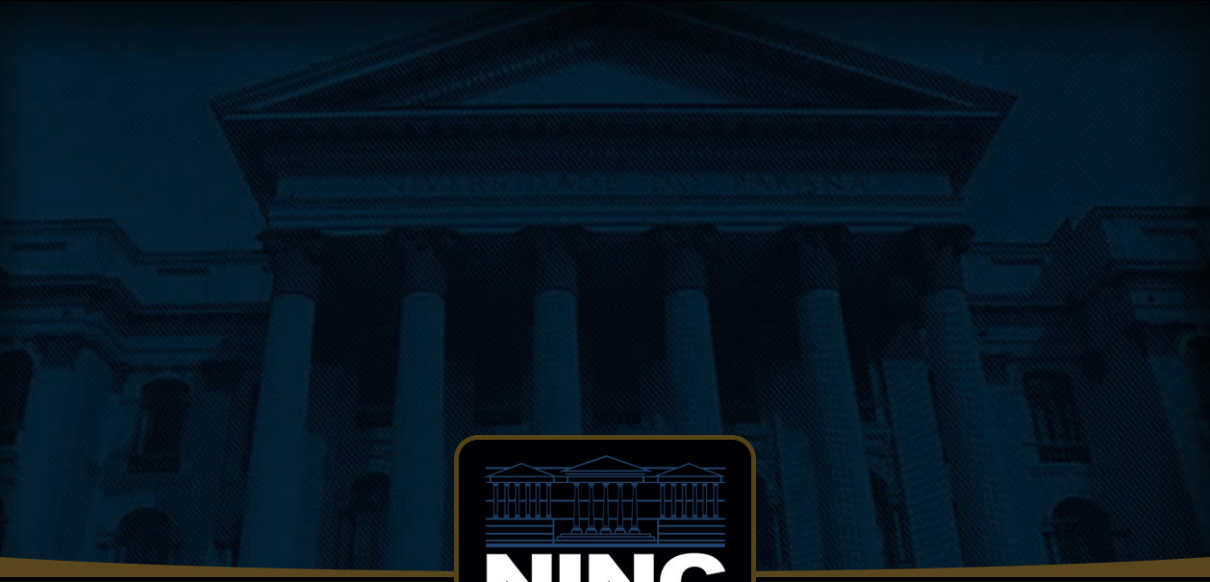

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The inconsistencies of the doctrine of unconstitutional constitutional amendments*

As inconsistências da doutrina das emendas constitucionais inconstitucionais

DIEGO PARDO-ÁLVAREZ [I, **]

[I] Adolfo-Ibáñez-University (Viña del Mar, Chile)
diego.pardo@uai.cl
https://orcid.org/0000-0002-5869-7133

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Abstract

This article critically examines Yaniv Roznai's influential doctrine of unconstitutional constitutional amendments (UCA), which aims to reconcile judicial review of constitutional amendments with democracy by grounding both amendment limits and judicial review in the people's constituent power. Through an analysis of Chile's experience with an imposed constitution and its subsequent democratic transformation through amendments, the article demonstrates two fundamental problems with Roznai's theory. First, the UCA doctrine proves inadequate for cases where amendment power serves to overcome an authoritarian past, as it cannot properly conceptualize amendment power's democratic enabling function. Second, the article reveals how Roznai's theoretical construction undermines its own foundations: his normative-ideal understanding of constituent power contradicts the political concept he claims to adopt, while

Resumo

Este artigo examina criticamente a influente doutrina das emendas constitucionais inconstitucionais (ECI) de Yaniv Roznai, que visa a reconciliar o controle judicial das emendas constitucionais com a democracia, fundamentando tanto os limites da reforma quanto o controle judicial no poder constituinte do povo. Através de uma análise da experiência chilena com uma constituição imposta e sua subsequente transformação democrática por meio de emendas, o artigo demonstra dois problemas fundamentais na teoria de Roznai. Primeiro, a doutrina das ECI mostra-se inadequada para casos em que o poder de emenda serve para superar um passado autoritário, pois não consegue conceituar adequadamente a função possibilitadora da democracia do poder de reforma. Segundo, o artigo revela como a construção teórica de Roznai mina seus próprios fundamentos: sua compreensão normativo-ideal do poder constituinte contradiz o conceito político que afirma adotar,

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** Professor of Constitutional Law at Adolfo Ibáñez University (Viña del Mar, Chile). Doctor of Law and Master's degree in Law, Georg-August-Universität Göttingen (Germany). Lawyer.

his theory of delegation neglects amendment power's enabling dimension and his defense of judicial review of implicit limits contradicts the very theory of constituent power it purports to protect. The article concludes that Roznai's attempt to immunize judicial review from the counter-majoritarian difficulty ultimately fails due to these internal contradictions.

Keywords: unconstitutional constitutional amendments; constituent power; judicial review of constitutional norms; popular sovereignty; granted constitution.

enquanto sua teoria da delegação negligencia a dimensão habilitadora do poder de emenda e sua defesa do controle judicial dos limites implícitos contradiz a própria teoria do poder constituinte que pretende proteger. O artigo conclui que a tentativa de Roznai de imunizar o controle judicial contra a dificuldade contramajoritária acaba fracassando devido a essas contradições internas.

Palavras-chave: *emendas constitucionais inconstitucionais; poder constituinte; controle judicial de normas constitucionais; soberania popular; constituição outorgada*

CONTENTS

1. INTRODUCTION: THE NEW THEORETICAL MOMENTUM OF THE DOCTRINE OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

The doctrine of unconstitutional constitutional amendments (UCA) has garnered significant scholarly attention over the past decade. A growing body of literature has accompanied its jurisprudential reception. Yaniv Roznai, a leading scholar in this field, considers it "one of the most successful migrating constitutional ideas".[1] The motivation behind this revived attention to judicial review of constitutional amendment powers appears to stem from concerns about authoritarian risk, abuse of constitutional amendment procedures, and the subsequent erosion of separation of powers. This renewed interest can be attributed to democracy's increasing authoritarian turn.

The possibility of declaring a constitutional amendment unconstitutional is, however, subject to the classic counter-majoritarian objection: unelected judges may become a judicial elite capable of imposing their final word over politically representative decisions.[2] The UCA doctrine is particularly vulnerable to this objection for two reasons. First, because constitutional amendment powers typically operate through qualified procedures of democratic will-formation that aim to enhance their democratic

[1] ROZNAI, Yaniv. Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea. **American Journal of Comparative Law**, v. 61, p. 657-720, 2013. p. 677-713.

[2] *Locus classicus*, BICKEL, Alexander M. **The Least Dangerous Branch**: The Supreme Court at the Bar of Politics. Indianapolis: Bobbs-Merrill, 1962.

credentials.[3] To judicially invalidate a constitutional amendment thus means interfering with a norm-creating democratic procedure that is considered especially representative and deliberative. Second, because the legitimacy of judicial review rests precisely on the ever-present possibility of amending the constitution where this power is grounded. Granting judges the ability to declare constitutional amendments unconstitutional effectively means giving them control over their own constitutional conditions of legitimacy.

Roznai's UCA doctrine, however, has achieved widespread recognition in constitutional theory because it purports to immunize judicial review of constitutional amendments against the counter-majoritarian objection.[4] In his argument, the democratic objection dissolves if both the limits on constitutional amendment and the constitutional court's authority to enforce them have been decided by and remain under the control of the *demos* itself.[5] Roznai's UCA doctrine thus promises to reconcile democracy with judicial review of constitutional amendments.

This article has two objectives. The first is to demonstrate that Roznai's doctrine is inadequate to justify judicial review of constitutional amendment powers in cases of imposed or granted constitutions. The second is to show, in light of the challenge posed by imposed or granted constitutions, that Roznai's attempt at immunization fails generally: the counter-majoritarian objection remains an obstacle that the UCA doctrine has yet to overcome. The second section will introduce the Chilean case to test Roznai's doctrine of unconstitutional constitutional amendments. The third section critically reconstructs Roznai's UCA doctrine in connection with its immediate theoretical antecedent: Carl Schmitt's constitutional theory.[6] The fourth section presents critical

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3 ARIAS CASTAÑO, Abel. Control de constitucionalidad de las reformas constitucionales. In: ALÁEZ CORRAL, Benito (ed.). **Reforma Constitucional y Defensa de la Democracia**. Madrid: Universidad de Oviedo – Centro de Estudios Políticos y Constitucionales, 2020. p. 519-547. p. 527.

4 See ALBERT, Richard; NAKASHIDZE, Malkhaz; OLCAY, Tarik; RIVAS, Pedro. La resistencia formalista a las reformas constitucionales inconstitucionales. **Díkaion**, v. 31, n. 1, p. 5-17, jan-jun. 2022. p. 15-17.

5 ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61. p. 39.

