

RETHINKING SUPRACONSTITUTIONALITY: AN EXPLORATION OF THE DOCTRINE OF UNCONSTITUTIONAL AMENDMENTS IN FRANCE, THE US, AND THE UK

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ABSTRACT

Although the doctrine of unamendable constitutional amendments has become a global trend, applied in more than half of the world's constitutions, in the three countries constituting the proponents of modern constitutionalism—the US, France, and the UK—it is almost absent. Specifically, besides the explicit minimal substantive limits on formal amendments in the French and US constitutions, judges have refused to extend this unamendability to additional fundamental principles, whereas the UK's Parliamentary Sovereignty excludes any concept of unamendable principles. The aim of this paper is to demonstrate that even if positive law expressly rejects any idea of implied unamendability, there is a “hidden” unamendability identifiable in the recognition of a hierarchy between constitutional principles. To analyze this doctrinal concept, we will refer to the German and French doctrinal concept of *supraconstitutionality*, which supports that some constitutional rights are placed even above the constitution because they derive from natural law and, for this reason, must be perceived as unbreachable. Hence, in this context, the first part of the study will address the official positive law position of rejection (I), whereas the second part will focus on the existence of concepts of constitutional hierarchy and identity to argue that they can be potentially developed in a real doctrine of unconstitutional constitutional amendments (II).

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INTRODUCTION

Constitutional amendment clauses can be characterized as the “most important part of a Constitution.”¹ In fact, we can affirm this statement if we take into consideration that a constitution and the rules of its amendments are like a “lock and key,” meaning that “one can hardly work without the other.”² But why is a process of “defin[ing] the conditions under which all other constitutional norms may be legally displaced,” as Akhil Amar defines amendment, considered so important?³ The answer can be found in the fundamental constitutional functions served by formal amendment provisions, such as the expression of values defining a Nation, the offering of a roadmap for constitutional alterations, and the recognition of a distinction between ordinary and constitutional law.⁴ For this reason, in the context of constitutional design on a global scale, 96 percent of constitutions provide special procedures for altering their text.⁵

However, despite the importance of amendment procedures in defining a constitution, public law studies have traditionally failed to focus on the analysis of this phenomenon. Constitutional law is primarily concentrated on the study of the relations between public institutions as an application of the separation of powers principle, to the methods of judicial interpretation when Courts review statutes, and on the strengthening of the legislative branch.⁶ Nevertheless, this trend has begun to change in recent years. Specifically, we can observe a paradigm shift in constitutional law studies.⁷

This shift towards detailed research on constitutional amendment was driven primarily by a comparative methodology that does not focus solely on amendment formulas or constitutional rigidity. Rather, it has given attention to a relatively new element of amendments: the substantive limits on constitutional alterations, namely, the unamendable clauses. When we use the adjective “new,” we do not mean to imply that unamendable clauses could not be found in some of the oldest constitutions globally. For instance, Article V of the United States

1. RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 1 (2019).

2. *Id.* at 1.

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

4. Richard Albert & Bertil Emrah Oder, *The Forms of Unamendability*, in 68 AN UNAMENDABLE CONSTITUTION? 1, 1 (Richard Albert & Bertil Oder eds., 2018).

5. See ALBERT, *supra* note 1, at 2.

6. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980)

(arguing that constitutional law should focus on the role of the judicial branch); see also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (defending the focalization of constitutional law on the legislative branch).

7. Xenophon Contiades & Alkmene Fotiadou, *The Emergence of Comparative Constitutional Amendment as a New Discipline?*, in *THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT* 369, 369 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2017).

Constitution contained two amendment prohibitions: the abolition of the slave trade until 1808 and the abolition of the Senate.⁸ The pivotal point here is that there is a strong evolutionary global tendency toward the insertion of formal unamendment clauses in constitutions. Hence, even though formal unamendability was a very rare phenomenon in the modern era of constitutionalism, with only 20 percent of all constitutions from 1789 to 1944 providing a mechanism for formal unamendability, today the rate is 50 percent, and is constantly increasing.⁹

It is important to pinpoint here that there is a huge variety regarding the content of this common feature of codified constitutions. Constitutional designers use this means to protect their system of government, as seen in France¹⁰ or Italy¹¹ where the amendment of the republican form of government is prohibited; the state's political structure, as in the case of the German Basic Law's federalism principal;¹² a fundamental ideology like socialism in Cuba;¹³ fundamental rights and liberties; principles of national integrity; or even the respect of international law norms, as in the case of Switzerland.¹⁴

These examples demonstrate the existence of explicit unamendability principles in some of the world's constitutions. Nevertheless, it is essential to emphasize that this method is not the only one for protecting certain fundamental constitutional principles from amendment entrenchment. In some countries, constitutional judges, by taking the initiative, have declared constitutional amendments unconstitutional by adopting an expansive interpretation of their own powers and of the Constitution as a fundamental norm with a specific spirit that transcends mere textual limitations.¹⁵ This practice is often qualified by the doctrine as *implicit*,¹⁶ *informal*,¹⁷ or *interpretive unamendability*.¹⁸ The most famous example is manifested in India's *basic structure doctrine*.¹⁹ This doctrine has been constructed by the Supreme Court of India in a series of cases dating from the early 60s to 1981.²⁰

8. See U.S. CONST. art. V.

9. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 22 (2017).

10. 1958 CONST. art. 89 (Fr.).

11. Costituzione Italiana [Constitution of the Italian Republic], Art. 139 (It.).

12. Grundgesetz [GG] [Basic Law], Art. 79, ¶ 3 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

13. CONSTITUCION DE LA REPUBLICA DE CUBA [CONSTITUTION] Feb. 24, 1976, art. 3.

14. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 193, ¶ 4 (Switz.).

15. See Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 996 (2025).

16. ROZNAI, *supra* note 9, at 39.

17. Albert & Oder, *supra* note 4, at 9-10.

18. ALBERT, *supra* note 1, at 149.

19. See SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 1 (2009).

20. See Manoj Mate, *Two Paths of Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175, 179-88 (2010); see also Gary Jeffery Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4(3) INT'L. J. CONST. L. 460, 470-76 (2006).

Specifically, the Constitution provided an unlimited power of formal amendment, with all its limits of a procedural nature, as the default amendment procedure required the consent of each of the two houses of Parliament, expressed by at least two-thirds of the voting members.²¹

The Court resolved the textual ambiguity regarding the existence of substantive limits on the amendment power, especially when the amendment concerns fundamental rights, by recognizing a principle of constitutional unamendability.²² In this context, it reversed its prior holding, which stated that the amendment power was unlimited,²³ by holding that a constitutional amendment could not abolish or violate fundamental rights.²⁴ The main case that places this doctrine within the constitutional order of India is the *Kesavananda Bharati Sripadagalvaru v. Kerala* case, which held that the amending power could be exercised only so long as it did not breach certain principles forming the Constitution's basic structure.²⁵ This basic structure is composed of several principles, including constitutional supremacy, federalism, separation of powers, the republican form of government, and others.²⁶ Several years after this case, the two houses of Parliament tried to amend the constitution's amendment provision to add a clause expressly limiting the power of the Court to review amendments.²⁷ In response to this amendment attempt, the Supreme Court in *Minerva Mills Ltd v. Union of India* rejected any limits on judicial control of formal amendments by invoking the basic structure doctrine.²⁸ Hence, the basic structure doctrine, as well as other countries' principles of implied unamendability,²⁹ recognize a specific premise: the affirmation that in a

21. India Const. art. 368.

22. See S.P. Sathe, *India: From Positivism to Structuralism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 215, 242-43 (Jeffrey Goldsworthy ed., 2007).

23. Sri Sankari Prasad Singh Deo v. Union of India, 1951 AIR 458; see also Sajjan Singh v. State of Rajasthan, (1965) 1 SCR 933.

24. Golaknath v. State of Punjab, (1967) 2 SCR 762.

25. Kesavanada Bharati v. State of Kerala, AIR 1973 SC 1461.

26. See Subhash Kashyap, *The "Doctrine" versus the Sovereignty of the People*, in SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 103-05 (Pran Chopra ed., 2006); see also Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 690-94 (2013).

27. See India Const. art. 368, amended by The Constitution (Forty-second Amendment) Act, 1976.

28. *Minerva Mills Ltd v. Union of India*, (1981) 1 SCR 206 (holding that "if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity").

29. See Premier of Kwazulu-Natal v. President of the Republic of S. Afr., 1996 (1) SA 769 (CC) at 22 ¶ 47 (S. Afr.) ("There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.").

Constitution, all constitutional provisions are not hierarchically the same. There are provisions considered superior to others, constituting a constitutional “basic structure” which are, for this reason, unamendable.

This affirmation can be applied in some constitutions by means other than constitutional judicial review. Strict procedural rigidity can also be used to protect the most fundamental elements of the Constitution. Richard Albert qualifies this type of amendment design as *constructive unamendability* and defines a constitutional rule as constructively unamendable when “the codified thresholds required to amend it are so onerous that reformers cannot satisfy this standard.”³⁰ As an illustration, the Constitution of South Africa codifies three different amendment procedures depending on the constitutional rules constituting the object of amendment.³¹ The most exigent procedure concerns the amendment of the constitution’s declaration of values and its amendment rules, requiring a vote of three-quarters of the members of South Africa’s National Assembly and two-thirds of its National Council of Provinces.³² Another example can be found in the Equal Suffrage Clause of the US Constitution. Although a formal amendment procedure ordinarily requires Congress or the states to propose an amendment rule by a two-thirds vote and to ratify it, respectively, by a three-quarters majority vote, an ordinary amendment diminishing a State’s representation in the Senate requires the State’s consent.³³ This clause is qualified by a very important part of the doctrine as practically unamendable³⁴ and illustrates that the will of the American founding fathers was to make federalism the most fundamental principle of the US constitutional DNA.

In general, all these types of constitutional unamendability constitute a means for illustrating the DNA of the Constitutions and the spirit of the people who adopted them. Nevertheless, the objective of this article does not consist of a general analysis of this phenomenon or the creation of a general doctrine of unconstitutional constitutional amendments, which already exists if we take into consideration the intellectual work of several current scholars like Richard

30. ALBERT, *supra* note 1, at 158.

31. S. AFR. CONST., 1996, ch. 4, § 74.

32. *Id.* (“Section 1 and this subsection may be amended only by a Bill passed by – (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and (b) the National Council of Provinces, with a supporting vote of at least six provinces”).

33. U.S. CONST. art V (“[N]o State, without its consent, shall be deprived of its equal Suffrage in the Senate”).

34. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 697 (2011).

Albert³⁵ or Yaniv Roznai.³⁶ The purpose of this study is to examine the issue of unamendable constitutional principles in three specific countries: France, the U.S., and the UK. These countries have been chosen for two specific reasons. Firstly, they constitute the historical and intellectual basis of modern constitutionalism. The most prominent modern political theorists, like Rousseau,³⁷ John Locke,³⁸ Montesquieu,³⁹ and Tocqueville,⁴⁰ were constantly writing about this founding era of constitutionalism, and their contributions significantly influenced the formation and functioning of liberal Constitutions, even today.

However, this is not the only reason for the present study's focus on these Constitutions. The main reason lies in a hidden contradiction regarding constitutional amendments. Although the practical and intellectual origins of the doctrine of constitutional amendments are found in these constitutional orders, especially the French and the American ones, judges nowadays refuse to recognize any substantive limits to the amendment power.⁴¹ In the UK, the absence of a formal constitution, as well as the fundamental principle of Parliamentary sovereignty, attributes an absolute amendment power to Parliament.⁴² Our analysis of this contradiction between the historical creation of these constitutions and their current practice will be made under the European methodology of unconstitutional amendments, which is based on the *doctrine of supra-constitutionality*.⁴³ This doctrine, originating from the French and German constitutional theory, supports the idea that the fundamental character of some constitutional principles makes them unamendable.⁴⁴ Thus, our purpose is to surpass or reinterpret the official positions of Courts to argue for a *hidden*

35. Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1034-45 (2014); Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CAL. L. REV. 2005, 2005-22 (2022); Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT. L. 1, 1-84 (2018).

36. ROZNAI, *supra* note 9, at 1; Yaniv Roznai, *We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments*, 110 SUP. CT. L. REV. 103, 103-31 (2023); Yaniv Roznai, *Unconstitutional Constitutional Change by Courts*, 51 NEW ENG. L. REV. 555, 555-77 (2018); Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1382-408 (2021).

37. See JEAN-JACQUES ROUSSEAU, PROJET DE LA CONSTITUTION DE LA CORSE (1765).

38. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690).

39. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1748) (Thomas Nugent trans., 1752).

40. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1 (Henry Reeve, trans., 1835).

41. Jacobsohn, *supra* note 20, at 461; see also Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639, 661 (2019).

42. John W.F. Allison, *The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective*, 34 J. CONST. HISTORY 57, 60-64 (2018).

43. See Serge Arné, *Existe-t-il des normes supra-constitutionnelles?*, 2 REVUE DU DROIT PUB., 460, 461 (1993).

44. *Id.*

or implied supra-constitutionality in these Constitutions, based on the existence of a clear *hierarchy* among constitutional norms.

Nevertheless, to make this idea of hierarchy clear, it is essential to define the notion of supra-constitutionality. In principle, the term supra-constitutionality includes a set of principles that are placed above the domestic constitutional order either because they derive from natural law or because they are considered as supranational law.⁴⁵ The present article rejects the idea of international standards susceptible to constrain a Constitution, and for this reason, the examination of supra-constitutional limits on amendment powers will be focused only on what Louis Favoreau calls “*internal supra-constitutionality*,” meaning the constitutional principles with which the amendment power must comply.⁴⁶ The superior legal value of these principles can be justified by two elements: moral considerations, as well as a fundamental distinction of nature between constituent power and amendment power.⁴⁷

Regarding the first element, natural law is a fundamental contextual basis for the above-mentioned constitutional hierarchy since it focuses primarily on the content of norms rather than their procedural or formal implications.⁴⁸ In this sense, we can refer to the substantive approaches of morally unconstitutional amendments of several current scholars, like Landau or Murphy. These scholars suggest that amendments that touch on fundamental democratic norms should be declared unconstitutional, as they violate the values of constitutionalism.⁴⁹ However, these ideas are not new. The major modern theorists of sovereignty, like Jean Bodin and Sieyès, used to admit that, regardless of the person holding the sovereign authority, be it the King or the Nation, they are limited by the principles of Natural Law.⁵⁰

The second foundational element concerns the nature of constitutional amendment powers. This question is the consequence of a distinction between constituent and constituted powers, which derives from the French and North American constitutionalism.⁵¹ We can define the constituent power (*pouvoir*

45. See Yaniv Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, 62 INT’L COMP. L. Q. 557, 558-59 (2013).

46. Louis Favoreu, *Souveraineté et supraconstitutionnalité* [Sovereignty and supraconstitutionality], 67 POUVOIRS 71, 74-76 (1993) (Fr.).

47. See Aharon Barak, *The Constituent Power and Its Limits*, in REDEFINING COMPARATIVE CONSTITUTIONAL LAW: ESSAYS FOR MARK TUSHNET, 160, 160-73 (2024); Raffael N. Fasel, *Natural Rights, Constituent Power, and the Stain of Constitutionalism*, 87 MOD. L. REV., 864, 866-67 (2024).

