The Law and Politics of Unconstitutional Constitutional Amendments in Asia

Comparative Constitutional Change
The Law and Politics of Unconstitutional Constitutional Amendments in Asia

This book explains how the idea and practice of unconstitutional constitutional amendments are shaped by, and inform, constitutional politics through various social and political actors, and in both formal and informal amendment processes, across Asia.

This is the first book-length study of the law and politics of unconstitutional constitutional amendments in Asia. Comprising ten case studies from across the continent, and four broader, theoretical chapters, the volume provides an interdisciplinary, comparative perspective on the rising phenomenon of unconstitutional constitutional amendments (UCA) across a range of political, legal, and institutional contexts. The volume breaks new ground by venturing beyond the courts to consider UCA not only as a judicial doctrine, but also as a significant feature of political and intellectual discourse.

The book will be a valuable reference for law and political science researchers, as well as for policymakers and NGOs working in related fields. Offering broad coverage of jurisdictions in East Asia, Southeast Asia, and South Asia, it will be useful to scholars and practitioners within Asia as well as to those seeking to better understand the law and politics of the region.

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Comparative Constitutional Change

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Introduction
1 Unconstitutional constitutional amendments as constitutional politics

Rehan Abeyratne and Ngoc Son Bui

1.1 Background and aims

Constitutional amendments are central to the study of comparative constitutionalism. Amendment rules and processes, as well as their effects on the constitutional order, have been the subject of much scholarship. Of particular interest to constitutional scholars in recent years are the theory and practice of unconstitutional constitutional amendments (UCA). The notion of UCA has diffused globally from its political foundations in France and the United States, to its doctrinal origins in Germany, to its practical application across the globe, including in Argentina, Austria, Greece, Hungary, Portugal, South Africa, South Korea, Switzerland, and Tanzania.

Constitutions may place both explicit and implicit limits on amendments. Article 79(3) of the German Constitution, for instance, makes the following provisions unamendable: the democracy principle (provided in Article 20), the federal structure, and the principle of human dignity (provided in Article 1). Such explicit limitations in the constitutional text are sometimes referred to as eternity clauses – they ensure that fundamental principles endure for as long as the constitution itself. More controversial, through increasingly common, are implicit limits on constitutional amendments. Implied limitations are usually declared by courts. Through a heightened form of judicial review, judges may find that constitutional amendments violate core constitutional principles such


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as the separation of powers or judicial independence. This is what transpired in the Indian Supreme Court’s landmark Kesavananda judgment (1973), which held that amendments could not violate the Constitution’s “basic structure” and inspired many other apex and constitutional courts to follow suit. Indeed, courts around the world have held certain constitutional amendments as unconstitutional on the grounds that the impugned amendments altered fundamental aspects of the existing constitution.4

As a result of the global spread of UCA, there is a great deal of comparative constitutional scholarship in this area. The scholarship generally covers one or more of the following dimensions: theory, constitutional design, and judicial review. At a theoretical level, UCA, particularly in its implicit form, poses a conundrum for the classic distinction between constituent and constituted power. The distinction was first articulated by the Enlightenment French theorist Emmanuel Joseph Sièyes, who distinguished between an all-powerful constituent power that creates the constitution and a lesser, constituted power, which is created by, and operates under, the constitution.5 Building on this insight more than one hundred years later, the German theorist Carl Schmitt argued that a constitution’s core identity – representing the fundamental decisions of the constituent power – could not be destroyed or removed by amendments.6

Constitutional amendments do not fit neatly in this framework. On one hand, they may amend the very rules and processes under which the constituted power operates. Constitutional amendments may, for instance, alter executive term limits, legislative voting roles, or judicial appointment processes. On the other hand, the amendment power is often vested in one or more branches of the constituted power – usually the legislature and/or executive – and so it would be odd to view it as on par with the constituent power, which is often (though misleadingly) thought to reside in “the people.”7 So, paradoxically, the amendment power appears be neither part of the constituent power, nor part of the constituted power. One way around this paradox is to argue, as Yaniv Roznai has, that the amendment power is “sui-generis,” a “secondary constituent power” that sits between the two poles.8 For Roznai, the amendment power operates in a fiduciary arrangement with the constituent power, serving as its “trustee” that is subject to procedural and substantive limits.9 Thus, an amendment may

4 Albert (n 2) 15–20.
5 Emmanuel Joseph Sièyes, ‘What is the Third Estate?’ in Oliver W Lembcke and Florian Weber (eds), Emmanuel Joseph Sièyes: The Essential Political Writings (Brill 2014).
7 Albert (n 2) 11–13. See also, Gary Jeffrey Jacobsohn and Yaniv Roznai, Constitutional Revolution (OUP 2020) 17–22 (showing how constitutional revolutions may happen incrementally and/or through constitutional amendments, rather than simply through extraordinary moments of popular sovereignty).
8 Roznai (n 1) 110–13.
9 ibid 118–20.
justifiably be considered unconstitutional if it violates these fiduciary terms. Roznai’s influential account has spawned several responses, both supportive and critical.  