6 Schmitt is important for two reasons. First, because he is the primary source of inspiration for Roznai's theory. See ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 109-120; ARATO, Andrew. **The Adventures of the Constituent Power:** Beyond Revolutions?. Cambridge: Cambridge University Press, 2018. p. 405-411. Second, because he is one of the authors who has gained the greatest relevance in explaining the constitutional development in Chile following the 1973 *coup d'état*. On this matter, CRISTI, Renato. La Noción de Poder Constituyente en Carl Schmitt y la Genesis de la Constitución Chilena de 1980. **Revista Chilena de Derecho**, Santiago de Chile, v. 20, n. 2/3, p. 229-250, 1993; CRISTI, Renato. **El Pensamiento Político de Jaime Guzmán**: 2nd edition. Santiago de Chile: LOM, 2011; ATRIA, Fernando. Sobre la soberanía y lo político. **Derecho y Humanidades**, Santiago de Chile, 12, p. 47-93, 2006.

conclusions, ranging from the most modest to the most ambitious.[7] According to the modest critique, Roznai's UCA doctrine is inapplicable to cases where the exercise of constitutional amendment power serves to overcome an authoritarian past, as in Chile. The more ambitious critique holds that Roznai's UCA doctrine is internally inconsistent: its outcomes are incompatible with the constitutional theory concepts it invokes for support. Thus, Roznai's doctrine fails to deliver on its central promise: its internal inconsistencies undermine its viability as a theoretical immunization against the counter-majoritarian objection

2. THE CHILEAN GRANTED CONSTITUTION

The current Chilean constitution was imposed by the military in 1980. Its drafting took seven years, beginning after the *coup d'état* of September 11, 1973. In 1980, the dictatorship held a plebiscite –without electoral registers or any procedural guarantees– to validate the constitution drafted by Pinochet and civilian supporters of the military junta.[8] Strictly speaking, it did not come into full effect until 1990, once democracy was restored. The return to democracy was marked by Pinochet's call in 1988 for the Yes-No plebiscite to extend the regime for another eight years. His (to him) unexpected defeat led to the calling of elections in 1989 and the return to democracy with the government of Patricio Aylwin in March 1990.

The 1980 Constitution has been amended more than seventy times. Several of these amendments have been significant. Before the return to democracy, in 1989, fifty-one amendments to the original document imposed by the dictatorship were approved through an agreement between the regime and nearly all political parties.[9]

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[7] GARLICKI, Lech; GARLICKA-SOWERS, Zofia A. Unconstitutional Constitutional Amendments. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n. 3, p. 307-317, 2018; JACKSON, Vicki C. "Constituent Power" or Degrees of Legitimacy?. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n.3, p. 319-344, 2018; STONE, Adrienne. Unconstitutional Constitutional Amendments: Between Contradiction and Necessity. **Vienna Journal on International Constitutional Law**, Vienna v. 12, n. 3, p. 357-368, 2018; RAGONE, Sabrina. The Limits of Amendment Powers. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n. 3, p. 345-356, 2018. All presented some observations in a symposium dedicated to Roznai's work. His response is in ROZNAI, Yaniv. Constitutional Unamendability – Four Observations. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n. 3, p. 369-385, 2018.

[8] A chronicle in FUENTES, Claudio. **El Fraude**: Crónica sobre el Plebiscito de la Constitución de 1980. Santiago de Chile: Hueders, 2013. Regarding the political-constitutional meaning of 1980's plebiscite, see CRISTI, Renato. **El Pensamiento Político de Jaime Guzmán**: 2nd edition. Santiago de Chile: LOM, 2011. p. 119-123; ATRIA, Fernando. Nueva constitución y poder constituyente. In: BUSTAMANTE KUSCHEL, Gonzalo; SAZO, Diego (eds.). **Democracia y Poder Constituyente**. Santiago de Chile: Fondo de Cultura Económica, 2016. p. 325-366. p. 341-345; and CRISTI, Renato. Proceso constituyente originario. In: BUSTAMANTE KUSCHEL, Gonzalo; SAZO, Diego (eds.). **Democracia y Poder Constituyente**. Santiago de Chile: Fondo de Cultura Económica Chile, 2016. p. 305-324. P. 305-311.

[9] On these amendments, see HEISS, Claudia; NAVIA, Patricio. You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy. **Latin American Politics and Society**, v. 49, n. 3, p. 163-190, 2007. CRISTI, Renato. Proceso constituyente originario. In: BUSTAMANTE KUSCHEL, Gonzalo; SAZO, Diego (eds.). **Democracia y Poder Constituyente**. Santiago de Chile: Fondo de Cultura Económica Chile, 2016. p. 305-324.

Among other modifications, these amendments increased the number of parliamentary seats elected by universal suffrage, repealed Article 8 of the original Constitution that proscribed the Communist Party under a militant democracy framework, and modified the constitutional amendment procedure itself by eliminating the requirement of full congressional ratification –thus making the amendment process more flexible as early as 1988. In 2005, another substantial set of significant amendments was enacted with the explicit intention of replacing Pinochet's constitution with a new one. The 2005 amendments eliminated constitutional references to the binomial electoral system and to senators not elected by universal suffrage, reduced presidential powers regarding states of constitutional exception, and granted the President the authority to remove commanders-in-chief of the armed forces and security forces. The 2005 amendments may have entailed a change in constitutional identity –Pinochet's signature on the 1980 Constitution was in fact removed and replaced with that of then-President Ricardo Lagos.[10]

Between 2019 and 2023, several constitutional amendments were introduced. After a month of social protests, in November 2019, a constitutional replacement procedure –absent from the original text of the Chilean Political Constitution– was enacted. A second constitutional replacement process was enabled in January 2023, following the failure of the first attempt. This second amendment approved the new Article 154 of the Chilean Political Constitution, which institutionally limits constitutional replacement through certain unmodifiable aspects –fundamental principles such as the republic, democracy and popular sovereignty, the unitary character of the State, the social state, and the recognition of indigenous peoples; as well as other institutional features, such as certain autonomies (Central Bank and others), the bicameral system, and some states of constitutional exception. Through another constitutional amendment in 2022, the qualified majority required for constitutional amendments was reduced –from three-fifths (and two-thirds for some chapters) to four-sevenths of members of the Chamber of Deputies and Senate. In August 2022, the constitution was amended to modify the decision rule for a set of legislative matters –designated by the constitution as "constitutional organic laws"– from four-sevenths to an absolute majority of members of the Chamber of Deputies and Senate.

Chilean legal scholar Fernando Atria argued that the constitutional identity of the 1980 Constitution consisted of the binomial electoral system, the four-sevenths qualified majority for constitutional organic laws, the Constitutional Court's preventive review, and the two-thirds and three-fifths qualified majorities required for

p. 313-320; ATRIA, Fernando. Nueva constitución y poder constituyente. In: BUSTAMANTE KUSCHEL, Gonzalo; SAZO, Diego (eds.). **Democracia y Poder Constituyente**. Santiago de Chile: Fondo de Cultura Económica, 2016. p. 325-366. p. 356-366

[10] See ATRIA, Fernando. **La Constitución Tramposa**. Santiago de Chile: LOM, 2013. p. 15-29

constitutional amendment.[11] All of these institutional features, except for the Constitutional Court's preventive review,[12] have been modified through the regular constitutional amendment procedure. If Atria's characterization is considered accurate, it must be concluded that the constitutional identity of the 1980 Constitution may have been replaced by a new identity through successive constitutional amendments –culminating in 2023 with the amendment of the amendment procedure itself.[13]

The Chilean Constitution grants jurisdiction to the Constitutional Court to "resolve constitutionality questions that arise during the processing of constitutional amendment bills" (Article 93.3 of the Chilean Political Constitution).[14] If Roznai's UCA doctrine were accepted in Chile, several if not all of these constitutional amendments could have been declared unconstitutional by the Constitutional Court.[15] This did not occur.

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[11] ATRIA, Fernando. **La Constitución Tramposa**. Santiago de Chile: LOM, 2013. p. 44-56.

[12] See CHIA, Eduardo. Authoritarian Constitutionalism, Judicial Capture or the Ambivalence of Modern Law: The Case of the Chilean Constitutional Tribunal. **Oñati Socio-Legal Series**, Oñati, p. 1-32, 2024. p. 21-23, on how the Chilean Constitutional Court, without needing to appeal to the doctrine of unconstitutional constitutional amendments, has preserved the neoliberal-authoritarian constitutional identity that was already ingrained in its origins in the 1980 constitution.

[13] So ROZNAI, Yaniv. "We the people", "oui, the people" and the Collective Body: Perceptions of Constituent Power. In: JACOBSOHN, Gary J.; SCHOR, Miguel (eds.). **Comparative Constitutional Theory**. Cheltenham: Edward Elgar Publishing, 2018. p. 295-316. p. 299; ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 228. See also FUENTES, Claudio. Debate constitucional en Chile ¿Reemplazo vía enmienda?. **Política y Gobierno**, Santiago de Chile, v. 25, n. 2, p. 469-483, 2018. p. 473-482. On this problem, GARLICKI, Lech; GARLICKA-SOWERS, Zofia A. Unconstitutional Constitutional Amendments. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n. 3, p. 307-317, 2018. p. 312.

[14] See PARDO-ÁLVAREZ, Diego. "Los límites de la potestad de reforma constitucional en el derecho constitucional chileno". **Revista de derecho (Valdivia)**, Valdivia, v. 36, n. 1, p. 113-135, 2023.

