending Power in Ethiopia: Thinking beyond Literalism [article]**
Mekelle University Law Journal, Vol. 4, pp. 1-33
Eshetu, Zelalem
4 Mekelle U. L.J. 1 (2016)
All Matching Text Pages (8)

Turn to page 4
amendments proposed either through Congress or conventions has to be ratified by three -fourths of the states.14 These procedures are mandatory requirements that must be observed on the process of constitutional amendments and in order to be valid, an amendment 9 Richard Albert, Non-constitutional Amendments, Canadian Journal of Law and Jurisprudence, Vol. XXII, No. 1 (January 2009), pp. 13-14 10 Kemal **Gozler. Judicial Review** of Constitutional Amendments; A Comparative Study (2008), pp. 27-28 1 Albert, supra note 9 12 Art. 79 of the German Basic Law 13 Art. V of the US Constitution 14 Ibid Vol. 4

Turn to page 5
an essential variable in this regard. The strong party discipline and a widespread culture of coalition among political parties may render a super-majority requirement to be 15 **Gozler**, supra note 10, pp. 27-28; George D Skinner, Intrinsic Limitations on the Power of Constitutional Amendment, Michigan Law Review, Vol. 18 (1999-1920), p. 214 16 Art.79 of the German Basic Law and Art. V of the US Constitution 17 Skinner, supra note IS, P. 214 " Ibid, p. 214 19 Aharon Barak, Unconstitutional Constitutional Amendments, Israel Law Review, Vol. 44 (2011), p. 434 20 Landau, supra note 7, pp. 210-213

Turn to page 6
nature of these restrictions on the power varies across countries depending on the level of development, the complexity and the heterogeneous characters of the society, the number and nature of the major communities, the history, the size and population of the country.2 22 Ibid 23 Barak, supra note 19, p. 434 24 Ibid 25 Landau, supra note 7, p. 192 26 Aid 27 **Gozler**, supra note 10, p. 55 2' Ashok Dhamija, Need to Amend a Constitution and Doctrine of Basic Features (revised 1' ed., 2007), pp. 290-296. More on the nature and the contents of unamendable provisions, Vol. 4 June 2016 #12;

Turn to page 10
limitation. He argues based on the concept of inner unity, identity, or sprit of a constitution and notes that every constitution has its own identity and sprit.6 He further claims that as an amendment assumes the continued existence of a constitution so that the amending power may not ruin the inner " Dhamija, supra note 28, pp. 252-283; Roznai, supra note 28, p. 8 According to the studies conducted by Yaniv Roznai and Ashok Dhamija, around 70% of the constitutions have no express substantive limitations. 52 **Gozler**, supra note 10, pp. 76-77 53 Sudhir Krishanaswamy, Democracy and Constitutionalism in

Turn to page 12
separation of power, the objectives specified in the Preamble to the Constitution, **judicial review**, Article 32 and 226, federalism, secularism, the sovereign, democratic and republic structure of the country, freedom and dignity of individuals, unity and integrity of the nation, the principle of equality, the parliamentary system of the government, the principle of fair and free election, independence of the judiciary, access to justice, power of the Supreme Court are considered as some of the basic features of the Constitution. 69 The Supreme Court in Minerva Mil Ltd v Union of India Case AIR 1980 SC... discussions. It goes beyond the theoretical discourse and has some practical endorsement through different court decisions. The Indian Supreme Court, for instance, affirmed the assertion of implied limitations in Minerva Mills Ltd v Union of India.69 In this seminal case, the Court held that there are 61 Ibid 66 Skinner, supra note IS, P. 214 67 **Gozler**, supra note 10 , p. 72 6' Dhamija, supra note 28, P 331-332, 433. The exhaustive list of all the basic features of the Constitution have not been provided by the judiciary. However, the supremacy of the Constitution, the rule of law, the principle of

Turn to page 13
Sc 1213, Supreme Court Advocates- on-record Association v Union of India (1993) 4SCC 441: AIR 1994 SC268, Pudyal v Union of India (1994) SUPP 1SCC 324, and Klhoto Hollohan v Zachillhu AIR 1993 SC 412: 1992 SUPP(2) SCC651. (See Dhamija, supra note 28, pp. 336-340 and **Gozler**, supra note 10, pp. 88 -89) 70 Dhamija, supra note 28, pp. 330,340,341-360 71 Ibid 72 **Gozler**, supra note 10, p. 84 73 Ibid, pp. 78-80. National Prohibition Case, 235U.S. 350 (1920) In this case it was argued that the substance of the 18th amendment is contrary to the Constitution. The argument is based on the assertion that

Turn to page 14
decentralization 76 Ibid 77 Ibid; Dhamija, supra note 28, pp. 340-360. On this point, Kemal **Gozler** also identified certain limitations on the doctrine. See **Gozler**, supra note 10, pp. 66-74 71 Ibid 79 CUD Manifesto, available at: hap: www. Kestedamena. Org . (last visited on Sep. 19, 2012); See also Tegaye Regassa, The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice , Afrika Focuse, Vol. 23, No. 1 (2010) pp. 85-118 o Ibid " Leonardo R. Arriola, Ethnicity, Economic Conditions, and Opposition Supports: Evidence From

Turn to page 27
preambles as a tool in constitutional interpretation is commonly invoked in Ukraine and Germany as well.1'¢ The Preamble of the FDRE Constitution that embodies in a solemn form the ideas and aspirations of the Nations, Nationalities, and Peoples has such an interpretive role to determine the scope of the amending power. Accordingly, the power must be construed in the light 147 **Gozler**, supra note 10, p. 69; Barak, supra note 19, p. 337 148 Liav Orgad, The Preamble in Constitutional Interpretation, International Journal of Constitutional Law, Vol. 8, No. 4, I-CON Vol. 8 No. 4 (2010), p. 175 149 Ibid "0

3. **Unconstitutional Constitutional Amendments - The Migration and Success of a Constitutional Idea [article]**
American Journal of Comparative Law, Vol. 61, Issue 3 (Summer 2013), pp. 657-720
Roznai, Yaniv (Cited 38 times)
61 Am. J. Comp. L. 657 (2013)
All Matching Text Pages (28)

Turn to page 660
NORMS IX (Mads Andenas ed., 2000). 10. For comparative studies, see KEMAL **GOZLER. JUDICIAL REVIEW** OF CONSTITU- TIONAL AMENDMENTS: A COMPARATIVE STUDY (2008); Gary Jeffrey Jacobsohn, An Unconstitutional Constitution? A Comparative Perspective, 4(3) INT'L. J. CONsT. L. 460 (2006); MARIE-FRANcOISE RIGAUX, LA THEORIE DES LIMITES MATERIELLEs A L'EXERCICE DE LA FONCTION CONSTITUANTE (1985); O'Connell, supra note 5, at 74. 11. See, e.g., Pierre Legrand, The Impossibility of "Legal Transplants," 4 MAAS- TRICHT J. EUR. & COMP. L. 111 (1997); Roger Cotterrel, Comparative Law and Legal Culture, in THE OXFORD...ï»¿THE AMERICAN JOURNAL OF COMPARATIVE LAW comparative research.9 This Article, however, is not comparative in the traditional sense,10 but rather a travel report of the ideas con- cerning a limited amendment power and of **judicial review** of constitutional amendments as they migrate through different juris- dictions. The journey reveals a comprehensive pattern of "constitutional behavior." It appears that the global trend is moving towards accepting the idea of limitations- explicit or implicit-on constitutional amendment power. Bearing in mind the difficulties of transplanting constitutional

Turn to page 665
) (original constituent power exists outside of any constitutional authority, whereas the amendment power-pouvoir institut6-requires a constitution in force for its exercise); see generally **GOZLER** 1999, supra note 43, at 10-28. 45. See Michel Troper, Constitutional Law, in INTRODUCTION TO FRENCH LAW 1, 11 (George A. Bermann & Rtienne Picard eds., 2008). 46. In France, it was held that **judicial review** of constitutional amendments is not considered within the Conseil Constitutionnel's competence. See French Constitu- tional Council No. 1962-20 DC, Nov. 6, 1962; French Constitutional Council No. 2003- 469... stipulated in the constitution. These prohibitions can in- clude substantive limits.45 It is important to note that while France was one of the origina- tors of the idea to explicitly limit amending power, contrary to other countries in which the development of this idea led to **judicial review** of constitutional amendments, the French system took a rather re- strained position, rejecting such **judicial review**.46 2. The Success of a Constitutional Idea The wish to shield certain principles or institutions from consti- tutional amendment power gained increasing popularity, both in America and in Europe.47... During the first half of the nineteenth cen- tury-even before the French explicit prohibition on amending the republican form of government-Latin American states were influ- enced by ideas from the U.S. Constitution and the French Revolution and widely used unamendable provisions in order to protect certain principles, tailoring them to local contexts. 43. For an analysis of the formal and substantive distinctions between the origi- nal and derived constituent power, see KEMAL **GOZLER**, LE PoUVOIR DE ReVISION CONSTITUTIONNELLE 12-32

(1995); KEMAL **GOZLER**, POUVOIR CONSTITUANT 10-28 (1999) [hereinafter... **GOZLER** 1999] . 44. RAYMoND CARRP DE MALBERG, CONTRIBUTION A LA THtORIE GINERALE DE L'ETAT 489-500 (CNRS 1962) (1922). See also GEORGES BURDEAU, ESSAI D'UNE THtORIE DE LA REVISION DES LOIS CONSTITUTIONNELLES EN DROIT FRANQAIS 78-83 (1930) (distin- guishing between constituent power in a strict sense, which is the establishment of the very first constitution outside the law, and the revision power, which is the power invested in a statutory body to modify the constitutional rules through the legal system); Roger Bonnard, Les actes constitutionnels de 1940, REVUE DU DROIT PUBLIC 46, 48-49 (1942

Turn to page 676
Consti- tutional Amendments, 62(3) INTL & COMP. L. Q. (forthcoming, 2013). 125. Decision of Apr. 4, 1950, 2 Verwaltungs-Rechtsrechung No. 65, quoted in Dietze, supra note 124, at 15-16. 126. 1 BverfGE 14, 32 (1951); see **GOZLER**, supra note 10, at 84-86. 127. 3 BverfGE 225, 234 (1953), see Dietze, supra note 124, at 17-19; **GOZLER**, supra note 10, at 86-87; DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 55 (1989). 128. Orro BACHOF, VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN? (1951). 129. Id. at 35, 47 et seq. I thank Maijorie Kaufman for translating Bachofs book to

