PART II:
The Interpretive Legitimacy of the Unconstitutional Constitutional Amendment Doctrine

3. Three Suggestions for the Legitimate Use of UCAD

3.1. UCAD as a Solution to Abusive Constitutionalism

The foregoing section has introduced three different moral reasons why the courts are justified in reviewing the constitutionality of constitutional amendments. Instead, this section seeks to provide a positive response to the interpretive legitimacy question. In doing so, it first clarifies why the courts are better suited than other legal institutions for implementing the UCAD. It then compares three different suggestions as to how to apply the UCAD without prejudice to the capacity of a political community to update its constitution. This comparison paves the way for the main argument of the monograph, that is, the courts should strike a balance between two competing (formal) principles in deciding on the constitutionality of constitutional amendments, i.e., constitutional continuity and constitutional innovation.

One of the greatest problems, if not the most daunting, afflicting constitutional democracies is the rise of populism and its detrimental impact on underlying normative principles. Landau, labelling this trend abusive constitutionalism, argues that populist and authoritarian leaders use seemingly legitimate constitutional mechanisms to strengthen their political power and make the system 'significantly less democratic than it was before'[272]. Populist leaders aim to consolidate

272 David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189, 195. In this context, the conception of democracy that one espouses has further

their political power and tilt the political landscape in favour of it by gradually weakening institutional mechanisms and constitutional safeguards. They conceal their true motivations when they employ various constitutional tools to erode the very limitations that the constitution imposes on them. The fact that abusive regimes combine different mechanisms and exploit the interaction effects between them makes it harder to detect the monstrous 'Frankenstate' they seek to create[273].

The success of populist governments in their effort to manipulate constitutional architecture is partially associated with the failure of the current constitutional safeguards against the strategic use of seemingly legitimate constitutional mechanisms. These include militant democracy, designing tiered constitutional amendment rules, and UCAD[274]. For instance, militant democracy proves ineffective against abusive constitutionalism because it seeks to protect democracy from apparent threats posed by the totalitarian or authoritarian governments of the 1930s and 1940s. In the same vein, a tiered constitutional amendment rule fails to hold rein in populist leaders, as it often assures unamendable status to expressive elements of constitutions (e.g., human dignity, secularism, fundamental rights) without much regard for the threats posed by populist leaders to structural provisions (e.g., independence of the judiciary)[275]. Constitutional tiering strategy, as Landau depicts,

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implications for offering an answer to the question of how to fight against abusive constitutionalism. Landau employs a minimalist definition of democracy whereby 'a judicial decision is an act of abusive judicial review if it has a significant negative impact on the minimum core of electoral democracy' Rosalind Dixon and David Landau, 'Competitive Democracy and the Constitutional Minimum Core' in Tom Ginsburg and Aziz Huq (eds) *Assessing Constitutional Performance* (CUP 2016) 281.

273 Ibid.

274 Rosalind Dixon and David Landau, 'Transnational Constitutionalism and A Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *International Journal of Constitutional Law* 606.

275 Landau (n 272) 229. Landau suggests that a temporal limitation clause could be added to constitutional amendments, requiring multiple votes on amendments with an intervening election between them. Ibid 228.While compulsory referendum clauses may seem effective in preventing would-be authoritarians, they are unlikely to be as successful as sequential approval. Would-be authoritarians often exploit majoritarian surges to amend the constitution. This is formulated by

'appears blind to the problem of abusive constitutionalism and plays instead an expressive or identity-related purpose'[276], even though it is said to function as a 'speed bump or deterrent against destabilizing or anti-democratic forms of constitutional change'[277].

Moreover, finding a constitutional system that is perfectly designed to keep democratic mechanisms intact and functioning smoothly is rare, as it is nearly impossible for the founding fathers to anticipate every potential threat to the constitutional system[278]. As Hayek noted, our knowledge is always limited, and this limitation is something we must accept[279]. Any attempt to comprehensively design society as though 'all relevant facts are known to one mind' risks falling into what Hayek calls 'synoptic delusion'[280]. For this reason, any ex ante mechanism to address abusive constitutionalism suffers from similar synoptic delusion. Consequently, neither militant democracy nor tiered constitutional design can effectively curb populist governments because constitutional designers cannot foresee all potential threats to the constitutional structure in advance. Seen in this light, we may view UCAD as 'necessary evil/negative virtue'[281] to compensate for our irremediable lack of knowledge.

For Dixon and Landau, the UCAD is the most effective constitutional safeguard in the fight against abusive constitutionalism. First, it takes a retrospective approach, addressing the deficiencies of ex ante designed constitutional amendment rules. This allows the courts to

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Dixon and Landau as follows: 'The more concentrated political power is, the more fragile a tiering strategy is likely to be to subsequent shifts in the power of an already dominant political party or faction, whereas the more dispersed power is, the less likely it is that heightened supermajority requirements will be easily circumvented'. Dixon and Landau (n 274) 614.

276 Landau (n 272) 229.

277 Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86 *Geo. Wash. L. Rev*. 438, 444.

278 Rosalind Dixon and David Landau, 'Constraining Constitutional Change' (2015) 50 *Wake Forest Law Review*, 859, 874–875.

279 Frederick A. Hayek, *Law, Legislation and Liberty: Rules and Order (Vol. 1.)* (The University of Chicago Press 1978) 12–15.

280 Ibid 15.

281 Raz (n 225) 195–202.

embrace a holistic perspective, see the collective impact of particular constitutional modifications, and detect the 'devil' hiding behind 'the interactions'[282]. The fact that courts are better placed than other legal institutions lies in the position they occupy in a legal system. They stand at the centre of a legal system because they are the final institutions responsible for 'the *authoritative* determination of normative situations in accordance with preexisting norms'[283]. A legal system can be seen as 'a system of interrelated reasons'[284] or 'a structure of authority'[285], composed of various legal rules, rulings, and doctrines, all of which are internally and hierarchically connected to each other through 'justificatory chains'[286], and 'yielding conclusions as to what rights, duties, liabilities, and so on exist by law (all legal things considered)'[287]. Within this chain of justification, the courts assume the role of final authority in the sense that 'the law is identified through the eyes of the courts'[288]. This is aptly worded by Raz as follows:

'The finality of judicial decisions is an essential feature of the law and of the judicial process. It expresses itself in doctrines like *res judicata*, and double jeopardy... Its role is not to allow for diversity and individuality within a relatively stable framework, but to secure uniformity if not of opinion at least in action'[289].