[15] Roznai's doctrine was cited and used by the Chilean Constitutional Court in the case known as the pension fund withdrawal cases –see POEHLS, Marianne; VERDUGO, Sergio. Auge y caída de la doctrina de las reformas constitucionales inconstitucionales en Chile. In LOVERA, Domingo (ed.). **Anuario de Derecho Público UDP,** v. 99, 2021, p. 99-131;– and the life annuities cases (*rentas vitalicias*) –see LOVERA, Domingo; CONTRERAS, Pablo. El Tribunal Constitucional Chileno y la doctrina de reformas constitucionales inconstitucionales. **Revista Justicia & Derecho**, Santiago de Chile, 6, n. 2, p. 1-22, 2023. p. 7-16. The Court considered, applying the doctrine of unconstitutional constitutional amendments, that a constitutional reform allowing the exceptional withdrawal of 10% of individual pension savings accounts to alleviate the economic effects of the COVID-19 pandemic should be declared unconstitutional. The reasoning of the Court's prevailing opinion is ambiguous. On the one hand, the Court seems to have considered that the President's exclusive initiative on pension matters also applies to constitutional amendments and that it is part of Chile's constitutional identity. On the other hand, the Court seems to have considered the reform a case of abusive constitutionalism. However, the decision is too anecdotal and lacks sufficient reasoning to be considered a relevant point in the jurisprudential evolution of the Chilean Constitutional Court. ROZNAI, Yaniv. Clownstitutionalism: Making a Joke of the Constitution by Abuse of Constituent Power. **Jurídica Ibero**, Ciudad de México, n. 15, p. 51-98, 2023. p. 62, presents an erroneously laudatory assessment of this decision.

3. ELEMENTS, OBJECTIONS, AND INCONSISTENCIES IN THE DOCTRINE OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

Roznai has developed what he terms the doctrine of unconstitutional constitutional amendments. This theory recognizes both explicit and implicit limits on the power of constitutional amendment, encompassing both procedural and substantive constraints,[16] which must be enforced by the constitutional court or tribunal in a manner analogous to judicial review of ordinary legislation. The implicit limits on the power of constitutional amendment would not be supra-constitutional (as international human rights law might be) but rather intra- and pre-constitutional. Pre-constitutional limits are those that conceptually derive from the existence of an amendment power as a constituted power and its distinctive relationship with constituent power. According to Roznai, the very notion of amendment power would analytically imply certain limits on its exercise.[17] Intra-constitutional limits are those that would derive from constitutional identity: every constitution would have elements constitutive of its identity that should be beyond the reach of the constitutional amendment power, as famously argued by Carl Schmitt in his *Verfassungslehre*. Both types of limits are interrelated, perhaps intertwined in Roznai's doctrine, notwithstanding that they must be analytically distinguished.

Roznai's construction is based on three elements: (1) Constitutional identity as a criterion for delimiting the competencies of constitutional amendment power; (2) the understanding of constitutional amendment power as a mandate of constituent power; and (3) the understanding of judicial review of constitutional amendments as equivalent to judicial review of ordinary legislation. These elements are analyzed with an eye toward the Chilean case.

3.1. Constitutional identity and constituent power

Drawing on Schmitt's constitutional theory,[18] Roznai distinguishes between constituent power and constitutional amendment power.[19] The amendment power is a

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16 PARDO-ÁLVAREZ, Diego. "Los límites de la potestad de reforma constitucional en el derecho constitucional chileno". **Revista de derecho (Valdivia)**, Valdivia, v. 36, n. 1, p. 113-135, 2023. p. 115-117.

17 ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 154-156.

18 SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 98.

19 ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 105-120.

constituted power, subordinate to constituent power. Its implicit limit would be not to disfigure the constitutional identity determined by the sovereign.[20]

There is, however, a significant distance between both theories. In the *Verfassungslehre*, the elements of "identity and continuity of the constitution as a whole" represent substantive limits that prevent "destroying" a constitution through the replacement of the constituent power that lends it support and validity.[21] The constituent power in Schmitt's work, however, is a real political magnitude. Schmitt recognizes three types of constituent power, each providing support and validity to a corresponding type of constitution (in an absolute sense): the monarch, the aristocracy, and the people. The amending power thus cannot replace one constituent power with another, in any direction this replacement might take. In Schmitt's examples, it cannot "transform a State based on the monarchical principle into one governed by the constituent power of the people", "replace the democratic electoral system with a council system" (a *Rätesystem*) or transform the president into a "constitutional monarch".[22]

In Schmitt's constitutional theory, granted or imposed constitutions pose no theoretical difficulties: granting would in fact be the paradigmatic form of constituent action under the monarchical principle, while aristocratic "minority organizations" exercise constituent power through their very renunciation of equal representation of political majorities.[23] The UCA doctrine, however, cannot sustain this Schmittian approach to constitutional imposition. This would imply not only accepting non-democratic constitutional identities but also providing them with jurisdictional protection through judicial review.[24] Since the UCA doctrine aims to prevent "authoritarian" constitutional amendments, it neither affirms nor can affirm that an imposed constitutional identity must be protected even against changes that deepen democracy or serve to overcome

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[20] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 142-143.

[21] The concept of constitutional identity presupposes, in Schmitt's constitutional theory, the substantial homogeneity of the people. On this, see SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 3-5, 20-36 and p. 223-238; see also MAUS, Ingeborg. **Rechtstheorie und Politische Theorie im Industriekapitalismus**. München: W. Fink, 1986. p. 113-123

[22] SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 103-105; ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 117.

[23] SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 80-82. Although problematic, a military dictatorship could be considered similar to an exercise of monarchical or aristocratic constituent power. On this CRISTI, Renato. **El Pensamiento Político de Jaime Guzmán**: 2nd edition. Santiago de Chile: LOM, 2011. p. 126; 164-165.

[24] On "malign" constitutional identities as a limit to the power of constitutional amendment, see Oran Doyle, *Constraints on Constitutional Amendment Powers*, in The Foundations and Traditions of Constitutional Amendment 73 (Richard Albert, Xenophon I. Kontiadēs and Alkmēnē Phōtiadou eds., 2017), p. 75-77.

an authoritarian past –as in the case of the recently described Chilean constitutional reforms–.[25]

The UCA doctrine must therefore commit itself to an essentially democratic concept of constituent power,[26] analytically rejecting the existence of any alternative holders of this power other than the people.[27] In this second case, imposed constitutional identities can be confronted by asserting that they are merely constitutional laws granted by an external, dictatorial, or tyrannical power. Only through this approach can the UCA doctrine fulfill its promise to defend the constituent power of the people against its authoritarian origins or subsequent authoritarian reversions. Under this alternative, however, the doctrine would have to embrace a normative theory of democratic constitution– a constitution in the ideal sense, in Schmitt's terminology– which stands in direct opposition to his political understanding of constituent power.[28]

The commitment to a democratic theory of popular constituent power is unassailable. The democratic appropriation of Schmitt, however, results in the irrelevance of the concept of constitutional identity. For under a normative-ideal understanding, constitutional identity would have to be defined by what the best normative theory of democratic constitutionalism prescribes, without any necessary connection to the original constituent decision or to the specific features of the idiosyncratic or particular basis of constitutional validity.[29] Neither the principles of constitutionalism nor those of

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[25] Roznai –in ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61– at p. 38, however, acknowledges that "unamendability can protect 'undesirable' principles or practices, from a democratic perspective...". This statement refers from a descriptive standpoint to certain eternity clauses or jurisprudential practices in that direction. However, the UCA doctrine operates on the normative level. Constructing an implicit authoritarian constitutional identity contrary to the constituent power of the people cannot be its objective.

[26] See BÖCKENFÖRDE, Ernst-Wolfgang. Die verfassunggebende Gewalt des Volkes. In: BÖCKENFÖRDE, Ernst-Wolfgang; GOSEWINKEL, Dieter. **Wissenschaft, Politik, Verfassungsgericht**. 3rd edition. Berlin: Suhrkamp, 2019. p. 97-119. p. 101-104. Schmitt is ambiguous on this point.

[27] "…the people are the subject and the holder of the constituent power" ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 105-106; also p. 124-125: the constituent power of the people "is a concept that belongs solely in the context of democratic theory".

[28] See SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 36-41. An abstract theory, in the critical formulation of STONE, Adrienne. Unconstitutional Constitutional Amendments: Between Contradiction and Necessity. **Vienna Journal on International Constitutional Law**, Vienna v. 12, n. 3, p. 357-368, 2018, p. 362.

[29] The criticism, of course, does not refer to the discrepancy between the theory and the *praxis* of constituent power, as some critics seem to understand –JACKSON, Vicki C. "Constituent Power" or Degrees of Legitimacy?. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n.3, p. 319-344, 2018. p. 320-324; POLZIN, Monika. The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting. **Indian Law Review**, v. 5, n. 1, p. 45-61, 2021. p. 47; RUOTSI, Mikael. A Doctrinal Approach to Unconstitutional Constitutional Amendments: Judicial Review of Constitutional Amendments in Sweden. **European Constitutional Law Review**, v. 20, n. 2, p. 247-281, 2024. p. 269. Imposed constitutions do not necessarily lack constituent power or a sovereign: the people can become sovereign even if, at the time of its enactment, the political power has been exercised by another autocratic political subject. ROZNAI, Yaniv.

democracy possess any characteristic of constitutional identity –any specific "*genetic code*"–[30] that would make a constitution distinctive. In this sense, the concept of constitutional identity becomes an unnecessary and dispensable element for the UCA doctrine.[31] It risks becoming merely a misleading label for general normativity that is independent and external to the constituent decision, such as liberal constitutionalism[32] or democratic principles.[33] The UCA doctrine could betray the theory of constituent power it claims to defend if it leads to constructing implicit normative limits on constitutional amendment without any connection to the constituent will of the people.[34] The ultimate political risk lies in placing an inherently authoritarian concept –that of constitutional identity– in the hands of authoritarians themselves, as a malleable criterion for producing or reversing constitutional changes through a captured constitutional court.[35]

Unconstitutional Constitutional Amendments: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 123, correctly defends the permanence of the constituent power after the act of constitutional creation. The present criticism is that the doctrine of unconstitutional constitutional amendments erects the concept of constitutional identity and then ignores its specificities. The doctrine would do well to abandon the criterion of constitutional identity and directly link the limits of the power of constitutional reform to the democratic principle. The doctrine is unable to do so because, as will be seen *infra* III.3, this would at most hinder the attempt to justify the judicial creation of implicit limitations.