Another thorny theoretical issue that implicates UCA is how to deal both descriptively and normatively with constitutional amendments that are amendments in name only. These are amendments that fundamentally reshape or shift the existing constitutional order. Richard Albert refers to such amendments as constitutional dismemberments. They are aimed not at correcting or clarifying an existing constitution, but instead seek “deliberately to disassemble one or more of a constitution’s elemental parts.” While Albert’s terminology and application is value neutral – applying to both progressive changes like the Civil War Amendments in the United States and regressive amendments like the Public Spending Cap Amendment in Brazil – it helpfully theorizes and gives a name to especially consequential amendments, even if those amendments are formally treated like ordinary amendments. The normative implications that flow from an amendment being treated as a dismemberment are substantial. For if an amendment has the effect of creating a new constitutional settlement, the constitutionality of future amendments should be measured against that new settlement, and not the original (or previous) constitutional order.

The second dimension of scholarship on constitutional amendments and UCA focuses on constitutional design. Much recent discussion has been on “tiered” or “multi-track” amendment rules, in which constitutional designers vary the requirements for formal amendment based on the type of provision at issue. For instance, while routine changes are subject to less rigorous rules, changes to fundamental provisions or values are placed on a higher tier and must pass more onerous requirements. Such differentiation among constitutional provisions serves an important expressive function, as core constitutional values are marked as such by being placed in a higher amendment tier. But tiering also

11 Albert (n 2) 4.
12 ibid 4–5, 40–2.
serves a practical purpose, particularly in guarding against abusive constitutionalism.16 As Rosalind Dixon and David Landau put it,

[T]iering can combine the best of … [rigid and flexible] constitutionalism. Because most provisions can be changed easily, the constitution can be updated as needs arise. At the same time, enhanced protection of a core set of provisions may help defend against particularly destabilizing forms of constitutional change.17

Some parts of a constitution, however, are explicitly immune from constitutional amendment. Such eternity clauses represent the highest level on a tiered or multi-track design. As they cannot be amended, these provisions have especial symbolic or expressive value.18 They also may be the product of hard-won political bargains – certain parties may not agree to ratify or support a constitution unless their interests are explicitly entrenched beyond the scope of amendment. Article V of the US Constitution, which insulated certain slavery-related provisions from amendment until a certain date and further made it practically impossible to deprive states of equal representation in the Senate, fits this description.19 As Silvia Suteu argues, though, in post-conflict or post-authoritarian situations, such political compromises may forestall the development of liberal constitutionalism in the long run and may entrench exclusionary majoritarianism at the expense of minority interests.20

The third dimension of scholarship in this area concerns UCA as a judicial doctrine. As Roznai has shown, implicit unamendability, as expressed in basic structure or UCA doctrines, has spread from the Indian Supreme Court to courts around the world including in Taiwan, Bangladesh, Kenya, Belize, and Colombia.21 At a normative level, scholars generally cabin their support for judicial interventions on UCA grounds to situations in which the amendment at issue grossly infringes upon core constitutional provisions. Thus, courts should only strike down amendments that are “manifestly unreasonable”22 or constitute a “disproportionate violation.”23 Within these limits, courts can play a useful countermajoritarian role in checking the excesses of elected leaders. But when courts

16 David Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis LR 189 (referring to the erosion of liberal democratic values by authoritarian governments using lawful mechanisms like constitutional amendments).
17 Dixon and Landau (n 14) at 441.
19 ibid 245.
21 Roznai (n 1) 47–69.
22 Yap (n 1) 116.
23 Roznai (n 1) 220–1.
are responsible for determining the content and scope of UCA enforcement, rule of law and democracy-related concerns inevitably arise. As Richard Albert put it,

[I]f the Court takes the broadest reading of democracy, an unamendable rule protecting “democracy” risks swallowing up the entire constitution, bringing all constitutional amendments within the purview of a court’s power of judicial review and accordingly its power to invalidate any constitutional amendment.24

Such broad policing of the amendment power may bring instability to the constitutional system or turn a democracy into a “juristocracy.”25

At a contextual level, the doctrine has been defended as a useful tool to protect against abusive constitutional amendments, particularly in new or fragile democracies, but it has also been criticized for aggrandizing judicial power beyond permissible limits. David Landau has defended the use of UCA in Colombia, inter alia, to prevent President Uribe from seeking a third term in office, which he was able to do given the low bar to constitutional amendments in that country.26 By contrast, the Indian Supreme Court’s judgment in the Fourth Judges Case invalidating the National Judicial Appointments Commission (NJAC) has been heavily criticized.27 The Court struck down a constitutional amendment and related legislation that would have vested the judicial appointment power in a multi-member, multi-institutional commission.28 As a result, the Court entrenched the deeply flawed and corrupt “collegium” system of judicial appointments, in which the appointment power is vested in a group of judges.

While these debates are important, and we seek to engage with them, this volume aims to expand academic research on unconstitutional constitutional amendments in two ways: substantive and jurisdictional. First, while existing scholarship has focused on the three dimensions discussed above, this volume explores a fourth dimension: constitutional politics. Politics refers to “the control, allocation, use of important resources and the values and ideas underlying these activities.”29 Constitutional politics, therefore, involves the control, allocation, use of public power, and the fundamental values and ideas underlying these activities.