48. See ROSCOE POUND, JURISPRUDENCE, 499 (1959); see also Roznai, *The Boundaries of Constituent Authority*, *supra* note 36, at 1392.

49. Walter F. Murphy, *Staggering Toward the New Jerusalem of Constitutional Theory: A Response to Ralph F. Gaebler*, 37 AM. J. JURIS. 337, 350-53 (1992); see also Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606 (2015).

50. JEAN BODIN, ON SOVEREIGNTY 10 (Julian H. Franklin trans., 2004); EMMANUEL SIEYÈS, *What Is The Third Estate?*, in POLITICAL WRITINGS 92, 136 (Michael Sonenscher trans., 2003).

51. See Andreas Kalyvas, ‘*Constituent Power*’, in POLITICAL CONCEPTS: A CRITICAL LEXICON 107 (J.M. Bernstein, Adi Ophir, & Ann Laura Stoler eds., 2018).

constituant) as the power of establishing a new constitutional order in the context of a Nation.⁵² The present concept comes from the intellectual political context of the 18th century, specifically from a pre-Revolution brochure written by Abbé Emmanuel Sieyès called *Qu'est-ce que les Tiers État?* (What is the Third Estate?).⁵³ Regarding the hierarchical relationship between the *pouvoir constituant* and the constituted power (*pouvoir constitué*), the national sovereignty theorist claims that “In each of its parts a constitution is not the work of a constituted power but a constituent power. No type of delegated power can modify the conditions of its delegation.”⁵⁴ That means that the extraordinary power to draft a constitution *ex nihilo* is absolute and unlimited because it is the direct expression of the Nation’s societal and institutional organization.⁵⁵ On the contrary, the power to modify a constitution is a limited power functioning according to the norms of positive law determined by the Nation.⁵⁶

The above-mentioned distinction was generalized into a veritable constitutional theory by Carl Schmitt. In his *Constitutional Theory*, a constitution is valid because it is the product of the will of a constitution-making authority, and this *will* is reflected in the adoption of a concrete decision determining the form of its own political existence.⁵⁷ This assumption constitutes the basis of his distinction between constitution-making power and constituted power.⁵⁸ In fact, the above-mentioned will, derived from the constitution-making power, has to be preserved in any case by constitutional amendments.⁵⁹ For this reason, even if there’s no express unamendable provision in the Constitution, an amendment process cannot change its essence because that would constitute an abrogation of the Constitution.⁶⁰ Constituted powers should always respect a specific constitutional identity and continuity.⁶¹

The most famous illustration of Schmitt’s constitutional theory in positive law is the German Basic Law. The oxymoron here is the fact that post-war Germany’s constitutional approach is based on the constitutional theory of the most prominent Nazi jurist.⁶² In fact, the Basic Law determines the unamendable

52. Fasel, *supra* note 47, at 864-65.

53. SIEYÈS, *supra* note 50.

54. *Id.* at 136.

55. *Id.*

56. See Raffael N. Fasel, *Constraining Constituent Conventions: Emmanuel Joseph Sieyès and the Limits of Pouvoir Constituant*, 20 ICON 1103, 1108 (2022).

57. CARL SCHMITT, CONSTITUTIONAL THEORY 125 (Jeffrey Seitzer trans., 2008); see also Renato Cristi, *Schmitt on Constituent Power and the Monarchical Principle*, 18 CONSTELLATIONS 352 (2011).

58. SCHMITT, *supra* note 57, at 127.

59. See Fasel, *Constraining Constituent Conventions: Emmanuel Joseph Sieyès and the Limits of Pouvoir Constituant*, *supra* note 56, at 1107-08.

60. SCHMITT, *supra* note 57, at 76.

61. *Id.* at 125-30; see also Monica Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power*, INT’L J. CONST. L. 411, 433-38 (2016).

62. Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, *supra* note 26, at 676.

principles within the German constitutional order.⁶³ The eternity clause (*Ewigkeitsklausel*) found in Article 79 paragraph 3 prevents any amendment of two fundamental constitutional canons, aiming to protect the Republic from slipping back into a dictatorship and to avoid the institutional mistakes of the Weimar experience.⁶⁴ Specifically, the above-mentioned provision prohibits “amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20.”⁶⁵

Article 20 of the Basic Law provides some fundamental guarantees of the Rule of Law, such as separation of powers, the principle of legality, and legislation subject to the constitutional order,⁶⁶ whereas the first article of Germany’s foundational text protects the constitutional value of human dignity.⁶⁷ It is important here to underline that the German eternity clause reflects the two foundational elements of the doctrine of *supra-constitutionality*.⁶⁸ Indeed, its existence confirms the supremacy of the constituent power by protecting its will.⁶⁹ For this reason, the last article of the foundational text, although it predicts its own destruction, does not preclude any specific procedures for this.⁷⁰ Concerning the natural law element, it can be found in the protection of the human dignity principle as a higher natural law codified in the Constitution, as explained by Otto Bachof.⁷¹ This natural law approach can be explained not only by the Karlsruhe Court’s extensively constructive interpretation, placing human dignity at the core of Germany’s

63. See Richard Albert, *Does Unamendability Even Matter?*, in *THE VIEW FROM THE OUTSIDE: INTERNATIONAL PERSPECTIVES ON THE GERMAN FEDERAL CONSTITUTIONAL COURT* 8 (Mohr Siebeck, 2026).

64. See Matthias J. Herdegen, *Unjust Laws, Human Rights, and the German Constitution: Germany’s Recent Confrontation with the Past*, 32 COLUM. J. TRANSNAT’L L. 591 (1995).

65. Grundgesetz [GG] [Basic Law], Art. 79, ¶ 3 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

66. *Id.* Art. 20 (“The Federal Republic of Germany is a democratic and social federal state. All state authority emanates from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.”).

67. *Id.* Art. 1 (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. The following basic rights shall bind the legislature, the executive and the judiciary as applicable law.”).

68. See Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, at 563.

69. See Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 ISR. L. REV. 429, 440 (2011); Helmut Goerlich, *Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany*, 1 NUJS L. REV. 397, 401 (2008).

70. Grundgesetz [GG] [Basic Law], Art. 146; see also ROZNAI, *supra* note 9, at 128-29.

71. OTTO BACHOF, VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN? 29-57 (1951) (Ger.).

constitutional value system,⁷² but also by several *obiter dicta* of the Federal Constitutional Court referring to general natural law principles that are presupposed as unamendable by every Constitution.⁷³

France and the United States each have their own eternity clauses. Article V of the U.S. Constitution originally forbade the abolition of the African slave trade till 1808 and continues to absolutely prohibit the deprivation of the states' equal representation in the Senate without their consent,⁷⁴ while article 89 of the French Constitution prohibits only an amendment of the Republican form of Government,⁷⁵ a specific provision that exists in numerous Constitutions worldwide, including the Italian Constitution. These clauses, however, cannot be compared to the German eternity clause. They have been interpreted very narrowly and have never been the subject of a political or legal debate. Nevertheless, all issues arising from the doctrine of unconstitutional amendments focus on the existence of an implied unamendability theory derived from the two above-mentioned axes of supra-constitutionality. It is essential, though, to examine their hidden premises of *Supra-constitutionality* as well as the potential for a conceptual upraising of this doctrine in the UK, a place considered almost impossible to recognize any limits on the amendment power. In this context, the first part of this study will examine the official constitutional position of these countries, which rejects any theory of material restrictions on the amendment power, while the second part aims to find the conceptual roots capable of establishing a new model that ensures the constitutional identity of these constitutions.

I. A CONTRADICTIONARY REJECTION OF THE SUPRA-CONSTITUTIONALITY DOCTRINE

Even though most unamendable provisions have entered the *modus operandi* of constitutional design after World War II,⁷⁶ this concept finds its origins in another era: the era of modern constitutionalism,⁷⁷ specifically in the American and French constitutional approaches deriving from the two

72. See, e.g., BVerfGE, 1 BvL 19/63, July 16, 1969; BVerfG, 1 BvL 14/76, June 21, 1977, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1977/06/ls19770621_1bvl001476en.html [<https://perma.cc/T66B-DDC8>]; BVerfG, 1 BvF 6/74, Feb. 25, 1975, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1975/02/fs19750225_1bvf000174en.html [<https://perma.cc/8JE6-TAYM>].

73. See, e.g., 1 BverfGE 14, 32 (1951); see also BVerfG, 1 BvL 106/53, Dec. 18, 1953, <https://openjur.de/u/365619.html> [<https://perma.cc/ZC35-Z2N2>].

74. U.S. CONST. art. V.

75. 1958 CONST. art. 89, ¶ 5 (Fr.) (“The republican form of government shall not be the object of any amendment.”).

76. See Adam Chilton & Mila Versteeg, *Do Constitutional Unamendability Rules Make a Difference?*, PUB. CHOICE (2025).

77. Claude Klein, *A Propos Constituent Power: Some General Views in a Modern Context*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 31, 31 (A Jyräki ed., 1999).

Revolutions.⁷⁸ We can see the oxymoron in our hypothesis here if we compare the conceptual position of this era with the current context of positive law, which clearly does not support any idea of implied unamendability or of hierarchy within the Constitution.

A. The Origins of Substantive Limits on Constitutional Amendments

Ideas of unamendability are as old as the concept of the Constitution broadly conceived. It was in 1669 when John Locke wrote the “Fundamental Constitution of the Colony of Carolina,” which contained a general amendment prohibition applying to the whole document by stipulating that it “shall be and remain the sacred and unalterable form and rule of the government of Carolina forever.”⁷⁹ It is obvious that such “delusions” about “eternal” Constitutions do not exist anymore.⁸⁰ In fact, these mechanisms can frame the amendment power, but they cannot impose limitations on the primary constituent power, which is an absolute and unlimited power in the hands of the people. Nevertheless, eternity clauses allow the constitution-making powers to preserve the Constitution’s essence, the Nation’s identity, or some global human rights that are situated even *above* the Constitution.⁸¹

Thus, since constitutional codification has an American origin, the amendment theory and its facets, procedural or substantive, occupy an important place in modern American political thought. Indeed, America’s first constitution, the Articles of Confederation, approved by the Continental Congress in 1777, just a year after the Declaration of Independence, did not omit to provide for an eternity. Article XIII provided that:

And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.⁸²

The three critical features of this provision were inviolability, unanimity, and perpetuity of a strong union of states.⁸³ Despite the potential contradiction between perpetuity and amendments, we can admit that conciliation is possible as long as the modifications respect the procedural rule of unanimity and that

78. Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 49, 50, 65-66 (Martin Loughlin & Neil Walker eds., 2007).

79. JOHN LOCKE, *THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA* 25 (1670); JOHN LOCKE, *THE WORKS OF JOHN LOCKE* 198 (1823).

80. ROZNAI, *supra* note 9, at 16-17.

81. *Id.*

82. ARTICLES OF CONFEDERATION of 1781, art. XIII, ¶ 1.

83. ALBERT, *supra* note 1, at 13.

the Union is preserved. In addition to the Articles of Confederation, the same tendency could be found in some state constitutions. Specifically, according to the 1776 Constitution of New Jersey, the members of the two Houses could not “annul or repeal” the election provisions, the state’s establishment clause, or the right to a jury in a trial.⁸⁴ Whereas, the 1776 Delaware Constitution prohibited amendments to the declaration of rights, the state’s name, the bicameral legislature, the ban on slave importation, and the establishment of any one religious sect.⁸⁵

Hence, given these precedents, it is not absurd that, in the U.S. Constitutional Convention of 1789 and the 1789-1791 Constitutional Assembly, providing for amendment rules was highly contentious.⁸⁶ Most concerns were raised about the danger that amendments could provoke political instability or jeopardize the document’s acceptance by the people.⁸⁷ Especially in France, there was the conception that amendments could never infringe on the people’s thought, which, according to Madison, is the “only... fountain of power.”⁸⁸ This approach guided constitutional decision-making in these two countries, which, although they accepted amendments as a means to deal with possible future imperfections, provided us with the first traces of unamendability elements.⁸⁹

As an illustration, the above-mentioned Article V of the U.S. Constitution originally forbade the abolition of the African slave trade prior to 1808 and, without time limits, the deprivation of states’ equal representation in the Senate.⁹⁰ It is not wrong if we claim that this Article makes federalism, through the equal representation clause, the most fundamental principle of American constitutional law. It is a compromise that protects the smaller states from being controlled and overruled by larger states. The same practice can be found in France’s first constitution. The 1791 Constitution’s Preamble stated that the National Assembly “abolishes irrevocably the institutions which were injurious to liberty and equality of rights,”⁹¹ whereas Title VII, section 7, stated that the members of the Assembly of Revision take an oath to maintain the perpetuity

84. N.J. CONST. of 1776, art. XXIII.

85. DEL. CONST. of 1776, art. XXX; see also MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 56 (1999).

86. Mark Tushnet, *Amendment Theory and Constituent Power*, in COMPARATIVE CONSTITUTIONAL THEORY 317 (Gary Jacobsohn & Miguel Schor eds., 2018).

87. Manfred Stelzer, *Constitutional Design Through Amendment*, in ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 136, 141 (Xenophon Contiades & Alkmene Fotiadou eds., 2020).

88. THE FEDERALIST NO. 49 (James Madison).

89. Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, at 662-64.

90. U.S. CONST. art. V (“Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

91. 1791 CONST. pmbl. (Fr.).

of the Constitution.⁹² This idea of perpetuity gave birth to the first and only French “eternity clause,” which is still alive nowadays. In fact, the genesis of the Third Republic in 1875 marked the complete end of any monarchic comeback, and that fact was reflected in article 8(3) of the constitutional law of 1875, a provision inserted by the amendment of 1884, which stated that “the Republican form of government cannot be made the subject of proposition of revision.”⁹³ Since then, this clause is found in all future French Constitutions, as article 95 of the Fourth Republic’s Constitution of 1946⁹⁴ and article 89 of the Fifth (and current) Republic’s Constitution demonstrate.⁹⁵

It is important to notice here that if we examine the constitutional history of the two above-mentioned countries, we can easily observe that these two eternity clauses have not led to any particular litigation. The entire unamendability debate does not revolve around France’s “republican form” limitation or America’s “equal suffrage” clause. Instead, it is concentrated in several doctrines of implied constitutional unamendability, encompassing a wide variety of provisions, ranging from individual rights to government sovereignty.⁹⁶ This issue is not new, as we will see it dates back to the 19th century. Nevertheless, does advocating for the existence of hidden eternity principles contradict the inclusion of formal unamendability clauses in the constitutions?

The Framers of the French and American Constitutions had expressly determined which principles should be considered unamendable.⁹⁷ Does this violate the maxim *expressio unius est exclusio alterius*, meaning that the explicit intent of the constituent power to limit amendment power by eternity clauses excludes the existence of an implicit unamendability for principles other than those cited in the above-mentioned clauses?⁹⁸ The answer cannot be positive if we take a comparative look. In Italy, for instance, although the Constitution of 1947 has provided the same unamendable clause as France regarding the Republican form of Government (article 139),⁹⁹ the Constitutional Court has

92. *Id.* tit. VII, art. 7.