30 ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 148-150.

31 The distinction between general and particular constitutional identity does not solve the problem. The argument is that there is no "constitutional identity" that is not aligned with the general normative principles of liberal constitutionalism. This actually reveals the problem with Roznai's approach. Referring to a "general" constitutional identity as *identity* seems meaningless; if constitutional identity must align with general liberal principles, then the concept becomes superfluous. "General constitutional identity (…) expands into the argument from universal reason" (TRIPKOVIC, Bosko. **The Metaethics of Constitutional Adjudication**. Oxford: Oxford University Press, 2018. p. 57). It loses its distinctive character and purpose within Roznai's doctrine.

32 For Polzin –in POLZIN, Monika. The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting. **Indian Law Review**, v. 5, n. 1, p. 45-61, 2021, at p. 58-59– in fact, the doctrine of the basic structure of the Supreme Court of India would protect not the constitutional identity in Schmittian terms, but the rule of law in connection with Hariou's constitutional theory.

33 This explains why Roznai has moved towards using concepts that allow operation under such normative indeterminacy, such as *bona fides* –in ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 143-144–, constitutional fraud –in ROZNAI, Yaniv. Clownstitutionalism: Making a Joke of the Constitution by Abuse of Constituent Power. **Jurídica Ibero**, Ciudad de México, n. 15, p. 51-98, 2023. p. 55-58– or abusive constitutionalism in HOSTOVSKY BRANDES, Tamar; ROZNAI, Yaniv. Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine. **Law and Ethics of Human Rights**, v. 14, n. 1, p. 19-48, 2020. p. 25-33 –compare with LANDAU, David. Abusive Constitutionalism. **U.C. Davis Law Review**, v. 47, n. 1, p. 189-260, 2013. p. 231-239.

34 BÖCKENFÖRDE, Ernst-Wolfgang. Die verfassunggebende Gewalt des Volkes. In: BÖCKENFÖRDE, Ernst-Wolfgang; GOSEWINKEL, Dieter. **Wissenschaft, Politik, Verfassungsgericht**. 3rd edition. Berlin: Suhrkamp, 2019. p. 97-119. p. 114-117. See also MAUS, Ingeborg. **Über Volkssouveränität**: Elemente einer Demokratietheorie. Berlin: Suhrkamp, 2011. p. 22-28

35 See POLZIN, Monika. **Verfassungsidentität**: Ein Normatives Konzept des Grundgesetzes?. Tübingen: Mohr Siebeck, 2018. p. 133-140; POLZIN, Monika. Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The development of the doctrine of constitutional identity in German constitutional Law. **International Journal of Constitutional Law**, v. 14, n. 2, p. 411-438, 2016. esp. p. 415-421. See also

3.2. The delegation theory

The second element of Roznai's theory is the peculiar relationship of delegation that he establishes between constituent power and the power of constitutional amendment. Roznai reconstructs intraconstitutional limits on the amendment power based on understanding the relationship between constituted power and constituent power as one of *delegation*: the limits on the amendment power would function, in his elaboration, as a protection for the delegator –the constituent power– against the possibility that the delegate –the amendment power– might exceed its authority or competence.[36] In other words, Roznai reinterprets the political limit that constitutional identity represents in Schmitt's theory as a limit on the competencies of constituted powers.

A first objection emerges at this point. If the limitations of constitutional amendment power are grounded in safeguarding the constituent power of the people, the UCA doctrine fails to provide a coherent theoretical justification for many of its prescribed constraints. In other words, the delegation theory exhibits an explanatory deficit.[37] The UCA doctrine includes as limitations on amendment power various elements of liberal constitutionalism (rule of law, fundamental rights, judicial independence, judicial review itself, etc.).[38] These limitations may serve to prevent authoritarian reversions, but they do not directly serve the people's political agency or their constituent power.

But even within the framework of constitutional identity as a limit on constitutional amendment power, the challenge posed by imposed or granted constitutions also impacts the understanding of amendment power as delegate of constituent power. In Roznai's theory, constitutional identity determines the scope of delegation: the amendment power must enhance, rather than betray, the constitutional framework established by constituent power.[39] Can amendment power, however, be understood as the delegate of a constituent power exercised *manu militari*, in an autocratic manner? In Schmitt's theory there would be no problem with retrospectively understanding

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SUTEU, Silvia. Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?. **Hague Journal on the Rule of Law**, v. 16, n. 2, p. 315-338, 2024. p. 333-334.

[36] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 117-123.

[37] In the same vein, BURITICÁ-ARANGO, Esteban. Democracia y cambio constitucional. **Ius et Praxis**, Talca, v. 28, n. 2, p. 222-242, 2022. p. 229-230.

[38] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 180-186; ROZNAI, Yaniv. Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea. **American Journal of Comparative Law**, v. 61, p. 657-720, 2013. p. 714-715; CASTILLO-ORTIZ, Pablo; ROZNAI, Yaniv. The Democratic Self-Defence of Constitutional Courts. **Vienna Journal on International Constitutional Law**, Vienna, v. 18, n. 1, p. 1-24, 2024. p. 8-15.

[39] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 135-138; SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 106-109.

amendment power as a power authorized by and subject to a monarchical or aristocratic constituent power. The terms of such authorization –the limits of constitutional amendment power– would correspond to the constitutional identity determined by constituent power in the exception.[40]

Given that the UCA doctrine claims to be "the ultimate expression of democracy", it necessarily requires a conception of delegation distinct from Schmitt's, one that embraces a democratic theory of delegated amendment power.[41] However, within the framework of an normative-ideal concept of constitution, delegation theory emerges as normatively superfluous and redundant for the UCA doctrine. This is certainly a consequence of the irrelevance of constitutional identity as a criterion for delimiting constitutional amendment power within the doctrine.[42] The terms of delegation lose their distinctive content when reduced to a simple directive from the principal requiring amendment power to uphold constitutional democracy:[43] The principles of democracy, not the terms defined by a delegator, would be the limits of constitutional amendment power. Thus, the doctrine can maintain exactly the same limits without including delegation theory as one of its core elements. And since democracy is an essentially contested concept, the parameters for judicial review become too open-ended and undifferentiated for courts.[44] This endangers the very separation of powers that the doctrine aims to defend.[45]

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40 SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957.

41 ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 196. The doctrine, therefore, cannot assume a theory that *denies* the existence of constituent power –in the line of FERRERES-COMELLA, Victor. The Death of Constituent Power. In: HIRSCHL, Ran; ROZNAI, Yaniv (eds.). **Deciphering the Genome of Constitutionalism**: The Foundations and Future of Constitutional Identity. Cambridge: Cambridge University Press, 2024. p. 56-62; VERDUGO, Sergio. Is it time to abandon the theory of constituent power?. **International Journal of Constitutional Law**, v. 21, n. 4, p. 1175-1181, 2023; and POLZIN, Monika. **Verfassungsidentität**: Ein Normatives Konzept des Grundgesetzes?. Tübingen: Mohr Siebeck, 2018. p. 104-107– as in that case both its democratic understanding of judicial review and its own theory of the mandate would lack foundation.

42 *Supra*, III.1. See STONE, Adrienne. Unconstitutional Constitutional Amendments: Between Contradiction and Necessity. **Vienna Journal on International Constitutional Law**, Vienna v. 12, n. 3, p. 357-368, 2018. p. 364-365.

43 ALÁEZ CORRAL, Benito. Reforma constitucional y concepto de Constitución. In: ALÁEZ CORRAL, Benito (ed.). **Reforma Constitucional y Defensa de la Democracia**. Madrid: Universidad de Oviedo – Centro de Estudios Políticos y Constitucionales, 2020. p. 23-59. p. 35, who points out the indeterminacy of the concept of democracy for material conceptions of the constitution.

44 ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61. p. 38: "With regard to the content of the unamendable subject, there is no categorial answer and every case must be judged on its own merits". About the open-ended parameters, see ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. 212-218.

45 See in this vein MAUS, Ingeborg. **Justiz als Gesellschaftliches Über-Ich**: Zur Position der Rechtsprechung in der Demokratie. Berlin: Suhrkamp, 2018. p. 61-64.