This enables them to address the challenge of abusive constitutionalism because they can embrace a holistic perspective due to their capacity to make a law and apply it retroactively to a past case. This means that judicial institutions have the advantage of flexibility[290] in

282 Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559, 561.
283 Raz (n 225) 109.
284 Raz (n 1) 8.
285 Raz (n 12) 259–260.
286 Ibid.
287 Raz (n 1) 8.
288 Raz (n 225) 71. He further notes: 'Legal systems contain only those standards which are connected in certain ways with the operation of the relevant adjudicative institutions'. Ibid 44.
289 Raz (n 1) 320.
290 The UCAD's biggest advantage is its flexibility, Dixon and Landau (n 279) 874.

their fight against abusive regimes because they can change the law through their innovative interpretations, which will be binding on all citizens and other legal institutions in forthcoming cases and incidents[291].

Additionally, there is also a moral case for the use of UCAD by judicial institutions, which results from the conclusion that the authority to amend a constitution is subject to three different limitations. Accordingly, we may see judicial review of constitutional amendments as a natural extension or addendum to eternity clauses, as this is the most common way of controlling if amendment power is exercised in accordance with the existing constitution and its underlying principles. As Barak astutely noted, judicial review 'provides teeth to the eternity clause'[292] and ensures that they remain unamendable and not subject to the whim of political incumbents. In the same vein, Tushnet sees the possibility of judicial review of constitutional amendments as a mechanism of political checks on the amendment process, serving as a 'sword of Damocles that … cautions political actors'[293].

While indispensable[294] in addressing abusive constitutionalism, the UCAD is a powerful tool that can be used for both good and ill individuals. Therefore, it is necessary to establish clear guidelines for its proper use to protect constitutional democracy and avoid undermining it[295].

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291 Raz (n 1) 320.

292 Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321, 333.

293 Tushnet (n 7) 332.

294 Dixon and Landau (n 274) 606.

295 For a perfect example of how to misuse the UCA doctrine, Serkan Yolcu and Yaniv Roznai, 'An unconstitutional constitutional amendment—the Turkish perspective: a comment on the Turkish constitutional court's headscarf decision' (2012) 10 *International Journal of Constitutional Law* 175. This decision has further resulted in a political backlash in the form of a popular constitutional amendment, Gürkan Çapar, 'A Guideline for the Courts Under Pressure: Pluralist Judicial Review' in Stefan Mayr and Andreas Orator (eds) *Populism, Popular Sovereignty, and Public Reason* (Peter Lang Publishing 2021) 105. For a similar exemplary case from Honnduras, see David Landau, Rosalind Dixon, and Yaniv Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 40.

The ex post nature of the UCA doctrine is its fundamental advantage, but it also undermines legal predictability, which is why its use must be limited[296]. Another common argument against the judicial review of constitutional amendments is that it allows courts to overturn the actions of democratically elected legislatures, leading to another version of the famous 'countermajoritarian difficulty'[297]. The fact that any legislature can override a court's ruling through a subsequent constitutional amendment provides a 'safety valve'[298] that relieves tension in the political system. Without this safety valve, judicial rulings run the risk of provoking political backlash, potentially leading to a constitutional crisis or even court packing[299]. This is the second point of criticism often voiced against the use of UCAD.

Seen in this light, the normative conditions under which the courts exercise this authority to review constitutional amendments in a legitimate way without undercutting the authority to amend a constitution should be explored. Constitutional identity should 'be resistant to change but not necessarily pose an insuperable obstacle to it'[300]. Even though it is difficult to offer one right answer, a balance is to be struck between constitutional continuity/stability and innovation whenever

296 For the principles of the rule of law, see, Raz (n 225) 210–229.

297 Today, countermajoritarian difficulty is fervently defended by political constitutionalists, see, e.g., Waldron (n 119). For a critique of political constitutionalism from the perspective of constitutional theory, Rosalind Dixon and Adrienne Stone, 'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (OUP 2016) 95.

298 Dixon and Landau (n 277) 462–464. The rigidity and flexibility of the constitution is of utmost importance for the proper functioning of this safety valve. The more flexible the constitution is, the more it will be easier to keep updated the constitutional text and to override judicial decisions. In contrast, the more rigid the constitution is, the more stable it will in terms of drawing a line between constitutional and ordinary politics. Ibid 450–473.

299 For an article arguing that the Turkish Constitutional Court's use of UCAD provided a permissive environment for court-packing, see, Ozan O. Varol, 'The Origins and Limits of Originalism: A Comparative Study' (2011) *Vand. J. Transnat'l L.*, 44, 1239.

300 Gary J. Jacobsohn, 'Constitutional Identity' (2006) 68 *The Review of Politics* 361, 387.

the courts review the constitutionality of constitutional amendments. Even so, we may reduce the scope of uncertainty and eliminate some ways of balancing exercises as illegitimate. For example, radical interpretations that inflict serious harm on the continuity (and identity) of legal systems tilt the balance between innovation and interpretation towards the former. A radical interpretation of existing norms or discontinuity of a legal system following a radical rupture not only harms the constitutional identity but also places extra pressure on the tension between the national and constitutional identities. As a result, Raz argues that any change in a constitutional system should be made slowly without creating a radical rupture in time simply because it is in the nature of law that it should be relatively stable over time[301]. In response, he suggests that the courts adopt what he calls 'innovative legal interpretation'[302], a balancing exercise between the constitutional baggage of the past and the ongoing demands of the present and future. This leads a constitution to conserve its identity no matter how many constitutional amendments it has been subject to:

> *'It is still the (same) constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century-house lives in a house built two hundred years ago. His house had been repaired, added, and changed many times since. However, it is still the same house and so is the constitution'*[303].

The question of how courts should find a balance between constitutional continuity and innovation is normative. One of its most visible examples may be found in the discussions surrounding the legitimacy of the UCAD, where many constitutional lawyers seek to offer a response to what I call the interpretive legitimacy question: How should the courts exercise the judicial review of constitutional amendments in

301 This results from the necessity of individuals to have access to the knowledge of law not only for their short-term decisions but also for their long-term planning. Raz (n 225) 214.

302 Innovative legal reasoning brings together the reasons for 'fidelity to an original constitution' and 'innovation'. Raz (n 1) 361.

303 Ibid 370.

a legitimate and morally acceptable manner? In what follows, I make three different suggestions by constitutional lawyers concerning the legitimate exercise of UCAD and then argue that the courts should strike a balance in each case between two different principles, i.e., constitutional continuity and innovation.

3.2. Treating Amendment Power as a Spectrum to Link Unamendability to the Amendment Procedure

Drawing on Schmitt's distinction between constituent and constituted powers, as well as between the constitution and constitutional laws, Roznai introduces what he calls three-track democracy, consisting of legislative power, amendment power, and constituent power[304]. Like Schmitt's notion that amendment power is inherently limited by constituent power, Roznai argues that amendment power cannot alter the constitutional identity or its core principles, no matter whether they are framed, including 'core nucleus principles', 'basic principles', 'identity', 'genetic code', 'immutable provisions' or 'eternity clauses'[305]. According to Roznai, the authority to change the identity of a constitution falls within the realm of constituent power. However, there is an important question to be addressed even when the foregoing explanations are accepted: How can we distinguish between constituent and amendment powers?