Turn to page 677
ï»¿UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS After 1953, the Federal Constitutional Court declined to refer to supra-constitutional principles and concentrated instead on explicit limits to the amendment power. To date, an amendment has never been invalidated for conflicting with the narrowly interpreted Article 79(3).130 In the Klass case, the Constitutional Court considered the constitutionality of an amendment that permitted violations of com- munication privacy for the purpose of protecting national security and substituted **judicial review** with parliamentary review of any al- leged... the Basic Law extends beyond human dignity to include equality before the law, but in the Land Reform II case, the Constitutional Court held that an amendment would be unconstitutional only if it affected one of the immutable principles explicitly mentioned in Article 79(3); thus the principle of equality is not immutable. See 84 BVerfGE 90 (1991); 94 BVerfGE 12 (1990); **GOZLER**, supra note 10, at 61. 131. 30 BVerfGE 1, 24 (1970); see Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMoRY L. J. 837, 852 (1991); O'Connell, supra note 5, at 55. An English translation of the case is

Turn to page 679
influenced by Portugal, and particularly by three leading Portuguese constitution- alists: Jos6 Joaquim Gomes Canotilho, Jorge Miranda, and Marcelo Rebelo de Sousa, who visited the country during the constituents' work, bringing the experience of the Portuguese constitutional pro- cess into the Brazilian process.143 It is claimed that the Brazilian Constitution followed in the footsteps of the Portuguese Constitution, which in turn was influenced to a large extent by German jurisprudence.144 In Brazil, **judicial review** is an established practice,145 and, more importantly, the judiciary may even examine... COLLOR'S IMPEACHMENT vii (1999). 140. BoRIS FAUSTO, A CONCISE HISTORY OF BRAZIL 316 (1999). 141. LINCOLN GORDON, BRAZIL'S SECOND CHANCE: EN ROUTE TOWARD THE FIRST WORLD 150 (2001). 142. Maia, supra note 136, at 61. 143. CIAudia de G6es Nogueira, A Impossibilidade de as cldusulas pitreas vincu- larem as geragdes futuras, 42(166) BRASILIA 79, 84 (2005), http://www.buscalegis. ufsc.br/revistas/files/anexos/15484-15485-1-PB.pdf. 144. Miyuki Sato, **Judicial Review** in Brazil: Nominal and Real, 3(1) GLOBAL JU- RIST ADVANCEs art. 4, 1, 11 (2003). 145. Keith S. Rosenn, **Judicial Review** in Brazil: Developments

Turn to page 687
of Sept. 29, 1988, VfSlg, 11.829; both cited in **GOZLER**, supra note 10, at 34-39. See generally Alexander Somek, Constitutional Theory as a Problem of Constituitonal Law-On the Constitutional Court's Total Revision of Austrian Constitutional Law, 32 ISR. L. REV. 567 (1998). 182. See, e.g., Decision of June 23, 1988, VfSlg, 29, V 102/88; cited in **GOZLER**, supra note 10, at 37. 183. Decision of Mar. 10, 2001, G 12/00, G 48-51/00, cited in **GOZLER**, supra note 10, at 38-39; see also Val'o, supra note 173, at 29; Pfersmann, supra note 5. 687

Turn to page 690
.200 peace, national solidarity and justice; respecting human rights; loyal to the national- ism of Atattirk, and based on the fundamental tenets set forth in the Preamble." 196. See **GOZLER**, supra note 10, at 64-66, 95-97; see also Ozbudun, supra note 2, and Roznai & Yolcu, supra note 2, at 195-97. 197. Decision of Apr.15, 1975, no. 1975/87; Decisions of Mar. 23, 1976, no. 1976/ 1963 and Oct. 12, 1976, no. 1976/46; Decision of Jan. 28, 1977, no. 1977/4; Decision of Sept. 27, 1977, no. 1977/117; see **GOZLER**, supra note 10, at 42-47; Roznai & Yolcu, supra note 2, at 195-97. 198. Constitutional Court

Turn to page 694
ï»¿THE AMERICAN JOURNAL OF COMPARATIVE LAW E. From India to Nepal, Bangladesh, and Pakistan After India adopted the basic structure doctrine, it migrated to neighboring countries. 1. Nepal Nepal expressly mentions the basic structure doctrine in its Con- stitution of 1990, which allows for **judicial review** of constitutional amendments.220 Article 116(1) of the Constitution stipulates that: "any bill purporting to amend or repeal any Article of this Constitu- tion may be introduced, without contravening the spirit of the Preamble of this Constitution . .. provided that this Article shall not.... 224. See generally Conrad 2003, supra note 215, at 187-91; Jafar Ullah Talukder & Jashim Ali Chowdhury, Determining the Province of **Judicial Review**: A Re-evaluation of 'Basic Structure' of the Constitution of Bangladesh, 2(1) METROPOLITAN UNIV. J. (2009), http://mjashimalichowdhury.blogspot.com/2009/10/determining-province-of-**judicial.review**.html; for a summary of the Supreme Court of Bangladesh decisions, see also Writ Petition No.696 of 2010, Siddique Ahmed v. Bangladesh, judgment of 694 [Vol. 61

Turn to page 695
ï»¿2013] UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS its 1989 case, Anwar Hossain Chowdhury v. Bangladesh,225 which expressly refers to the Indian Kesavananda case. In that case, the Constitutional Amendment Act 1988, which had affected the **judicial review** jurisdiction of the Supreme Court by decentralizing its High Court Division, was declared unconstitutional and void. The majority in the Appellate Division endorsed the basic struc- ture doctrine, ruling that although the constitutional amendment power is not an ordinary legislative power but a constituent power, it nevertheless is merely... validity of an order for detention. The Appellate Division held that the consti- tutional **judicial review** competence vested in the High Court Division could not be limited or taken away by subsequent constituent legisla- tion.228 In Fazle Rabbi v. Election Commission,229 the Appellate Division recognized the basic structure doctrine in obiter dicta, but held that because reserved seats for women in Parliament had ex- isted in the original Constitution, the Constitution (Tenth Amendment) Act, which extended the tenure of these reservations, cannot violate the "basic structure."230 Indeed, the **judicial**... **review** of Aug. 26, 2010, pp. 107-14, http://www.thedailystar.net/newDesign/images/text/7th% 20Amendmentfull% 20textThe%2ODaily%2OStar.pdf. 225. 41 DLR 1989 App. Div. 165. 226. See a summary of the case at Eighth Amendment Case, Bangladesh Supreme Court Bar Association website, http://www.bangladeshsupremecourtbar.com/eighth-amendment_case.php. 227. 42 DLR (1990) 98. 228. See M.A. Fazal,

Effectiveness of Ouster Clauses in India, 25 ANGLO-AM. L. REV. 482, 499 (1996). 229. 44 DLR 14. 230. Id., see also Dr. Ahmed Hossain v. Bangladesh, 44 DLR (AD) 109, 110. 695

Turn to page 708

ï»¿THE AMERICAN JOURNAL OF COMPARATIVE LAW tutional Court assumed for the sake of argument that the basic structure doctrine applies to the South African Constitution, but then found that no basic feature was violated. Consequently, the precise status of the basic structure doctrine in South Africa remains ambiguous.306 2. Zambia, Kenya, Zimbabwe, Tanzania, and Malawi In the rest of Africa, the case law concerning the **judicial review** of constitutional amendments is sparse.307 In Zambia, the introduction of a one-party state by way of a con- stitutional amendment was challenged in Henry... destruction 306. See G.E. Devenish, Political Musical Chairs: The Saga of Floor-Crossing and the Constitution, 15 STELLENBOSCH L. REv. 52, 55-56 (2004). For a review of constitu- tional amendments in South Africa, see Hugh Corder, The Republic of South Africa, in How CONSTrrUTIONS CHANGE-A CoMPAIRTIvE STUDY, supra note 174, at 261. 307. See Githu Muigai, Towards a Theory of Constitutional Amendment, 1 E. AFRI- cAN J. HUM. RTs. & DEMOCRACY 1, 7-8 (2003). 308. (1972) Z.L.R. 204, 215 (Zambia). See also H. Kwasi Prempeh, Marbury in Af- rica: **Judicial Review** and the Challenge of Constitutionalism in... Contemporary Africa, 80(4) TUL. L. REv. 1, 17 (2006); H. Kwasi Prempeh, Neither "timorous souls" nor "bold spirits": Courts and the Politics of **Judicial Review** in Post-Colonial Africa, 45 (2) VERFASSUNG UND RECHT IN UBERSEE 157, 162-63 (2012). 309. See Gitobu Imanyara v. Attorney General, Misc. Civil Application Number 7 of 1991 (unreported); Salim Damwe and others v. Attorney General, HCCC 253 of 1991 (unreported); both cited in Muigai, supra note 307, at 7. 310. Njoya & Others v. Attorney General & Others, [2004] LLR 4788 (HCK), High Court of Kenya at Nairobu, Mar. 25, 2004, available at http://www.chr

4. **Constitutional Protection of the Head of State: The Case of Kosovo [article]**
Vienna Online Journal on International Constitutional Law, Vol. 7, Issue 2 (2013), pp. 128-149
Hasani, Enver (Cited 8 times)
7 Vienna J. on Int'l Const. L. 128 (2013)
All Matching Text Pages (6)

Turn to page 136

aspects of preventive control of constitu- tional amendments, Cf Kemal **Gozler. Judicial review** of Constitutional Amendments: A Comparative Study (Ekin Press, Bursa 2008); Gary Jeffrey Jacobson, 'An unconstitutional constitution: comparative perspective' (2006) 4 Int'l J Con Law 460. 21 Art 144.1 of the Constitution (Amendments): 'The Government, the President or one fourth (1/4) of the deputies of the Assembly as set forth in the Rules of Procedure of the Assembly may propose changes and amendments to this Constitution'. 22 'Zgjedhjet e parakohshme presidenciale varen nga Jahjaga', Pristina-based

Turn to page 141

constitutional democracy meant first and foremost that the change in the existing

constitutions should be extraordinary difficult thing to do. This difficulty in changing the original text of a constitution was seen by some as a factor that fostered the practice of **judicial review**, implying that there is a correlation between the written constitutional text and its rigidity in one side and the strong **judicial review** of constitutionality on the other. Cf Arend Lijphart, Patterns of Democ- racy. Government forms and Performance in Thirty-Six Countries (YUR New Haven and London 1999) 217-230. 45 Such