Consistent with a democratic understanding of constituent power is the view that amendment power is conceptually prevented from disabling the people's political agency through constitutional amendments.[46] In the face of imposed or granted constitutions, it would then be consistent to consider that precisely the *lack of limitation* on constitutional amendment power would express the delegation of the genuine constituent power of the people, so as to allow the democratic reappropriation of a constitution *against* the decision taken when power was usurped.[47] For why would it be in the interest of the people's genuine constituent power to protect the rigidified will of past autocrats and generals? At least in these cases, it should be assumed that constitutional amendment power is delegated to reverse, not respect, the granted constitutional identity.

The case of imposed constitutions reveals the need for a theoretical framework that recognizes the enabling potential of constitutional amendment power, an aspect for which the UCA doctrine's delegation theory proves inadequate.[48] The doctrine inevitably produces a one-dimensional understanding of constitutional amendment.[49] This reductionist approach becomes particularly evident when Roznai addresses the inclusion of eternity clauses in a constitution through amendment power. According to traditional constitutional theory, the inclusion of eternity clauses in a constitution is problematic from a democratic perspective because it limits the institutional possibilities for the people's self-legislation and political reconfiguration.[50] This presupposes recognizing constitutional amendment power as a representative expression of popular sovereignty. Roznai, however, analyzes the problem not from the standpoint of democratic principle but through delegation theory: he maintains that amendment power would be acting *ultra vires* if it were to establish that a constitutional provision

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[46] In this vein, POLZIN, Monika. **Verfassungsidentität**: Ein Normatives Konzept des Grundgesetzes?. Tübingen: Mohr Siebeck, 2018. p. 109-110, .

[47] GARLICKI, Lech; GARLICKA-SOWERS, Zofia A. Unconstitutional Constitutional Amendments. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n. 3, p. 307-317, 2018. p. 311-312.

[48] GARLICKI, Lech; GARLICKA-SOWERS, Zofia A. Unconstitutional Constitutional Amendments. **Vienna Journal on International Constitutional Law**, Vienna, v. 12, n. 3, p. 307-317, 2018. p. 312: "in some situations, the primary constituent power did find its manifestation in constitutional amendments". Roznai –In ROZNAI, Yaniv. Amendment Power, Constituent Power, and Popular Sovereignty. In: ALBERT, Richard; KONTIADĒS, Xenophon I.; PHŌTIADOU, Alkmēnē (eds.). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Hart Publishing, 2017. p. 23-49. P. 42-43– seems to acknowledge that amendment power can express popular sovereignty as "secondary constituent power", particularly expressed in more demanding procedures. The mandate theory, however, points in the opposite direction: amendment *limitation* would constitute recognition of constituent power.

[49] See MAUS, Ingeborg. **Über Volkssouveränität**: Elemente einer Demokratietheorie. Berlin: Suhrkamp, 2011. p. 44-61.

[50] See ALBERT, Richard. Counterconstitutionalism. **Dalhousie Law Journal**, Dalhousie, v. 31, n. 1, p. 1-54, 2008. p. 49-51; ALBERT, Richard. Constitutional Handcuffs. **Arizona State Law Journal**, Arizona, v. 42, p. 663-715, 2010. p. 675-677.

cannot be amended.[51] For only the delegator –the constituent power– possesses the authority to determine the competence of amendment power as delegate.[52] The authority to define the scope of its own competencies, he argues, falls outside the sphere of delegated powers.

Why use delegation theory to reject the inclusion of eternity clauses by amendment power? Why not appeal directly to democratic principle? The reason is the following. The UCA doctrine cannot consider eternity clauses as contrary to democratic principle because its aim is precisely to justify the imposition of implicit eternity clauses by constitutional courts.[53] The doctrine must therefore appeal to delegation theory as a functional equivalent of democratic principle to simultaneously justify eternity clauses while prohibiting amendment power from establishing them. Delegation theory thus artificially imposes a univocal solution where a genuine constitutional dilemma exists: for Roznai, the absence of an express prohibition on adding eternity clauses in a constitution implies an implicit prohibition on amendment power to include them. However, the absence of such a prohibition could also signify, conversely, a positive decision by constituent power to allow amendment power to modify any constitutional provision,[54] including adding eternity clauses.[55] This second possibility is ignored within the narrow conceptual framework provided by delegation theory. The ultimate function of delegation theory is to establish a direct path for judicial review of implicit limits on amendment by reducing the problem of eternity clauses to a mere question of *ultra vires* action under a delegation contract. This maneuver reduces a fundamental

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[51] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 139. Contradictorily, he later (p. 218-224) considers proportionality the main "standard of review" for constitutional amendments. The ultra vires declaration, however, cannot legally depend on the "disproportionality" of the act. This reveals the irrelevance of mandate and constitutional identity as criteria.

[52] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 138-139. In cases of imposed constitutions the only justification for eternity clauses would be the people's lack of extra-institutional rebellion against them.

[53] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 119: "The legal framework of delegation is by itself characterized by constraints".

[54] STONE, Adrienne. Unconstitutional Constitutional Amendments: Between Contradiction and Necessity. **Vienna Journal on International Constitutional Law**, Vienna v. 12, n. 3, p. 357-368, 2018. p. 366.

[55] Indeed, this second resolution of the dilemma should be favored by a consistent theory of constitutional identity –if the amendment seeks to eternalizes it. In Schmitt's work, the inclusion of eternity clauses presents an ambiguity. For the Schmitt of *Verfassungslehre*, such clauses would be *ultra vires only if* amendment power's scope itself were part of constitutional identity. Alternatively, they could be seen as explicating amendment power limits through enhanced constitutional rigidity. See SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 105; also p. 16-20. In *Legalität und Legitimität* democratic functioning takes precedence over both constitutional identity and amendment power as "delegation". See SCHMITT, Carl. **Legalität und Legitimität**. 5th edition. Berlin: Duncker & Humblot, 1993. p. 28-37; see also VINX, Lars. Are There Inherent Limits to Constitutional Amendment? An Analysis of Carl Schmitt's Argument. In: ARVIDSSON, Matilda; BRÄNNSTRÖM, Leila; MINKKINEN, Panu (eds.). **Constituent Power**: Law, Popular Rule and Politics. Edinburgh: Edinburgh University Press, 2022. p. 61-76.

democratic-institutional problem to a mere legal question, framed in private law categories, to be resolved by judicial decision.[56]

Delegation theory reveals itself, ultimately, as a theoretical device designed to limit constitutional amendment power while providing a justification for eternity clauses wielded by constitutional courts. However, this carries two significant costs. The first is the patent internal inconsistency in justifying the judicial creation of implicit amendment prohibitions. The theory, without justification, requires from one delegate –the constitutional court– precisely what it prohibits to another –the amendment power (*infra*, III.3.). The second problem: delegation theory overlooks the dimension of democratic enablement inherent to constitutional amendment power. This enabling dimension is essential for understanding the role that constitutional amendment can play in overcoming an authoritarian past, as in Chile. Delegation theory, and by extension the UCA doctrine, cannot even conceptualize this role. Constrained by its restrictive Schmittian conception of constitutional identity, the doctrine inevitably characterizes amendment power as an extraordinary competence that must be limited rather than enabled.[57] For the realization of constituent power would depend on the limitation, not the enablement, of constitutional amendment power.[58] This one-dimensional understanding makes it impossible even to properly conceptualize democratic objections to judicial limitation of amendment power.[59] By understanding amendment power as constrained by a fictitious delegation, the theory purports to solve the problem of political authoritarianism precisely by rendering it theoretically invisible.

3.3. The judicial review of implicit limits

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[56] Also critic in this sense, referring to German constitutional law, see POLZIN, Monika. **Verfassungsidentität**: Ein Normatives Konzept des Grundgesetzes?. Tübingen: Mohr Siebeck, 2018. p. 113-128.

[57] SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 102-103.

[58] See MAUS, Ingeborg. **Justiz als Gesellschaftliches Über-Ich**: Zur Position der Rechtsprechung in der Demokratie. Berlin: Suhrkamp, 2018. p. 66. Roznai states, –in ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61. p. 35– that "unamendability [...] is a sovereignty-reinforcement mechanism, as it creates a space of decision-making (that of the fundamental principles of the polity), which is reserved solely for 'the people'". This reveals a problematic mutual exclusion between amendment power and constituent power, while paradoxically suggesting that constituent power requires amendment limitations to exist. The internal contradiction becomes evident: constituent power would be negated wherever amendment power lacks substantive limits–or, following this logic, maximizing popular sovereignty would require maximizing the limitations to amendment power (as Schmitt would approve).

[59] On the tension between unamendability and democratic principle, see ALBERT, Richard. **Constitutional Amendments:** Making, Breaking, and Changing Constitutions. New York: Oxford University Press, 2019. p. 45-47, p. 194-200; ABAT NINET, Antoni. The Inexorableness of Constitutional Amendments and Its Democratic Potentiality. **Revista de Investigações Constitucionais**, Curitiba, v. 7, n. 3, p. 689-705, 2020. p. 694-698.