93. 1875 CONST. art. 8, ¶ 3 (in its version after the amendment made by Article 2 of the constitutional law of 14 august 1884) (Fr.).

94. 1946 CONST. art. 95 (Fr.).

95. 1958 CONST. art. 89 (Fr.); see also Claude Klein, *On the Eternal Constitution: Contrasting Kelsen and Schmitt*, in HANS Kelsen AND CARL SCHMITT: A JUXTAPOSITION 61 (Dan Diner & Michael Stolleis eds., 1999).

96. Claude Klein, *Le contrôle des lois constitutionnelles – Introduction à une problématique moderne* [The control of constitutional laws – Introduction to a modern problem], CONSEIL CONSTITUTIONNEL (Jan. 2010), <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-des-lois-constitutionnelles-introduction-a-une-problematique-moderne> [<https://perma.cc/LPM7-ZMUH>].

97. See David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 2-5 (1990); see also Wim J.M. Voermans, *Constitutional Reserves and Covert Constitutions*, 3 INDIAN J. CONST. L. 84, 92-95 (2009).

98. ROZNAI, *supra* note 9, at 150.

99. Costituzione Italiana [Constitution of the Italian Republic], Art. 139 (It.).

accepted that, besides this formal exception, there are other “supreme principles” that cannot be modified in their essential content.¹⁰⁰ Italian Scholars mention that these principles could include the Rule of Law, Democracy, and the protection of human rights.¹⁰¹ That purpose is not without connection with a supra-constitutionality conception because such an argumentation is based on the assumption that supra-constitutional principles do not require a text to be protected because they are above even the Constitution. In this context, it is essential to examine how scholarship developed the doctrine of supra-constitutionality based on implied material limitations on amendments and what the response was from the principal interpreters of the Constitution, the courts.

*B. A Conflict Between the Doctrine and the Courts About
the Structure of the Constitution*

The modern theory of implicit constitutional limits started in the United States in the 19th century.¹⁰² However, its naissance is based on general constitutional theories regarding the nature of the amendment. Specifically, Sieyès’s aforementioned thesis on constituent power (*pouvoir constituant*) was developed into a general theory that forms the basis of unconstitutional amendments.

It is true that the French founding father distinguished the power to create a constitution from the power exercised by the institutions established by the first one,¹⁰³ but this distinction does not answer the question concerning the nature of the amendment power. Is it a constituent or a constituted power? It is important here to add that in France, the terminology has evolved so that the power to adopt a constitution is doctrinally characterized as an original constituent power (*pouvoir constituant originaire*), and the power of amendment as a derived constituent power (*pouvoir constituant dérivé*).¹⁰⁴ As

100. Corte Cost. [Constitutional Court], Dec. 15, 1988, n. 1146 (It.) (stating that the Constitution contains some supreme principles that cannot be “subverted or modified in their essential content . . . Such are principles that the Constitution itself explicitly contemplates as absolute limits to the power of constitutional revision, such as the republican form . . . as well as principles that, although not expressly mentioned among those not subject to the principle of constitutional revision, are part of the supreme values of which the Italian Constitution is based.”); see also Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, 686-87.

101. See VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS & DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 107 (2009).

102. Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, *supra* note 26, at 670-71.

103. SIEYÈS, *supra* note 50, at 136.

104. See RAYMOND CARRÉ DE MALBERG, CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT [Contribution to the General Theory of the State] 489-500 (CNRS ed., 1962) (distinguishing the original constituent power, meaning the power to establish a Constitution, which is exercised under revolutionary circumstances, from the amendment power, which is exercised in a peaceful and legal context); GEORGES BURDEAU, ESSAI D'UNE THÉORIE DE LA RÉVISION DES LOIS

Olivier Beaud, an adherent of Carl Schmitt's constitutional theory, underlines, the qualification of both an absolute and unlimited power exercised directly by the people and of a power limited by the absolute power as "constituent" is very contradictory because they do not have the same nature.¹⁰⁵ If we consider the existence of this hierarchy, the *pouvoir constituant* can only be original. The consequence of this position is the fact that if the amendment power tries to repeal these unamendable provisions, it would exceed the scope of its authority.

These arguments were present in the first American Congress, in which Roger Sherman argued that "the Constitution is an act of the people, and ought to remain entire," whereas the amendments, because they are acts of the State Governments, have a limited scope and they cannot establish a new Constitution.¹⁰⁶ It was not wrong to admit that the Constitution of the U.S. has a "core" containing the dual sovereignty or the Union principles that cannot be changed by any Article V amendment. In this context, the *Discourse on the Constitution and Government of the United States*, written by John Calhoun, supports an implicit unamendability applied to the "nature of our system" or the "character of our constitution."¹⁰⁷ This argument is almost identical to Thomas Cooley's position, the most prominent defender of unconstitutional amendments in the U.S., who claimed that amendments cannot be "revolutionary" but that they must be harmonious with some principles constituting the "body of the instrument."¹⁰⁸

It is important to add here that although these positions were expressed two centuries ago, they remain alive. Indeed, Yaniv Roznai uses the doctrine of

CONSTITUTIONNELLES EN DROIT FRANÇAIS [Essay on a Theory of the Revision of Constitutional Laws in French Law] 78-83 (1930) (distinguishing the constituent power, as a power to adopt a constitution outside the law, from the revision power, as the power to modify the constitutional rules through the legal system); ROGER BONNARD, LES ACTES CONSTITUTIONNELS DE 1940 [Constitutional Acts of 1940] 46, 49 (1942) (supporting that the original constituent power is exercised outside of any constitutional authority, whereas the amendment power is exercised in the context of a Constitution already in force); see Arnaud Le Pillouer, *Pouvoir constituant originaire et pouvoir constituant dérivé : à propos de l'émergence d'une distinction conceptuelle* [Original Constituent Power and Derived Constituent Power: On the Emergence of a Conceptual Distinction], 25 *Revue d'histoire des facultés de droit et de la culture juridique, du monde des juristes et du livre juridique* [J. Hist. L. Facs. & Legal Culture, World Lawyers & Legal Books] 123 (2006) (Fr.); see Roznai, *The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments*, *supra* note 45, at 664-65.

105. OLIVIER BEAUD, *LA PUISSANCE DE L'ETAT* 315 (1994).

106. 1 *ANNALS OF CONG.* 708 (1789) (Joseph Gales ed., 1834).

107. JOHN CALDWELL CALHOUN, *DISQUISITION ON GOVERNMENT: A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 300-01 (1851) ("[I]f it transcends the limits of the amending power,--be inconsistent with the character of the Constitution and the ends for which it was established,--or with the nature of the system . . . the State is not bound to acquiesce . . . that a State, as a party to the constitutional compact, has the right to secede . . . if a power should be inserted by the amending power, which would radically change the character of the Constitution, or the nature of the system . . ."); Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, *supra* note 26, at 672.

108. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 *MICH. L. J.* 109, 118-20 (1893).

delegation to argue that the amendment power is a constitutional power delegated to certain constitutional organs by the people, and for this reason, it should act like a “trustee” of the people and respect its authentic will,¹⁰⁹ while Richard Albert also utilizes an idea of delegation when he makes a distinction between amendment and dismemberment. Albert defines the latter as a “fundamental transformation of one or more of the constitution’s core commitments.”¹¹⁰

Nevertheless, even if these positions sound very logical, they must be supported by positive law to be valid. Over the centuries, the U.S. Supreme Court has adopted different approaches regarding this subject. In *Dodge v. Woolsey* (1885), a dictum in the majority opinion accepts the above-mentioned idea of delegation by characterizing the amendment power as delegated and thus limited.¹¹¹ However, this position was not retained for long. The significant shift regarding the idea of substantive amendment in the U.S. Constitution was evident during the adoption of the 18th Amendment, which prohibited alcohol consumption, triggering several arguments before the courts supporting the view that the amendment was void because it conflicted with the Constitution’s “fundamental principles and spirit.”¹¹²

However, the Court was either constantly refusing to answer that argument, or it was adopting a negative position, accepting the constitutionality of this revision. In the *National Prohibition Case* of 1920, the U.S. Supreme Court, without analyzing this argument in detail, decided that the amendment was placed within the scope of the constitutional amendment powers.¹¹³ This position was applied in another 18th Amendment decision, *Dillon v. Gloss*, in which the court went more thoroughly into the details of the issue by holding that, in the context of an amendment’s ratification, the people who are the “original fountain of power” authorize the modification of the Constitution through representative assemblies and that such ratification “shall be taken as a decisive expression of the people’s will and be binding at all.”¹¹⁴ *As we will see, this formulation anticipates, by nearly seven decades, the French Constitutional Council’s approach to the nature of the amendment and its ratification.*

The former position regarding the 18th Amendment’s ratification was also taken for the adoption of the 19th Amendment. The Supreme Court of the United States held that it had been constitutionally authorized.¹¹⁵ This *status quo*, though, would not last for long. The Court, after examining but also refusing to declare amendments unconstitutional, clearly rejected any willingness to review them by denying its own jurisdiction. Hence, in *Coleman v. Miller*, the majority

109. ROZNAL, *supra* note 9, at 133-34.

110. ALBERT, *supra* note 1, at 84.

111. 59 U.S. (18 How.) 331, 347-48 (1856).

112. See Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, at 673.

113. *Rhode Island v. Palmer*, 253 U.S. 350, 385 (1920).

114. 256 U.S. 368, 374 (1921).

115. *Leser v. Garnett*, 258 U.S. 130, 136 (1922).

held that the amendment process is a political question not subject to judicial review.¹¹⁶ It is important to add here that this solution, finding its origins in the case *Luther v. Borden* of 1849 in which the Supreme Court refused to answer the complex question of the content of the republican guarantee clause,¹¹⁷ has been extended even to the procedural aspects of amendments, since the U.S. Supreme Court decided in *Baker v. Carr*, the most famous decision for the definition of the political questions doctrine, that even procedural questions about amendments are unsusceptible to being litigated by the courts.¹¹⁸

Coleman v. Miller is the last case in which the U.S. Supreme Court rendered a decision about the issue of unamendable amendments. It is clear that American positive law rejects any idea of substantive limits on the amendment power.¹¹⁹ The issue of the ratification of the 18th Amendment and the prohibition of alcohol consumption is interesting, though, because it also raised some criticisms of supra-constitutionality on a theoretical level. Everett Abbott was claiming at the time of the provision's ratification that the above-mentioned prohibition was unconstitutional because it constituted a violation of the "natural right to pursue happiness."¹²⁰ Nevertheless, the formal position of U.S. law is an express rejection of any supra-constitutionality concerns, not only because the amendment power is an expression of sovereignty since its ratification is done by assemblies representing the sovereign people, but also because it is considered a political question under the "political questions" doctrine.

In France, though, at that time, the idea of unamendable constitutional principles was also widespread and based mostly on considerations of supra-constitutionality. It is not a coincidence that the most famous constitutional law scholars defended very clearly the idea that the amendment power could not be considered as absolute. In this context, Carré de Malberg, a French scholar who criticized very severely the III Republic's Constitution because of its legislative omnipotence and the lack of any amendment rigidity, admired the fact that in the U.S. there was a double separation between the legislative organ and the *pouvoir constituant* expressed by the fact that a constitutional convention could not pass statutes and a legislative organ could not adopt a Constitution.¹²¹ This phenomenon, establishing a foundational difference between constituent power and amendment power by constituted institutions, as the former is considered as

116. 307 U.S. 433, 459 (1939).

117. 48 U.S. 1 (1849).

118. 369 U.S. 186 (1962).

119. *Downs v. City of Birmingham*, 198 So. 231 (1940) (holding that the State Constitution has to conform to the republican form of government condition imposed by the U.S. Constitution); see also Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J. L. SOC. PROBLEMS 251 (1996); Jacobsohn, *supra* note 20, at 480.

120. Everett Abbott, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183 (1920); see also Dudley O. McGovney, *Is The Eighteenth Amendment Void Because of its Contents?*, 20 COLUM. L. REV. 499 (1920).

121. MALBERG, *supra* note 104, at 489-500.

an extra-legal power, was called according to Carre de Malberg, as the "American Difference."¹²² This approach, though, turns more into positivism since the constituent power is treated as excluded from normative considerations, leaving the amendment function, which has a legal nature, to the constituted institutions.

Nevertheless, the most prominent scholar regarding unconstitutional amendments was Maurice Hauriou. The famous institutionalist based his argument not on the classic constituent power/constituted power scheme of Carré de Malberg, but on the doctrine of supra-constitutionality (*supraconstitutionnalité*). Especially, besides the explicit unamendable provision regarding the republican form of government, he accepted an implied unamendability based on the existence of some principles found even above the Constitution.¹²³ It's a matter of "constitutional legitimacy" which is above the "*superlégalité* itself because it consists of principles that are always above the text."¹²⁴ We can see here how this scholar influenced the constitutional theory of Carl Schmitt, which constitutes the main doctrinal reference on supra-constitutionality.

The only problem with this syllogism is the fact that we cannot define or identify these unamendable principles. Which elements constitute the *supraconstitutionnalité* scope? The answer is very ambiguous and uncertain. For instance, Léon Duguit argued in the 1920s that supra-constitutionality applied to the French Declaration of the Rights of Man and of the Citizen of 1789.¹²⁵ This argument is still alive as several scholars, like Stéphane Rials, claim that even today the content of the declaration, and especially its article 16 concerning the separation of powers principle, is above other constitutional laws and cannot be amended.¹²⁶ Nevertheless, all these examples constitute just a doctrinal interpretation.

It is important to notice here that the question of the potential existence of a supra-constitutionality application could not be treated by positive law during the development of this doctrine in the early twenties for a very simple reason; the Constitution of the Third Republic did not provide the existence of a constitutional court having jurisdiction to interpret the Constitution by

122. Serkan Köybası, *Amending the Unamendable: The Case of Article 20 of the German Basic Law*, in AN UNAMENDABLE CONSTITUTION?, *supra* note 4, at 259, 263.

123. MAURICE HAURIOU, *PRÉCIS DE DROIT CONSTITUTIONNEL* [Summary of Constitutional Law] 297 (1st ed. 1923).

124. MAURICE HAURIOU, *PRÉCIS DE DROIT CONSTITUTIONNEL* [Summary of Constitutional Law] 269 (2d ed. 1929); *See* CARL SCHMITT, *LEGALITY AND LEGITIMACY* 58-60 (Jeffrey Seitzer ed. & trans., 4th ed. 2004); *see also* Roznai, *The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments*, *supra* note 45, at 674-75.