Second, this volume focuses on Asian jurisdictions that have been under-studied in the existing scholarship on unconstitutional constitutional amendments. To be sure, the basic structure doctrine in India has been extensively

24 Albert (n 14) 171.
25 Ran Hirschl, Towards Juristocracy (HUP 2004).
26 Landau (n 16) 199–203.
28 Supreme Court Advocates-on-Record Association v Union of India, (2016) 4 SCC 1.
studied. In addition, there are several studies on this topic in other Asian jurisdictions, such as Taiwan and Malaysia. However, the existing scholarship has focused on individual Asian jurisdictions and has largely considered issues of design or judicial review of constitutional unamendability. Several other Asian jurisdictions such as China, Japan, Thailand, and Vietnam have been largely overlooked in the scholarship on unconstitutional constitutional amendments. Moreover, there are no book-length treatments of which we are aware on unconstitutional constitutional amendments in Asia generally and on their politics particularly. This volume seeks to fill this scholarly gap by investigating the political aspects of constitutional unamendability in a range of Asian jurisdictions from a comparative perspective.

The politics of unconstitutional constitutional amendment involves the following aspects: diverse political regimes including democratic, socialist, and hybrid; diverse political activities including political discourse and mobilization; diverse forums including legislative, judicial, and popular; diverse social and political actors including judges, politicians, lawyers, scholars, activists, political parties, and social movement actors; and the diverse triggers, including formal amendments, informal amendments, amendment proposals, and constitutional replacements.

1.2 Typology of Asian cases

The ten case studies in this book could be organized in several ways. Geographically, the volume has broad coverage of the three main Asian sub-regions: East Asia (China, Japan, Taiwan), Southeast Asia (Malaysia, Thailand, Vietnam), and South Asia (Bangladesh, India, Nepal, Pakistan). But more interesting for our purposes is the spectrum on which these cases fall as to their treatment of UCA as a theory and doctrine. Depending on how UCA is used, we develop a three-part typology of our cases: discursive, denotive, and decisive. Each of these is an ideal type. Though none captures the full complexity and dynamism with which constitutional actors have wrestled with UCA, each captures a significant mode of engagement with the concept in three or more of our case studies.

In the discursive model, UCA is not adopted in the courtroom but informs public and intellectual discussion. Japan, China, and Vietnam fall within this model.

30 See, for example, Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2010).
In Chapter 2, Koichi Nakano analyzes the political processes in Japan that led to informal constitutional amendments through the Abe government’s interpretation in July 2014. In the Japanese case, informal amendments might be considered unconstitutional on normative, substantive, and procedural grounds; for instance, if they surpassed the limitations of informal amendments, breached the principles of constitutionalism, violated constitutional pacifism, or exercised arbitrary power. Civil society, the bar, and former judges argued that the informal constitutional amendments are unconstitutional. This chapter explores the dynamics of this public constitutional activism surrounding these informal constitutional amendments.

In Chapter 3, Ryan Mitchell explores the discursive dynamics of Chinese constitutional fundamentals referred to in the People’s Republic of China as guoti (fundamental form of state). Guoti has ideational and institutional aspects of constitutional cores. Its ideational aspects (liberal, socialist…) vary depending on the historical context. The same can be said of its institutional manifestations (rights, party leadership…). The chapter also explores the constitutional discourse on guoti surrounding the 2018 constitutional amendments. The idea was used in critical discussions on this topic. For example, it informed different ideational justifications of term limit entrenchment. Some justifications of term limit abolition are instrumental, necessity-based (continuity of reform), while other justifications of term limit entrenchment are normative and value-based. Second, guoti was constitutionalized through the 2018 amendments. For example, the chapter discusses the migration of party leadership (a core of Chinese socialist polity) from the Preamble to Article 1 of the Constitution. In addition, the 2018 amendments constitutionalize another core concept within guoti: socialism with Chinese characteristics. Third, the newly entrenched constitutional guoti has important implications for post-2018 constitutional discourse. Mitchell further argues that aspects of constitutionalized guoti seem beyond revision or even questioning.

In Chapter 4, Bui Ngoc Son explores an academic paper criticizing Vietnam’s 2013 Constitution as an “unconstitutional constitution.” The paper was penned by Hoàng Xuân Phú, a Vietnamese mathematician. Hoàng argues that Vietnam’s 2013 Constitution is an unconstitutional constitution because some new provisions in the constitution violate fundamental principles established in preceding provisions. This chapter explores Hoàng’s account of an unconstitutional constitution, while situating it within the broader national constitutional debates in Vietnam and comparative scholarship on unconstitutional constitutional amendments and unconstitutional constitutions. It argues that Hoàng’s account of an unconstitutional constitution is a political, critical, and normative discourse on Vietnam’s Constitution. Hoàng’s arguments echo the arguments justifying the doctrine of unconstitutional constitutional amendments and the doctrine of unconstitutional constitutions in comparative scholarship. The Vietnamese case suggests that “unconstitutional constitutions” is not solely a judicial doctrine but can be a political theory which informs public constitutional discourse.
The second, *denotive* model involves UCA as part of judicial rhetoric and reference. Malaysia, Pakistan, and Nepal are grouped within this model. While the courts in these countries have not invalidated constitutional amendments, judges have invoked variants of UCA doctrine in their judgments and have, therefore, affected the politics around thorny constitutional issues.