Turn to page 144
amended under any situation and to which all other provisions of the German Constitution are subordinated. Cf Kemal **Gozler. Judicial Review** of Constitutional Amend- ments. A Comparative Study, 55-56, 84-86; Donald P Kommers, 'German Constitutionalism: A Pro- legomenon', 858-859, n 60. 56 Article Five of the United States describes the process whereby the Constitution may be altered. Alter- ing the Constitution consists of proposing an amendment or amendments and subsequent ratification. Once ratified, amendment or amendments become a valid part of the Constitution, provided that no state 'shall be... deprived of its equal suffrage in the senate,' without its consent. In a similar fashion, the Constitution of Norway of 1814 speaks of the ban on any amendment that runs against the prin- ciples and the very spirit of the original text of the Constitution. Cf more on these issues in Kemal **Gozler. Judicial Review** of Constitutional Amendments. A Comparative Study, 10-12, 28-34, 78-80; Lech Garlicki and Zofia A Garlicka, 'Review of Constitutionality of Constitutional Amendments (An Imperfect Response to Imperfections)', 205 at n 46. @ Verlag Osterreich 144 #12; ...Hasani, Constitutional Protection of the Head of State: The Case of Kosovo tional review of constitutional amendments, both as an idea and a practice existing in contemporary constitutional law. The idea of a **judicial review** of constitutional amendments sounds paradoxical in the sense that in this case there takes place a **judicial review** of the constitutionality of con- stitutional norms that are not as yet in force by comparing them with the other ones found in the existing (original) constitutional text that is already applied. In a sense, this raises major conceptual dilemmas and possible... misunderstandings because the original mean- ing of constitutional justice, as understood by Hans Kelsen, consists in a review of legal norms in order to establish whether they contradict constitutional norms with a superior status within the constitutional order. This type of review not only exists as such but, in some countries, the United States for example, it is older than **judicial review** of laws.52 The main reason for the existence of this type of review is the fact that many consti- tutions contain principles and provisions that cannot be amended. As such, they are la- beled differently and, as... **review** of laws. Quoted in Kemal **Gozler**, Judi- cial Review of Constitutional Amendments. A Comparative Study (Ekin Press, Bursa 2008) 29. 53 Cf n 19 and the text accompanying it. 54 He used this term in his analysis of the Chapter II of the Weimar Constitution. These 'entrenched provisions', according to him, represented a second German constitution of Germany alongside the Weimar Constitution. This was so because, in his view, this Chapter limited the power of the president and the government of the Reich since it created additional and special duties for these bodies in favor of ordinary German...- stantial consensus within society in order to give effect to them. Procedural obstacles were for the first time inserted in Article V of the American Constitution of 1878. They were thereafter transmitted into other constitutions around the world, albeit modeled differently,56 leading to the constitutional doctrine and practice of 'rigid constitutions'. 52 First decision of the US Supreme Court regarding the constitutional amendments was rendered in 1798 in the case known as Hollingsworth v Virginia, five years before Marbury v Madison (1803) through which had been founded the practice of **judicial**

Turn to page 145
it provide for the preservation of the primary role of Islam in society.57 Taking into

account the fact of 'a tacit recognition of the globally evi- dent presumption in favor of liberal constitutionalism',58 we refer in this paper only to the Western type constitutional culture and tradition. Whether foreseen in the constitutional text or created by judicial practice, the en- trenched constitutional provisions, values and principles need a judicial protection in order for them to have a practical enforcement and meaning. **Judicial review** of constitu- tional amendments using entrenched

Turn to page 147
outside the text itself. The incidence of constitutional change, nevertheless, has not been the object of discussion in this paper.64 What is discussed here has to do with one aspect of the amending process only. That aspect is known as abstract and preventive **judicial review** of the constitutionality of the constitutional amendments. Operated by a very limited number of the countries of the world, including Kosovo, this review consists in the evalu- ation of the constitutionality of constitutional amendments before they enter into force. In most countries of the world there is known only the

Turn to page 149
-04 Regarding the Election of the President of the Republic of Kosovo of 22 February 2001. Karl Sm it, Tri Vrste Pravnonaucnog Misljenja (Biblioteka Parerga, Beograd 2003). Kemal **Gozler. Judicial review** of Constitutional Amendments. A Comparative Study (Ekin Press, Bursa 2008). Lech Garlicki and Zofia A Garlicka,'External Review of Constitutional Amendments? International Law as a Norm of Reference' (2012) 44 Israel L Rev 343. Lech Garlicki and Zofia A Garlicka, 'Review of Constitutionality of Constitutional Amendments (An Imperfect Response to Imperfections)' (2012) 1 J Const L/Revue De Droit

5. **When a Constitutional Amendment Violates the Substantive Core: The Czech Constitutional Court's September 2009 Early Elections Decision [article]**
Review of Central and East European Law , Vol. 36, Issue 1 (2011), pp. 33-52
Williams, Kieran
36 Rev. Cent. & E. Eur. L. 33 (2011)
All Matching Text Pages (2)

Turn to page 42
's categories in his 2005 article; see Hollinder, op.cit. note 22, 318. 38 On the exaggeration of the Weimar syndrome by constitutional courts, see Kieran Williams, '**Judicial Review** of Electoral Thresholds in Germany, Russia and the Czech Republic", 4(3) ElectionL.J. (2005), 191-2o6. #12;

Turn to page 49
derived from 57 Anna Gamper and Francesco Palermo, "The Constitutional Court ofAustria: Modern Profiles of an Archetype of Constitutional Review", 3(2) J. Comp. L. (2oo8), 64-79, at 69. (Footnote omitted from citation.) 58 Kemal **Gozler. Judicial Review** of ConstitutionalAmendments: A Comparative Study (Ekin, Bursa, 2oo8), 34-37. This book was cited by the Czech Court in the Melik case (at 4629) to support its claim that: 'The development of democratic constitutionalism in democratic countries at present emphasizes the protection of values identifying a constitutional system of freedom and... democracy, including alternative forms of **judicial review** of constitutional amendments." Gbzler's book in fact shows that

there is still a very wide range of views on the matter, with several noteworthy states (such as France, the United States, Norway and Turkey under its 1982 Constitution) not authorizing courts to safeguard aspects of their constitutions deemed unalterable, such as republican guaranty clauses. 59 **Gozler**, op.cit. note 58, 37-39. The Czech Court in the Melik decision mentions one of them, Case G i2/oo (accessible at) but botches (at 4629) its citation, giving it as VgGH 16.327 rather than VfSlg. 16.327/2001, and the date (giving ii November instead of ii October 2oo). It thereby duplicates an error in Hollander's 2005 article "Materidlni ohnisko fistavy a diskrce fistavodirce" (at 323). 6o **Gozler**, op.cit note 58; Richard Stith, "Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court", I(i) Am. UJ. Int'IL. &Poly (1996), 47-77; GaryJeffreyJacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective", 4(3) Int'lJf. Cont. L. (2oo6), 460-487; and Richard Albert

6. **Book Reviews [reviews]**
International Journal of Constitutional Law, Vol. 7, Issue 3 (July 2009), pp. 544-552
7 Int'l J. Const. L. 544 (2009)
All Matching Text Pages (1)

Turn to page 551
University Press, 2009. Pp. 319. Peter Cane, Carolyn Evans, and Zoe Robinson, eds., Law and Religion in Theoretical and Historical Context. Cambridge University Press, 2008. Pp. 328. Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti, and Adam Tomkins, eds., European Union Law: Text and Materials. Cambridge University Press, 2007. Pp. 1235 Damian Chalmers and Giorgio Monti, eds., European Union Law: Updating Supplement. Cambridge University Press, 2008. Pp. 214. Kemal **Gozler. Judicial Review** of Constitutional Amendments: A Comparative Study. Ekin Press, 2008. Pp. 126. Grant Huscroft, ed

7. **Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective [notes]**
Wake Forest Law Review, Vol. 50, Issue 4 (2015), pp. 951-984
Halmai, Gabor (Cited 3 times)
50 Wake Forest L. Rev. 951 (2015)
All Matching Text Pages (14)

Turn to page 951
JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS AND NEW CONSTITUTIONS IN COMPARATIVE PERSPECTIVE Gdbor Halmai* This Article examines the legitimacy of **judicial review** of the merits of proposed new constitutions and constitutional amendments. But we first have to deal with a preliminary question: Are constitution-making and constitutional-amending organs

subject to any internal or external constraints in terms of the substantive solutions they may employ in drafting new constitutions or amending existing ones

Turn to page 954
exercise **judicial review** of the substance of constitutional amendments: "**Judicial review** of the merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments."26 Opposing this view on possible **judicial review**, Rawls, also considering a hypothetical amendment, questions "whether an amendment to repeal the First Amendment, say, and to make a particular religion the state religion with all the consequences of 22. Richard Albert, Counterconstitutionalism, 31 DALHOUSIE L.J. 1, 47-48 (2008) (Can

Turn to page 955
REVIEW OF CONSTITUTIONAL AMENDMENTS The underlying, serious constitutional law problem behind the **judicial review** of constitutional amendments is in how far the power amending the constitution may be regarded as sovereign in terms of changing the provisions of the constitution, maybe even its entire structure. What amount to the grossest interferences with the power to amend the constitution are those provisions that qualify themselves as immutable. These suggest-either expressed explicitly or assumed implicitly, but logically, as in Germany-that constitutional amendments... themselves are subject to the constitutional court's review to determine whether they are in breach of "eternity clauses."29 In many countries, the review of constitutional amendments by the constitutional court is conceivable without the presence of immutable provisions in the constitution, and even without the explicit authorization of the courts by the constitution.30 In Switzerland, on the other hand, explicit limits to the amendment power are present in the constitution without **judicial review**. According to Articles 193 and 194 of the 1999 Constitution, when there is a... 2015] CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 955 that, or to repeal the Fourteenth Amendment with its equal protection of the laws, must be accepted by the Court as a valid amendment."27 For Rawls, the First Amendment is entrenched in the sense of being validated by long historical practice. They may be amended ... but not simply repealed and reversed. . . . The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.28 I. **JUDICIAL**

Turn to page 957
argument does not legitimize the disobeying of the Constitution,39 and the real question is whether future generations should be totally free to amend it. According to critics, **judicial review** of constitutional amendments also exacerbates tensions between the legislature and constitutional courts by depriving parliaments of the possibility of interpreting "eternity clauses" and placing the latter responsibility exclusively in the hands of the courts.40 Of course, future generations generally deserve the lack of trust-evinced by these eternity clauses-which the... dictatorships by allowing the courts to strike down unconstitutional constitutional amendments. The postindependence Constitution of Zimbabwe represents a unique eternity approach that is a mixture of substantive and procedural rules. As prescribed by the 1979 Lancaster House 38. U.S. CONsT. art. V; SEIDMAN, supra note 35, at 17. 39. See, e.g., David Cole, Should We Discard the Constitution?, N.Y. REV. BOOKS (July 11, 2013), http://www.nybooks.com/articles/archives/2013/jul/11 /should-we-discard-constitution/. 40. See Michael Freitas Mohallem, Immutable Clauses and **Judicial**... **Review** in India, Brazil and South Africa: Expanding Constitutional Courts' Authority, 15 INT'L J. Hum. RTS. 765, 765-66 (2011). 41. See, e.g., Barak, supra note 29, at 322-32. 42. It is undeniable that this instrument was not always capable of preventing the return of dictatorships. See GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 37 n.6 (2010) (citing Ssemogerere v.