304 'Schmitt (also) distinguished between the constituent power and the amendment power. The first is the power to establish a new Constitution, whereas the second is the power to amend the text of constitutional laws currently in force, which, like every constitutional authority, is limited. Schmitt's doctrine is built upon a distinction between the Verfassung, or 'the Constitution', which is the fundamental political decisions of the constituent power, and ordinary Verfassungsgesetz, or 'constitutional laws', which are constitutional norms or provisions but which lack any true fundamental character'. Roznai (n 32) 116. For the influence of Schmittian ideas on Venezuela and Colombia, see Joel Colón-Ríos, 'Carl Schmitt and constituent power in Latin American courts: the cases of Venezuela and Colombia' (2011) 18 *Constellations* 3, 365.

305 Roznai (n 32) 221,126, 149, 203.

The answer to this question has further implications for the interpretive legitimacy question. Therefore, let me briefly explain how Roznai addresses this problem. For Roznai, amendment power—whether eternity clauses exist—is always constrained by constituent power because 'it uses a legal competence *delegated* to it by the primary constituent power'[306]. In other words, amendment power is not unconditionally transferred but entrusted, making it contingent on the proper use of that power as part of a principal-agent relationship. Given that any constitutional amendment potentially affects unamendable principles, the extent to which the former interferes with the latter must be evaluated. The courts should bring eternity clauses to bear on reviewing the constitutionality of constitutional amendments and interpret any amendment as consistent with unamendable principles whenever possible (verfassungskonforme Auslegung). Only when the principle of consistent interpretation with unamendable principles is a practical impossibility can the court annul the amendment[307]. The first problem to surmount is to provide an explanation for how to balance unamendable principles with proposed amendments.

In response, Roznai connects unamendability (and its judicial review) to constitutional amendment procedures, introducing the idea of a 'spectrum of constitutional amendment powers'[308]. Seeing amendment power as a continuum oscillating between constituent and constituted powers allows Roznai to distinguish between two types of amendment power, i.e., popular and governmental amendment powers. In his view, the more an amendment power includes 'the people' through a referendum or constituent assembly, the more it borders on constituent power or what Roznai calls the popular amendment power[309]. In con-

306 Ibid 118 (emphasis belongs to the author).
307 Ibid 225.
308 Ibid 158–159. In this context, he also cites Lior Barschak's following formula: 'the fuller the sovereign presence, the more relaxed the constitutional structure and the formal procedure that governs the referendum'. Lior Barshack, 'Constituent Power as Body: Outline of a Constitutional Theology' (2006) 56 *The University of Toronto Law Journal* 185, 212–213.
309 Ibid 162–164.

trast, the more an amendment power excludes 'the people' from the process, the more it resembles ordinary constituted power or what he calls governmental amendment power. The spectrum of amendment power helps not only dissolve the traditional opposition between constitutional amendment and replacement but also offers a response to the interpretive normative question. Here, Roznai suggests that the more the constitutional amendment procedure (i.e., including popular participation) resembles popular amendment power, the looser the judicial scrutiny will be and vice versa. In summary, he suggests applying different standards of judicial scrutiny to constitutional amendments depending on how participatory or popular they are.

Depending on the participatory quality of the constitutional amendment, Roznai introduces three different standards of judicial review that the courts may adopt when they review the constitutionality of constitutional amendments: i) minimal effect standards, ii) disproportionate violation standards, and iii) fundamental abandonment standards. When dealing with the highest level of amendment power (popular amendment power) and the lowest judicial scrutiny, the court will only strike down an amendment if it disproportionately undermines constitutional identity[310]. This is what Roznai calls the 'fundamental abandonment standard'; amendments remain legitimate as long as they do not destroy the constitution's genetic code. At the secondary level, where there exists a disproportionate violation standard, a constitutional amendment should be struck down only when it disproportionately infringes on unamendable principles. When a constitutional amendment is more like an ordinary use of governmental power due to the absence of popular participation, the courts are justified in applying the minimal effect standard. This standard suggests that whenever a constitutional amendment contradicts unamendable principles, this leads to an automatic nullification of the proposed amendment no matter how minimal its effect is on unamendable principles. Here, unamendable

310 Ibid 219–221.

principles are viewed as unamendable rules[311], as they trigger an automatic process of nullification whenever they are violated.

In addition to his spectrum of amendment power, Roznai proposes a tiered-amendment rule, or 'constitutional escalator', which suggests that 'the more fundamental the principles of the constitutional order, the more they should be protected from hasty changes through heightened amendment requirements'[312]. This rule serves two purposes: it jealously protects the 'genetic code' of the constitution from rash changes while also making it easier to amend ordinary provisions than would be possible under a uniform amendment rule[313]. The tiered-amendment rule assumes that 'the more deliberative, multi-institutional, and prolonged the processes of amendments are, the less the likelihood of abuse of the amendment power'[314]. In this way, Roznai links democratic legitimacy with the amendment process, proposing that the more democratic the process is, the lower the amendment threshold should be. He goes a step further, suggesting that as the amendment threshold increases, the intensity of judicial review should decrease, and vice versa[315]. In short, he establishes a reverse correlation between the degree of judicial review and the amendment threshold, tying amendment procedures to judicial scrutiny[316].

311 For the distinction between rules and principles, see Chapter IV in this monograph.

312 Ibid 168. For tiered constitutional design, see Dixon and Landau (n 277), and Richard Albert, Amending Constitutional Amendment Rules (2015) 13 *International Journal of Constitutional Law* 655. The main examples of the tiered constitutional design may be seen in the constitutions of Nicaragua, Philippines, Austria, Canada and South Africa.

313 Roznai (n 32) 168.

314 Ibid.

315 Ibid 175.

316 The same suggestion is also made by Barshack who argues that 'the binding force of constitutional procedure varies in every constitutional moment in proportion to the intensity of sovereign presence ... When the communal body asserts itself in the amendment of a constitution as intensely as it was involved in its original adoption, it is hardly bound by constitutional procedure at all and hardly subject to judicial review over the constitutionality of the amendment'. He further maintains that 'the more exuberant the sovereign presence, the less bound is the

In summary, Roznai establishes a positive correlation between amendment procedures, the legitimacy of amendment power, and the degree of judicial scrutiny. His approach is evident in concepts such as the 'spectrum of amendment power', 'constitutional escalator', and 'spectrum of judicial review', which reflect a relative and conditional approach to unconstitutional constitutional amendments. His formula can be summarized as follows: the more amendment power resembles (primary) constituent power, the less it is bound by eternity clauses, and the lower the degree of judicial scrutiny. This approach allows Roznai to avoid a categorical approach to the interpretive legitimacy question and seems to cohere well with the politically salient nature of the UCAD. This is most clear in his presumption that there is no need to draw a strict line between constitutional amendment and replacement, particularly at a time when populist leaders often attempt to replace a constitution under the guise of a constitutional amendment. For example, De Gaulle circumvented high amendment thresholds through a referendum, whereas Mugabe in Zimbabwe bypassed popular participation, proposing 17 constitutional amendments in his first 25 years without any referendum[317]. In both cases, the distinction between amendment and replacement blurred, undermining the constitutional limitation imposed on amendment power.[318] This highlights the need to view the relationship between amendment and replacement as a continuum, particularly in the context of abusive constitutionalism. This nuanced approach helps refute the mistaken argument that the UCAD cannot be applied to constitutional replacement or constituent power.