In Chapter 5, HP Lee and Yvonne Tew chart the “rising trajectory” of Malaysian constitutional jurisprudence from the country’s independence in 1957 to the present day. Central to their analysis are three recent cases – *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*. The first two cases witnessed the migration of the basic structure doctrine (BSD) from India to the Malaysian Federal Court. These judgments protected the judicial power against incursions from land assessors and the Syariah courts, respectively. They interpreted the Constitution as vesting judicial power only in the courts, and held that this power cannot be reduced or moved elsewhere. The basic structure doctrine was firmly entrenched in *Alma Nudo*. Building on the two previous judgments, Chief Justice Richard Malanjum declared that

> while the Federal Constitution does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the [Constitution] but also for violation of the doctrine or principles that constitute the constitutional foundations.

However, as Lee and Tew point out, none of these judgments actually struck down a constitutional amendment, leaving the future path of the BSD uncertain. Indeed, the recent *Maria Chin* judgment, issued by a divided Federal Court, cast doubt on the applicability of the BSD in Malaysia, though Lee and Tew argue that reports of its death are “greatly exaggerated.”

In Chapter 6, Matthew Nelson discusses the functional equivalent of basic structure review – the “salient features” doctrine – as it has developed in the context of Islamic features in Pakistan’s Constitution. Nelson focuses on Article 62(1)(f) of the Constitution which, among other things, requires those standing for elections to Parliament as well as sitting parliamentarians to be *ameen* (trustworthy in a Quranic sense). The Pakistan Supreme Court has interpreted this provision broadly to disqualify several members of Parliament who had been found guilty of dishonesty by lower courts. The Supreme Court even disqualified

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33 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 Malayan LJ 561.
35 *Alma Nudo Atenza v Public Prosecutor* [2019] 4 Malayan LJ 1.
36 ibid [73].
37 *Maria Chin Abdullah v Director-General of Immigration* [2021] 2 Current LJ 579.
38 See HP Lee and Yvonne Tew, Chapter 5 in this volume.
Prime Minister Nawaz Sharif on this basis. With this institutional conflict emerging between the Parliament and the Court, Nelson explores the likelihood of Parliament repealing this provision by constitutional amendment and whether the Supreme Court, asserting its own power, would find that amendment unconstitutional. The Court in 2015 declared that constitutional amendments violating salient features should be annulled, but as in Malaysia, it remains to be seen whether, and in which context, the Court will actually exercise this power.

In Chapter 7, Mara Malagodi explores the unique case of Nepal’s Constituent Assembly. Nepal went through a long transitional period as its 1990 Constitution, which established a constitutional monarchy and parliamentary government, was destabilized by a ten-year Maoist insurgency. As Malagodi explains, in 2005, the Maoist and mainstream parties agreed to repeal the 1990 constitution, leading to the adoption of an Interim Constitution in 2007. The government also formed a Constituent Assembly (CA) to draft a permanent constitution, but it was beset by delays. After the CA’s term was extended three times, the Supreme Court ruled that any further extensions would violate the Interim Constitution. When the government failed to meet that deadline and sought to amend the term of the CA again, the Supreme Court issued an order that effectively prevented any further extensions. As a result, Nepal was left without a functioning legislature for more than a year, and a new Constituent Assembly had to be formed. Malagodi explores the thorny theoretical issue of judicial intervention in the CA’s exercise of constituent power – conventionally thought to be beyond the pale of judicial review – within the complex politics of transitional Nepal. She concludes that this bold assertion of judicial power contributed to the Supreme Court being weakened in several respects under the permanent 2015 Constitution.

The third, decisive model involves judiciaries striking down constitutional amendments on UCA grounds. Taiwan, Thailand, India, and Bangladesh exemplify this model. While the legal aspects of the relevant judgments have been analyzed in detail in past scholarship, the chapters in this volume place these judgments in their broader political context.

In Chapter 8, Jiunn Rong Yeh discusses Judicial Interpretation No. 499 issued by Taiwan’s Constitutional Court in 1999, which declared constitutional amendments passed by the National Assembly as unconstitutional. 39 Imran Ahmed Khan Niazi v Mian Muhammad Nawaz Sharif, PLD 2017 SC 692. 40 District Bar Association Rawalpindi v Federation of Pakistan, PLD 2015 SC 401. 41 Joel Colón-Ríos has presented a related typology, which includes two models of UCA review within a broader spectrum of judicial review. One model, “strong basic structure review,” is equivalent to our “decisive model” – it applies to jurisdictions in which courts can strike down constitutional amendments. A second model, “weak basic structure review,” permits judges to strike down amendments, but allows “the people,” through a constituent assembly, to have the final word on the validity of such amendments. This model, as Colon-Ríos notes, is practiced in Latin America. It is not, to our knowledge, present in Asia. See Joel I Colón-Ríos, ‘A New Typology of Judicial Review of Legislation’ (2014) 3(2) Global Constitutionalism 143.
Rehan Abeyratne and Ngoc Son Bui
dealt with parliamentary reform, provincial elections, and basic national policies. The chapter explores three political imperatives for the court’s ruling on the unamendability (incremental constitutional reform, the status of the National Assembly, and the presidential election) and situates the Court as a political institution within the broader social and institutional dynamics. In particular, civil society mobilized to the Court to nullify the amendment. The chapter concludes that the Court functioned as an instrument for the people to exercise oversight on constitutional amendments.