Attorney General (Const. Appeal No. 1 of 2002) [2004] UGSC 10 (Uganda)). 43. See generally Rosalind Dixon, Transnational Constitutionalism and Unconstitutional Constitutional Amendments 1-4 (Univ. of Chi. Pub. Law & Legal

Turn to page 959
2015] CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 959 **judicial review** designed during the 2004 constitutional reform, which amalgamates elements of the Continental European and American systems.49 Even though the Brazilian Constitution- similar to the German Grundgesetz-does not expressly provide for the authority to review constitutional amendments, such a practice is accepted by the Supreme Federal Court of Brazil.50 Despite these strong requirements, the constitution has been amended seventy- one times since 1988.51 Under the Colombian Constitution of 1991....54 By the end of 2012, several reforms had been approved by Colombia's Congress, including one by referendum.55 These amendments adopted by Congress can even be challenged by an individual citizen through an actio popularis, as ordinary statutes 49. Eduardo Soares, The Legal System of Brazil, LIBR. CONGRESS, http://www.loc.gov/law/help/legal-research-guidelbrazil-legal.php (last updated June 9, 2015). 50. See generally Dieter Grimm, Human Rights and **Judicial Review** in Germany, in HUMAN RIGHTS AND **JUDICIAL REVIEW**: A COMPARATIVE PERSPECTIVE (1994); Soares

Turn to page 968
institutions which were injurious to liberty and equality of rights.'"116 The eternity clause of the 1884 amendment is "repeated in Article 95 of the Constitution of 1946, and it appears in Article 89 of the 1958 [Constitution of the Fifth Republic] with slightly different wording: 'The republican form of government shall not be object of any amendment.'"117 But "[i]t is important to note that while France was one of the originators of the idea to explicitly limit amending power, contrary to other countries in which this idea led to **judicial review** of constitutional amendments, [France...] took a rather restrained position, rejecting such **judicial review**" of constitutional amendments adopted by way of referendum by the Conseil Constitutionnel.118 During the first half of the nineteenth century, influenced by ideas from the U.S. Constitution and the French Revolution, Latin American states widely used unamendable provisions in their constitutions. Discussing Latin American constitutions, Yaniv Roznai wrote: The Mexican Constitution of 1824 stated that "the Religion of the Mexican Nation is, and shall be perpetually, the Apostolical Roman Catholic... since 1814." Id. at 200 n.4. 114. Roznai, supra note 52, at 663-64 (quoting English Text Amending Arts. 5 and 8 of the Constitutional Law of 25 February 1875, in FRANK MALOY ANDERSON, THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907, at 640 (1908)). 115. Id. at 663. 116. Id. 117. Id. at 664. 118. Id. at 665; Denis Baranger, The Language of Eternity: **Judicial Review** of the Amending Power in France (or the Absence Thereof), 44 ISR. L. REV. 389, 392-93 (2011) (citing Conseil constitutionnel [CC] [Constitutional Court] decision No. 62-20DC, Nov

Turn to page 970
personal data). 127. Halmai, supra note 113, at 183. 128. Id. 129. See KEMAL **GOZLER. JUDICIAL REVIEW** OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 52 (2008). 970 [Vol. 50 #12;

Turn to page 971
they will annul such amendments. The German and Italian courts have never made such decisions. The Austrian Federal Constitutional Court made such a decision on October 11, 2001, for the first time in its history and for the first time in Europe as well.136 It was followed by a decision from the Czech Constitutional Court that annulled the constitutional law regarding the shortening of the fifth parliamentary

term.137 On the other hand, some scholars argue that the extended power "of **judicial review** has resulted in a controversy over the power of the legislature to correct... or invalidate the decisions made by the Constitutional Court by enacting a statute with constitutional law status."38 These scholars suggest that a constitution should be amended by adopting an "incorporation principle" A la Article 79 of the German Grundgesetz, for example, 130. See Corte Cost., 29 dicembre 1988, n. 1146, Racc. uff. corte cost. 1988, II (It.). 131. See id. 132. See id. 133. See id. 134. See THE ROUTLEDGE HANDBOOK OF CONTEMPORARY ITALY: HISTORY, POLITICS, SOCIETY 150 (Andrea Mammone et al. eds., 2015). 135. See **GOZLER**, supra note 129, at

Turn to page 972
WAKE FOREST LAWREVIEW that all constitutional provisions and all amendments must be incorporated into the constitutional document, and "incorporated overruling" ought to be exempt from **judicial review**.139 According to these recommendations-against a total revision of the constitution, affecting "fundamental principles" of the constitution, such as federalism, parliamentary democracy, republicanism, separation of powers, rule of law (Rechtsstaatlichkeit), and liberalism (i.e., the Bill of Rights)-it is enough guarantee that these must be submitted to a referendum, as..., personal liberty, and religious freedom; and separation of powers.143 II. **JUDICIAL REVIEW** OF A NEW CONSTITUTION: SOUTH AFRICA South Africa's postapartheid constitutional arrangements represent the most extreme form of restrictions on the sovereignty of the constitution's framers, since the provisional Constitution of 1993 not only provided for the mandatory review of the constitutionality of constitutional amendments, but also for that of the new, final constitution, as one of the preconditions for its adoption.144 One of the reasons behind this was what Andrew Arato has identified

Turn to page 983
; rule of law; multiparty system, political pluralism, or other democratic characteristics; territorial integrity; **judicial review**; separation of powers; sovereignty of the people; or even such general provisions as the spirit of the constitution. This trend is linked to the general rise of "world constitutionalism," the global spread of "supranational constitutionalism," and **judicial review**, which all serve to prevent the abuses of majority rule. 224. Roznai, supra note 52, at 667. 225. See id. at 666-68. 226. Id. at 677-78, 678 n.135. #12;

8. **The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments [article]**
International and Comparative Law Quarterly, Vol. 62, Issue 3 (July 2013), pp. 557-598
Roznai, Yaniv (Cited 38 times)
62 Int'l & Comp. L.Q. 557 (2013)

9. **The Eternal Territory - The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle [article]**
German Law Journal, Vol. 16, Issue 3 (July 2015), pp. 542-580
Roznai, Yaniv (Cited 38 times); Suteu, Silvia (Cited 2 times)
16 German L.J. 542 (2015)
All Matching Text Pages (8)

Turn to page 542
court with far-reaching powers of **judicial review**. Territorial integrity as an eternal constitutional principle then remains merely aspirational. Moreover, we argue that the act of entrenching territorial protection as an unamendable principle is in clear tension with the idea of popular sovereignty and with mechanisms for expressing popular will. East-Central European constitutions play like songs of the liturgy on a very old gramophone. You hear the expected music performed in the service of

Turn to page 546
German Law Journal principleiC Building on insights from the Crimean crisis, we argue that the unamendable protection of territorial integrity is an especially ineffective type of eternity clause because it is subject to both the internal threat of secession and the external risk of forceful annexation. The preservative promise of unamendable territorial integrity is severely curtailed by this double vulnerability, even when backed by a constitutional court with far- reaching powers of **judicial review**. Territorial integrity as an eternal constitutional

Turn to page 555
state organs to defend the territorial integrity of the state or struggle for its re-establishment, especially if read together with Article 17, which makes defending the sovereignty and territorial integrity of Ukraine a major state function. Second, and more importantly, this provision should be read in the context of the entire Ukrainian constitution, especially in conjunction with the strong **judicial review** powers afforded to the constitutional court. Therefore, as we argue in greater detail in the following section, this eternity clause appears intended to... U. CHI. L. REV. 14, 25 (1967-1968); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1978); Robert Alexy, On the Structure of Legal Principles, 13 RATIOJuRis 294, 295 (2000). so Denis Baranger, The Language of Eternity: **Judicial Review** of the Amending Power in France (or the Absence Thereof), 44 1SR. L, REV. 389, 404 (2011). N Compare this with the following: Art. 104 of the constitution of the Republic of Equatorial Guinea (1991), according to which the territorial integrity shall not be subject to reform, in conjunction with Art. 16, according to which "All Equatorial-Guineans shall have the

Turn to page 558
Transition: From Newly Emerged Democracy Towards Autocracy?, 26 REV. CENT. & E. EUR. L. 267 (2000). See generally Roznai, supra note 31; KEMAL **GOZLER. JUDICIAL REVIEW** OF CONSTITUTIONAL AMENDMENTS-A COMPARATIVE STUDY 5-7 (2008). 9 UKRAINE CONST. (1996), art. 159; Tykhyi, supro note 96, at 207-08 (2011); GABOR HALMAI, PERSPECTIVES ON GLOBAL CONSTITUTIONALISM 40 (2014); WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY or CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 25, n. 116 (2014); see generally Futey, supra note 78 (discussing the Constitutional Court). C See Dec... German Law Journal IIL The Constitutional Court as Guardian of the Territory Ukraine constitutional system protects human rights and recognizes the practice of **judicial review**.96 The Constitutional Court not only has authority to judicially review ordinary legislation, but can also give judgments on proposed constitutional amendments through a priori **judicial review**.97 According to Article 159 of the

Ukrainian constitution, a preliminary opinion of the Constitutional Court regarding the conformity of proposed amendments with the requirements

Turn to page 560
). In Trevor L. Brown & Charles R. Wise, Constitutional Courts and Legislative-Executive Relations: The Case of Ukroine, 119 POL. Scl. Q. 143, 155 (2004). 15o Of course, in some jurisdictions, courts have taken upon themselves such a judicial role, even without an explicit authority in the constitution. See Yaniv Roznal, Unconstitutional Constitutional Amendments-The Migration and Success of a Constitutionol Idea, 61 AM. J. COM. L. 657 (2013); ROZNAI, supro note 31; **GOZLER**, supro note 97, at 5-7. I The involvement of courts in questions of territory is not in Itself unique. See, e.g., Texas v