125. LEON DUGUIT, *TRAITE DE DROIT CONSTITUTIONNEL* [Treatise on Constitutional Law] 603-07 (3rd ed., 1930).

126. Stéphane Rials, *Supraconstitutionnalité et systématique du droit* [Supraconstitutionality and Systematicity of Law in the Legal System], 31 *ARCHIVES DE PHILOSOPHIE DU DROIT* [ARCHIVES LEGAL PHIL.] 57 (1986).

controlling statutes,¹²⁷ whereas there was no such thing like a *Marbury v. Madison* ruling giving the above-mentioned power to ordinary judges.¹²⁸ During the Third and Fourth French Republics, the institutional system was dominated by a legislative sovereignty approach (*légitimité*) and, as a consequence, not only could constitutional amendments not be controlled by courts, but even ordinary statutes were untouchable.¹²⁹

This conception was radically changed by the adoption of the Constitution of the 5th Republic, which tried to rationalize the French parliamentary system by constraining the legislative power.¹³⁰ One aspect of that effort was the creation of the Constitutional Council (*Conseil constitutionnel*), whose primary object was to ensure the conformity of statutes to the Constitution by the exercise of judicial review power.¹³¹ This reference regarding the creation of France's first constitutional court is not without any relation to our subject.¹³² In fact, the answer to our question about the position of French positive law regarding supra-constitutionality can be found in the court's detailed jurisprudence.

It is essential to notice here that, although the dominant Public Law position in the first part of the twentieth century was in favor of "constitutional unamendments," the main rulings of the Constitutional Council chose a different path. The first time the question of substantive limits on constitutional amendments came to the forefront was in 1962 during the major constitutional reform brought by de Gaulle regarding the appointment of the President of the Republic (*Président de la République*).¹³³ Initially, the 1958 Constitution stipulated that the head of state should be elected by a college body of 80,000 delegates.¹³⁴ However, de Gaulle sought to introduce a reform that would allow the President's election by universal suffrage. Due to the opposition in Parliament, he couldn't use the formal amendment procedure in Article 89 of the Constitution, which required approval from both houses.¹³⁵ Instead of following the official procedure, he attempted to get the reform approved by "the people" through a referendum based on Article 11 of the Constitution,¹³⁶

127. Raymond Carré de Malberg, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE* 103-05 (1931).

128. 5 U.S. 137 (1803).

129. See Guillaume Tusseau, *La Fin D'une Exception Française? [The End of a French Exception ?]*, 137 *POUVOIRS [POWERS]* 5, 6-10 (2011).

130. See Jean-Félix de Bujadoux, *Des rationalisations du parlementarisme en France*, 71 *DROITS* 173, 193-98 (2020).

131. 1958 CONST. art. 61 (Fr.).

132. See Arthur Dyevre, *The French Constitutional Council: Argumentation Practices*, in *COMPARATIVE CONSTITUTIONAL REASONING* 323 (ed. Andras Jakab, Arthur Dyevre, Giulio Itzcovich ed. 2017).

133. See FERDINAND MÉLIN-SOUCRAMANIEN, *DROIT CONSTITUTIONNEL* 335-337 (2025).

134. 1958 CONST. art. 6 (original version) (Fr.).

135. See *Id.* art. 89, ¶ 2.

136. See David B. Goldey, *The French Referendum and Election of 1962: The National Campaigns*, 11 *POL. STUD.* 287, 288-90 (1963).

which states that the President of the Republic can submit “any Government Bill which deals with the organization of the public authorities” to a referendum.¹³⁷ This practice faced severed criticism from the opposition because, although article 11 refers to the “organization of public authorities,”¹³⁸ it was argued that the referendum act could have the *status* of an ordinary statute and not a constitutional statute, as only article 89 was included in the constitution’s Title XIV concerning “On Amendments to the Constitution.”¹³⁹

When the bill was deferred, however, to the *Conseil constitutionnel*, the constitutional court had a different opinion. The Court denied any jurisdiction to determine whether the bill was constitutional or not because referenda statutes constitute the “direct expression of the national sovereignty.”¹⁴⁰ In this context, this constitutional modification, which completely transformed the nature of the institutional system¹⁴¹ and, for some scholars such as Olivier Beaud, was considered the “true constituent moment” of the 5th Republic,¹⁴² was not constitutionally challenged. Here, the Constitutional Council relied on the fact that the amendment was made through a referendum.¹⁴³ What if this reform had been carried out through the official amendment procedure of Article 89, which provides for the intervention of the Senate and the National Assembly?¹⁴⁴ Could the outcome have been different?

The answer to that question was given in the nineties through the *Maastricht litigation*.¹⁴⁵ Specifically, in 1992, the Constitutional Council was asked to review the Maastricht Treaty through Article 54 of the Constitution concerning the control of conformity of international treaties to the Constitution.¹⁴⁶ The French constitutional judges found that the treaty could only be ratified if the Constitution was amended. This decision, also called *Maastricht I*,¹⁴⁷ triggered a constitutional amendment for the insertion of article 88-3 into the Constitution, which governs the relations of EU law to French law.¹⁴⁸ After this amendment, the Constitutional Council was again called under Article 54 to oversee the

137. 1958 CONST. art. 11 (Fr.).

138. *Id.*

139. See Tribune extraite du journal L’Aurore des 13 et 14 octobre 1962 [Opinion piece extracted from the newspaper L’Aurore, October 13 and 14, 1962], L’AURORE [DAWN], Oct. 13 & 14, 1962.

140. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-20DC, Nov. 6, 1962, Rec. 27 (Fr.).

141. Bertrand Mathieu, Philippe ARDANT, Droit constitutionnel et institutions politiques 408 (2022).

142. Beaud, *supra* note 105, at 383-84.

143. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-20DC, Nov. 6, 1962, Rec. 27 (Fr.).

144. 1958 CONST. art. 89, para. 1-3 (Fr.).

145. Denis Baranger, *The Language of Eternity: Constitutional Review of the Amending Power in France (or the Absence Thereof)*, 44 ISR. L. REV. 389, 394-98 (2011).

146. 1958 CONST. art. 54 (Fr.).

147. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-308DC, Apr. 9, 1992, Rec. 55 (Fr.).

148. Denis Baranger, *supra* note 145, at 394.

Treaty.¹⁴⁹ Plaintiffs argued that, despite the constitutional amendment, the treaty remained unconstitutional and that the insertion of article 88-3 violated the principle of national sovereignty defined in article 3 of the Constitution and the French Declaration of the Rights of Man and Citizen.¹⁵⁰ The *Conseil constitutionnel*, in its decision *Maastricht II* rendered on September 2, 1992,¹⁵¹ rejected that claim in a very famous development. It said that, besides the constitutional provisions governing the periods in which the Constitution cannot be amended¹⁵² and the formal unamendability provision of Article 89, meaning paragraph five regarding the “Republican form of Government,” the constituent power is sovereign; it has the power to repeal, amend, or amplify constitutional provisions in such a manner as it sees fit.”¹⁵³ Hence, there are no implied substantive or material limits on amending the French constitution, because positive law considers the amendment power as a constituent power.¹⁵⁴ A constitutional revision can even insert provisions that derogate from existing constitutional rules or principles.¹⁵⁵

That was not the end of the Maastricht story, though. After that decision, several members of the Parliament tried to contest the constitutionality of the EU Treaty not by contesting it directly through article 54, but by contesting it via an article 61 *a priori* constitutional control of its ratification bill, which was adopted by an article 11 referendum.¹⁵⁶ Nevertheless, in a *Maastricht III* ruling, the Council decided that it had no jurisdiction in such a case by adopting an argumentation saying that its jurisdiction is “strictly defined by the Constitution” and that Article 61 empowers it to control “whether organic laws and ordinary acts of Parliament are compatible with the Constitution,” whereas it is not specified whether this jurisdiction can be extended to constitutional laws, “be they adopted by means of referendum or enacted in parliament . . .”¹⁵⁷ Hence, the end of the *Maastricht cases* demonstrates a willingness to interpret the Constitution’s silence on the control of constitutional amendments restrictively, rather than broadly.¹⁵⁸

149. *Id.*

150. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sep. 2, 1992, Rec. 76 (Fr.).

151. *Id.*

152. See 1958 CONST. art. 7 (Fr.).

153. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sep. 2, 1992, Rec. 76, §19 (Fr.).

154. See WANDA MASTOR & LILIANE ICHER, CONSTITUTIONAL AMENDMENT IN FRANCE, IN *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA, AND THE USA* 115, 118 (Xenophon Contiades ed. 2013)

155. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sep. 2, 1992, Rec. 76, §19, §35 (Fr.).

156. Baranger, *supra* note 145, at 395.

157. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-313DC, Sep. 23, 1992, Rec. 94 (Fr.).

158. See Susan Wright, *The Constitutional Implications in France of the Maastricht Treaty*, 9 TUL. EUR. & CIV. L.F. 35 (1994).

This approach was also confirmed in its last case concerning the supra-constitutionality issue rendered in 2003.¹⁵⁹ The question concerned the adoption of a constitutional bill on March 17, 2003, “regarding the decentralized organization of the République.”¹⁶⁰ The difference between that amendment and the Maastricht revision in 1992 was that the adoption of the constitutional bill was not made by referendum but by a “Parliament convened in Congress,” a special chamber provided by article 89 to approve constitutional amendments.¹⁶¹ However, regardless of the absence of popular intervention in the amendment procedure, the constitutional judges declared that there was “no jurisdiction to decide the case” by repeating the *Maastricht III* formulation, saying that article 61 provides jurisdiction only for a constitutional control of organic and ordinary laws and not for constitutional amendments.¹⁶²

The above-mentioned constitutional position creates some further questions. Why did the *Conseil constitutionnel* take such a restrictive approach to its own jurisdiction, while in other cases, such as the recognition of the constitutionality of the Constitution’s Preamble, which contains the Declaration of the Rights of Man and of the Citizen, it demonstrated strong judicial activism, transforming the entire French public law system? Why couldn’t it fill the textual gap of articles 61 or 89 by adopting a similar conception to India’s Supreme Court, which took the power to control amendments based on the basic structure doctrine? The answer can be found in the prevailing current doctrine.¹⁶³ In fact, as Denis Baranger notes, in order to find the answer, we have to focus on a “form v. substance” doctrinal distinction.¹⁶⁴

Although France’s public law doctrinal fathers like Hauriou or Duguit had a substantial approach of constitutional law,¹⁶⁵ that’s not the case in today’s 5th Republic’s context. Nowadays, the current approach to the Constitution’s definition and interpretation is governed by positivism. Hence, as we can easily understand, there is no place for the *supraconstitutionnalité* in a positivist or

159. Xavier Philippe, *France: The Amendment of the French Constitution “On the Decentralized Organization of the Republic”*, 2 INT’L J. CONST’L L. 691 (2004).

160. Loi 2003-276 du 28 mars 2003 relative à l’organisation décentralisée de la République [Law 2003-276 of March 28, 2003 relating to the decentralized organization of the Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Marc. 29, 2003, p. 5568.

161. See Philippe, *supra* note 159, at 691-92.

162. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2003-469DC, Mar. 26, 2003, Rec. 293 (Fr.); for more details about this position, see Otto Pfersmann, *Unconstitutional constitutional amendments: a normativist approach*, 67 ZÖR 81, 107-06 (2012) (translating this position as a judicial policy of denial, meaning the hypothesis in which a Constitution provides implicitly for a “polymorphism” regarding its. Norms, but the competent courts refuse to apply it in concrete cases).

163. See Karlson Preuß, *‘Legal Formalism’ and the Western legal thought*, 14 JURISPRUDENCE 22, 22-54 (2023).

164. See Baranger, *supra* note 145, at 399-400.

165. Hauriou, *supra* note 123, at 245; Duguit, *supra* note 125, at 603-07.

formalist context.¹⁶⁶ The father of legal positivism, Hans Kelsen, adopted a clear thesis against “supra-positive norms” and argued that they should not be considered as real legal norms.¹⁶⁷ In France, the most famous and dominant argumentation regarding the supra-constitutionality concept can be found in Georges Vedel’s writings.¹⁶⁸ His position was a total rejection of any extra-constitutional or supra-constitutional consideration, and he supported it by a formal definition of the concept of Constitution.¹⁶⁹ According to him, a constitution cannot be defined by its content, rather it should be defined by a specific procedure of creation and amendment.¹⁷⁰ The formal element of its definition matters more than the substantive element, and that idea could be confirmed by the fact that in France, the “constitution” is distinguished from an “ordinary statute” of parliament based on their procedure of adoption.

This view of constitutional analysis, which is the dominant one nowadays, leaves no room for supra-constitutionality considerations. Positivist approaches did not allow French and American courts to recognize a constitutional corpus that could never be amended, even though they had demonstrated an important judicial activism on several other occasions.¹⁷¹ Hence, we might wonder whether the above-mentioned positions would differ in a constitutional order lacking a formal constitutional document.¹⁷² The best—and probably sole—example of this order is the UK.

C. The Case of the UK: Searching for the Impossible

It is true that legal scholarship on unamendability focuses on legal systems with a strong judicial review tradition over legislation. The UK definitely does not belong to that category of countries for a very obvious reason: its constitution is not set out in a formal document that can be enforced by judges.¹⁷³ Hence, examining the application of unamendability principles in such a constitutional context is like hitting our heads against a wall.

The English doctrine, however, has not failed to examine the question of constitutional modifications.¹⁷⁴ Albert Dicey wrote in the late 19th century that

166. Baranger, *supra* note 145, at 299-340; Albert, Nakashidze & Okcay, *supra* note 41, at 661.

167. Renaud Baumert, *Hans Kelsen, « La Garantie Jurisdictionnelle de la Constitution »* [*Hans Kelsen, “The Jurisdictional Guarantee of the Constitution”*], 45 *REVUE DU DROIT PUBLIC* [Rev. P.L.] 197, 239 (2024).

168. GEORGES VEDEL, *MANUEL ÉLEMENTAIRE DE DROIT CONSTITUTIONNEL* 78 (1949).

169. *Id.*

170. *Id.*

171. Baumert, *supra* note 167; see Albert, Nakashidze & Okcay, *supra* note 41, at 639.

172. Albert & Oder, *supra* note 4, at 1-2.

173. See Ernest Young, *The Constitution Outside of the Constitution*, 117 *YALE L. J.* 408 (2007).

174. Ian Cram, *Some Thoughts on Constitutional Amendment*, U.K. CONST. L. BLOG (Nov. 12, 2013), <https://ukconstitutionallaw.org/2013/11/12/ian-cram-some-thoughts-on-constitutional-amendment/> [<https://perma.cc/6STJ-KS9M>].

“to know how the constitution of a given State is amended is almost equivalent to knowing who is the person or the body of persons in whom, under the laws of the State, sovereignty is vested.”¹⁷⁵ The UK Constitution which is composed of a certain number of historic documents, specifically the Magna Carta of 1215, the Habeas Corpus of 1679, and the Bill of Rights of 1689, some rights recognized under common law and constitutional conventions, can be amended by the adoption of an ordinary statute adopted by Parliament.¹⁷⁶ This phenomenon is explained by the fundamentality of Parliamentary sovereignty under English law.¹⁷⁷

Parliament can legally be regarded as the “single ultimate source of legal authority.”¹⁷⁸ As Dicey told us in 1885 when he theorized and conceptualized the English constitution in two major principles—the sovereignty of Parliament and the rule of law—“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament (defined as the Queen, the House of Lords, and the House of Commons, acting together) . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, no person or body is recognized by the law as having a right to override or set aside the legislation of Parliament.”¹⁷⁹ *The above-mentioned definition concretely requires courts to obey any new statute, with no other body able to adopt legal norms that override an Act of Parliament.*¹⁸⁰

Moreover, one of the most important implications of this basic principle is that a sovereign Act of Parliament cannot be bound by its predecessor’s acts.¹⁸¹ This prohibition to “bind its successors” means simply that courts, when faced with two conflicting statutes on the same subject, treat the more recent act as repealing the earlier one.¹⁸² Applying this principle, along with the exclusion of judicial review of statutes, can become quite complex. This is especially true in the transformative context in which the Constitution entered the 20th century, as will be illustrated below.¹⁸³

It is essential to note that several important constitutional moments have strongly contested the *Diceyan* approach to sovereignty, demonstrating that this fundamental principle may not be absolute.¹⁸⁴ Specifically, the Parliament

175. A.V. Dicey, *Constitutional Revision*, 11 L.Q. REV. 387, 388 (1895).

176. See PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS*, 25-44 (2016).

177. See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 291, 315 (Roger E. Michener ed., 1982).

178. Anthony Bradley, *The Sovereignty of Parliament - Form or Substance?*, in *THE CHANGING CONSTITUTION* 35, 37 (Jeffrey Jowell & Dawn Oliver eds., 7th ed. 2011).