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collective body by ... the nonamendability of certain constitutional principles'. Barshack (n 308) 201–202.

317 Constitutionnet (n.d) *Constitutional History of Zimbabwe* http://constitutionnet.org/country/zimbabwe-country-constitutional-profile.

318 Dixon and Landau (n 278) 864–868; In this article Dixon and Landau contend that due to the indifference between constitutional amendment and replacement, the courts carry out a review on constituent power's compatibility with specific substantive constraints such as 'international constitutional minimum core', from which the Constitutional Court of South Africa benefited diligently in the transition period.

3.3. Using Transnational Constitutionalism as a Second Check

A very similar suggestion is made by Dixon and Landau, who argue that transnational constitutional norms reduce the unpredictability of the UCAD. Let us leave aside many problems likely to arise concerning how to determine the content of these norms that fall under the category of transnational constitutional norms and focus on their line of argumentation. For them, the UCAD, despite its many advantages, risks undermining the principles of the rule of law and is therefore subject to certain limitations. In addition, here, transnational constitutional norms may help differentiate real threats to democracy from others.

Dixon and Landau identify three different approaches that courts have developed in their use of the UCA doctrine: (a) a narrow approach, (b) a potential adverse impact approach, and (c) a limited doctrine approach incorporating transnational constitutionalism. They differ in their degree of sensitivity, specifically how sensitive courts should be to the infringement of unamendable principles by a constitutional amendment. The narrow approach, which protects only a 'small, core set of institutions or principles'[319], underprotects the basic structure of the constitution, making it vulnerable to evasion by populist governments[320]. Additionally, this approach ignores the cumulative effects of incremental amendments, failing to prevent the creation of a 'Frankenstate'[321]. The potential adverse impact approach, on the other hand, risks being overbreadth, as it gives courts too much latitude to strike down amendments that may not pose a significant threat to constitutional identity[322]. This tension between overprotection and underprotection reflects the classical dilemma between rules and stan-

319 Dixon and Landau (n 274) 623.
320 Ibid 624–626.
321 See Scheppele (n 282).
322 Dixon and Landau (n 274) 624–626.

dards: overly rigid rules may prevent justice in specific cases, whereas excessive discretion threatens the rule of law[323].

To overcome the shortcomings of these first two approaches, Dixon and Landau propose the use of transnational constitutional norms as a second check to be applied only after the UCA doctrine has been invoked. This approach balances the weaknesses of both the narrow and potential adverse impact approaches[324]. On the one hand, it is broad enough to address the threat of abusive constitutionalism because 'it does not attempt to identify a narrow set of institutions or values ex ante"[325]. On the other hand, it is weak because 'it strikes down only constitutional changes that it is confident will have a substantial adverse impact'[326]. This method has been successfully applied by courts such as the Indian Supreme Court and the Colombian Constitutional Court. In Colombia's first and second re-election cases, the court used a case-by-case approach to contextualize presidential term limits, ultimately finding the proposed amendment in the second case unconstitutional. In line with Dixon and Landau's proposals, the Colombian court first decided whether to apply the UCAD and then referred to transnational principles as a second check to ensure its decision[327]. According to Dixon and Landau, transnational norms serve as a safeguard against the misuse of the UCAD, but they are not a panacea. Instead, they represent a positive step toward a limited and carefully calibrated use of the UCAD.

This suggestion of benefiting from transnational constitutionalism can be viewed as an attempt to construct and draw from shared under-

323 Ibid. In making a distinction between rules and standards, they make reference to Sullivan, Kathleen Sullivan, 'The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards' (1993) 106 *Harvard Law Review* 22.

324 'The key question a judge should ask is the following: based on the actual impact of this amendment and what has come before it or is occurring in parallel in a particular country, does this particular amendment clearly pose a substantial threat to democracy or to democratic constitutionalism?' Dixon and Landau (n 274) 628.

325 Ibid.

326 Ibid.

327 Ibid 629.

lying principles widely accepted as part of today's international law. The first thing to note here is that the use of transnational constitutional norms by a domestic court in its review of constitutional amendments is dependent on developing a theory about how to determine these constitutional norms that gain transnational or international significance and recognition. It is clear to me that there is a great deal of comparative work here, as the court is called on to investigate, compare, and decide on the identity of transnational constitutional norms. Moreover, domestic courts differ in their attitudes towards international law, which makes it difficult for some to anchor their judgement in transnational constitutional norms[328]. For instance, the U.S. Supreme Court has taken a quite conservative stance towards international norms, often seeing them as alien norms originated and legitimated by a political process not controlled by American citizens[329]. In contrast, the German courts show no hesitation in benefiting from and citing international norms in their judgments, as long as they are relevant to the case. This permissive approach to international law has brought about an unwritten constitutional principle, also known as 'Völkerrechtsfreundlichkeit des Grundgesetzes', meaning that 'every national German norm including the constitution itself has to be interpreted in accordance with international law'[330].

Concerns aside, we can argue that the use of transnational norms can help national courts strengthen their legitimacy when they issue a judgement on the constitutionality of constitutional amendments. The court may use these transnational norms to support its line of reasoning and argumentation. Doing so would not only provide legitimacy to national courts but also aid in the construction of an 'ius commune' or global constitutional principles. In an increasingly fragmented and

328 For a comparative study, see Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011).

329 For an interesting study, see Frederick Schauer, 'Authority and Authorities' (2008) 94 *Virginia Law Review* 1391.

330 Hans-Peter Folz, 'Germany' in Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 241.

globalized society where law is becoming more pluralized by the day[331], creating such common principles could serve as a defence against the threat of abusive constitutionalism.

Furthermore, the idea of transnational constitutionalism as a second check could benefit both legal scholarship and doctrine. As Van Hoecke and Ost argued more than 20 years ago, legal doctrine is in crisis due to increasing specialization, acceleration, pluralization of legal systems, and overemphasis on quantitative data at the expense of qualitative knowledge[332]. To overcome this crisis, they suggest that we must a) construct and use general legal principles, b) create diverse control mechanisms, c) employ balancing and weighing in legal reasoning, and d) accept paradoxical concepts such as 'partial sovereignty'[333]. Unsurprisingly, the UCAD serves as a telling example of how legal doctrine can provide a solution to the challenges and problems posed by globalization, digitalization, and populism to our constitutional democracies. As argued above, it considers sovereignty as a negative concept whose content is mostly determined by today's international legal norms. As shown in this section, the threat of abusive constitutionalism can be addressed only with a context-sensitive and holistic approach for which judicial institutions are particularly suited. They are well versed in interpreting legal rules and finding a balance between competing interests and principles.