In Chapter 9, Khemthong Tonsakulrungruang explores the Thai Constitutional Court’s four decisions in 2013–14 on the constitutionality of proposed amendments to the 2007 Constitution. In contrast to the normative underpinnings of the doctrine of unconstitutional constitutional amendments, this chapter reveals that judicial rules on unamendability of amendments may undermine democracy in Thailand. It demonstrates that the proposed amendments sought to challenge the authoritarian features of the 2007 Constitution, which was barred by the court’s decisions. Therefore, Tonsakulrungruang argues that judicial decisions on unconstitutional constitutional amendments in Thailand entrenched authoritarianism.

Perhaps the most widely known case of UCA is in India, where the Kesavananda judgment (1973) inaugurated the modern trend towards courts defining the scope of implicit unamendability and striking down amendments that violate the Constitution’s “basic structure.” Surya Deva, in Chapter 10, reviews the history and evolution of the basic structure doctrine within the context of two strands of politics. The first strand he calls the “politics of supremacy,” which involved a dispute between the political branches and the judiciary on who has the final word on constitutional meaning. Deva refers to the second strand as the “politics of legitimacy,” which is contested between dominant political coalitions and members of the public who believe majoritarian politics must abide by constitutional rules. Deva defends BSD as a necessary tool to prevent against majoritarian excesses, particularly in the current context of democratic erosion and the concentration of power in the Modi regime. He calls for a reconceptualization of BSD “as part of a wider constitutional mechanism of checks and balances, rather than as a judicial brahmastra (a weapon with no defences) against the legislature and/or the executive.”42 He further argues that BSD should be applicable against the judiciary, to guard against judicial misuse of the doctrine.

A similar story emerges in Bangladesh. Ridwanul Hoque in Chapter 11 recounts how the Appellate Division of the Bangladesh Supreme Court (SCAD) recognized the basic structure doctrine in Anwar Hossain Chowdhury (1989) and has used the doctrine in increasingly divisive matters of constitutional law and politics. Hoque’s analysis focuses on the politics surrounding the 8th and 15th Amendments to the Bangladesh Constitution. Hoque argues that while both amendments were framed as non-partisan improvements to the constitutional

42 Surya Deva, Chapter 10 in this volume.
order, they were both driven – as he argues most constitutional amendments in Bangladesh are driven – by narrow party politics aimed at the consolidation and perpetuation of power. Because of the majoritarian nature of these amendments, they are often exclusionary, resulting in SCAD judgments that implicitly favor one political regime or coalition over the others. A major outcome of the 15th Amendment and the judgment in the 13th Amendment Case that led to it, according to Hoque, is that the Awami League led by Prime Minister Sheikh Hasina now presides over a country that is democratic in name only.

The final four chapters of this volume offer broad theoretical and comparative reflections on the law and politics of UCA. In Chapter 12, Richard Albert situates the judicial nullification power, as it has developed in Asia, within the global context, both to uncover the conceptual roots of this power across borders and regions, as well as to bring Asian cases into a wider conversation. He describes six forms of judicial nullification – procedural irregularity, subject-rule mismatch, temporal limitations, codified unamendability, interpretive unamendability, and supranational constitutional restrictions – and illustrates how each operates using examples from Asia and beyond.

Andrew Harding, in Chapter 13, interrogates the breadth of the basic structure doctrine. He asks whether we should conceive of BSD as a necessary consequence of constitutionalism, particularly when a constitution sets forth a democratic form of government, or whether it is a contingent doctrine, emerging from the constitutional history of a particular society. In making the case for the contingent view, Harding cautions against unwarranted or excessive uses of the doctrine. He argues that an unamendable basic structure is not always implied by the facts of constitution-making or entrenchment; that it should not be implied if constitutional provisions are protected by a referendum requirement; that the actual content of the doctrine varies by context; and that the BSD, in principle, should not apply to unwritten or unentrenched constitutions.

In Chapter 14, Silvia Suteu highlights the majoritarian, exclusionary tendencies of eternity clauses and UCA judicial doctrines. She argues that the potential of these mechanisms to forestall democracy and exclude minorities is greater in fraught constitutional contexts – societies that are divided, fragile, and affected by conflict. In Thailand, for instance, she notes that by making the monarchical system of government unamendable, successive Thai constitutions have constricted possible avenues for democratic change, leading to multiple political breakdowns and constitutional crises. In Nepal, Suteu shows how the 2015 Constitution entrenched a majoritarian, ethnocultural conception of citizenship as well as a federal structure that disadvantages minorities, particularly the Madhesi community, which may be detrimental to the country’s stability and democratic governance.