Turn to page 561
form of explicit constitutional provisions that designate certain constitutional subjects-such as principles, rules, institutions, and symbols-as unamendable through the formal constitutional amendment process. There is a growing trend in global constitutionalism to provide for formal unamendability.'3 The "new" constitutional orders in Central and Eastern Europe following the collapse of communism protect human rights and recognize the practice of **judicial review**.114 Although some have argued that it would be a mistake for these new democracies to... constitutions included such provisions, and between 1989 and 2013, already over fifty percent of new constitutions include formal unamendable provisions. See Roznai, supra note 16. Unamendability can also be implicit and judge-made through judicial decisions; Roznai, supra note 110; RoZNAI, supra note 31; **GOZLER**, supra note 97. 114 Wiktor Oslatynski, Rights in New Constitutions of East Central Europe, 26 COLUM. HUM. RTS. L. REV. 111 (1994); HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2002); SADURSKI, supra note 98. 115 Stephen Holmes, Back to the Drawing Board: An

Turn to page 562
' reflecting a certain "amendophobio" that the amendment process might be abused in order to repeal societies' basic values.122 At the very least, unamendability and its institutional enforcement through **judicial review** mechanisms may provide additional time for the people to reconsider their support for a change of their core principles, thereby hindering revolutionary movements.2 As Gregory Ludwikowski, Constitutional Culture of the New East-Central European Democracies, 29 GA. J. INT'L & COMP. L. 1, 14-21 (2000-2001). 117 See Kyrgyzstan, 28 THE WORLD OF PARLIAMENTS-QUARTERLY REVIEW OF THE

Turn to page 576
threats, mainly by limiting people's claims to what is termed 'external self-determination' by territorial secession.94 There is thus a conceptual difference between the unamendability of territorial integrity versus unamendability of other principles such as fundamental rights, secularism, separation of powers, and the form of government. The latter principles are all under domestic control, regulated by various governmental and institutional bodies, which allow-especially when accompanied by effective mechanisms of **judicial review**-for the enforcement of provisions... of Crimea and the Boundaries of the Will of the People, 16 GERMAN LJ. 365 (2015); Amandine Catala, Secession and Annexation: The Case of Crimea, 16 GERMAN L. 581 (2015); EL OUALI, supra note 137, at 113-66, 241-94. 195 See Yanlv Roznal & Serkan Yolcu, An Unconstitutional Constitutional Amendment-The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision, 10 INT'L]. CONST. L. 175 (2012); Ergun Ozbudun, **Judicial Review** of ConstitutionalAmendments in Turkey, 15 EUR. PUB. L. 533 (2009). 1% See Yanv Rozal, Legisprudence Limitations on Constitutional Amendments

10. **Legisprudence Limitations on Constitutional Amendments: Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act [article]**
Vienna Journal on International Constitutional Law / ICL Journal, Vol. 8, Issue 1 (2014), pp. 29-57
Roznai, Yaniv (Cited 38 times)
8 Vienna J. on Int'l Const. L. 29 (2014)
All Matching Text Pages (16)

Turn to page 29
Court's decision in a broader com- parative and theoretical perspective and focuses, mainly, on four issues: first, the Czech Constitutional Court's authority to substantively review constitutional norms; second, the appropriate standard of review when exercising **judicial review** of constitutional norms; third, the'individual, specific' character of the constitutional act; and fourth, its alleged ret- roactive application. The article claims that while the Czech Constitutional Court was gener- ally correct in claiming an authority to substantively review even constitutional norms, this was not the... appropriate case in which to annul a constitutional act. Keywords: unconstitutional constitutional amendments, **judicial review**, limitations on con- stitutional amendment power, rule of law, individual legislation, retroactive legislation I. Introduction On 10 September 2009, the Czech Constitutional Court (hereinafter: the court) de- livered its decision on the constitutionality of Constitutional Act no 195/2009 Coll, on Shortening the Fifth Term of Office of the Chamber of Deputies (hereinafter: the consti- tutional act)' Grounding its reasoning mainly on Article 9(1) of the Czech Constitution of * The

Turn to page 31
inferred its authority to review constitutional acts. The court stated that the protection of the Constitution's material core 'is not a mere slogan or proclamation, but an actually en- forceable constitutional provision.' In other words, the court is authorised to review constitutional acts in terms of their conformity with the essential requirements of a democratic state governed by the rule of law; otherwise, the protection of constitutional- ity would be illusory, since any act could be dressed as a constitutional act, and would then be immune to **judicial review**. 7 Constitutional Act No 69/1998

Turn to page 33
Success of a Constitutional Idea' (2013) 61.3 American Journal of Comparative Law 657; Yaniv Roznai, 'The Migra- tion of the Indian Basic Structure Doctrine' in Malik Lokendra (ed), Judicial Activism in India - A Fest- schrift in Honour of Justice V. R. Krishna Iyer (Universal Law Publishing Co 2012) 240; For a review of different judicial approaches see also Kemal **Gozler. Judicial Review** of Constitutional Amendments - A Comparative Study (Ekin Press 2008); Gary Jeffrey Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4.3 Intl J Const L 460. 13 On substantive limits on... temporal ap- plication. I deal with each of these issues separately. A. Authority to Review Constitutional Norms At the outset, it has to be admitted that the court is correct in its observation that the global trend, albeit some exceptions, is moving towards acceptance of the idea of **judicial review** of constitutional amendments.12 There

is also little doubt regarding the limited power of the constitutional legislature under the Czech Constitution. Article 9 expressly limits it.'3 However, arguing that the amendment power is limited is not as arguing that 9 The judge rapporteur in the matter was the

Turn to page 34

Roznai, Legisprudence Limitations on Constitutional Amendments? this limitation is judicially enforceable.14 One can cogently argue that even if the amend- ment power is limited, whether a particular amendment oversteps those limits is not a decision for courts to make.'5 That may certainly be true in countries without constitu- tional courts or with other bodies than constitutional courts which use instruments of ex-ante review or scrutiny,'6 and in the Westminsterial parliamentarianism model in which **judicial review** is absent or limited, but it may also apply in the 'constrained par...- liamentarianism' model in which there is an effective **judicial review** mechanism.'7 In- deed, in some jurisdictions, such as Norway and France, limitations on the amendment power are considered declarative or a directive for the legislature, denying courts any authority of **judicial review**.'8 One must distinguish between two separate questions: does the court have the au- thority to review amendments and, if so, what are the criteria or standards for that review?'9 With regard to the first question, some constitutions expressly vest courts with the competence to substantively review constitutional amendments... Democracy: Creating and Maintaining a Just Political Order (Johns Hopkins University Press 2007) 519-21. For Schmitt, for example, the'guardian of the consti- tution' would not be a constitutional court, but rather, the President. See Claire-Use Buis, 'France' in Markus Thiel (ed), The 'militant democracy'principle in modern democracies (Ashgate Publishing Ltd 2009) 83. Nevertheless, it has to be remembered that with the absence of **judicial review** of ordinary legislation during the Weimar period, **judicial review** over constitutional amendments was naturally not recognised. 16 On ex-ante scrutiny of

Turn to page 35

, the existence - or absence thereof - of any explicit limitation on amend- ments is decisive. When expressed limitations exist, the judicial enforceability of these limitations seems if not self-evident then at least less contentious. This is because such judicial exercise would carry greater legal legitimacy since it would conform to the legal norms applicable to the issue at hand.24 As we have learned from the celebrated Marbury 21 See G~bor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution' (2012) 19.2 Constellations 182-191; **Gozler** (n

Turn to page 36

Roznai, Legisprudence Limitations on Constitutional Amendments? v Madison case, an 'effectiveness presumption' exists: 'It cannot be presumed that any clause in the constitution is intended to be without effect.'25 If the constitution-maker declared certain provisions 'unamendable,' the interpreter - ordinarily the court - must supply the appropriate mechanism of effectiveness. **Judicial review** of constitutional amendments then becomes, as Aharon Barak writes, 'a natural mechanism for protecting eternity clauses in the constitution'; it 'provides (legal) "teeth" to the eternity clause.'26... original constitution-maker" preserves the constitu- tion.3' The exercise of **judicial review** of constitutional amendments vis-h-vis unamenda- ble provisions can thus be seen as an essential condition of a rigid constitution.32 Moreover, the court was correct in asserting that without effective **judicial review** of amendments, limitations that are imposed by the constitution can be by-passed by using constitutional acts that would be immune from review.33 Therefore, in light of the unamendability provi- sion, the authority of the court to review constitutional acts should be recognised.34 it; (2) in... Reconciling Constitutional Eternity Clauses with Popular Sovereignty; Toward Three- Track Democracy in Israel as a Universal Holistic Constitutional System and

Theory' (2011) 44 Isr L Rev 449, 458. 26 Barak (n 19) 333, adding that: 'In this respect, there is no substantive difference between a regular statute that violates the constitution and an amendment to the constitution that violates the eternity clause. Just as **judicial review** is recognized in the first case [.] it should also be recognized in the second case. 27 Cass R Sunstein, 'A Constitutional Anomaly in the Czech Republic?' (1995) 4 E Eur

Turn to page 37
ICL Journal I Vol 8 | 1/2014 | Articles B. Standard of Review What should be the standard for **judicial review** of amendments? Clearly, in this case the examination of amendments should be in the light of the unamendability provision as stated in Article 9(2) of the Constitution. Here, **judicial review** of amendments seems to be a similar intellectual operation as ordinary **judicial review**; it is an examination of the compliance of a given legal standard to a superior standard.35 Of course, any ex- amination of amendments in light of Article 9 calls for a preliminary exercise of develop- ing a... appropriateness of the constitutional act, as the court emphasizes that there were other means to call early elections provided by Article 35 that are less interfering with the protected principle of the rule of law. Tomoszek argues that the proportionality test is suitable for **judicial review** of constitutional amendments. Just as ordinary law may endowing courts with competence to declare constitutional norms unconstitutional enhances the counter-majoritarian difficulty embodied in the situation of a non-elected court invalidating legislation enacted by a legislature. How can a small, often divided, set of... difference between **judicial review** of the constitutionality of a regular statute and **judicial review** of an amendment to the constitution. In both cases, the **judicial review** is intended to safeguard the constitution and its (express or implied) con- tent. The court thus fulfills its classic role.' 36 Walter F Murphy, 'Staggering Toward The New Jerusalem of Constitutional Theory: A Response To Ralph F. Gaebler' (1992) 37 Am J Juris 337, 349. A separate but related problem is of course if there is (and can be) any consensus on the meaning of these two principles. On how complex and con- tested these ideas

Turn to page 38
abandonment of the principles mentioned therein. Principles are from the very begin- ning not "affected" as "principles" if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character [...]. Restriction on the legislator's amending the Constitution [...] must not, however, prevent the legislator from modifying by constitutional amend- ment even basic constitutional principles in a system-immanent manner'.43 38 Maxim Tomoszek, Proportionality in **Judicial Review** of Constitutional Amendments (VIIIth World Con