179. A.V. Dicey, *supra* note 113, at 3-4.

180. *Id.*

181. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *90.

182. See Jeffery Goldsworthy, *Challenging parliamentary sovereignty: Past, present and future*, in *PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES* 267-318 (2010).

183. See N.W. Barber, *The afterlife of Parliamentary Sovereignty*, 9 *ICON* 144, 149-52 (2011).

184. *Id.*

itself made this framing, as it can bring changes to constitutional law through ordinary legislation.¹⁸⁵ Indeed, it is not wrong to admit that the most important of these moments was the UK's integration into the European Union, which was the first step toward changing the constitutional status regarding the judicial review of parliamentary acts.¹⁸⁶ Since 1972 and the adoption of the European Communities Act,¹⁸⁷ until the 31st of January 2020 and the application of the European Union (Withdrawal) Act 2018,¹⁸⁸ the House of Lords, and later the Supreme Court, and in general, ordinary judges, could render any law that violated European law inapplicable.¹⁸⁹ Under the European Communities Act 1972 ("ECA"), European law should prevail against all English norms,¹⁹⁰ even against statutes adopted after the enactment of the above-mentioned statute. This principle derives from the ruling of the *Factortame n°2 case* regarding the question of a conflict between an EU norm incorporated in the EC Act and an English statute.¹⁹¹

For the first time, it was admitted that the Parliament itself voluntarily agreed to limit its own Sovereignty by adopting the EC Act 1972.¹⁹² Nevertheless, the appearance of this form of judicial review of statutes was not the only consequence of this constitutional change brought about by European law. In addition to that fundamental mutation, another important change concerns the *constitutionalizing* of certain statutes. Thus, in *Thoburn v. Sunderland City Council*, the case of the "metric martyrs,"¹⁹³ Lord Justice Laws developed the argument that the EC Act 1972 constituted a "constitutional statute" which "(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights."¹⁹⁴ *Nevertheless, Parliament's recognition of certain statutes as constitutional does not preclude subsequent legislative modification of those enactments.*¹⁹⁵ The

185. See Vernor Bogdanor, *Imprisoned by a Doctrine: The Modern Defense of Parliamentary Sovereignty*, 32 OXFORD J. LEGAL STUD. 179, 183-86 (2012).

186. Natalie Fox, *The Impact of Brexit on the British Constitutional Law*, 1 Przegląd Konstytucyjny 51, 53-55 (2024).

187. European Communities Act 1972, c. 68 (U.K.).

188. European Union (Withdrawal) Act 2018, c. 16 (U.K.).

189. *R v. Sec'y of State for Transp., ex parte Factortame Ltd.* (No. 2) [1991] UKHL 13, [1991] 1 AC 603 (appeal taken from Eng.).

190. European Communities Act 1972, c. 68, § 2 (U.K.).

191. *R v. Sec'y of State for Transp., ex parte Factortame Ltd.* (No. 2) [1991] UKHL 13, [1991] 1 AC 603.

192. *Id.*; see Iris Nguyễn-Duy, *Sovereignty and Europe- The British Perspective*, 2 L'EUROPE EN FORMATION 79, 85-86 (2013).

193. See Barbara Crutchfield George et al., *U.K.'s Metric Martyr Case: A Challenge to the European Union's Authority over Its Member States*, 21 WIS. INT'L L.J. 299 (2003).

194. *Thoburn v. Sunderland City Council* [2002] EWHC (Admin) 195 [62], [2003] QB 151 (U.K.).

195. See *Re Allister* [2023] UKSC 5; see also Kacper Majewski, *Re Alister: The End of 'Constitutional Statutes'?* U.K. CONST. L. BLOG (Feb. 21, 2023), <https://ukconstitutionallaw.org/>

difference between constitutional and ordinary statutes is the fact that Parliament may “impliedly repealed” the former, whereas it may repeal or amend the latter only “by unambiguous words on the face of the later statute.”¹⁹⁶

Hence, this “constitutionalization” does not render these statutes unamendable; it simply places a specific degree of legislative rigidity on their amendment. *We can affirm this thesis by referring to the Miller I decision, in which the UK Supreme Court accepted the result of the Brexit referendum.*¹⁹⁷ *The Court required a more rigid procedure for its realization by deciding that such a process, modifying the whole UK legal order by modifying its sources, cannot be made by a simple exercise of the royal prerogative by the executive power. It requires a clear consent from the sovereign Parliament.*¹⁹⁸

The present discussion of the above-mentioned constitutional statutes may easily allow us to search for additional constitutional laws. Several statutes contain constitutional content concerning the organization of public institutions; among them, the two most significant are the Scotland Act of 1998¹⁹⁹ and the Human Rights Act of 1998,²⁰⁰ because both Acts also place limits on the Parliamentary Sovereignty principle. *Enacted as part of the Labour Party’s devolution program, the first statute grants the Scottish Parliament a defined scope of legislative authority while preserving the principle of Parliamentary sovereignty by reserving ultimate authority over Scottish affairs to Westminster.*²⁰¹ *In contrast, the Human Rights Act, which incorporates the European Convention of Human Rights, constitutes a huge constitutional transformation by introducing a new form of judicial control of statutes grounded in the convention’s rights.*²⁰²

It is essential to add here that, although the UK signed the European Convention on Human Rights in 1951, there was no Bill of Rights incorporating its content. The basic reason for this absence was that it was extremely difficult to enforce statutes that violated these rights. Any mechanism of judicial review based on the ECHR would contradict the Constitution, and specifically Parliamentary Sovereignty. However, in 1998, the UK parliament chose a “middle path” for that.²⁰³ The Human Rights Act (“HRA”) transforms the whole normative system by establishing a mechanism that places human rights in the

2023/02/21/kacper-majewski-re-allister-the-end-of-constitutional-statutes/ [https://perma.cc/8PQX-W895].

196. *Thoburn v. Sunderland City Council* [2002] EWHC (Admin) 195 [63], [2003] QB 151 (U.K.).

197. *R v. Sec’y of State for Exiting the Eur. Union* [2017] UKSC 5 (appeal taken from Eng., Wales, & N. Ir.).

198. *Id.* [124].

199. Scotland Act 1998, c. 46 (U.K.).

200. Human Rights Act 1998, c. 42 (U.K.).

201. Scotland Act 1998, Section 28(7) c. 46 (U.K.).

202. See BRENDA HALE, *THE RISE AND FALL OF THE UK HUMAN RIGHTS ACT* 294, 294-306 (David Capper, Conor McCormick & Norma Dawson eds., 2025).

203. See Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights of Rights-and Democracy-Based Worries*, 38 WAKE FOREST. L. REV. 813, 837 (2003).

first place and creates a new form of *judicial control* of statutes to ensure the protection of these rights by public authorities.

It is clear that such a mutation towards a model of stronger judicial oversight and human rights protection based on declarations of rights creates a new UK constitutional law. Nevertheless, we may easily doubt the connection of this evolution to the doctrine of supra-constitutionality. In fact, supra-constitutionality, based on natural law considerations, places some individual rights above everything—above positive constitutional law. As with the German Basic Law, the Human Rights Act protects fundamental rights, such as the rights to human dignity²⁰⁴ and to life.²⁰⁵ These rights, though, unlike the German eternity clause, are not unamendable. Westminster can adopt a law with a clear and express content, and repeal or even suppress this constitutional human rights statute. In fact, we were in the middle of the process of a total repeal of the Act by Westminster's conservative majority.

However, during the last twenty-five years, this new model based on human rights protection has offered the basic unamendability premises, which are constitutional rigidity and hierarchy; whereas the fundamental moral character of the EHCR rights allows us to thoroughly examine if an implied unamendability doctrine can be established, even when the HR act disappears, and positive law based on parliamentary sovereignty totally rejects it.

II. AN IMPLIED RECOGNITION OF THE CONSTITUTION'S HIERARCHICAL STRUCTURE

In the last chapter, we saw that the positive law of our countries clearly denies any supra-constitutional consideration. From different bases and considerations, there are no implied unamendability principles. France and the US rely heavily on positivist theories, refusing to operate a distinction between constituent power and amendment power, whereas in the UK, Parliamentary Sovereignty, which constitutes the most fundamental constitutional principle and is still alive despite the whole above-mentioned constitutional transformation, prohibits the imposition of any limits to the Parliament's authority to change the Constitution.

However, the express refusal of any unamendability principles does not mean that the conditions for a feature implied recognition are not present. The basic element that supports this position is the presence of a hierarchical structure inside these constitutions. Indeed, even though constitutional judges refuse to accept that, apart from the express eternity clauses, we cannot impose any additional substantive limits to the amendment power, their jurisprudence

204. *R v. Ministry of Just.* [2014] UKSC 38 (recognizing human dignity as a foundational principle of the European Convention system); Although the principle is not explicitly mentioned in the HR Act of 1998, it is applied as a constitutional principle deriving from the other provisions of the statute which incorporates the ECHR.

205. Human Rights Act 1998, sch. 1 (U.K.).

opens a “path” towards the conclusion that some constitutional principles are more fundamental than others. This phenomenon is very evident in France, where the Constitutional Council, relying on the notion of “constitutional identity,” an extremely expanded principle in European constitutional law, decides to set aside the constitutional obligation of conformity to EU law in order to protect some rules that constitute the constitution’s core. In the US, although jurisprudence has not demonstrated such an interpretative technique, considerations of constitutional identity often appear at the doctrinal level. Contrary to the French position, UK constitutional law bases this hierarchy not on any notion of constitutional identity, but on the protection of the Human Rights Act. The adoption of this constitutional statute has radically changed the constitution, allowing the existence of a newly established model that cannot disappear even if the Parliament repeals the HR Act.

A. Constitutional Identity as the Basis of a “New” Supra-Constitutionality

As we saw in the first chapter, all the major doctrines of unconstitutional amendments have two “key concepts”—a hierarchy between constitutional values and constitutional identity.²⁰⁶ However, this concept becomes relatively problematic because it cannot be seen as unique or complete over time. It should be understood as a “composite construction” whose meaning is shaped by the interpretation of several actors.²⁰⁷ Nevertheless, the objective of its concretization is straightforward. It demonstrates that each Constitution has an essence that cannot be modified with one amendment, because even a reform of one element can affect the document’s identity.

In general, despite this conclusion, constitutional identity remains a very enigmatic notion. Indeed, the reason for its ambiguity can be explained by the fact that, unlike notions of national identity, such as Rousseau’s *caractère national*²⁰⁸ or Hegel’s *Volksgeist*,²⁰⁹ which were developed in early modernity, constitutional identity as a theory evolved in the twentieth century and has gained a legal concretization in the last few years in several European countries struggling in a context of rapid and aggressive European integration. Under the doctrines of Carl Schmitt²¹⁰ and Carl Bilfinger²¹¹ during the Weimar Republic, the above-mentioned identity was understood as the “identity of the constitution

206. Sabrina Ragone, *The Limits of Amendment Powers*, 12 VIENNA J. ON INT’L CONST. L. 345, 348 (2018).

207. *Id.* at 348.

208. ROUSSEAU, *supra* note 37, at 9-10.

209. See D. GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDISSE (1821), reprinted in PHILOSOPHISCHE BIBLIOTHEK 124 (Georg Lasson ed., 1911).

210. SCHMITT, *supra* note 57, at 125-30.

211. CARL BILFINGER, DER REICHSSPARKOMMISSAR (1928); Carl Bilfinger, *Verfassungsfrage und Staatsgerichtshof* [*The Constitutional Question and State Court*], 20 ZEITSCHRIFT FÜR POLITIK [POL. MAG.] 81 (1931).

itself and it was a purely normative concept.”²¹² In fact, this term was used to construct implied, material limits to formal amendments. Taking this background into consideration, it is not a coincidence that, regarding continental legal systems in the last decades, the doctrine’s normative concretization was placed in Germany.

Nevertheless, to understand this concretization in Europe, we must also focus on another factor: European Law. Specifically, Article 4, Paragraph 2 of the TEU states that the European Union shall “respect the Member States’ national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”²¹³ Hence, this provision prompted member states’ courts to interpret constitutional identity as a justification for noncompliance with EU law. *The most famous jurisprudence regarding this notion can be found in the German Constitutional Court. Since the Lisbon judgment,*²¹⁴ *the court has interpreted constitutional identity as the core of the constitution, not susceptible to any constitutional amendment, and capable of limiting European integration by excluding the application of European norms deemed incompatible with its core principles.*

The German constitutional judges, therefore, besides their very expansive jurisprudence concerning the relationships between the EU and national constitutional order based on the protection of human rights,²¹⁵ henceforth have an additional tool to protect the Basic Law’s essence. This allows them to control the conformity of national laws transposing EU norms with constitutional identity principles, such as human dignity, which are included in the above-mentioned “eternity clause” of Article 79, Section 3.²¹⁶ Hence, the constitutional court can expand its jurisprudence regarding the limits of the transfer of state power to European institutions, even beyond human rights, including democratic considerations such as the people’s ability to influence decisions through parliamentary representation at the European level.²¹⁷

This approach can be considered as a “common heritage” of European countries’ constitutional orders, as several courts have used the interpretative

212. Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L.J. 1595, 1597-98 (2017).

213. Consolidated Version of the Treaty on European Union art. 4, ¶ 2, Oct. 26, 2012, 2012 O.J. (C 326/18)13, 17 (EU) [hereinafter TEU].

214. BVerfG, 2 BvE 2/08, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (Ger.); BVerfG, 2 BvR 2735/14 Dec. 15, 2015 (Ger.); KRISZTA KOVÁCS, *THE JURISPRUDENCE OF PARTICULARISM: NATIONAL IDENTITY CLAIMS IN CENTRAL EUROPE* 39 (Kriszta Kovács ed., 2023).

215. BVERFGE, 2 BvL 52/71, May 29, 1974, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1974/ls19740529_2bv1005271en.html; see also BVerfG, 2 BvR 197/83, Oct. 22, 1986, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1986/10/rs19861022_2bvr019783en.html (Ger.).

216. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Dec. 15, 2015, 140 BVerfGE 317 (Identity Control), ¶ 41.