Finally, in Chapter 15, Yaniv Roznai seeks to explain why UCA has been adopted across Asia. He deploys the following theories – Edward Crown’s higher law, John Hart Ely’s democracy and distrust, Tom Ginsburg’s political insurance, and Ran Hirschl’s hegemonic preservation – and explains how each is apposite in certain political and historical contexts. Roznai argues that institutional factors
affect the adoption *vel non* of UCA doctrines. These include the flexibility of the amendment process, party or executive dominance, the political-democratic amendment culture, and the existence and effectiveness of supra-national institutions. Roznai illustrates these features with reference to the case studies in the volume, as well as the case of Israel, where the Knesset plays the dual role of constituent power and national legislature and is dominated by the government. He concludes that in such a context there is greater justification for the judiciary to play a role in limiting the amendment power.

### 1.3 UCA as constitutional politics

The animating idea of this volume is that UCA forms part of, and is influenced by, constitutional politics. The book seeks to explore and explain how and why the idea of unconstitutional constitutional amendments informs political activities through diverse forums, by various social and political actors, through both formal and informal constitutional amendment processes in Asia. Thus, the volume aims to consider not only constitutional design and judicial review, but also intellectual and political debates on unamendability.

Why constitutional politics in the context of UCA? Elsewhere, one of us suggested four reasons: (1) the political nature of the constituent power; (2) the political nature of foundational constitutional questions; (3) the political nature of constitutional disagreements; and (4) consequently the political protection of constitutional unamendability. First, the constituent power is not a legal aggregate entity but a politically constructed one. Second, unconstitutional constitutional amendments often touch on fundamental questions of a polity. These questions are not merely legalistic. These are also political questions as they deal with political ideals and ideas, political systems, political institutions, and they may inform political activities and behaviors. Third, the questions of unconstitutional constitutional amendments may generate higher level political disagreements. Constitutional questions often create disagreements, but the fundamental questions concerning the basic structure and identity of the constitutional order may be more controversial and, hence, induce greater disagreement. Fourth, the protection of constitutional unamendability is not merely a legal or judicial concern, but also a political one. As questions of unconstitutional constitutional amendments are foundational political questions which generate reasonable political disagreements, it is myopic to think that UCA is or should be limited to the courts. Tackling such questions often involves political and social actors beyond courts including citizens, legislators, activists, and political parties.

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44 ibid.
Consider first the discursive model of UCA in China and Vietnam. Unamendability in the socialist single-party regimes of China and Vietnam is not a judicial doctrine. Courts in these counties do not have the constitutional review power due to the socialist principle of democratic centralism, which subordinates courts to the supreme legislature. Rather, unamendability is a part of political discourse. Without judicial review, the ideas of constitutional *guoti* and unconstitutional constitution are only debated in academic or popular forums by intellectual actors triggered by the process of formal constitutional amendment (China) and replacement (Vietnam). Unamendability is also not a design issue in China and Vietnam as their socialist constitutions do not have eternity clauses. However, unamendability is not necessarily associated with constitutional review and design: it can be entrenched through political construction. Political construction of unamendability can be procedural and substantive. Richard Albert’s concept of “constructive unamendability” captures the procedural aspect: “[a] constitutional rule is constructively unamendable when the codified thresholds required to amend it are so onerous that reformers cannot realistically (though theoretically) satisfy the standard.” The substantive aspect of political construction of unamendability is that the existing political reality renders content in the constitution unamendable although amendments are textually plausible. The cases of China and Vietnam fall into this substantive aspect. Every provision in their constitutions is theoretically amendable. However, as the Communist Party remains the single dominant party in these countries, it is practically impossible to amend the core socialist commitments that the party attempts to pursue. These include commitments such as the vanguard role of the communist party itself, the construction of socialism, and the principle of democratic centralism. Such commitments may also rise to the level of constitutional conventions – deeply entrenched practices that over time have come to be seen as unamendable.

The discursive model of UCA in Japan also includes several political aspects although it is different from those of China and Vietnam. Unlike the two socialist countries, Japan is a constitutional democracy with judicial review. However, Japan’s Supreme Court has been conservative and rarely exercised its judicial review power. Rather, the government has enjoyed the power of constitutional interpretation (through its Cabinet Legislation Bureau), and the Court tends to avoid making judgments on the government’s interpretations. Therefore, public

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45 Albert (n 14) 158.
48 See Nakano, Chapter 2 in this volume.
intellectuals and civil society organizations have challenged the government’s constitutional interpretations (a form of informal constitutional amendments\(^\text{49}\)) as unconstitutional through public debate and social mobilization alongside litigation. Japan’s basic protection of freedom of speech and association enables the wider public to debate the constitutionality of the government’s interpretations. The same cannot be said of China and Vietnam.

The implication of the discursive model in China, Vietnam, and Japan is that UCA is not necessarily a doctrine used by courts: it can be a critical political theory that informs public debate on the (un)constitutionality of constitutional change. In addition, the discursive model shows that the idea of UCA is dynamic because it is not fixed by constitutional texts but presented, circulated, debated, and (de)legitimatized in the public.