Turn to page 42
laws is connected to liberty and freedom.6s Hence, particular constitutional amendments raise suspicion regarding abuse of the amendment power. Indeed, abuse of power is not only to be feared from the executive or legislative branch, but also from the constitutional legislature.66 As David Landau recently demon-strated, there is a growing misuse of constitutional mechanisms designed for constitu- tional change in order to erode the democratic order.67 **Judicial review** in this context is a constitutional mechanism protecting the democratic order from usurpation by transient majorities.68... Wojciech (ed), Consti- tutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective (Springer 2002) 139. 67 David Landau, 'Abusive Constitutionalism' (2013) 47.1 UC Davis L Rev 89. 68 Pratap Bhanu Mehta,'The Inner Conflict of Constitutionalism: **Judicial Review** and the Basic Structure' in Zoya Hasan, Eswaran Sridharan and Ratna Sudarshan (eds), India's Living Constitution: Ideas, Practices, Controversies (Anthem Press 2002) 179, 193-195. @ Verlag Osterreich 42 #12;

Turn to page 51
Act violating some of the most fundamental principles of Czech constitutional system.'123 Allow me to differ. Does a constitutional act that dissolves a chamber of parliament in order to engender early democratic elections, constitute an abandonment of the rule of law which deserved an annulment? Or maybe this extraordinary 'weapon day judgment' deserves a clearer case to be exercised. The above analysis suggests the latter.124 Even if the court simply wanted to set a precedent to equip itself with the power of **judicial review** of constitutional acts for possible future cases involving more... important constitutional rules re- garding dissolution of parliament. Such an ambivalent approach to constitutional rules poses a threat to the rule of law. Any ignorance of the existing constitutional rules poses a risk of violating legal certainty and security. Nonetheless annulling a constitutional act can also infringe legal certainty. Paradoxically, the decision that attempts to protect the rule of law can also be seen as damaging it. We care not only about rule of law principles, 122 One may claim that this was not a substantive **judicial review** at all but merely a formal one. Accord- ing to such

11. **External Review of Constitutional Amendments - International Law as a Norm of Reference [article]**
Israel Law Review, Vol. 44, Issue 3 (2011), pp. 343-368
Garlicki, Lech (Cited 17 times); Garlicka, Zofia A. (Cited 5 times)
44 Isr. L. Rev. 343 (2011)
All Matching Text Pages (9)

Turn to page 344
t la loi. In the procedural dimension, it gradually developed into **judicial review** of the legality of administra- tive action. In most European countries, this review was entrusted to separate admin- istrative courts. The (ordinary) laws served as exclusive and ultimate norms of reference in this process. In the early European tradition, constitutions were not regarded as suitable instruments for judicial enforcement. The second level of review developed in Europe almost a century later. It emerged from the modernized concept of the constitution, which was now understood as the supreme law of... Constitutionalism, 50 VA. J. INT'L L. 3, 21 (2009): "By the twenty- first century, **judicial review** has become, if not universal, certainly widespread. Indeed, a majority of today's constitutions contain explicit provisions for some form ofjudicial review." 344 [Vol. 44: 343 #12;

Turn to page 345
-intellectually and axiologi- cally-the process of the interpretation and application of particular constitu- tional norms. 5 See, e.g., VERFASSUNGSGERICHTSBARKEIT IN WESTEUROPA (C. Starck & A. Weber eds., 1986); MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989); A.R. BREWER-CARIAS, **JUDICIAL REVIEW** IN COMPARATIVE LAW (1989); DOMINIQUE ROUSSEAU, LA JUSTICE CONSTITUTIONNELLE EN EUROPE (1992); HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000); TOM GINSBURG, **JUDICIAL REVIEW** IN NEW DEMOCRACIES (2003). 345 #12;

Turn to page 346
developments. It goes without saying that the very existence of constitutional jurisdictions transforms modem constitutions into living instruments. It enhances the capacity of constitutional provisions to function as genuine norms of reference, especially in controlling parliamentary legislation. - Accessibility of constitutional jurisdictions. The procedural framework of consti- tutional litigation allows numerous actors to start the process of **judicial review**. In other words, there are procedural avenues to have all important cases and con- troversies assessed from the perspective of constitutional

Turn to page 347
challenged amendment. See KEMAL **GOZLER. JUDICIAL REVIEW** OF CONSTITU- TIONAL AMENDMENTS: A COMPARATIVE STUDY 40-41 (2008). 347 #12;

Turn to page 349
unamendable provisions and/or principles into the text of the constitution vests them with higher legal authority and presupposes the **judicial review** of the constitutionality of constitutional amendments. While there has never been a case of a judicial invalidation of a constitutional amendment due to its sub- t0 See 1958 CONST. art. 89 § 4 (Fr.); 1946 CONST. art. 95 (Fr.); 1884 Constitutional Act on Partial Revision of Constitutional Laws, art. 2 (Fr.). For a more detailed discussion, see Denis Baranger's contribution in this issue. "1 See, e.g., 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 110 § I (Greece

Turn to page 350
on the Lisbon Treaty: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08, in particular para. 226 et seq. See also the following judgments of the Court: 30 BVERFGE 1 (24) (1970); 34 BVERFGE 9 (19) (1972); 84 BVERFGE 90 (120) (1991); 94 BVERFGE 49 (1996); 109 BVERFGE 279 (2004). In all these judgments, the Court upheld constitutional amendments under review. In regard to France, see Denis Baranger's contribution in this issue. 14 **GOZLER**, supra note 8, at 45-49. 1s Judgment of June 5, 2008 (E 2008/16; K 2008/116). The Court declared the amendment to be

Turn to page 356
ISRAEL LAW REVIEW declare that the European Union "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights."28 The practice of **judicial review** has resulted in a widespread absorption of natural law concepts into positive constitutional law and has, at least to some extent, attenu- ated the distinction between those normative systems. This distinction is encouraged to resurface only when a particular constitution (or a particular constitutional amendment) imposes regulations that are barely compatible with higher values

Turn to page 363
conferred on the Strasbourg Court a power to assess the "conventionality" of constitutional provisions of the member states.44 Finally, **judicial review** is genuine only if it is effective, in other words, if judi- cial decisions are binding and directly applicable. This is the weak point of the Strasbourg Court. On the one hand, article 46(1) of the Convention is unequivocal in declaring that the judgments of the Court enjoy "binding force" and that member states "undertake to abide by the final judgment of the Court in any case to which they are parties." Therefore, if a modification of national laws

Turn to page 366
perspec- tive of **judicial review**, the international review of national constitutions (and consti- tutional amendments) cannot be regarded as an effective tool for protection against constitutional aberrations. However, this strict perspective may

be too narrow, as it does not take all aspects of the modem entanglement of international and constitutional law into account. A narrow, positivistic confirmation of lawfulness may not always suffice for the purpose of a more general assessment of a particular norm. Such an assessment requires references to all binding normative systems, and it goes without

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12. **Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism [article]**
International Journal of Constitutional Law, Vol. 11, Issue 3 (July 2013), pp. 702-726
Isiksel, Turkuler (Cited 1 times)
11 Int'l J. Const. L. 702 (2013)

Full Text Not Currently Available in HeinOnline

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13. **The Potentially Unamendable State Constitutional Core [article]** **new**
Arkansas Law Review, Vol. 69, Issue 2 (2016), pp. 317-334
Friedman, Lawrence (Cited 295 times)
69 Ark. L. Rev. 317 (2016)
All Matching Text Pages (1)

Turn to page 318
the United States, courts are willing and able to hold constitutional amendments unconstitutional. See KEMAL **GOZLER. JUDICIAL REVIEW** OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY (2008) (discussing courts' ability to review constitutional amendments). 7. See generally Richard Albert, The Unamendable Core of the United States Constitution, in COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION 13 (Andrbs Koltay ed., 2015) (discussing whether the U.S. Constitution requires some form of unamendability). 318 #12;

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14. **The Theory and Doctrine of Unconstitutional Amendment in Canada [article]**
Queen's Law Journal, Vol. 41, Issue 1 (Fall 2015), pp. 143-206
Albert, Richard (Cited 169 times)
41 Queen's L.J. 143 (2015-2016)
All Matching Text Pages (10)

Turn to page 144
Implication III. A Framework for **Judicial Review** of Constitutional Amendment A. Procedural Unconstitutionality (i) Subject-Rule Mismatch (ii) Temporal Violations

(iii) Processual Irregularity B. Substantive Unconstitutionality (i) Unwritten Fundamental Values (ii) Non-Negotiable Founding Values (iii) Amendment-Revision Unamendability C. Hybrid Forms of Unconstitutionality (i) Statutory Unconstitutionality (ii) The Recognition of Convention (iii) Unconstitutionality by Implication

Turn to page 146
the Court has yet to invalidate an amendment,' modern constitutional politics suggest that the Court possesses residual constitutional authority to declare that a future amendment violates either the text or spirit of the Canadian Constitution. This residual authority derives both from the Court's power of **judicial review** and from contemporary changes to the Constitution "outside" of the Constitution.9 5. See Reference re Senate Reform, 2014 SCC 32 at para 3, [2014] 1 SCR 704 [SenateReform Reference]. 6. Unless otherwise specified, a constitutional amendment refers to a formal

Turn to page 147
Drawing from the **judicial review** of constitutional amendments around the world, I propose a framework anchored in three major categories of possible unconstitutional constitutional amendment in Canada: procedural, substantive and procedural-substantive hybridity. Each of these three categories consists of at least three subsidiary forms of unconstitutionality. Procedural unconstitutionality includes subject-rule mismatch, temporal violations and processual irregularity. Substantive unconstitutionality includes unwritten unamendability, text-based unamendability and the amendment

Turn to page 154
value of human dignity to invalidate several others laws.5 A court may also interpret formal unamendability in connection with the adoption of a new constitution. The most well-known example comes from South Africa. In the transitional period after the end of apartheid, political actors adopted an interim constitution on the understanding that a new constitution would be adopted within two years of the first sitting 53. See e.g. Kemal **Gozler. Judicial Review** of Constitutional Amendments: A Comparative Study (Bursa, Turkey: Ekin Press, 2008) at 40-49; Yaniv Roznai & Serkan Yolcu, "An

Turn to page 170
judicial review, see generally Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389. 136. Sujit Choudhry, "Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?" (2008) 6:2 Int J Constitutional L 193 at 219. 137. Supra note 4. 138. Ibid at paras 55-82. (2015) 41:1 Queen's LJ #12;