217. BverfG, 2 BvE 2/08, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (Ger.).

approach of constitutional identity.²¹⁸ France, as we will see, has followed this “path,” as the Constitutional Council’s case law demonstrates the development of an interpretation similar to the German one to address the problem of conciliation between EU law and national constitutional principles. In fact, under Article 88-1 of the French Constitution, the transposition of EU secondary legislation, and especially directives, constitutes a constitutional requirement.²¹⁹ Based on this provision, the *Conseil constitutionnel* has, since its decision of 10 June 2004, declined to exercise judicial review of a transposition statute.²²⁰ In the context of its interpretation, this provision establishes a principle of “constitutional immunity” of EU law, as well as a constitutional obligation to transpose secondary European legislation into the French legal order.²²¹

However, as we will see, this immunity is not absolute. In 2006, the French constitutional judges nuanced their above-mentioned position by deciding that this transposition obligation has a specific limit, the “rules and principles of constitutional identity.”²²² Thus, although, in principle, the Council must abstain from controlling the constitutionality of a transposition law, it recognized that “the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto.”²²³ So, plaintiffs, in the context of an *a priori* or an *a posteriori* procedure of judicial review of statutes, can only contest a statute implementing an EU directive by invoking that this norm violates a principle of France’s constitutional identity. This solution was further expanded by the Supreme Administrative Court, the Council of State (*Conseil d’Etat*), in administrative rules (*règlements*) implementing a directive.²²⁴ Specifically, plaintiffs may contest the administrative decision as violating a right of France’s

218. Magyarország Alkotmánybíróság (AK) [Constitutional Court of Hungary] Nov. 30, 2016, Decision No. 22/2016 (XII. 5.), para. 65-66 (Hung.); Trybunał Konstytucyjny [Constitutional Tribunal of Poland] Nov. 24, 2010, Ref. No. K 32/09, at 23 (Pol.); see also Corte Cost., Dec. 18, 1973, No. 183 (Frontini v. Ministero delle Finanze), Giur. Cost. 1973, 2401 (It.). The European Court of Justice decides in the other sense affirming the supremacy of EU law over national law, including constitutional law, in case of conflict. See Case 283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (requiring national courts of last instance to refer questions of EU law under Article 267, and allowing them to refuse only if the answer is obvious or already settled); Case C-416/17, Commission v. France, ECLI:EU:C:2018:811 (regarding a condemnation of France for not referring to the EU Court of Justice); Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 & C-840/19, Euro Box Promotion, ECLI:EU:C:2021:1034 (providing that national courts should refuse to apply constitutional case law in case it conflicts with EU law).

219. 1958 CONST. art. 11 (“The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.”); see *Conseil constitutionnel* [CC], decision No. 2004-496DC, June 10, 2004, §7, Rec. 101 (Fr.).

220. *Conseil constitutionnel* [CC], decision No. 2004-496DC, June 10, 2004, Rec. 101 (Fr.).

221. *Id.* §7.

222. *Conseil constitutionnel* [CC], decision No. 2006-540DC, July 26, 2006, Rec. 88 (Fr.).

223. *Id.* ¶ 19.

224. CE Ass., Feb. 8, 2007, 287110, Rec. Lebon 55.

constitutional identity, whereas the judges shall verify if the same right is protected in the EU legal system by an “equivalent principle” by sending an interlocutory question to the European Court of Justice. In the absence of such a provision in the European legal corpus, the Court can hear the case and answer the constitutional identity question.²²⁵ Thus, in principle, as the recent *Conseil d’Etat* case regarding the application of EU data protection standards and considered as a French dialogical response to the famous decision of the German Federal Constitutional Court of 5 May 2020, demonstrates, when the judges have to conciliate a European requirement, like data protection, with a national constitutional principle like national security, the former has to be interpreted in order to assure the major possible protection of the latter.²²⁶

This evolution, though, raises another cardinal question. In fact, the notion of “inherent principle to the French constitutional identity” is significantly vague and general. As with the supra-constitutional concept, which can have multiple meanings, especially influenced by political and moral considerations, the above-mentioned principles can be interpreted in several ways by French lawyers.²²⁷ Nevertheless, the situation here is a little clearer because the French constitutional judges have taken the first steps toward the legal concretization of the notion. Specifically, since 2018, after a period of silence regarding the principles’ meaning, the notion has been placed in a process of content construction.²²⁸

Hence, its latest jurisprudence offers a negative and positive definition of constitutional identity norms.²²⁹ In a decision rendered on July 26, 2018, the Constitutional council started with the negative approach by refusing to qualify the principle of equality before the law as being part of the French constitutional identity.²³⁰ The clearest concretization, though, was made in the famous recent decision *Air France*, in which the Council combines both a positive and negative approach of definition. Regarding the negative aspect, the judges decided that “the right to security, the principle of individual responsibility, and equality before public burdens, which are protected under European Union Law, do not constitute rules or principles that are inherent to French constitutional

225. *Id.*

226. CE Ass., Apr. 21, 2021, 393099.

227. See Édouard Dubut, *Les règles ou principes inhérents à l’identité constitutionnelle de la France : une supra-constitutionnalité?* [The rules or principles inherent in the constitutional identity of France: a supra-constitutionality], 83 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [French Rev. Const. L.] 451, 461 (2010).

228. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-750/751QPC, Dec. 7, 2018 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-768DC, July 26, 2018 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018,2018-745QPC, Nov. 23, 2018; Anne-Charlène Bezzina, *Le Conseil constitutionnel au cœur du “système”*, 130 LES PETITES AFFICHES 24, 24-27 (2020).

229. DENIS BARANGER, *LA CONSTITUTION: SOURCES ET INTERPRÉTATIONS* 221 (2022).

230. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-768DC, July 26, 2018, J.O. 0174, para. 38 (Fr.).

identity.”²³¹ As for the positive aspect, it was recognized that the prohibition on delegating administrative police powers to private persons, based on Article 12 of the Declaration of the Rights of Man and of the Citizen of 1789, is, by contrast, part of the constitutional identity.²³² Therefore, the latest position demonstrates a clear step towards the submission of EU law to constitutional law, as well as a positive legal basis for the development and evolution of the constitution’s core.

This evolution, effected through judicial interpretation, can lead us into the field of supra-constitutional law. Do the “rules or principles inherent to the constitutional identity of France” constitute a “new supra-constitutionality”?²³³ The answer to that question will come through the development of constitutional jurisprudence. It is not wrong to admit, though, the identification of the basic premises of an implied supra-constitutionality. We have a clear hierarchy between constitutional requirement: the application of EU law on the one side and some principles constituting the constitution’s essence on the other. Moreover, the fact that the notion of constitutional identity is judicially construed reminds us of the Indian *Basic Structure doctrine*.²³⁴ Nevertheless, it would be wrong to qualify the position of the French *Conseil constitutionnel* as analogous to India’s Supreme Court. In fact, the question of constitutional identity has a very limited scope: the conflicts between EU law and the French Constitution, whereas the characterization of a principle as “inherent to the constitutional identity” depends on an examination of the equivalence between French and EU principles. However, even if constitutional identity is currently a limited-scope concept, it still places a hierarchy on the structure of the constitution, which can be judicially evolved in the future towards the recognition of a real Constitution’s essence, like in the case of Germany.

Nevertheless, taking into consideration that the constitutional identity concept is limited to European countries as a judicial tool to regulate the relations between EU law and state constitutions, we may ask ourselves whether considerations of this concept can be found in non-European constitutional orders, like in the case of the US. Surprisingly, this notion is not strange to the American side of the Atlantic, at least in a doctrinal context.²³⁵ As an illustration, US constitutional lawyer Michel Rosenfeld claims that a functioning constitutional order requires a constitutional identity, whereas “all constitutions depend on the elaboration of a constitutional identity that is distinct from national identity and all other relevant pre-constitutional and extraconstitutional

231. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2021-940QPC, Oct. 15, 2021, para. 14 (Fr.).

232. *Id.* para. 15.

233. See Dubut, *supra* note 227, at 451-82.

234. See Jürgen Bast, *Don’t Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court’s Ultra Vires Review*, 15 GERMAN L. J. 167, 168 (2014).

235. Monica Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L.J. 1595, 1601 (2017).

identities.”²³⁶ According to him, it reflects a reconciliation process between the different identities, conflicts, and tensions within a state or a community. It is important to pinpoint here a very clear influence of Carl Schmitt’s notion of Constitution, in which the fundamental law is a result of “dilatory compromises.”²³⁷ Moreover, he adds that if we look to the Constitution, we can identify the American constitutional identity in the Preamble’s phrase “We the People,” which expresses the fundamental principle that all people are equal.²³⁸

In addition to Rosenfeld, there are other constitutional law scholars who have focused on constitutional identity. Specifically, Gary Jeffrey Jacobsohn uses constitutional identity as a tool for analyzing constitutional development in a context of judicial interpretation.²³⁹ It is a concept placed in a context of constant mutation and development, not only by the judiciary, but also by the political process itself.²⁴⁰ The previous definitions, though, should drive us to a thorough examination of the elements that compose the identity. In fact, some scholars after considering the specificity of the American constitutional order, have concluded that there are some rights considered as unamendable because of their special character that US constitutional law attributes to them.²⁴¹

These considerations can be definitely part of the *supra-constitutionality doctrine* as they present the Constitution as a hierarchical set of values.²⁴² Thus, John Rawls claims that First Amendment protections are “entrenched in the sense of being validated by long historical practice.”²⁴³ John Rawls also says, “[t]hey 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 by the beginning.”²⁴⁴ Influenced by this thesis, Samuel Freedman accepts that the First Amendment freedoms are so fundamental that their suppression would be a “constitutional suicide.”²⁴⁵ Other scholars focus on different rights, like the right to equality. Stephan Macedo, for instance, suggests that an amendment denying African Americans civil and political rights would be unconstitutional. He supports his position by the fact that there are some rights and freedoms that are so

236. MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY* 10 (Routledge eds., 2010).

237. SCHMITT, *supra* note 57, at 85.

238. Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY* 3, 6 (Michel Rosenfeld ed., 1994).

239. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 7 (Harv. U. Press, 1st ed. 2010).

240. *Id.*

241. See Roznai, *supra* note 89, at 711.

242. Walter Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 756-57 (1980); see also Walter Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 12-14 (1987).

243. JOHN RAWLS, *POLITICAL LIBERALISM* 238-39 (Colum. U. Press, 1st ed. 1993).

244. *Id.*

245. Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI. KENT. L. REV. 619, 663 (1994).

fundamental in a process of self-government that modifying them would be considered more as "revolutionize" than "amend."²⁴⁶

All these positions demonstrate that, at least at the doctrinal level, there is a hierarchy of constitutional values that justifies the unamendability of certain principles. However, are these statements reflected in constitutional law as shaped by the Supreme Court? The answer is no. The American constitutional judges have never rendered a decision qualifying the above-mentioned rights as unamendable.²⁴⁷ Nevertheless, we can find another concept in case law, the concept of "fundamentality" that establishes a sort of hierarchy inside the Constitution.²⁴⁸ In fact, fundamentality is an evaluative technique of judicial interpretation that qualifies a norm as "more important" than other norms.²⁴⁹ The "fundamental" norm can be characterized as a "super-source" compared to other norms, even if both norms are formally on the same level.²⁵⁰

This concept, which has been significantly developed and theorized in Anglo-American and German literature, as the theories of Ronald Dworkin²⁵¹ and Radbruch demonstrate,²⁵² is readily identifiable in the Supreme Court's jurisprudence. Specifically, in U.S. constitutional law, we may identify a jurisprudential doctrine of fundamentality if we focus on the transition from a procedural approach of due process to a substantive one concerning the interpretation of the Fourteenth Amendment.²⁵³ This doctrine which focused on providing an extended protection of economic rights from the *Lochner* era till the New Deal,²⁵⁴ also had a second wave focused more on the protection of individual liberties than property rights.²⁵⁵ The most prominent example is *Roe v. Wade*²⁵⁶ in which the Supreme Court recognized the constitutional right of abortion by taking some short of distance from a strict interpretation of the text and connecting it with the constitutional right of privacy.

This technique, which combines a written normative source with a "non-written constitution," captures the essence of fundamentality, since these rights are perceived as inherent to the idea of liberty and expressly recognized in the due process clause. However, as we can notice, the objective of the fundamental

246. STEPHEN MACEDO, *LIBERAL VIRTUE: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 183 (1990).

247. Jacobsohn, *supra* note 20, at 461.

248. BARANGER, *supra* note 229, at 225.

249. *See id.* at 225-43.

250. *Id.* at 225.

251. RONALD DWORKIN, *LAW'S EMPIRE* 151-75 (Harv. U. Press, 1st ed. 1986).

252. *See* Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 26 OXFORD J. LEGAL STUD. 1, 1-11 (1946).

253. BARANGER, *supra* note 229 at 228-29.

254. *Lochner v. New York*, 198 U.S. 45 (1905) (adopting an approach of "fundamentality" of economic rights through the creation of the doctrine of "substantive due process").

255. *See* *Whitney v. California*, 274 U.S. 357 (1927) (accepting the fundamental character of freedom of speech guaranteed by the First Amendment, even though it does not constitute an absolute right).

256. 410 U.S. 113 (1973).

concept does not consist of providing an absolute value for these rights or principles. The right to abortion was not absolute and currently has even been federally eliminated by the Supreme Court.²⁵⁷ Fundamentality is not supra-constitutionality. They have just some similarities in terms of the influence that moral values play on judicial interpretation, especially when judges recognize a particular significance to a constitutional norm. Fundamental rights, though, can be amended.

Nevertheless, the above-mentioned references demonstrate that even if supra-constitutionality has been clearly rejected by positive U.S. law, positions of unamendability based on moral values or natural law considerations can be easily found at a doctrinal level. In addition, the U.S. Supreme Court has already used interpretative techniques, based on similar considerations, in order to qualify some rights as fundamental, attributing to them a particular significance. This background shows us that inside the Constitution there is a hierarchy that has been implicitly recognized by the constitutional judges. However, hierarchy is not synonymous with supra-constitutionality or unamendability in general. It can be, though, the most important condition for the recognition of this implied unamendability. If judges recognize a hierarchy, when the social or institutional situation requires it, they can transform this hierarchy into supra-constitutionality. Hence, concerning the French and the U.S. system, we can only wait to see if these considerations of hierarchy can turn some fundamental constitutional principles into unamendable. Let's see the U.K. system, which renders even more difficult any recognition of supra-constitutional principles.

B. A New Human Rights Model as the Premise of Unamendability in the UK

As we have seen in the first part, the major principle in the UK constitutional system is the principle of parliamentary sovereignty, which forbids any judicial control of Acts of Parliament. This recognition of the Parliament as the "supreme lawmaker" is arguably founded on the idea that law is not a substitute of politics.²⁵⁸ The main idea is the fact that human rights, but also the broader constitutional issues, cannot be protected beyond political process. They have to be deliberated through democratically elected institutions.²⁵⁹ This justifies the position of the Parliament as the holder of the supreme law authority.²⁶⁰ Nevertheless, the above-mentioned constitutional transformation through the adoption of several constitutional statutes can confirm that Parliamentary

257. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

258. J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 16 (1979).

259. Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L J. CONST. L. 86, 92 (2011).