In conclusion, both Roznai and Dixon and Landau emphasize that while the UCAD is necessary and indispensable, it must be applied in a way that protects democracy rather than undermines it. They all seek ways to utilize the UCAD without prejudicing democratic values. Notably, Roznai's emphasis on balancing unamendable principles with proposed amendments is of particular importance for the purposes of

331 For the link between modernism and fragmentation of society, and how it has been undergone a process of transformation through globalization, see Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012).

332 Mark Van Hoecke and François Ost, 'Legal doctrine in crisis: towards a European legal science' (1998) 18 *Legal Studies* 197.

333 Ibid.

this project. In his analysis of the disproportionate violation standard, he states:

> *'There is no 'technical' obstacle to using the principle of proportionality in the review of amendments, since the nature of proportionality allows for balancing between conflicting principles. In the case of unamendability, the balance would be between the core of the protected unamendable principle on the one hand and the pursued interest and the means taken by the constitutional amendment for its achievement on the other hand'*[334].

I must admit that this is a significant step towards resolving the conflicts of competence between the judiciary and legislature or between amendment and constituent powers. However, Roznai, while addressing the balance between unamendable principles and proposed amendments, overlooks the authority responsible for issuing them. In other words, while courts can balance competing fundamental rights, it is also possible to strike a balance between proposed amendments and unamendable principles. The issue here, however, is not substantive principles such as fundamental rights but rather formal principles regarding who has the competence to decide on those substantive principles. For this reason, I think we need to approach Roznai's suggestion from the perspective of legal theory and provide a clear explanation for the nature of these principles and how they can be balanced with each other.

3.4. Constitutional Dismemberment as an Alternative to UCAD

Unlike previous scholars, Richard Albert took a rather critical approach to the UCAD. Richard Albert takes issue with what he calls the 'conventional understanding', according to which the power of constitutional amendment is limited by constituent power, and judicial review of constitutional amendments is considered part of the judiciary's ordi-

334 Ibid 220.

nary competences[335]. From this perspective, the court can strike down an amendment that contradicts unamendable principles. Albert views the improper use of the UCAD, mostly due to inadequately designed amendment rules, as a serious problem because most amendment rules do not differentiate between creating a new constitution and making ordinary amendments. Thus, this standard design of constitutional change fails to constitutionalize the constituent power.

To address this design flaw, Albert coined the term 'constitutional dismemberment' to define the sort of constitutional amendments whose purpose is 'to unmake the constitution' without disrupting legal continuity[336]. In his view, not all constitutional amendments are of equal importance and are thereby constitutional in the substantive sense. As Lincoln stated in his first inaugural address, '(w)henever (people) should grow weary of the existing government, they can exercise their CONSTITUTIONAL right of amending it, or their REVOLUTIONARY right to *dismember* or overthrow it'[337]. Similarly, Albert refers to this second type of revolutionary amendment as *constitutional dismemberment*, as these amendments dismantle core or fundamental features of the constitution to the point that it can no longer retain its identity[338]. Some amendments alter the structure of the constitution so significantly that they 'do not amend at all'; rather, '(t)hey seek to *transform* the constitution, to *replace* it with a new one,

335 Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 *The Yale Law Journal* 1.

336 Ibid 4.

337 Abraham Lincoln's First Inaugural Address, cited from Jacobsohn (n 300) 367 (emphasis belongs to me).

338 Albert (n 335) 1. However, for Roznai, such amendments not only deconstruct the constitution's core features but also reconstruct its identity. Therefore, he proposes 'the term "*fundamendment*" to describe constitutional amendments that *fundamentally* change the constitution'. Additionally, Roznai argues that the term *fundamendment* is narrower than concepts like constitutional revolution or transformation, which are used to describe moments of extralegal constitutional change. Yaniv Roznai, 'Constitutional Amendment and "Fundamentment": A Response to Professor Richard Albert, (2018, February 26) Yale Journal of International Law Forum. Available at: https://www.yjil.yale.edu/constitutional-amendment-and-fundamendment-a-response-to-professor-richard-albert/.

and to *revolutionize* the constitutional order'[339]. For example, he suggests treating 'the Civil War Amendments to the U.S. Constitution' as constitutional dismemberments, for they have introduced such radical changes in 'the existing constitution's structure, identity or rights'[340].

This enables him to overcome the failure of the conventional approach in discriminating constitutional replacement from amendment, resulting in instability and uncertainty and ultimately leading to 'judicial manipulation of the rules of constitutional change'[341]. To resolve the uncertainty caused by constituent power, Albert suggests the need to redesign the constitutional system rather than relying on conventional ex-post judicial review. He proposes a two-track system for constitutional change: one track for corrective and elaborative amendments and another for constitutional dismemberment, which would require a higher threshold than the first track would require[342]. This allows for the integration of the constituent power into the legal framework of a constitution and obviates the need for an extra-legal and unlimited constituent power in the Schmittian sense. In addition,

339 Ibid.

340 Albert (n 335) 4. These changes 'tore down the major pillars of America's original sin: The Three-Fifths Clause, the Fugitive Slave Clause, the Migration or Importation Clause, and the Proportionate Tax Clause'. Ibid. As an example of structural change, he gives the example of failing constitutional amendment proposal in Italy in December 2016 and in Ireland in 2013, which would have changed almost one third of the constitutional provisions had they entered into force. As a rights-based change, he gives the 2016 Public Spending Cap Amendment to the Brazilian Constitution, as it is expected to have serious negative impact on the future generations. Last, he suggests construing the establishment of the Caribbean Court of Justice as a replacement of the Judicial Committee of the Privy Council. Ibid 41–49.

341 Ibid 29. 'One of the key pillars of constitutional dismemberment is *the principle of variable difficulty* in constitutional change. The basic point of variable difficulty is a prescription for constitutional design: political actors should be directed by the rules of constitutional change to satisfy different thresholds for amendment than for dismemberment'. Ibid 4.

342 'Constitutional amendments come in two types: they can either be corrective or elaborative. Properly defined, a constitutional amendment is a correction made to better achieve the purpose of the existing constitution. … Instead of repairing an error in the constitution, however, an elaboration advances the meaning of the constitution as it is presently understood'. Ibid 3.

subsequently, it obviates the need to recourse to the UCAD because there would no longer be a constituent power outside the constitution to be infringed upon. In the absence of a constitutional dismemberment rule, he proposes a default rule of mutuality, which holds that 'removing something fundamental from a constitution should be permissible using only the same procedure that was used to put it in or something more onerous'[343]. This rule of mutuality resembles Bruce Ackerman's two-track democracy and constitutional moments[344]. In addition, constitutional dismemberment may be thought of as a version of the constitutional moment that is integrated into the constitution; that is, it becomes positivized.