The denotive model, by contrast, sees courts enter the constitutional politics of UCA without claiming the last word on the validity of specific amendments. In Malaysia and Pakistan, courts have recognized the basic structure doctrine or salient features doctrine, respectively, and given content to those doctrines.\(^\text{50}\) The Federal Court of Malaysia held that judicial review, separation of powers, rule of law, and protection of minorities fall within the unamendable basic structure.\(^\text{51}\) The Supreme Court of Pakistan, meanwhile, held that the following salient features cannot be amended: “[F]ederalism, parliamentary democracy and Islamic provisions including independence of judiciary.”\(^\text{52}\) The Court subsequently ruled that a “parliamentary form of government blended with Islamic provisions” constitutes part of the basic structure.\(^\text{53}\)

But why have these courts adopted and given substance to these UCA doctrines if they do not actually enforce them? One reason might be that, in these fragile democracies, courts are hesitant to intervene too forcefully because they might face political reprisals. In Malaysia, the judiciary appears to be treading cautiously, waiting for opportune moments to enhance their constitutional authority vis-à-vis the government.\(^\text{54}\) This strategic account makes sense within Malaysian constitutional politics, where one political alliance (Barisan National) has ruled for almost the entire post-independence period.\(^\text{55}\) It also fits with the type of case in which the Federal Court has advanced the BSD: those concerning the scope and singularity of judicial power.\(^\text{56}\) On these issues, the Court is arguably at its most authoritative, given that it sits atop the judiciary. Moreover, from an


\(^{50}\) See Lee and Tew, Chapter 5; Matthew Nelson, Chapter 6 in this volume.

\(^{51}\) Indira Gandhi (n 34) [42], [90].

\(^{52}\) Mahmood Khan Achakzai v Federation of Pakistan, PLD 1997 SC 426.

\(^{53}\) Nelson, Chapter 6; District Bar Association Rawalpindi v Federation of Pakistan, PLD 2015 SC 401.

\(^{54}\) See Yvonne Tew, Constitutional Statecraft in Asian Courts (OUP 2020) 8–10.

\(^{55}\) ibid 1–2.

\(^{56}\) Lee and Tew, Chapter 5.
institutional perspective, these cases present the highest stakes, where the Court not only must protect its terrain, but may also wish to signal that further incursions on judicial power will not be tolerated.

A strategic motivation may apply in Pakistan too, though in a slightly different form. As Nelson explains, judicial independence has been subject to frontal assaults, most notably in 2007 when General (President) Musharraf tried to sack Chief Justice Chaudhry.\textsuperscript{57} Though Chaudhry successfully challenged this removal attempt at the Supreme Court, Musharraf later declared a state of emergency, suspended the Constitution, and removed several judges (including Chaudhry) from their posts. Chaudhry was later reinstated as Chief Justice, but the institutional battle between the government and the Supreme Court has continued.\textsuperscript{58} Given this recent history, Supreme Court justices may wish to avoid direct confrontations with the political branches and, hence, have avoided striking down constitutional amendments on salient features grounds.

Another reason for the Pakistan Supreme Court’s reticence in this context is the institutional culture of the Court. As Nelson informs us, “[A]ll of my respondents felt that basic structure jurisprudence in Pakistan was now more closely tied to historically specific personalities and the politically contingent patterns of judicial activism (or reticence) attached to them.”\textsuperscript{59} His respondents specifically mentioned the personality of the Chief Justice as significant in determining the future trajectory of the salient features doctrine. This idiosyncratic, personality-driven style of judicial decision-making has been noted in other studies of South Asian constitutionalism.\textsuperscript{60} In addition to rule of law and coherence-based concerns that may arise from this approach,\textsuperscript{61} it also makes the future path of the law very difficult to predict. By contrast, on a strategic account, we would expect these courts to eventually strike down constitutional amendments when the constitutional politics are conducive and the institutional stakes are sufficiently high.

The final denotive case is Nepal. By refusing to extend the first Constituent Assembly’s term indefinitely – on the grounds that extensions would violate Nepal’s 2007 Interim Constitution – the Supreme Court may have stepped on a political landmine. The 2015 Constitution, unlike the Interim Constitution, contains an eternity clause; namely, the Constitution “shall not be amended in way that contravenes with self-rule of Nepal, sovereignty, territorial integrity and sovereignty vested in people.”\textsuperscript{62} While this clause might be enforced through