260. Geertjes & Uzman, *Conventions of Unamendability: Covert Constitutional Unamendability in (Two) Politically Enforced Constitutions*, in AN UNAMENDABLE CONSTITUTION?, *supra* note 4, at 89, 101.

Sovereignty is no longer absolute, as the courts have obtained an important role, illustrating a judicialization of the U.K. constitutional structure.²⁶¹

This change was even recognized by the Courts themselves. *In R (Jackson) v. Attorney General*, Lord Hope states that “Parliamentary sovereignty is no longer, if it ever was, absolute . . . Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament . . . is being qualified . . . The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”²⁶² In this case, the House of Lords had even accepted the control of the procedural validity of a statute, the Hunting Act 2004, demonstrating that constitutionality is not just a question of political interpretation.²⁶³ Hence, even if the solution at *Jackson* is an exceptional example, we can affirm that judges have a word to say.

This judicial role, therefore, is a basic condition for the development of a supra-constitutionality doctrine. It is necessary to add that, in order to verify the potential premises for the doctrine’s evolution, we have to focus on the UK human rights protection system, as fundamental rights protection constitutes, most of the time, the basic objective of unamendability principles. Indeed, the UK’s human rights system is largely shaped by the Human Rights Act of 1998. That Act, which incorporated most of the rights found in the European Convention on Human Rights, allowed courts to evaluate both legislative and administrative action against those rights. Before that statute, the protection of these rights depended on Parliament, and it was sometimes perceived as inefficient at protecting individual rights against the security state, leading to several condemnations of the UK by the European Court of Human Rights. That fact led the Labour Government to introduce the HRA.

The HRA brought a radical revolution in the UK’s public law, not only because it empowers judges to control acts of government agencies and statutes against the ECHR’s rights, but also because it placed the protection of these rights at the center of the constitutional context. However, to understand this phenomenon, we have to refer to some important pieces of the Act’s structure.²⁶⁴ Specifically, Article 1 of the HRA defines Convention’s rights as Articles 2 to 12 and 14 of the ECHR,²⁶⁵ excluding Article 13, whereas Article 2 provides that English courts should take into consideration the ECHR’s jurisprudence without being bound by it.²⁶⁶ Section 3(1) provides that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights,”²⁶⁷ and section 3(2) adds a nuance to that by specifying that this provision “does not affect the validity,

261. *Id.* at 102.

262. *R (Jackson) v. Att’y Gen.* [2005] UKHL 56 [104], [107] (appeal taken from Eng.).

263. *Id.*

264. See STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 156 (2013).

265. Human Rights Act 1998, c.42, §1 (U.K.).

266. *Id.* §2.

267. *Id.* § 3(1).

continuing operation or enforcement of any incompatible primary legislation.”²⁶⁸ Another important mechanism is found in section 4, which empowers courts to make a declaration of incompatibility if a statutory provision does not conform to the ECHR principles,²⁶⁹ by also specifying in paragraph 6 that this declaration does not have any effect on the validity or continuing operation of the provision, being considered as “not binding.”²⁷⁰

Furthermore, section 10 gives authority to the relevant minister to amend legislation subject to a declaration of incompatibility by a “fast-track” remedial order as an alternative to the ordinary legislative process.²⁷¹ Section 6, an important provision, especially in administrative law, makes it unlawful for all public authorities, excluding the Parliament, to act incompatibly with the Convention’s right, unless they have express authorization from primary legislation.²⁷² It is essential to outline here that this prohibition applies also to the devolved institutions, like the Scottish Parliament and the Northern Ireland Assembly,²⁷³ which are considered as public authorities under section 6, also empowering the courts to strike down decisions of these Houses judged as violating the Convention’s content.²⁷⁴ Finally, the Act in Section 19 requires the responsible minister in charge of a bill to make a statement before second reading to the effect that, in his own view, the bill is compatible with the Convention rights.²⁷⁵

As we can notice from the above-mentioned description, the HRA introduces a new form of constitutional rights review within a framework that reconciles a mechanism of human rights protection with the fundamental principle of parliamentary sovereignty. The enactment of this act creates a constitutional revolution. Stephan Gardbaum, considering this evolution in the UK as well as in other similar legal systems strongly influenced by UK public law, characterized this new context as the “New Commonwealth model.”²⁷⁶ In fact, the *New Commonwealth model* represents a third path between legal constitutionalism, characterizing systems like the US with a strong judicial review of statutes, and political constitutionalism, characterizing traditional Commonwealth systems marked by the principle of Parliamentary Sovereignty, excluding any potential constitutional control on statutes. Countries falling into this new category include the UK, Australia, New Zealand, and Canada. Despite their potential constitutional differences, their constitutional evolution shares two common characteristics concerning the protection of individual rights: a

268. *Id.* § 3(2)(b).

269. *Id.* § 4(2).

270. *Id.* § 4(6).

271. *Id.* § 10.

272. *Id.* § 6(1)–(3).

273. See *Scotland Act 1998*, c. 46, § 29(1), (2)(d) (U.K.); *Northern Ireland Act 1998*, c. 47, § 6(1), (2)(c).

274. Human Rights Act 1998, c.42, §§ 6(1)–(3) (U.K.)

275. *Id.* § 19(1).

276. GARDBAUM, *supra* note 264.

mandatory pre-enactment political rights review and a weak-form judicial review.²⁷⁷ For instance, section 33 of the Canadian Charter combines these two aspects by granting the judiciary power to invalidate conflicting statutes, but with a formal legislative final word exercisable by an ordinary majority vote.²⁷⁸

Let's return to England and its human rights judicial control mechanism. We may acknowledge that a reading of sections 3 and 4 of the HRA transforms courts into genuine constitutional judges to ensure the application of the ECHR's content. Based on the "interpretative obligation" under section 3, considered "very strong and far-reaching,"²⁷⁹ courts have at times attempted to develop different techniques to promote a statutory interpretation compliant with the Convention.²⁸⁰ On occasions, the courts have a statute as having implied terms (*read in*) in order to construct it as valid under the Act. One example of that approach can be found in the extensive interpretation of the Crime (Sentences) Act 1997 by the House of Lords.²⁸¹ The other approach is to read the statute in a very restrictive way (*read down*), as the then-supreme court, the House of Lords, did regarding the Road Traffic Act 1988 in 2000.²⁸² These two interpretative techniques were used with the objective of protecting the law from being qualified as violating the Convention.²⁸³

Judges also retain the power to declare a statute incompatible with the HRA and, by extension, the Convention's rights.²⁸⁴ It is important to note here that a declaration of incompatibility is not a "real" judicial review mechanism because Parliament always retains the final word.²⁸⁵ Parliamentary sovereignty requires that the political branch always prevails over the judicial one in terms of constitutional interpretation.²⁸⁶ Thus, we may question the future of cases in which courts have made a declaration of incompatibility. As Stephen Gardbaum points out, most of these declarations of incompatibility have been resolved either by Section 10 remedial orders, legislation enacted at the time of the declaration, or subsequent primary legislation.²⁸⁷ Nevertheless, as the *Belmarsh*

277. *Id.* at 25.

278. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, § 33(3)-(4), 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

279. Ghaidan v. Godin-Mendoza [2004] UKHL 30, [2004] AC (HL) 557 [30] (on appeal from Eng. & Wales) (U.K.).

280. See Alison L. Young, *Judicial Sovereignty and the Human Rights Act 1998*, 61 CAMBRIDGE L.J. 53, 61 (2002); Vanessa Barbé, *L'interprétation neutralisante, substitut de la déclaration d'inconstitutionnalité des lois contraires aux droits et libertés pour les juges britanniques*, 133 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [R.F.D.C.] 53, 64-66 (2023).

281. R v. Offen [2000] EWCA (Crim) 96.

282. Brown v. Scott [2000] UKPC D3 (appeal taken from Scot.).

283. Barbé, *supra* note 280, at 64-66.

284. Human Rights Act 1998, c.42, §4 (U.K.).

285. *Id.* § 4(6).

286. See Alexander Latham-Gambi, *Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?*, 40 OXFORD J. LEGAL STUD. 737, 738 (2020).

287. GARDBAUM, *supra* note 264, at 175.

case illustrates,²⁸⁸ there are instances in which, even though judges have found a very clear violation of ECHR's rights, the political institutions deny correcting the incompatibility.²⁸⁹ Almost all these cases concern the sensible issue of the political rights of prisoners, in which Parliament is entirely reluctant to correct the unconformity as the European Court requires.²⁹⁰

Thus, the previous considerations obviously raise the question of whether this new model is capable of establishing an implied doctrine of supra-constitutionality. The answer will be probably not. There is no unamendability requirement in the HRA. Even if this Act is considered a constitutional statute and the rights incorporated therein have the advantage of special political and judicial protection, we cannot talk about supra-constitutionality. However, we do have a particular constitutional hierarchy since the new model places special rigidity on their modification. Hierarchy is a *sine qua non* condition for an implied supra-constitutionality but, unlike in France or the US, in the UK, it cannot establish it since we have clear examples of non-respect of these rights after judicial declarations of incompatibility.

In addition to that fact, the HRA itself had been placed in a process of repeal by the former conservative government.²⁹¹ Specifically, judicial protection of human rights has been coming under attack for several years due to ongoing political dissatisfaction with European Court of Human Rights case law, especially regarding prisoners' voting rights.²⁹² Moreover, the fight against terrorism and the effects of immigration have created important tensions between several governments and the courts.²⁹³ It was over fifteen years ago, in 2009, when the conservative Prime Minister, David Cameron, first indicated his intent to eliminate the Human Rights Act.²⁹⁴ The same reluctance exists even today since the last conservative Government attempted to pass a new Bill of

288. *A v. Sec'y of State for the Home Dep't* [2004] UKHL 56 (on appeal from Eng. & Wales).

289. *Chester v. Secretary of State for Justice* [2013] UKSC 63; *see also* Gregory Davis & Robert Jones, *Prisoner Rights: Time for a Rethink?*, in *THE HOWARD JOURNAL OF CRIME AND JUSTICE* 1, 1-5 (2025).

290. *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. 187; *Scoppola v. Italy (No. 3)*, App. No. 126/05, Eur. Ct. H.R. 23 (2012); *see* Alison L. Young, *Prisoner Voting: Human or Constitutional Right?*, U.K. CONST. L. ASSOC. (Sep. 27, 2013), <https://ukconstitutionallaw.org/2013/09/27/alison-l-young-prisoner-voting-human-or-constitutional-right/> [<https://perma.cc/9VB7-5X9J>].

291. Bill of Rights Bill 2022-23, HC Bill [117] (UK).

292. *See* Conner Gearty, *The Human Rights Act Comes of Age*, 2 EUR. HUM. RTS. L. REV. 117, 117-26 (2022); Steve Foster, *Should it Go or Should it Stay? The Coming of Age of the Human Rights Act 1998, or Time to Say Goodbye?*, 26 COVENTRY L. J. 23-39 (2021).

293. *See A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.).

294. David Cameron, Leader of the Conservative Party, Speech to the Conservative Party Conference (Oct. 8, 2009); *see also* Conservative Party, *Invitation to Join the Government of Britain*, 79 (2010).

Rights that would replace the HRA in order to limit the strong judicial role guaranteed by the previous mechanism.²⁹⁵

This evolution obviously raises questions about the features of human rights in the UK as well as the entire constitutional order. Can the rights derived from the ECHR, like the rights to life or dignity,²⁹⁶ be entirely suppressed, or must they be considered unamendable? As early as 2010, then President of the UK Supreme Court, Lord Philipps, indicated that the Human Rights Act “is here to stay.”²⁹⁷ But how can these rights be protected without a statute guaranteeing their respect? It is important to note at this point that declarations of human rights go against the English constitutional tradition. In this context, Dicey used to claim that declarations of rights are useless because fundamental rights are protected by the Parliament, which can frame governmental action.²⁹⁸ Nevertheless, even the Parliament cannot exercise an absolute power to suppress constitutional rights. Lord Chief Justice Coke stated in 1610 that when an Act of Parliament violates common law or reason, the common law will control the Act and render it void.²⁹⁹ If we take into account the power of the principle of Parliamentary sovereignty and the fact that individual rights are guaranteed by the Parliament, the previous situation has to be judged as very exceptional and applicable only in cases in which the statute violates one of the most fundamental rights.

Hence, even if the HRA is repealed, judges will be able to use the common law in order to protect the most fundamental rights. In the UK legal order, common law is considered a constitutional source.³⁰⁰ It is not incorrect to admit that judges can qualify some fundamental rights as unamendable. In fact, since the 2010s and the tendency of contestation of the HRA mechanism, judges have started to invoke common law as a source of fundamental rights.³⁰¹ In *Kennedy v. Charity Commission*, Lord Mance, writing for a narrow majority, outlined that, even if there is a tendency to analyze areas covered by the Convention solely in terms of the Convention rights, there are some areas in which “common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence.”³⁰² We can imagine, therefore, that if the HRA ceases to exist due to repeal by a future government,

295. See Mark Elliot, *Leaving Strasbourg? Understanding the British Human-Rights Debate*, 3 QUADERNI COSTITUZIONALI [CONST. NOTEBOOKS] 804 (2015) (It.).

296. See European Convention on Human Rights arts. 3, 8, Nov. 4, 1950, 213 U.N.T.S. 221.

297. Geertjes & Uzman, *supra* note 260, at 108.

298. See T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics and Revolution*, 113 L.Q. REV. 443 (1997).

299. *Bonham's Case* (1610) 77 Eng. Rep. 64; 8 Co. Rep. 114 (U.K.).

300. DICEY, *supra* note 177.

301. See T.R.S. Allan, *Constitutionalism at Common Law: The Rule of Law and Judicial Review*, 82 CAMBRIDGE L. J. 236 (2023).

302. See *Osborn v. Parole Board* [2013] UKSC 61, [2014] AC 1115 (appeal taken from Eng. & Wales); *Kennedy v. Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808 (appeal taken from Eng. & Wales); *R v. Att'y Gen.* [2015] UKSC 21, [2015] AC 1787 (appeal taken from Eng. & Wales).

“the common-law constitutional landscape that is left behind may be remarkably similar to the situation that has obtained during the era of the HRA.”³⁰³

It is not bizarre that an important part of legal scholarship, especially represented by Sir John Laws and Trevor Robert Seward Allen, supports the idea that fundamental rights are inherently protected by common law. The former argues that every citizen should be granted the rights protected by the European Convention because these rights constitute fundamental principles found in every democratic society.³⁰⁴ The latter asserts that a bill of rights protecting these European rights would be useless, not only because these liberties already exist under common law, but also because the declaration would be interpreted under the same common law principles.³⁰⁵ Therefore, the status brought by the “New Commonwealth model” cannot be reversed. It is important to add here that all these positions bring considerations of implied supra-constitutionality. The hierarchy imposed by the HRA is also found in the “judge made constitution,” and there are some principles, like the right to human dignity, that would be perceived as unamendable by the judges.