In regard to determining whether a constitutional change rises to the level of dismemberment, Albert emphasizes that the reference point should not be an idealized founding moment but rather 'the understanding of the relevant actors and the people at the time the change is made'[345]. Here, he aligns himself with political constitutionalism, advocating for the priority of democracy over constitutionalism whenever possible. He maintains that courts should play a more 'defensive, collaborative, and constructive'[346] role, contrary to the model under the UCAD, where courts can annul an amendment even in disregard of the constitution's text. For example, Albert suggests that if courts face uncertainty about whether to strike down an amendment, they should refrain from doing so and instead ask Parliament to vote on the issue again[347]. This intertemporal voting procedure, he believes, enhances deliberation and makes it harder for courts to intervene in the political process. Moreover, in this system, courts may rule on the unconstitutionality of an amendment only when this decision is

343 He also writes that 'the people exercise their constituent power when they speak in the same way they did when they wrote the constitution' Ibid 6.

344 Here the distinction is made between ordinary/normal and constitutional politics or moments, Bruce Ackerman, 'Constitutional Politics/Constitutional Law' (1989) 99 *The Yale Law Journal* 453.

345 Albert (n 335) 49.

346 Ibid 67.

347 Ibid 69–70.

reached by a supermajority. However, this ruling would not be legally binding on political actors but would instead carry political weight for the legislature or executive[348]. Overall, Albert's model, which assigns a highly deferential role to courts, may undermine their ability to rule on constitutional amendments, potentially leading to the demise of the UCAD.

Despite his eloquent discussions on the proper use of the UCAD, I think that Albert's model is designed to defuse its use while seeking to prevent its misuse. As such, I have several disagreements with his line of reasoning. First, Albert's argument is based on the assumption that constitutions are often made as democratically as possible. For example, all four constitutions of Turkey were drafted under extraordinary circumstances, such as following coups in 1961 and 1982 or during or after a war of independence in 1921 and 1924. This phenomenon is not unique to fragile democracies. Constitutions drafted after World War II, such as those in Germany and Italy, also reflect this pattern.

Second, Albert criticizes the new wave of scholarship that supports the use of the UCAD for being ideologically oriented and pursuing particular political agendas. Instead, he views constitutions as empty vessels[349] available for any moral or ideological aspirations, free from imposed values. He argues that imposing Western liberal democratic values on other constitutional systems amounts to 'intrusion into a nation's sphere of sovereignty and the self-determination of its peoples'[350]. By distancing himself from value-laden conceptions of the constitution, Albert aims to prevent the potential misuse of the UCAD, which he believes could allow the judiciary to have the final say on matters that should be democratically decided. For Albert, the justification for constitutional dismemberment lies in 'the support of a substantial democratic majority of the relevant people'[351]. However, he shies away from discussing whether it is possible to depict a constitution as an empty

348 Ibid 72.
349 Ibid 63.
350 Ibid 64.
351 Ibid 66.

vessel to be filled with any political ideology while at the same time remaining committed to the normative concept of constitutionalism. Simply, I expect him to tell a little bit more about how constitutions as a set of founding rules are linked to the ideal of constitutionalism.

Third, Albert is committed to pursuing a purely descriptive methodology rather than a normative one. However, it is dubious whether he fully adheres to his promise. For instance, Albert argues that traditional constitutional design, which fails to distinguish between constitutional amendment, dismemberment, and replacement, paves the way for inconsistent applications of the UCAD. He cites two contradictory rulings by the Turkish Constitutional Court (TCC) — the 2008 headscarf and the 2016 parliamentary immunity cases — as evidence of this inconsistency[352]. According to Albert, if the constitution had included a dismemberment rule, the TCC would have applied the UCAD consistently. However, the inconsistency in the TCC's rulings is not due to arbitrary judicial power or misuse of the UCAD but rather to the court's capture by political incumbents following the 2010 constitutional amendments[353]. These amendments significantly altered the court's composition, increasing the number of justices from 11–17 and introducing a mandatory 12-year term, thus giving incumbents more influence over the court's makeup[354]. Empirical studies by Varol et al. in 2017 revealed a conservative ideological shift in the TCC after the 2010 amendments, with the full implications of this shift becoming more apparent over time[355]. While Albert points to the absence of a dis-

352 Ibid 26–29.

353 For a detailed analysis of the political and legal background of the 2010 Turkish constitutional amendment, together with an explanation for why Albert was mistaken in his arguments about the Turkish constitutional saga, Gürkan Çapar, 'How (not) to Compare?: Not Being Inside, Nor Outside' (2022) 7 *Global Jurist* 375.

354 For the proposed constitutional amendment, see Levent Gönenç, '2010 Proposed Constitutional Amendments to the 1982 Constitution of Turkey' (2010 September) TEPAV Evaluation Note.

355 'When the size of the TCC increased from eleven to seventeen in 2010, the AKP government was unable to immediately fill the six new seats. Rather, four judges that were serving as substitutes on the eleven-member Court became permanent members'. Ozan O. Varol, Lucia Della Pellegrina, and Nuno Garoupa, 'An Empiri-

memberment rule as the cause of the inconsistency, the real issue was not the defects in the constitutional amendment rule but the court's capture.

Fourth, Albert's argument is based on the assumption that, since constituent power is extra-legal and amendment power is derived from it, amendment power is inherently limited. The concept of constitutional dismemberment helps Albert fill the legal gap between constituent and amendment powers, making the use of UCAD questionable from the perspective of legitimacy. However, as discussed in the first section, there are other justifications for the UCAD, one of which is Schmitt's argument, which Albert accepts without question. In contrast, I believe that the strongest argument for the UCAD arises from the concept of constitutional identity. Recall that constitutional identity can be formal or material, and unlike material identity, formal identity is grounded in the idea that the constitution is a consistent and coherent structure. Moreover, there are external constraints, such as human rights and constitutionalism, which also limit the amendment power and are closely linked to the notion of constitutional identity. From this, it can be inferred that defending the UCAD does not require an extra-juridical constituent power as a looming threat to amendment power. Similarly, constitutionalizing the constituent power through a mechanism what Albert calls the constitutional dismemberment rule does not suffice to deny the legitimate use of the UCAD for other reasons. Simply put, there are different values and reasons at stake when the UCAD is employed by the courts.