\textsuperscript{58} See Nelson, Chapter 6.
\textsuperscript{59} ibid.
\textsuperscript{60} See, for example, Anuj Bhuwania, \textit{Courting the People: Public Interest Litigation in Post-Emergency India} (CUP 2017); Rehan Abeyratne, ‘Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia’ (2018) 54 Texas International LJ 1.
\textsuperscript{61} Abeyratne (n 60) 30–3; Chintan Chandrachud, ‘Constitutional Interpretation’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), \textit{Oxford Handbook of the Indian Constitution} (OUP 2016) 86–92.
\textsuperscript{62} Constitution of Nepal 2015, art 274(1).
litigation, the principles therein are not amendable to judicial review. Unlike, say, judicial independence or the separation of powers, sovereignty and territorial integrity are subjects usually confined to the political domain. Moreover, as Malagodi argues, the 2015 Constitution weakens the Supreme Court in several ways. Judicial review may only be conducted by a single Constitutional Bench, which is likely to slow down an already backlogged docket; judges can be impeached and removed more easily from office; and judicial appointments must be confirmed by a Parliamentary Hearings Committee, which may politicize the process. Finally, the 2015 Constitution, which emerged from the Court-mandated second Constituent Assembly, has proved unpopular with several minority groups, who are likely to blame the Court for their predicament under the current constitutional order. Thus, the Supreme Court of Nepal, partly as a result of its UCA-related interventions into the Constituent Assembly, finds itself today on shaky institutional grounds and enjoys limited public support.

We turn now to the decisive model of UCA. The four cases here – Taiwan, Thailand, India, and Bangladesh – illustrate the political contingency behind judicial decisions to strike down constitutional amendments. Consider Taiwan. Its Constitutional Court was able to decide on the unconstitutionality of the amendment largely thanks to the island’s transitional democracy. Taiwan’s democratic transition transformed the dormant Council of Grand Justices into an active constitutional court, which made the institution an attractive and trusted forum to decide major issues of constitutional reform. In addition, democratization helped to generate a vibrant civil society which employed the judicial platform in the struggle to consolidate Taiwan’s young democracy. Therefore, the court is not the only actor engaged in UCA. Civil society was also a major social and political force in defending unamendable constitutional essentials.

Meanwhile, Thailand was a fragile democracy when the country’s Constitutional Court ruled that the proposed amendments in 2013–14 were unconstitutional. As Thailand’s democracy was not stable, the court was more vulnerable to political influences. Tonsakulrungruang observes that

The Constitutional Court was equipped with the ultimate power to intervene in politics … Moreover, at a personal level, anti-Thaksin figures were

63 Mara Malagodi, Chapter 7 in this volume.
64 ibid.
65 See Jiunn-Rong Yeh, Chapter 8 in this volume.
67 For details on the legal and judicial aspects of the case, see David K Huang and Nigel N Li, ‘Unconstitutional Constitutional Amendment in Taiwan: A Retrospective Analysis of Judicial Yuan Interpretation No. 499 (2000)’ (2020) 15 University of Pennsylvania Asian LR 421.
68 On fragile democracies and the politicization of the courts, see Po Jen Yap, Courts and Democracies in Asia (CUP 2017) 125–34.
recruited onto the bench. As a result, the Constitutional Court represented the interests of the minority to suppress Thaksin and his political allies.\textsuperscript{69}

In this context of judicial politicization, when the Court decided to strike down the Yingluck Shinawatra government’s amendment proposals which arguably aimed to dismantle authoritarian legacies,\textsuperscript{70} it appears to have been representing the political interests of the anti-Thaksin actors.

These accounts depict two poles of the normative spectrum of UCA judicial enforcement. At the positive end, UCA can be used to protect and consolidate a democracy as it was in Taiwan. Its judicial use was supported by the broader public (including civil society organizations). The normative weight of positive unamendability is connected to values associated with liberal constitutionalism. At the negative end, UCA can be used to undermine the existing democracy as in Thailand. Its judicial use was supported by some political factions, but not by the broader public. The instrumental weight of negative unamendability rests on justifications associated with authoritarianism.

The two South Asian cases in this group – India and Bangladesh – fall somewhere in the middle of the UCA normative spectrum. In India, Surya Deva defends the Supreme Court’s use of basic structure review as part of a “wider system of checks and balances in times of serious democratic deficits in all institutions of governance.”\textsuperscript{71} Deva argues that India faces such deficits today, as Prime Minister Narendra Modi’s government has adopted a centralized and quasi-authoritarian mode of decision-making, sidelining political opponents, diminishing the freedoms of speech and press, and politicizing erstwhile independent institutions.\textsuperscript{72} In 2019, the Modi government also used executive orders and ordinary legislation to effectively change the constitutional status of Jammu and Kashmir under Article 370 of the Constitution. Thus, for the BSD to be effective in today’s political context, Deva contends that it must be expanded. The Supreme Court should not only be able to strike down formal amendments, but also laws or orders that have the effect of amending the Constitution. However, the Supreme Court cannot be trusted to wield this great power with appropriate care and forbearance. In the Fourth Judges case, as Deva explains, the Court struck down a constitutional amendment and related legislation that would have created a National Judicial Appointments Commission.\textsuperscript{73} The Court’s reasoning suggested that any judicial appointment procedure that did not confer primacy on judges in the decision-making process would be a violation of judicial

\textsuperscript{70} Khemthong Tonsakulrungruang, Chapter 9 in this volume.
\textsuperscript{71} Surya Deva, Chapter 10 in this volume.
\textsuperscript{72} See also Tarunabh Khaitan, ‘Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India’ (2020) 14(1) Law & Ethics of Human Rights 49.
\textsuperscript{73} Supreme Court Advocates-on-Record Association (n 28).