The third element of the UCA doctrine is the organ responsible for defending constitutional identity from amendment power. In the case of democratic constitutions –those grounded in the constituent power of the people– Schmitt clearly rejects any type of court as the defender of the constitution. Throughout the evolution of his constitutional theory from *Die Diktatur* in 1921 to *Legalität und Legitimität* in 1933, Schmitt considers that the defender of the Weimar Constitution is the President of the *Reich* adopting the powers inherent to a commissarial dictatorship.[60] This is for two reasons. First, because the Reich President would be a neutral and intermediary power,[61] a power expressive of the political, but not subject to the vicissitudes of multiparty politics or "polyarchy".[62] Second, because the position of the *Reich* President –a "republican monarch" says Schmitt– is constituted and derives its authority from plebiscitary acclamation.[63] For Schmitt, the proper mode of defense for a democracy lies in an extraordinary plebiscitary power.[64]

Roznai, in a rather characteristically Kelsenian move,[65] contends instead that the constitutional court is the genuine defender of constitutional identity. Even if this competence is not expressly established in the constitution.[66] His theory in fact understands the declaration of unconstitutionality of a constitutional amendment in terms entirely equivalent to the declaration of unconstitutionality of ordinary legislation.[67] This implies assuming a relation between amendment power and constitution similar to the relation between legislation and constitution.[68] The democratic legitimacy of judicial review of legislation rests on the ever-present possibility of changing the higher level

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60 See SCHMITT, Carl. Die Diktatur des Reichspräsidenten Nach Artikel 48 Der Weimarer Verfassung. In: SCHMITT, Carl. **Die Diktatur**. Berlin: Duncker & Humblot, 1964. p. 213-259; SCHMITT, Carl. Reichspräsident und Weimarer Verfassung (1925). In: MASCHKE, Günter (ed.). **Staat, Großraum, Nomos**: Arbeiten aus den Jahren 1916-1969. 2nd edition. Berlin: Duncker & Humblot, 2021. p. 24-32. p. 24-27.

61 See BÖCKENFÖRDE, Ernst-Wolfgang. Verfassungsgerichtsbarkeit. In: BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Nation, Europa**: Studien zur Staatstheorie, Verfassungstheorie und Rechtsphilosophie. Frankfurt am Main: Suhrkamp, 2011. p. 157-182. p. 160.

62 SCHMITT, Carl. **Der Hüter der Verfassung**. Berlin: Duncker & Humblot, 1985. p. 132-159.

63 SCHMITT, Carl. **Verfassungslehre**. 3rd edition. Berlin: Duncker & Humblot, 1957. p. 290-292.

64 SCHMITT, Carl. **Legalität und Legitimität**. 5th edition. Berlin: Duncker & Humblot, 1993. p. 57-64. See also MAUS, Ingeborg. **Justiz als Gesellschaftliches Über-Ich**: Zur Position der Rechtsprechung in der Demokratie. Berlin: Suhrkamp, 2018. p. 224-226.

65 See GRIMM, Dieter. **Recht oder Politik?** Die Kelsen-Schmitt-Kontroverse zur Verfassungsgerichtsbarkeit und die heutige Lage. Berlin: Duncker & Humblot, 2020. p. 9-28.

66 ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 179-186.

67 ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 137-138.

68 Representing early positivism, JELLINEK, Georg. **Verfassungsänderung und Verfassungswandlung**: Eine Staatsrechtlich-Politische Abhandlung. Verlin: Häring, 1906. p. 5: "The doctrine of legal constitutional amendment presents the same problems as that of legal amendments in general."

that contains the standards of review.[69] Extending unconstitutionality to constitutional amendments means recognizing legal limits and requirements that, while not at its disposal, must be at the disposal of a "higher" competence.[70] Usual candidates are international law or natural law.[71] In the UCA doctrine, however, constitutional identity, as determined by constituent power, stands superior to amendment power.[72]

The legitimacy of the constitutional court follows the same logic: the court understands itself as empowered by the constitution to declare laws unconstitutional, given the possibility, always open to democratic deliberation through amendment power or original constituent power, to modify the constitutional framework and the court's own powers.[73] This is precisely the presupposition of Kelsen's theory on the compatibility of democracy and judicial review:[74] closing democratic debate is incompatible with democracy.[75] In a modern democratic legal system, the possibility of change serves as *the* fundamental condition of validity for every norm and every form of control.[76]

The UCA doctrine correctly assumes that the limits of amendment power, as well as its judicial control, remain ultimately subject to the constituent power of the

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[69] See BÖCKENFÖRDE, Ernst-Wolfgang. Verfassungsgerichtsbarkeit. In: BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Nation, Europa**: Studien zur Staatstheorie, Verfassungstheorie und Rechtsphilosophie. Frankfurt am Main: Suhrkamp, 2011. p. 157-182. p. 176-182. SCHWARTZBERG, Melissa. **Democracy and Legal Change**. Cambridge: Cambridge University Press, 2007. p. 197-200.

[70] Following, as *locus classicus*, KELSEN, Hans. **Reine Rechtslehre**: Mit einem Anhang: Das Problem der Gerechtigkeit. Tübingen: Mohr Siebeck, 2017. p. 398-403 and p. 478-487.

[71] On these limits, correctly, ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 71-102.

[72] See ARATO, Andrew. **The Adventures of the Constituent Power:** Beyond Revolutions?. Cambridge: Cambridge University Press, 2018. p. 409: "Just as previously illegal alteration by statue was banned in the name of the amendment rule provided for, so in the multi-track constitution, illegal amendment is prohibited by the existence of a higher rule of change".

[73] See MÖLLERS, Christoph. Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts. In: JESTAEDT, Matthias; LEPSIUS, Oliver; MÖLLERS, Christoph; SCHÖNBERGER, Christoph (eds.). **Das Entgrenzte Gericht**: Eine Kritische Bilanz nach Sechzig Jahren Bundesverfassungsgericht. Berlin: Suhrkamp, 2011. p. 281-422. p. 289-295 and p. 329-333. Recently CASTILLO-ORTIZ, Pablo; ROZNAI, Yaniv. The Democratic Self-Defence of Constitutional Courts. **Vienna Journal on International Constitutional Law**, Vienna, v. 18, n. 1, p. 1-24, 2024. argue that constitutional courts must defend their institutional configuration by declaring constitutional amendments unconstitutional. To assume judicial review belongs to constitutional identity begs the question: it presupposes the court's competence to reflexively declare its own modifications through constitutional amendment unconstitutional. Coherent seems instead to abandon constitutional identity's premise and embrace liberal constitutionalism.

[74] KELSEN, Hans. **Wer Soll der Hüter der Verfassung Sein?**. 2nd edition. Tübingen: Mohr Siebeck, 2019. p. 50-51.

[75] See also in this context ARIAS CASTAÑO, Abel. Control de constitucionalidad de las reformas constitucionales. In: ALÁEZ CORRAL, Benito (ed.). **Reforma Constitucional y Defensa de la Democracia**. Madrid: Universidad de Oviedo – Centro de Estudios Políticos y Constitucionales, 2020. p. 519-547. p. 530-532. See HOHNERLEIN, Jakob. **Recht und Demokratische Reversibilität**: Verfassungstheoretische Legitimation und Verfassungsdogmatische Grenzen der Bindung Demokratischer Mehrheiten an Erschwert Änderbares Recht. Tübingen: Mohr Siebeck, 2020. p. 30-45.

[76] MAUS, Ingeborg. **Über Volkssouveränität**: Elemente einer Demokratietheorie. Berlin: Suhrkamp, 2011. p. 46.

people.[77] In the case of constitutions originally imposed or granted, the democratic possibility of establishing limits on constitutional amendment presupposes that the people –originally disabled at the time of the grant– have retrospectively assumed constituent power and, therefore, control the constitution and the limitations of constituted powers. A theory of the constituent power of the people constituent power must recognize that it can emerge not only *ab initio*, but also determine its own channels of expression *during* the life of a constitution.[78] Specifically, the people may choose to express themselves through amendment power, ordinary legislation, or judicial review.[79] None of these pathways exhausts the possibilities for expressing constituent power, nor is any excluded from it.

This primarily reveals a political problem inherent to judicial review of constitutional amendment. The UCA doctrine aims to constrain amendment power to prevent authoritarian reversions. Constitutional amendment allows adaptation of the constitutional order to new circumstances at lower transaction costs compared to the exercise of original constituent power.[80] If excessively limited, transaction costs increase and make a non-institutional expression of constituent power more expedient in comparative terms. Thus, the UCA doctrine places the constitutional court in the position

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77 See HOSTOVSKY BRANDES, Tamar; ROZNAI, Yaniv. Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine. **Law and Ethics of Human Rights**, v. 14, n. 1, p. 19-48, 2020. p. 36-37: "the UCA doctrine is actually *based* on the primary constituent power of the people" (my enfasis).