Furthermore, Geertjes and Uzman add another conceptual basis for the supra-constitutionality doctrine in the UK. Specifically, given that the UK constitution is a politically enforced one, constitutional conventions can serve as another factor that renders some fundamental principles unamendable.³⁰⁶ These “conventions, understanding, habits or practices” regulating the conduct of several members of the sovereign power and completing the rules of the constitution are determined by the application of the *Jennings test*, examining the precedents of these practices if political actors perceived them as mandatory, and if there is a “reason for the rule.”³⁰⁷ The whole parliamentary system, based on the political responsibility of the Government to the Parliament, was created from these practices. We can understand, hence, their crucial role in the UK constitutional system.

The argument of previous scholars is that, since the political constitution of England derives from the application of several constitutional conventions, these sources include the values of democracy, the rule of law, and the independence of the judiciary.³⁰⁸ These sometimes-conflicting principles can establish a set of unamendable principles. In the context of the English

303. Mark Elliott, *Common-Law constitutionalism and proportionality in the Supreme Court: Kennedy v. the Charity Commission*, PUB. L. FOR EVERYONE (Mar. 31, 2014), <http://publiclawforeveryone.com/2014/03/31/common-law-constitutionalism-and-proportionality-in-the-supreme-court-kennedy-v-the-charity-commission/> [<https://perma.cc/GC7A-DLT4>].

304. John Laws, *Is the High Court the Guardian of Fundamental Constitutional Rights?*, PUB. L. 59 (1993); John Laws, *Law and Democracy*, PUB. L. 72 (1995); John Laws, *The Limitations of Human Rights*, PUB. L. 254 (1998).

305. T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111 (Mar. 1985); T.R.S. Allan, *supra* note 298, at 443.

306. Geertjes & Uzman, *supra* note 260, at 112-13.

307. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 136 (3d ed. 1959).

308. Geertjes & Uzman, *supra* note 260, at 112-13.

institutional functioning, there is no Parliament that can abolish the “Principles of Democracy,” for instance.³⁰⁹ The fact that the UK Constitution cannot be found in a formal document makes it easier for us to assume that there can be an implied supra-constitutionalism in some of its sources, such as common law or constitutional conventions.

In conclusion, even Parliamentary Sovereignty cannot block considerations of unamendability. Indeed, the new model of human rights was a major step toward providing rigidity and hierarchy within the Constitution, demonstrating that some fundamental rights require special protection. Even if the sovereign Parliament is not constrained in abolishing these rights, the citizens will still be protected given the fact that fundamental rights also derive from common law principles and constitutional conventions. Even in our current era, in which the Parliament attempted to repeal, without any success, the Human Rights Act, fundamental principles will be guaranteed by the judicial system and political practices. This hierarchy between constitutional norms will continue to exist and, not only can common law recognize some fundamental human rights, like dignity, as unamendable at any time, but we can already perceive them as implicitly unamendable under the current *status quo*.

CONCLUSION

The doctrine of unconstitutional constitutional amendments, despite becoming a global trend, contains several oxymorons. One of the most important oxymorons is the fact that, although it was created as a concept in France and the US, countries with the first written Constitutions, the official constitutional position nowadays clearly denies recognizing the doctrine’s implied extension in order to overcome the explicit minimal unamendability principles, which have never been a subject of litigation. In the UK, the constitutional tradition based on the fundamental principle of Parliamentary Sovereignty has rendered this question entirely absent from constitutional litigation and scholarship.

Considering these positions, it is evident that we need to ask ourselves if these countries really need doctrines of implicit unamendability. With regards to the US, the difficulty of formally amending the Constitution under the procedures of Article V,³¹⁰ renders the need for the development of an

309. *Id.* at 113.

310. U.S. CONST. art. V (“The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.”).

unamendability doctrine nonexistent.³¹¹ Specifically, the above-mentioned provision, characterized by a particular constitutional rigidity, imposes very strict majority requirements, allowing us to affirm that, in the current era, it has been almost impossible to formally amend the Constitution. Thus, an important part of academic scholarship supports this idea. For instance, Jack Balkin observes that Article V places “almost insurmountable obstacles to constitutional revision,”³¹² while Sanford Levinson characterizes a formal amendment of the US Constitution as “functionally impossible.”³¹³ On the other hand, scholars, like Vicky Jackson, point to the constitutional history and past amendments, supporting that the practice has shown that it is possible to revise the Constitution, depending on the political circumstances.³¹⁴ However, these circumstances are marked by a “political polarization in the American society in general and specifically between the two dominant parties,” making it extremely difficult to form a majority to propose and then ratify any kind of constitutional change.³¹⁵

Hence, it is not wrong to admit that Article V is in decline and disuse.³¹⁶ For this reason, constitutional law scholarship is extremely focused on informal amendments, meaning amendments operated without any formal modification of the constitutional text through judicial or political interpretation.³¹⁷ As an illustration, Bruce Ackerman discusses “constitutional moments” to show that throughout American history, political leaders have transformed constitutional meaning without altering the constitutional text.³¹⁸ The New Deal and the civil rights revolution are both found in this context.

Regarding France, the reasons for this decline differ. Besides the dominance of positivist approaches on constitutional definition and interpretation, the genesis of a “constitutional justice” is a relatively new phenomenon, dating from the adoption of the 5th Republic’s Constitution in 1958. The constitutional

311. KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 157 (2009) (supporting that between 1789 and 2004, there have been 11,000 amendments introduced to Congress, and only thirty-three have been effectively approved); see Jonathan Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 242 (2016).

312. Jack M. Balkin, *Sanford Levinson’s Second Thoughts About Our Constitutional Faith*, 48 TULSA L. REV. 169, 171 (2012).

313. Sanford V. Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a “New Political Science,”* 89 B.U. L. REV. 409, 422 (2009).

314. Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT’L J. CONST. L. 575 (2015).

315. DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 246 (1996).

316. Albert, *Constitutional Disuse or Desuetude*, *supra* note 35, at 1046 (describing this phenomenon by pinpointing that from 1968 to 1991 there was only one formal amendment ratified and since 1992 one additional amendment).

317. See *Oregon v. Mitchell*, 400 U.S. 112, 202-03 (1970) (Harlan, J., concurring in part and dissenting in part); see also Marshfield, *supra* note 311, at 244-46.

318. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

spirit, marked by the ideas of Rousseau and considerations of national sovereignty, was reticent, even for the judicial control of simple statutes, as they represent the Nation's general will. However, the recent concept of constitutional identity used by constitutional judges since 2006 can be characterized as a "little supra-constitutionality," as it allows them to set aside the constitutional requirement of EU law implementation, to protect some French core principles. It is obvious, though, that constitutional identity does not constitute a general unamendability doctrine, given its very limited scope of application. If we consider the general conception of the *Conseil* regarding the nature of the amendment power, we may affirm that the constitutional judges themselves have refused any existence of a legitimate basis for using the hierarchical superiority of domestic principles to control formal constitutional amendments. The current state of law does not lead to the transformation of constitutional identity into a "basic structure" theory.

The above-mentioned French conceptual reticence for constitutional judicial review is a clear refusal in the UK legal order. In principle, Parliamentary sovereignty excludes any potential judicial review, even regarding simple statutes. Any constitutionalizing of statutes, as in the case of the new human rights model, must operate a conciliation between the Parliament's sovereignty and the fundamentality of the statutory content. Thus, a recognition of unamendable principles in such a system would be a clear alteration of its own structure.

Nevertheless, even in these systems, there is a continuing ongoing academic tendency to support unamendability doctrines. In this context, even Laurence Tribe, who calls for a reserved judiciary role with regard to constitutional amendments,³¹⁹ seems willing to embrace the idea that some "properly adopted formal amendments could themselves be deemed "unconstitutional" because of their radical departure from premises too deeply embedded to be repudiated without a full-blown revolution."³²⁰ We face this thesis because it is conceptually recognized that, even in countries where there is no implied doctrine of unamendability, there exists a core identity—an "essential identity of the constitutional order"³²¹—that cannot be modified without destroying the whole constitution.

It is at this point that we delve into the doctrine of supra-constitutionality, which justifies implied unamendability principles perceived as fundamental because they derive from considerations of moral values and natural law. To accept supra-constitutionality, we must first acknowledge that certain rights, such as the right to human dignity, considered the most fundamental right under the German Basic Law, or the principle that the State is the holder of sovereignty

319. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983).

320. LAURANCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 33-34 (2008).

321. Adrienne Stone, *Unconstitutional Constitutional Amendments: Between Contradiction and Necessity*, 12 VIENNA J. ON INT'L CONST. L. 357, 365-66 (2018).

with respect to public powers (*Staatsgewalt*)³²² are beyond elimination. The nature of these rights transcends potential objections against this doctrine, based on its subjectivity, the sovereignty of amendment powers, or the possibility that it may become a tool of political manipulation of the Constitution.

However, let us examine how this *supra-constitutionality* can be established. If we adopt the methodology of Yaniv Roznai, we must take into consideration two elements: a hierarchy of constitutional values, and constitutional identity.³²³ If we look at the constitutional orders examined in this study, these elements are present, and they are recognized by judges. In this context, the French *Conseil constitutionnel* uses the concept of “constitutional identity” to qualify some constitutional principles as superior to others because they have a particular place in the French system. In the U.S. case law, the Supreme Court has, on several occasions, imposed a hierarchy on constitutional principles by requiring that they receive special protection against government regulation, within the context of judicial review. Although such rights, such as free speech, are not considered formally superior to other constitutional provisions, they are *de facto* deemed substantially more important.

Even in the UK, where the constitutional system, in principle, excludes any idea of normative hierarchy, the recent constitutional transformation based on the establishment of a new system of human rights protection demonstrates a hierarchy of constitutional values. Specifically, it emphasizes that human rights are so fundamental that their protection justifies the framing of Parliament’s sovereignty. It is important to add here that this fundamentality will persist even if the Parliament decides to repeal this special human rights protection mechanism because common law is already poised to become the basis of this constitutional hierarchy. This “common law constitutional rights” approach necessitates significantly strong judicial activism. Nevertheless, judicial activism in constitutional interpretation is a constant tendency in UK law. As an illustration, in *Miller II*,³²⁴ a recent case concerning the decision of the Queen, following the advice of the Prime Minister, to prorogue Parliament, the Supreme Court of the United Kingdom—by acknowledging the legal enforcement of a constitutional convention—qualified the royal prerogative of prorogation as justiciable and unlawful under separation of powers considerations.³²⁵ Hence, “common law constitutionalism” as the basis of the English doctrine of unconstitutional amendments is a matter of interpretation. A very activist judiciary may adopt Coke’s approach, according to which common law prevails over statutes, while a less activist judiciary will utilize apply the traditional

322. Olivier Beaud, *Le conseil constitutionnel et ses approximations sur la souveraineté*, in *JUS POLITICUM* 143 (2018).

323. ROZNAI, *supra* note 9, at 144-50.

324. *Cherry v. Advoc. Gen. Scot.*, [2019] UKSC 41, [2020] AC 373 (appeal taken from Eng., Wales & Scot.).

325. See Mark Elliott, *Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context*, 16 *EUR. CONST. L. REV.* 625, 625-46 (2020).

constitutional approach under which statutes can always limit or repeal common law rights.

Constitutional hierarchy and identity are elements that compose the doctrine of supra-constitutionality. In these countries, these elements already exist. However, another fundamental element is missing: implied unamendability *per se*. Although constitutional judges recognize the above-mentioned hierarchy and take into consideration the constitution's special identity, they refuse to recognize any implied unamendability principles. In addition to that argument, there are some constitutions that already recognize the superiority of some of their provisions by providing special procedures for their amendment, but they still admit these provisions as susceptible to potential modification. A famous example of the above-mentioned argument is Canada. The Supreme Court of Canada took upon itself the issue regarding a potential separation of Québec. In its *Secession Reference*, the Court developed an interpretation going beyond the formal constitutional text to impose additional procedural limitations on the power of formal amendment, as applied to the subject of provincial secession.³²⁶ In fact, the Canadian constitutional judges supported the idea that provincial secession is possible under the Constitution, but that it has to be governed by particular, rigid procedural requirements. The amendment process must be based on a "duty to negotiate," and the reformers should respect "underlying constitutional principles," including federalism, democracy, constitutionalism, the rule of law, and respect for minority rights.³²⁷ These principles are not stated in the text of Canada's formal amendment rules, but the Court's constructive interpretation requires their respect for the amendment of such a particularly special matter. Two years after this reference, Parliament adopted the *Clarity Act* to incorporate these principles by adding procedural requirements and guiding any potential future exercise of the amendment power concerning the secession of a Province.³²⁸

We see, hence, that constitutional orders recognize a hierarchy between constitutional principles but without recognizing their unamendable character. Do we have *supra-constitutionality* here? The answer is probably not, because there is no recognition of unamendability. Supra-constitutionality entails and requires unamendability. Nevertheless, we can adopt a broader definition of supra-constitutionality, one not limited to unamendability but based on constitutional hierarchy and identity. Indeed, if these latter elements are recognized, we have the potential for the judicial establishment of implied unamendability principles. Constitutional judges already have the tools, and all they need are the most pertinent circumstances to exercise them. As Richard Albert claims, it is at this moment when a court becomes truly

326. Reference re Secession of Québec, [1998] 2 S.C.R. 217 (Can.).

327. *Id.*

328. An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26 (Can.).

“constitutional.”³²⁹ This moment prompts us to examine more closely what exactly supra-constitutionality means in these countries. Is it just a theoretical concept of unconstitutional amendments, or can it have a practical significance through notions like hierarchy, identity, and rigidity that already exist in their constitutions?

If we evaluate the current political and constitutional circumstances in the study’s three countries, we can conclude that there is no actual need for the Courts to push forward this hierarchy into implied unamendability. In the U.S., the rigidity of Article V combined with the present political situation, makes a formal constitutional amendment almost impossible, whereas in France, the need for constitutional judges to exercise special interpretative techniques influenced by supra-constitutionality is found primarily in cases of conflict between EU law and French constitutional principles. Nevertheless, in the event of a radical change in political circumstances threatening the existence of these principles, it is highly probable that judges will use the above-mentioned tools to protect them. It would be a barrier against “illiberal constitutionalism.”³³⁰ In such a context, the concretization in positive law of unamendability doctrines will be completely justified, as there is no democratic legitimacy issue that could overcome the fundamental need of protection of the constitution’s structural elements and the rule of law. This possibility may become a reality in the UK, where the HRA had unsuccessfully been placed in a process of repeal during the last period, as judges and scholars claim that ECHR’s fundamental rights are also reflected in common law, and potential dangers regarding their protection can lead to unamendability principles through common law methods. Therefore, the transformation of a hierarchy to a real supra-constitutionality, including unamendability, is only a matter of pertinent occurrences.

329. Richard Albert, *How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 MD. L. REV. 181, 183-86 (2017) (regarding the role of judges of defending constitutional democracy by controlling the amendment power).

330. We can define the concept of “illiberal constitutionalism” as a constitutional context in which pluralism and fundamental rights protection are menaced. See Michel Rosenfeld, *Illiberal constitutionalism: Viable Alternative or Nemesis of The Modern Constitutional Ideal?*, in COMPARATIVE CONSTITUTIONAL THEORY 23 (Gary Jakobson & Miguel Schor eds., 2d. ed. 2024).