Turn to page 182
include statutory unconstitutionality, the recognition of convention, and unconstitutionality by implication. 198. See Albert, "Amendment Difficulty", supra note 72. 199. See e.g. Supreme Court Act Reference, supra note 156; Senate Reform Reference, supra note 5. 200. I have learned a great deal from Kemal **Gozler**'s study of unamendability, in which he divides **judicial review** of constitutional amendments into procedural and substantive categories. He does not, however, offer further differentiation between the two categories, nor does he consider the third category I suggest here. See **Gozler**, supra... III. A Framework for **Judicial Review** of Constitutional Amendment The extraordinary complexity of the rules and practices for altering the text of Canada's Constitution makes it arguably the world's most difficult to amend.198 The escalating, federalist and consultative structures of constitutional amendment entrenched in the Constitution Act, 1982 create intricate rules that reveal constraints rooted in both specificity and generality. Specific rules involve matters like the quantum of provincial agreement required to

ratify a constitutional amendment, whereas general rules concern... definitional matters about the "composition" of the Supreme Court or "the method of selecting Senators", both of which are matters of recent controversy.199 In the case of both specificity and generality, the Court has, in some instances, positioned itself to evaluate the constitutionality of a future constitutional amendment. In others, the constitutional text and political practice may leave the Court no other choice. In this Part, I draw from the **judicial review** of constitutional amendments around the world to propose a framework anchored in three major categories of possible unconstitutional

Turn to page 184
section 38. Had Parliament proceeded to engage its section 44 power, it is likely that this would have been challenged as an unconstitutional use of this narrow amendment rule.2" The Court, in this case, could have invalidated the amendment as improperly authorized by the wrong amendment rule. **Judicial review** of an amendment on the basis of the procedures entrenched in the constitutional text is consistent with the separation of powers. Legislative and executive actors should not themselves determine whether they have used the correct amendment rule because this effectively grants them a self

Turn to page 187
also in major constitutional reform.212 But judges commonly engage in difficult line drawing exercises, and this would be no different. Moreover, where legal doctrine in other jurisdictions might prohibit the Court from reviewing a political matter, the political question doctrine has been rejected in Canada213 and therefore poses no bar to **judicial review** of such controversies.214 Similarly, it would be difficult to evaluate what constitutes fair notice to a legislator, but judges could identify reasonable standards against which to measure a notice period alleged to be insufficient

Turn to page 190
unwritten rules of constitutionalism or they may rely on the distinction between amendment and revision. In all three cases, each illustrated below, **judicial review** of constitutional amendments raises significant challenges for constitutional democracy. 226. See Senate Reform Reference, supra note 5 at para 65. 227. Ibid at paras 64-67. 228. Ibid at para 102. 229. Ibid at para 110. (2015) 41:1 Queen's LU #12;

Turn to page 204
itself to evaluate the constitutionality of a future amendment and how, in other instances, political practice and the constitutional text may have constrained the Court eventually to engage in **judicial review** of constitutional amendments. The answer to the second question is contestable. If the evidence from other constitutional states is any indication, the debate on the legitimacy of **judicial review** of constitutional amendment in Canada will be similarly divided between those who argue for a majoritarian or "counter- majoritarian" understanding of constitutional democracy-the former adopting

15. **The Substantive Validity of Constitutional Amendments in South Africa [article]**
South African Law Journal, Vol. 131, Issue 3 (2014), pp. 656-694

Abebe, Adem Kassie (Cited 1 times)
131 S. African L.J. 656 (2014)

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16. **In the Name of the Constitution - Substantive Limits of Constitutional Change [article]**
Zbornik Pravnog Fakulteta u Zagrebu, Vol. 65, Issue 3-4 (2015), pp. 481-504
Vukovic, Ana Horvat
65 Zbornik PFZ 481 (2015)
All Matching Text Pages (3)

Turn to page 486
deklaratornom jer francusko Ustavno vije& odbija nadle~nost za nadzor nad ustavnosti ustavnih promjena, izriitoj Idauzuli vjeanosti unato : "Ovo more nalikovati na bezobzirno zanemarivanje jasnog slova Ustava, i uistinu more biti upravo to." - Baranger, B., The Language of Eternity: **Judicial Review** of the Amending Power in France (or the Absence Thereof), Israel Law Review, vol. 44, 2011., str. 391. '9 Usporedi http://www.senato.it/1025?sezione=139&articolo-numero-artico- lo =139 (27. rujna 2013.). 20 Usporedi http://www.servat.unibe.ch/icl/poOOOOO_.html (27. rujna 2013.). 21 Usporedi http

Turn to page 490
., http:/Awww.utexas.edu/law/academics/cen- ters/transnational/work new/german/case.php?id=1369 (27. rujan 2013.), to. B. II. par. 6. " Odluka 1970/31 od 16. lipnja 1970. - Gzler, K., **Judicial Review** of Constitutional Amendments: A Comparative Study, Ekin, Bursa, 2008., str. 40. 42 Barak, op. cit. u bilj. 21, str. 329, 331. 43 Ibid., str. 333. #12;

Turn to page 497
naêela koja bi - neovisno o specifiênostima povijesne, kulturne i institucionalne slike pojedine drave - êinila opéu sr ustavnog identiteta79 75 Barak, op. dt. u bilj. 21, str. 338. 76 Barak, A., Le rôle de la Cour suprême dans une démocratie, RFDC, br. 66, 2006., str. 241, prema Kostadinov, op. dt. u bilj. 35, str. 307. 77 IKemal **Gozler** jedan je od autora koji supstancijalna ogranidenja ustavne promjene dopuýtaju samo u sludaju postojanja izridite "Idauzule vjednosti" - op. dt. u bilj. 41, str. 67. Navodi da implicitna supstancijalna ogranidenja nisu uopce upisana u ustavnom tekstu

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17. **Some Comments on the Decision 61/2011 (VII. 12) of the Constitutional Court [article]**
Jura: A Pecsi Tudomanyegyetem Allam- es Jogtudomanyi Karanak Tudomanyos Lapja, Vol. 2012, Issue 1 (2012), pp. 37-46
Drinoczi, Timea (Cited 2 times)
2012 Jura: A Pecsi Tudomanyegyetem Allam- es Jogtudomanyi Karanak tudomanyos lapja 37 (2012)
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Turn to page 46
kihirdetss napjAt foglalja magAban. 34 Az alacsonyabb hierarchiai fokon A116 norma nem m6dosithat magasabb hierarchiai fokon All6 normAt. 35Ld. a hatarozat V.2. pontjat. 3 Ennek viszonylag teljes kOrui targyalasAt Id.: Kemal **Gozler. Judicial review** of constitutional amendments. A comparative study. EKIN Press, Bursa 2008. www.anayasa. gen.tr/jrca.htm, Gary Jeffrey Jacobsohn: An unconstitutional constitution? A comparative perspective. International Journal of Constitutional Law Vol. 4, No.3 (July 2006), az alkotmany- ellenes alkotmAnym6dositdsr61 rendezett nemzetkozi kon- ferencia: http://wn.com/Round

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18. **Amending Constitutional Amendment Rules [article]**
International Journal of Constitutional Law, Vol. 13, Issue 3 (July 2015), pp. 655-685
Albert, Richard (Cited 169 times)
13 Int'l J. Const. L. 655 (2015)

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Columbia Human Rights Law Review, Vol. 45, Issue 2 (Winter 2014), pp. 441-498
Mate, Manoj (Cited 27 times)
45 Colum. Hum. Rts. L. Rev. 441 (2013-2014)
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Turn to page 448
Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment, 29 Colum. J.L. & Soc. Probs. 251 (1996); Ran Hirschl, The Political Origins of the New Constitutionalism, 11 Ind. J. Global Legal Stud. 71 (2004); Mark Tushnet, Social Welfare Rights and the Forms of **Judicial Review**, 82 Tex. L. Rev. 1895 (2004); Richard Fallon, The Core of an Uneasy Case for **Judicial Review**, 121 Harv. L. Rev. 1693 (2008) Ernest A. Young, Constitutive and Entrenchment Functions of Constitutions: A Research Agenda, 10 U. Pa. J. Const. L. 399 (2008); Jacob Levy, Paper presented at the annual meeting of

Turn to page 449
initiative merely limited access to the word "marriage" and thus reflected simple "disagreement over a single, newly recognized, contested application of a general principle."27 In invalidating Proposition 8, Moreno articulated an "entrenched rights provisions" argument that went far beyond existing precedent. He suggested that core features of the California Constitution, including fundamental rights provisions like equal critiques of **judicial review** and constitutional entrenchment more generally, see Larry Kramer, The People Themselves (2005); Jeremy Waldron, A Right-Based Critique of Constitutional... Rights, 13 Oxford J. Legal Stud. 18, 18-51 (1993); Jeremy Waldron, Law and Disagreement (1999); Richard Fallon, The Core of the Case Against **Judicial Review**, 115 Yale L.J. 1346 (2006). 23. See Strauss, 207 P.3d at 124 (Werdegar, J., concurring), 207 P.3d at133 (Moreno, J., concurring and dissenting). I derive the term "structural- organizational" from Justice

Werdegar's concurrence in which she observes: "The majority purports to find in this court's prior decisions a definition of the term "revision"-one focused on governmental structure and organization-that categorically excludes

Turn to page 450
Unconstitutional Constitutional Amendments (Chicago Public Law and Legal Theory Working Paper No. 349), available at http://ssm.com/abstract=1840963. 30. India is not the only judiciary to have developed a basic structure doctrine. High courts in other countries, including Germany, South Africa, Turkey, Israel, Colombia, and Brazil have developed and applied similar doctrinal approaches allowing for **judicial review** of the constitutionality of amendments. See Kemal **Gozler. Judicial Review** of Constitutional Amendments: A Comparative Study 52-53 (2008); Jackson, supra note 29; Richard Albert..., constitutionalism, and fundamental rights, suggesting that state 28. Several recent works have explored the doctrinal and historical development of the Indian basic structure doctrine. See Sudhir Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine in India (2009); Pratap Bhanu Mehta, The Inner Conflict of Constitutionalism: **Judicial Review** and the Basic Structure, in India's Living Constitution: Ideas, Practices, Controversies 178-206 (Zoya Hasan et al., eds., 2002); Raju Ramachandran, The Supreme Court and the Basic Structure Doctrine, in Supreme But Not

Turn to page 453
constitutional theorist Pratap Bhanu Mehta has defended the legitimacy of **judicial review** of constitutional amendments in India, but has criticized the manner in which the Supreme Court of India has articulated basic features and applied the doctrine. See Pratap Bhanu Mehta, The Inner Conflict of Constitutionalism: **Judicial Review** and the Basic Structure, in India's Living Constitution: Ideas, Practices, Controversies 179 (Zoya Hasan et al., eds., 2002). 40 See Richard Albert, Nonconstitutional Amendments, 22 Can. J. L. & Jurisprudence 5, 31-32 (2009). 41. See Mark Tushnet, Taking the Constitution Away... from the Courts (1999); Larry D. Kramer, "The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 Val. Univ. L. Rev. 697 (2006); Larry D. Kramer, The People Themselves: Popular Constitutionalism and **Judicial Review** (2004). Larry D. Kramer, Popular Constitutionalism, circa 2004, 92 Cal. L. Rev. 959 (2004); Akhil R. Amar, Philadelphia Revisited:Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043 (1988). 453 #12;