78 ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017.constitutional design, and constitutional adjudication. This book describes and analyses the increasing tendency in global constitutionalism substantively to limit formal changes to constitutions. The challenges of constitutional unamendability to constitutional theory become even more complex when constitutional courts enforce such limitations through substantive judicial review of amendments, often resulting in the declaration that these constitutional amendments are 'unconstitutional'. Combining historical comparisons, constitutional theory, and a wide comparative study, [the author] sets out to explain what the nature of amendment power is, what its limitations are, and what the role of constitutional courts is and should be when enforcing limitations on constitutional amendments.\"--"","call-number":"K3168 .R69 2017"","collection-title":"Oxford constitutional theory"","edition":"First edition"","event-place":"Oxford, United Kingdom"","ISBN":"978-0-19-876879-1"","note":"OCLC: ocn975929191"","number-of-pages":"334"","publisher":"Oxford University Press"","publisher-place":"Oxford, United Kingdom"","source":"Library of Congress ISBN"","title":"Unconstitutional constitutional amendments: the limits of amendment powers"","title-short":"Unconstitutional constitutional amendments"","author":[{"family":"Roznai"","given":"Yaniv"}],"issued":{"date-parts":[["2017"]]}}},"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} p. 167-168; BÖCKENFÖRDE, Ernst-Wolfgang. Die verfassunggebende Gewalt des Volkes. In: BÖCKENFÖRDE, Ernst-Wolfgang; GOSEWINKEL, Dieter. **Wissenschaft, Politik, Verfassungsgericht**. 3rd edition. Berlin: Suhrkamp, 2019. p. 97-119. p. 105-107; BÖCKENFÖRDE, Ernst Wolfgang. Demokratie als Verfassungsprinzip. In: BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Verfassung, Demokratie**: Studien zur Verfassungstheorie und zum Verfassungsrecht. 2nd edition. Frankfurt am Main: Suhrkamp, 1991. p. 289-377. p. 294-295

79 ROZNAI, Yaniv. "We the people", "oui, the people" and the Collective Body: Perceptions of Constituent Power. In: JACOBSOHN, Gary J.; SCHOR, Miguel (eds.). **Comparative Constitutional Theory**. Cheltenham: Edward Elgar Publishing, 2018. p. 295-316. p. 314-316; Doyle, supra note 24, p. 80.

80 TUSHNET, Mark. Amendment Theory and Constituent Power. In: JACOBSOHN, Gary J.; SCHOR, Miguel (eds.). **Comparative Constitutional Theory**. Cheltenham: Edward Elgar Publishing, 2018. p. 317-333. p. 81-83

of having to invite revolutionary and extra-institutional expression of the constituent power of the people.[81] This remains obscured in the UCA doctrine because it overlooks the relevance of amendment power in enabling democratic procedure. But it becomes evident that a theory which assumes as a conceptual consequence the need to force a court to incentivize the dissolution of all institutional safeguards for direct political action by the people is particularly inadequate for preventing authoritarian reversions.[82] The remedy risks being worse than the disease.[83]

This issue further reveals how the theory conceals the dilemmas inherent to the concept of the constituent power of the people. When a court imposes limits (moreover implicit ones) on constitutional amendment, it exercises a competence approximating the legal determination of valid channels for expressing the constituent power of the people constituent power. In strict terms, however, it corresponds to constituent power itself to determine the channels of its institutional or extra-institutional expression. Understanding the constitutional order as under the people's permanent control cannot, therefore, mean empowering the constitutional court with the competence to determine implicit requirements for its emergence, operation, and representation.[84] To assert

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[81] So, ROZNAI, Yaniv. Amendment Power, Constituent Power, and Popular Sovereignty. In: ALBERT, Richard; KONTIADĒS, Xenophon I.; PHŌTIADOU, Alkmēnē (eds.). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Hart Publishing, 2017. p. 23-49. p. 42: "...to some extent demanding amendment power might paradoxically be more difficult to exercise than primary constituent power". Roznai embraces this paradox: in his view, the deliberative requirements of the amendment procedure "implies the assumption that a legitimate exercise of *primary constituent power* should indeed conform to such requirements". The argument thus deduces procedural normative consequences for the constituent power of the people from the constitutional amendment power. See also HOHNERLEIN, Jakob. **Recht und Demokratische Reversibilität**: Verfassungstheoretische Legitimation und Verfassungsdogmatische Grenzen der Bindung Demokratischer Mehrheiten an Erschwert Änderbares Recht. Tübingen: Mohr Siebeck, 2020. p. 85-88.

[82] ALBERT, Richard. Counterconstitutionalism. **Dalhousie Law Journal**, Dalhousie, v. 31, n. 1, p. 1-54, 2008. p. 51. According to Pietro FARAGUNA, Pietro. Populism and Constitutional Amendment. In: DELLEDONNE, Giacomo; MARTINICO, Giuseppe; MONTI, Matteo; PACINI, Fabio (eds.). **Italian Populism and Constitutional Law: Strategies, Conflicts and Dilemmas**. Cham: Springer, 2020. p. 97-117. p. 104-106, populist movements tend to prefer, for conceptual reasons, constitutional replacements over partial amendments.

[83] Roznai – in ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 131 and also in ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61. p. 41–, embraces this objection because he interprets it as having a limited scope and different object. He states: "This [the possibility of revolutionary action by constituent power] is a legitimate concern which should be a warning sign for constitutional designers to use unamendability carefully. That said, changing unamendable subject must not necessarily be done through forcible means". The response misses the point. The objection is not against amendment prohibitions, but against their determination by the constitutional court. And it is not an objection motivated (only) by the violence that might accompany the revolutionary rise of constituent power. The problem is rather that the UCA doctrine aims to grant competence to and force the constitutional court to determine, having the final word, whether a constitutional amendment qualifies as a representative act of the sovereign or not.

[84] See MAUS, Ingeborg. **Justiz als Gesellschaftliches Über-Ich**: Zur Position der Rechtsprechung in der Demokratie. Berlin: Suhrkamp, 2018. p. 229-241. HOSTOVSKY BRANDES, Tamar; ROZNAI, Yaniv. Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine. **Law and**

that the court *defends* constituent power by imposing implicit limits on amendment power under its control is, at the very least, theoretically problematic.[85]

The UCA doctrine's most acute internal inconsistencies become evident when defending judicial review of implicit limits to constitutional amendment. In Roznai's democratic argument, the postulation of implicit limits on amendment power seeks to protect the conditions that enable the people's permanent democratic self-configuration. These limits aim to prevent circumstantial political groups from disabling the people through an abusive or authoritarian exercise of constitutional amendment. However, the judicial implementation of these implicit limits stands in contradiction to the will it claims to defend. A constitutional court that declares unconstitutional an amendment that meets all formal requirements, by way of constructing an implicit constitutional identity, is elevating its own authority above that of constituent power in determining the limits of amendment. The doctrine authorizes the court to ignore constituent power's silence. This involves the constitutional court in a fundamental performative contradiction: the doctrine requires the court, whose legitimacy rests on being under constituent power's control, to contradict its own legitimacy premises and prioritize its judgment over that of constituent power –expressed in the constitution– regarding the limits of constitutional amendment.

This becomes particularly evident when Roznai argues that amendments to constitutional provisions that underpin a constitution's fundamental principles must be carried out through procedures that are more stringently participatory, inclusive, and deliberative compared to amendments of less fundamental constitutional provisions.[86] Certainly, as a matter of *constitutio ferenda*, multi-track constitutional amendment

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Ethics of Human Rights, v. 14, n. 1, p. 19-48, 2020. p. 44-46, argue that constitutional replacement procedures should also be subject to judicial review: "The primary strength of allowing the judiciary to define the constituent power and examine its exercise is that this approach is in harmony with the theoretical rational behind constitutional unamendability". However, for judicial control of constituent power or constitutional replacement to be compatible with Roznai's theory requires adopting a normative-ideal concept of constituent power, subject to higher rules beyond its own exercise (rules that are not at its disposal). Who determines these higher rules? Hence, the UCA doctrine is paradoxically favorable to considering the logical possibility of an unconstitutional constitution. In this, there is perfect continuity with Schmitt, for whom constitutional law itself can also be contrary to the constitution. On this, see MAUS, Ingeborg. **Über Volkssouveränität**: Elemente einer Demokratietheorie. Berlin: Suhrkamp, 2011. p. 130; p. 128-134; see also MAUS, Ingeborg. **Justiz als Gesellschaftliches Über-Ich**: Zur Position der Rechtsprechung in der Demokratie. Berlin: Suhrkamp, 2018. p. 220-226.

[85] ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61. p. 53: "the doctrine of constitutional unamendability can be seen as a safeguard of the people's *primary constituent power*. Unamendability is therefore not an expression of *necrocracy* –a government whereby the people are governed by the dead, but rather as the ultimate expression of democracy".

[86] ROZNAI, Yaniv. Amendment Power, Constituent Power, and Popular Sovereignty. In: ALBERT, Richard; KONTIADĒS, Xenophon I.; PHŌTIADOU, Alkmēnē (eds.). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Hart Publishing, 2017. p. 23-49. p. 46-48.

procedures based on the democratic importance of the matter being amended are highly desirable.[87] However, Roznai assumes, without demonstrating, that the constitutional court is the body responsible for verifying whether there is a heightened need for deliberation: the court must strengthen its judicial review of constitutional amendment when it considers that the amendment procedure is too flexible, insufficiently inclusive, and inadequately deliberative. If the amendment does not meet the constitutional court's standards, and is not sufficiently representative of the sovereign people, then the court will decide through a judicial ruling whether it is necessary to "awaken the giant": to demand the presence of original constituent power.[88] The *constitutio ferenda* becomes *constitutio lata*, and the constitutional court emerges as the *Kafkaesque* guardian of the gate to constituent power: in defending it, the court ends up replacing it.[89]

As anticipated, not only the theory of implicit constitutional identity, but also the theory of mandate proves inconsistent with the defense of judicial review of constitutional amendment. Under Roznai's argument, the people are so protective of their constituent authority that they do not even allow amendment power to *deepen* constitutional identity through the establishment of eternity clauses. But then why would the people permit a constitutional court –also a constituted, delegated power– to construct implicit amendment prohibitions –*i.e.*, eternity clauses– against constitutional amendment power?