Finally, Albert's proposal to strengthen the amendment rule, despite his scepticism towards the UCAD, is crucial. His 'rule of mutuality' mirrors Roznai's gradual approach to amendment power as a spectrum. For this reason, it could even serve as a basis for defending the judicial review of constitutional amendments. Designing a more flexible and rational amendment rule is necessary in the wake of the recent populist and antidemocratic trend prevalent in all countries, including

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cal Analysis of Judicial Transformation in Turkey' (2017) 65 *The American Journal of Comparative Law* 187, 214.

those Western democracies with exemplary records of democratic governance. Notably, all three approaches acknowledge the importance and benefits of a tiered constitutional design. It is clear that this shared understanding is a response to the rise of abusive constitutionalism. The next section explores how to reach a compromise between conflicting competences, specifically how to balance formal principles in line with the spectrum of amendment power.

4. Amendment Power and Its Judicial Review as Formal Principles

This section, drawing on Dworkin and Alexy, explores the concept of formal principles. In simple terms, formal principles[356] are responsible for determining the authority entrusted with setting rules, laying down judgments, and issuing orders. As such, formal principles require deference to authority, although the extent of that deference can vary, particularly when substantive principles exist to be balanced. The best example of substantive principles is constitutional rights, which call for optimization to the greatest extent possible when they are in partial conflict with each other. In contrast, formal principles demand not optimization of substantive principles (or constitutional rights) but deferring to the judgment of an authority. One may trace the origins of this distinction between formal and substantive principles in Dworkin's distinction between rules and principles. In his view, rules 'apply in an all-or-nothing fashion'[357], whereas a principle 'states a reason that

356 They are also called procedural principles, as they 'establish how and by whom the substantial content is to be established'. Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 136. In a similar vein, Schauer draws a distinction between jurisdictional and substantive rules, arguing that while the former 'grant(s) to some agent or institution the power to make decisions with respect to some category of events', the latter acts as a restraint filling in these jurisdictional rules. Schauer (n 109) 171–172. Sieckmann similarly notes that 'the authority of law must be justified through balancing, which in turn establishes formal principles that grant authoritative powers'. Jan-R Sieckmann, *The Logic of Autonomy: Law, Morality and Autonomous Reasoning* (Bloomsbury Publishing 2012) 167.

357 Ronald M. Dworkin, 'The model of rules' (1967) 35 *The University of Chicago Law Review 14*, 24.

argues in one direction without necessitating a specific decision'[358]. After making a distinction between rules and principles on the basis of how they operate logically, Dworkin classifies principles into two different categories, i.e., substantive and conservative. Substantive principles help judges go beyond the constraints of rules, whereas conservative principles protect existing precedents and legislation. For example, the principle that "no man should profit from his own wrong" is a substantive principle, whereas the doctrine of precedent is a conservative one, which "incline(s) towards status quo"[359]. In summary, the reasons undergirding the substantive and formal principles are different: While the former concerns first-order ordinary reasons, the latter concerns second-order reasons calling for deference to an authority.

4.1. Rules and Principles

In my view, it is highly likely that Dworkin's distinction between rules and principles has a dramatic influence on Robert Alexy, laying the foundations of his 'principles theory'. It is even arguable that Alexy helped spread Dworkin's ideas towards Continental Europe in a more positivized and less moralistic way, as he depicts legal principles as something 'distilled from the constitution by interpretation'[360]. In this sense, Dworkin's extra-legal moral principles, which judges are meant to invoke in hard cases, are transformed into constitutional rights enshrined in the positive constitution. Here, Alexy benefits a great deal from precedents of the German Federal Constitutional Court in highlighting the inherent connection between substantive principles and proportionality analysis[361]. If principles do require optimization to the greatest extent possible, then we need a logical tool or mechanism to

358 Ibid 26.
359 Ibid 37.
360 Jan Henrik Klement, 'Common Law Thinking in German Jurisprudence – on Alexy's Principles Theory' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 191.
361 Martin Borowski, 'Discourse, Principles, and the Problem of Law and Morality: Robert Alexy's Three Main Works' (2011) 2 *Jurisprudence* 575, 580.

find an equilibrium or balance whenever they partially conflict with each other. This is why Alexy sees proportionality analysis as a direct logical consequence of the definition of principles as optimization requirements. Let me elaborate on this point by explaining how Alexy explains the distinction between principles and rules.

In his view, it is misleading to view principles as merely more general or abstract versions of rules. Instead, a norm-theoretical distinction exists between rules and principles because they operate as different kinds of norms that follow distinct logical forms[362]. The fact that a norm plays a different role and function in judicial reasoning depending on whether it is initially classified as a rule or a principle leads Poscher to depict this distinction as ontological[363]. When a court is faced with a rule, it is expected to take it as a command or order, indicating 'conclusive and 'incompatible ought-judgements'[364] that 'require something (to be done) definitively'[365]. Instead, when it is encountered with a principle, it should take it as an 'optimization requirement'[366] that gives ordinary reasons to (not) do something without demanding a specific conclusion. Rules have a bipolar nature, meaning that they are 'always either fulfilled or not[367]'. This is because they operate in the dimension of validity, and there is *no tertium datur* when two rules come into conflict with each other: one should be deemed valid and the other invalid[368]. In contrast, principles are polar because they deny the logic of validity and operate in a scalar dimension of weight. When

362 The distinction 'is not simply a matter of degree but is qualitative'. Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010) 47.

363 Ralf Poscher, 'The Principles Theory: How Many Theories and What is their Merit?' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 220.

364 Alexy (n 362) 49.

365 Robert Alexy, 'Constitutional Rights, Democracy, and Representation' (2014) 3 *Richerche giuridiche*, 197, 198.

366 'principles are norms which require that something to be realized to the greatest extent possible given the legal and factual possibilities' Alexy (n 362) 49.

367 Ibid 48. 'If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain *fixed points* in the field of factually and legally possible'. Ibid.

368 Another option is to create an exception rule. Alexy (n 362) 49.

two principles *compete with* each other, there is no need to consider one as invalid and irrelevant to the judgement. The exact weight of a principle can be established only when it competes with another principle, meaning that principles call for 'a conditional relation of precedence'[369] among themselves. Principles, therefore, acquire 'different weights in different cases'[370], depending on which principles they are competing against. For this reason, balancing (or proportionality analysis in the strict sense) is the method used to resolve conflicts (or competitions) between principles: 'The greater the detriment to one principle, the greater the importance of satisfying the other'[371].

Proportionality analysis, as is well known, consists of three subtests: suitability, necessity, and proportionality in the strict sense[372]. The gist of proportionality analysis is that any measure taken by public authorities should go no further than what is strictly necessary to achieve the intended aims. The first prong, the principle of suitability, serves to disqualify means that are inappropriate for achieving the desired ends. The second prong, the principle of necessity, eliminates the means that are over-restrictive and impose unnecessary burdens on individual rights and freedoms. It finds its best expression in the following motto: 'Do not use a cannon to kill a crow'. While the suitability test assesses whether the means are effective in achieving the goal, the necessity test compares alternative means to ensure that no less restrictive options exist to achieve the same goal. Furthermore, these two subprinciples concern factual optimization by avoiding unnecessary costs, thus aligning with efficiency and causality, similar to Pareto optimality. As such, they can be viewed as rationality tests[373]. In contrast, the principle of

369 Ibid 50.

370 Ibid 50.

371 Ibid 102. For its refined version, see Robert Alexy, Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 573.

372 Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava* 52.