Turn to page 455
. See Cain & Noll, supra note 17, at 1518; see also John Hart Ely, Democracy and Distrust: A Theory of **Judicial Review** 101-104 (1980) (discussing the role of the courts in checking the excesses of majority rule). On the contrast 455 #12;

Turn to page 456
undermine the "laboratory of democracy" model of "popular federalism" or "political federalism."53 According to this model, popular sovereignty is the basis for the legitimacy of state governments, and popular majorities within states should have the leeway to experiment with different models of governance. This may include the process of amendment and constitutional change.54 Juxtaposed against this model of political or popular federalism is the "rights federalism" or "judicial federalism" model.55 between procedural versus substantive models of **judicial review** of constitutional amendment, see, e.g

Turn to page 458
Julian N. Eule, **Judicial Review** of Direct Democracy, 99 Yale. L.J. 1503 (1990); Robin Charlow, **Judicial Review**, Equal Protection and the Problem with Plebiscites, 79 Cornell L. Rev. 527, 534-36 (1994)). 64. See Redfield-Ortiz, supra note 61, at 1376 (citing Derek Bell, The Referendum: Democracy's Barrier to Racial Equality, 54 Wash. L. Rev. 1, 14-15 (1978)). 65. Strauss v. Horton, 207

P.3d 48, 59 (Cal. 2009). 66. Id. 67. Cal. Const. art. XVIII. 68. Cal. Const. art XVIII, § 1. 69. Cal. Const. art XII, § 8; art XVIII, § 3. 458 #12;

Turn to page 466
provisions to the Schedule in order to immunize them from **judicial review**. In earlier decisions, the Indian Supreme Court held that Parliament's power to amend the Constitution under Article 368 (the constitutional provision governing amendment of the constitution) was unlimited.112 Turning away from its earlier decisions in Sankari Prasad and Sajjan Singh, the majority in Golak Nath ruled that Parliament cannot enact constitutional amendments that violate the fundamental rights provisions of the Constitution. Chief Justice K. Subba Rao and the note 30 (explaining that the Federal Constitutional Court

Turn to page 468
impose restrictions on the management of his property. n'The Twenty-Fourth Amendment sought to overrule Golak Nath by reasserting Parliament's unlimited power to amend the Constitution under Article 368, and held that such amendments were not ordinary "laws" under Article 13, and could not be subject to **judicial review** by the Court. The Twenty-Fifth Amendment made compensation associated with land acquisition laws nonjusticiable, and stipulated that laws enacted to give effect to the Directive Principles could not be challenged in Court. The Twenty-Ninth Amendment had placed the 1969 Kerala Land... Reform Act in the Ninth Schedule to immunize it from **judicial review**.120 In a decision consisting of eleven separate opinions, a closely divided 7-6 bench overruled its earlier decision in Golak Nath and held that Parliament 116. According to several senior advocates who argued before the court in Golak Nath, Chief Justice Subba Rao was influenced by Conrad's argument although the Court ultimately did not hold that there were implied limitations on the amending power. See Granville Austin, Working a Democratic Constitution: A History of the Indian Experience 200-02 (1994). In addition, Subba Rao

Turn to page 476
COLUMBIA HUMAN RIGHTS LAW REVIEW [45.2:362 In Minerva Mills v. Union of India,165 the Court heard a challenge from the owners of the Minerva Mills to the Sick Textiles Nationalization Act of 1974, which had been added to the Ninth Schedule of the Constitution through the Thirty-Ninth Amendment, thus immunizing the Act from **judicial review**.'66 Pursuant to the Act, the National Textiles Corporation had taken over textiles mills in Karnataka, on the grounds that these mills were being "managed in a manner highly detrimental to the public interest."167 The majority in Minerva Mills ultimately... dissolve state governments under certain conditions, and attacked judicial power, by barring **judicial review** of the 1971 elections (including Gandhi's), overturning the Court's landmark decision in Kesavananda by stripping the Court's power to review the validity of constitutional amendments, and requiring two-thirds majorities of Court benches to invalidate statutes. In addition, the amendment barred the Supreme Court from reviewing the validity of state laws (and state courts from reviewing the validity of central laws); stipulated that implementation of the Directive Principles would take

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The Structure of Constitutional Amendment Rules [article]
Wake Forest Law Review, Vol. 49, Issue 4 (2014), pp. 913-976
Albert, Richard (Cited 169 times)
49 Wake Forest L. Rev. 913 (2014)
All Matching Text Pages (4)

Turn to page 919
constitutional rigidity.29 Third, Lijphart also connects constitutional malleability with the strength of **judicial review**. He posits that "**judicial review** can work effectively only if it is backed up by constitutional rigidity and vice versa,"30 meaning that a judicial ruling is more likely to be durable where the rules of formal amendment are difficult. He also uses his classification to suggest that "completely flexible constitutions and the absence of **judicial review** permit unrestricted majority rule."31 His classification is instructive. Nevertheless, Lijphart's classification cannot serve

Turn to page 964
, however, disclaimed responsibility for determining contemporaneousness, ceding this duty to Congress under the political question doctrine.279 Yet in India the nonentrenchment of the distinction between amendment and revision has not precluded its emergence. The 275. **Judicial review** of constitutional amendments may be procedural or substantive. For a leading analysis on this distinction as well as the difficulty of identifying the line separating procedure from substance, see generally KEMAL **GOZLER. JUDIcIAL REVIEW** OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY (2008) (inquiring into the practice... and theory of **judicial review** of formal amendments around the world). 276. See U.S. CONST. art. V. But the slave-traded and census-based taxation were made unamendable until the year 1808. See id. Likewise, the composition of the Senate is made subject to a special consent requirement. See id. 277. See Leser v. Garnett, 258 U.S. 130, 136 (1922) (upholding Nineteenth Amendment); Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) (upholding Eighteenth Amendment). 278. Dillon v. Gloss, 256 U.S. 368, 375 (1921). 279. Coleman v. Miller, 307 U.S. 433, 454-55 (1939). 964 [Vol. 49 #12;

Turn to page 965
learn from the Netherlands, where formal amendment occurs through the legislative process with the proposal and ratification of a law deemed constitutional.283 Unlike constitutional states where courts are granted by delegation or acquiescence the power of **judicial review** and would therefore possess the power to review the constitutionality of such laws, the Netherlands forecloses this power from Dutch courts. The Dutch Constitution prohibits courts from exercising the power of **judicial review**: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."284

Turn to page 968
NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 122-23 (2006); SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 20-23 (1996); Lorraine E. Weinrib, The Postwar Paradigm and American Exceptionalism, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 85-86 (Sujit Choudhry ed., 2006); G. Brinton Lucas, Structural Exceptionalism and Comparative Constitutional Law, 96 VA. L. REV. 1965, 1998 (2010); Miguel Schor, **Judicial Review** and American Constitutional Exceptionalism, 46 OSGOODE HALL L.J. 535, 536-38 (2008); Carol S. Steiker, Capital Punishment and American

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Accessed 44 Times

21. **The Origins and Limits of Originalism: A Comparative Study [article]**
Vanderbilt Journal of Transnational Law, Vol. 44, Issue 5 (November 2011), pp. 1239-1298
Varol, Ozan O. (Cited 72 times)
44 Vand. J. Transnat'l L. 1239 (2011)
All Matching Text Pages (5)

Turn to page 1259
THE ORIGINS AND LIMITS OF ORIGINAL ISM The 1924 Constitution also created an independent judiciary and recognized the supremacy of the Constitution by declaring that "no law shall be in contradiction to the Constitution."'15 But the Constitution did not expressly authorize any court to examine the constitutionality of laws passed by the Parliament.16 It would take a coup d'6tat in 1960 to establish a constitutional court with the power of **judicial review**.117 The reforms that transformed a fundamentalist empire into a secular and democratic republic happened in less than twenty years. That is

Turn to page 1276
concurring opinion.227 He would have dismissed the challenge because the Court lacked the authority to review the case, which did not raise a justiciable constitutional question.228 In Justice Kilic's view, the legislation at issue was clearly neutral on its face as to religion and thus obviated any concerns that the Court had expressed in its 1989 opinion as to the impermissible link between religion and clothing.229 He accosted the majority of abandoning all limits to **judicial review** and invoking its authority to impermissibly challenge the reasonableness of the Parliament's policy determinations.230

Turn to page 1290
1290 VANDERBILTJOURNAL OF TRANSNATIONAL LAW Partisi), founded by Atattirk, immediately applied to the Turkish Constitutional Court for annulment of the amendment.309 But the jurisdiction of the Court to review constitutional amendments was far from clear. The 1961 Constitution, which established the Turkish Constitutional Court and empowered it with **judicial review** of legislation, was silent on whether the Court could review constitutional amendments.310 In two separate decisions rendered in 1970 and 1971, the Turkish Constitutional Court interpreted constitutional silence as

Turn to page 1291
, the Court held that it was "impossible" to review constitutional amendments for substance and 317. Id.; KEMAL **GOZLER. JUDICIAL REVIEW** OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 42-43 (2008). 318. E. 1973/19, K. 1975/87 (Turk.). 319. See, e.g., Anayasa Mahkemesi [Constitutional Court], Esas No. 1976/38, Karar No. 1976/46 (Turk.); Anayasa Mahkemesi [Constitutional Court], Esas No. 1976/43, Karar No. 1977/4 (Turk.); Anayasa Mahkemesi [Constitutional Court], Esas No. 1977/82, Karar No. 1977/117 (Turk.). 320. ANA. art. 148 (Turk.) ("Constitutional amendments shall be examined and verified

Turn to page 1294
1294 VANDERBILT/OURNAL OF TRANSNATIONAL LAW the secularism provisions in the Constitution in accordance with their original meaning, but rejected a legislative attempt to amend them, thereby preserving their original understanding indefinitely. With this decision, the Turkish Constitutional Court rang its own death knell. The Turkish Justices failed to display the political deft of

Justices such as John Marshall of the U.S. Supreme Court, who treaded carefully in Marbury v. Madison in establishing the power of **judicial review** while managing not to antagonize the hostile political

Results 1-21 of 21 items searching for (((Gozler AND "judicial review"))) in All Collections sorted by "Relevance".

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