The doctrine could assume that in systems contemplating constitutional review of amendment power, there would be not one but two agents: the first, the amendment power, to carry out the constituent power's legislative plan; the second, in favor of the constitutional court (even implicit), to protect original constituent power's

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87 FARAGUNA, Pietro. Populism and Constitutional Amendment. In: DELLEDONNE, Giacomo; MARTINICO, Giuseppe; MONTI, Matteo; PACINI, Fabio (eds.). **Italian Populism and Constitutional Law: Strategies, Conflicts and Dilemmas**. Cham: Springer, 2020. p. 97-117. p. 106-108, arguing that against populism, procedures that promote sustained discussion and deliberation over time are even more effective than eternity clauses.

88 Compare with the critique of internal inconsistencies in delegation theory by RUOTSI, Mikael. A Doctrinal Approach to Unconstitutional Constitutional Amendments: Judicial Review of Constitutional Amendments in Sweden. **European Constitutional Law Review**, v. 20, n. 2, p. 247-281, 2024. p. 268-270

89 See in this sense RÜTHERS, Bernd. **Die Heimliche Revolution vom Rechtsstaat zum Richterstaat**: Verfassung und Methoden. 2nd edition. Tübingen: Mohr Siebeck, 2016. p. 107-168. ARIAS CASTAÑO, Abel. Control de constitucionalidad de las reformas constitucionales. In: ALÁEZ CORRAL, Benito (ed.). **Reforma Constitucional y Defensa de la Democracia**. Madrid: Universidad de Oviedo – Centro de Estudios Políticos y Constitucionales, 2020. p. 519-547, considers (at 525-526) this an objection related to the excess of judicial review, not to its existence. In the present context, however, it is a conceptual objection. The UCA doctrine itself defends the need to impose implicit judicial limits on amendment power. Conceptually, then, the doctrine cannot even conceive of judicial creation of amendment procedure in place of the constitutional one as an excess. Appealing to the possibility of court *self-restraint* does not immunize the doctrine from its internal conceptual problem. Roznai himself –in ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 182– acknowledges that "self-restraint is not always enough". He is referring to constitutional amendment power, but the same applies to the constitutional court.

competencies against the first. But even under the two-mandate model, the paradox persists: How can the constitutional court, without contradiction, construct *implicit* limits against amendment power *in order to protect the exclusive competence* that constituent power has to establish the limits of amendment power? If the constituent people are assumed to require protection against amendment power, they must also be assumed to require protection against the constitutional court.[90] The constitutional court cannot construct implicit limits on amendment power without attributing to itself the people's exclusive competence to establish amendment prohibitions and thus incurring in the same *ultra vires* action attributed to constitutional amendment power.[91]

The only way to make judicial review of constitutional amendment coherent with the premises of Roznai's UCA doctrine is to confine its scope to explicit intraconstitutional limitations and, consequently, to limit the constitutional court's competence to their explicit content.[92] The premises of Roznai's doctrine imply that judicial review cannot, without contradiction, create implicit limitations of any kind –whether substantive or procedural– against constitutional amendment power. Conversely, the creation of implicit limitations by the constitutional court stands in fundamental contradiction to both the theory of the constituent power of the people and the theory of mandate. Either the doctrine abandons these theories, or it abandons implicit judicial review and implicit limits. For the assumption that the people hold the constituent power is only compatible with respect for both their positivized will and their silences.[93] Inherited

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[90] "…facing silence regarding unamendability, a court's decision regarding a limited amendment power may only derive from judicial activism or daring". ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 209.

[91] See also BURITICÁ-ARANGO, Esteban. Democracia y cambio constitucional. **Ius et Praxis**, Talca, v. 28, n. 2, p. 222-242, 2022. p. 231. Roznai –in ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61. p. 50– would insist instead that "any organ established within the constitutional scheme to amend the constitution cannot modify the basic principles supporting its constitutional authority; even in the absence of any explicit limitations. Hence, explicit and implicit unamendability should be regarded as confirmation, a 'valuable indication' that the amendment power is limited, but not as an exhaustive list of limitations". This statement begs the question; it takes for granted precisely what is under discussion.

[92] Correctly, in another passage, Roznai himself states –in ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 201–: "Limiting the court's competence to a formal review does not mean that the amendment power is absolute. It is still limited. It only means that the constitution-makers had decided it should not be the courts that decide what the constitution's basic structure is or enforce its unamendability".

[93] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 152-154 –and ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In: ALBERT, Richard; ODER, Bertil Emrah (eds.). **An Unamendable Constitution?** Unamendability in Constitutional Democracies. Cham: Springer, 2018. p. 29-61. p. 51–, shows himself "fully aware that an argument in favor of implicit unamendability may seem contradictory in that it both upholds and rejects the constitution: in one breath it views the constitution as so sacred that the interference with its basic principles is prohibited, while in the next breath it claims that the constitution's own amendment procedure must be ignored or recognized only to a limited extend". Roznai's only response to this evident contradiction is that without implicit limits on constitutional amendment, "the power to amend may

constitutional theory remains correct: the democratic conception of constituent power supports positivism and formalism;[94] in no case does it support judicial creation.[95]

4. CONCLUSIONS

The critical conclusions drawn from this analysis are modest. The most modest conclusion is that Roznai's UCA doctrine is inapplicable to the Chilean constitutional system, when considered as a case of a constitution granted by an autocratic power that has become democratically appropriated precisely through the regular exercise of constitutional amendment power. The UCA doctrine does not provide sufficient elements of constitutional theory to explain the function that amendment power performs in efforts to overcome an authoritarian constitutional past. The UCA doctrine precludes assigning any democratic role to constitutional amendment power.

This conclusion, while modest, can be generalized: the Chilean case demonstrates internal contradictions and theoretical deficits in Roznai's UCA doctrine, particularly regarding granted or imposed constitutions. Roznai himself risks extending the scope of this observation when he asserts that "all constitutions can be considered as imposed to some extent".[96] As the criteria distinguishing between heteronomous and autonomous constitutions dissolve, every constitution becomes, in some sense, imposed. If every constitution is imposed, the aporias affecting both the notion of constitutional identity and the delegation relationship between constituent power and amendment power extend to every constitutional system.

The preceding analysis leads to a more fundamental critical conclusion: Roznai's UCA doctrine undermines the very constitutional theory concepts it claims to adopt as its foundation. Constituent power, which should ground a democratic understanding of limits to constitutional amendment power, becomes in Roznai's normative-ideal framework not a political force but merely a set of general and abstract norms external

include the power to destroy the constitution, and that would be *reductio ad absurdum*". However, the present objection does not lie in the inconsistency of recognizing limitations on constitutional amendment power, but in the compatibility between its judicial creation and the theory of the constituent power of the people. The warning about adverse consequences that would follow from not having a UCA doctrine shows an abandonment of the discussion rather than a path to its genuine resolution.

94 Fundamentally, MAUS, Ingeborg. **Justiz als Gesellschaftliches Über-Ich**: Zur Position der Rechtsprechung in der Demokratie. Berlin: Suhrkamp, 2018. p. 64-98. Against this view, ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 225.

95 Against this position, but adequately explaining the formalist understanding, ALÁEZ CORRAL, Benito. Reforma constitucional y concepto de Constitución. In: ALÁEZ CORRAL, Benito (ed.). **Reforma Constitucional y Defensa de la Democracia**. Madrid: Universidad de Oviedo – Centro de Estudios Políticos y Constitucionales, 2020. p. 23-59. p. 36-46. On some cases of formalist understanding, ALBERT, Richard; NAKASHIDZE, Malkhaz; OLCAY, Tarik; RIVAS, Pedro. La resistencia formalista a las reformas constitucionales inconstitucionales. **Díkaion**, v. 31, n. 1, p. 5-17, jan-jun. 2022. p. 36-42.

96 ROZNAI, Yaniv. Internally Imposed Constitutions. In: ALBERT, Richard; KONTIADĒS, Xenophon I.; FOTIADOU, Alkmene (eds.). **The Law and Legitimacy of Imposed Constitutions**. London: Routledge, 2019. p. 58-81. p. 60.

to the people's autonomous political agency. Constitutional identity becomes so diluted that it risks collapsing into liberal constitutionalism.

The delegation purportedly mediating the relationship between constituent power and amendment power emerges as overly abstract and undifferentiated; it fails to explain several limitations included in the doctrine while neglecting the enabling dimension of constitutional amendment power. The defense of judicial review of implicit limits on constitutional amendment power contradicts its own premises of democratic legitimacy, conflicts with constituent power's supposed exclusive competence to determine constitutional identity and proves inconsistent with the theory of mandate. By entrusting a court with determining the democratic credentials of institutionalized expressions of constituent power, the theory threatens to create problems more severe than those it claims to solve.

The attempt to reconcile the theory of the constituent power of the people with judicial review of constitutional amendment thus fundamentally fails. Equally unsuccessful is the attempt to mediate between "democrats" and "constitutionalists":[97] Roznai begins from democratic premises only to arrive at conclusions indistinguishable from liberal constitutionalism. Judicial review of constitutional amendment therefore remains vulnerable to the classic counter-majoritarian objection.

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[97] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The Limits of Amendment Powers. Oxford: Oxford University Press, 2017. p. 232.

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