373 Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill 2015) 201–202.

proportionality in the strict sense—the balancing step—requires striking a balance between competing principles. This step goes beyond choosing among alternatives; it aims to synthesize and account for both principles at stake. In that respect, it is more about reasonableness than mere rationality[374].

For proportionality analysis to function effectively, principles rather than rules are needed for the simple reason that rules, being norms that 'require something definitively'[375], are unfit for the balancing step. Alexy, who is primarily interested in offering an analytical explanation for rights-based adjudication, suggested treating constitutional rights as substantive principles that demand optimization. This seems to be the best possible way of explaining why constitutional rights are to be balanced against each other. This link between proportionality analysis and substantive principles can be considered Alexy's 'genuine contribution to'[376] the distinction between rules and principles, as well as to proportionality analysis. Alexy's proportionality analysis, along with his later-developed weight formula[377], operates as follows:

$$Wij = \frac{Ii \,.\, Wi \,.\, Ri}{Ij \,.\, Wj \,.\, Rj}$$

In this formula, **W** represents the abstract weight of each principle, **I** represents the intensity of interference with each principle, and **R** represents the epistemic reliability of the assumption. 'Wij' is the outcome of the balancing, or the concrete weight of the competing principles. Moreover, the balancing formula consists of two steps: a) external

374 Ibid 201–208.

375 Alexy (n 365) 198.

376 Poscher (n 363) 220. This is a significant contribution when particularly seen against the backdrop of the problem of developing a general theory on constitutional interpretation. In a way attesting to the success of Alexy's principles theory, Raz notes: 'The writings on constitutional theory fill libraries. They are often presented as, and almost invariably are, writings on the constitutional practice of one country or another. Few writings on constitutional inter- pretation successfully address problems in full generality; that is, few offer useful lessons regarding the nature of constitutional interpretation as such'. Raz (n 1) 323.

377 Alexy (n 362) 408–410, 418–419.

justification and b) internal justification[378]. The weight formula corresponds to the internal justification step, where arithmetic calculation is performed on the basis of the values assigned to the variables in the formula. The values of these variables are determined during the external justification step, which relies on arguments and evidence. Unlike internal justification, external justification depends on 'arguments external to the balancing itself'[379]. Thus, the rationality of the balancing process hinges on how sound and rational the external justification process is, in which values are assigned to the three variables in the weight formula. In other words, if the weight formula does not clarify how 'the concrete weights to be inserted into the formula are identified, measured, and compared', it risks being 'left hanging in mid-air'[380].

However, Alexy argues that law, as a form of legal argumentation, is a special case of practical discourse. In his view, law necessarily claims correctness, meaning that when evaluating the soundness of arguments in the external justification step, judges must appeal to morality and rationality for guidance[381]. As such, he embeds his principles theory and the weight formula in discourse theory, thereby constraining them within a framework of rational discourse. This connection provides a firmer foundation for the external justification step, which is the most vulnerable part of the balancing process. Drawing on BVerfG case law, Habermas's discourse theory, and Dworkin's distinction between rules and principles, Alexy develops his principles theory to explain the role of proportionality analysis in adjudicating constitutional rights. The popularity of proportionality analysis and Alexy's principles theory lies not only in his analytical clarity but also in his being 'the right theoretical idea in the right place at the right time'[382].

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378 See, e.g., Jerzy Wroblewski, 'Legal Decision and Its Justification' (1971) 14 *Logique et analyse*, 409.

379 Matthias Klatt, 'Balancing competences: How institutional cosmopolitanism can manage jurisdictional conflicts' (2015) 4 *Global Constitutionalism* 214.

380 Matthias Jestaedt, 'The Doctrine of Balancing – its Strengths and Weakness' in Matthias Klatt (ed) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 164–165.

381 Klatt and Meister (n 356) 4–6.

382 Jestaedt (n 380) 157.

4.2. The Problem of Formal Principles

Alexy appears to follow Dworkin's approach by defining formal principles as conservative, citing 'one should not depart from established practice without good reason'[383] as an example. For Alexy, formal principles are conceived of as authoritative principles, requiring the balancing authority to defer to other authoritative institutions[384]. For example, a formal principle of respect to legislative authority requires that adjudicative institutions should show deference to the legislative decision when finding a balance between competing substantive principles. Consequently, tension arises between formal and substantive principles, rooted in the fact that although principles are optimization requirements and constitutional rights are considered principles, legislatures retain discretion in cases of uncertainty. This discretion leads to the under-optimization of substantive principles, which conflicts with the way principles are intended to function. Alexy addresses this tension by arguing that formal principles require 'the authority of duly issued and socially efficacious norms to be optimized', meaning that 'the formal principle of democratically legitimized legislative decision-making competence' should also be optimized[385]. Simply put, if formal principles are distinct from substantive principles, this distinction helps preserve the integrity of principles theory by allowing Alexy to maintain his commitment to the view that all principles are optimization requirements, even though they differ in kind.

However, it is worth underscoring that the integration of formal principles into Alexy's principles theory was a latecomer, becoming particularly relevant during the 2000s as a result of the increasing discussions on the use of proportionality analysis in balancing socioe-

383 Alexy (n 362) 58.

384 'The more weight that is given to formal principles within a legal system, the stronger is the prima facie character of its rules. It is only when such principles are completely deprived of any weight than the rules would no longer apply as rules' Ibid 58.

385 Alexy (n 362) 416.

conomic rights[386]. It is also bound up with the expansion of the rights catalogue that is used by the courts all across the world and with the more deferential rulings of the last instance courts with the rise of the subsidiarity principle[387]. Between 2002 and 2003, Alexy sought to clarify the role that formal principles play in his principles theory in four key articles[388] and revised his theory by introducing a second (epistemic) law of balancing[389] and making a distinction between epistemic and structural discretions. Even though there are numerous problems with how to square them with each other on the one hand and with the weight formula on the other hand, it is safe to say that these are all authority-related tools. For instance, structural discretion refers to situations in which 'the law itself leaves open the choice

386 Peng-Hsiang Wang, 'Formal Principles as Second-Order Reasons' in Martin Borowski, Stanley L. Paulson und Jan-Reinard Sieckmann (eds) *Rechtsphilosophie und Grundrechtstheorie: Robert Alexys System* (Mohr Siebeck 2017) 429. For socioeconomic rights see, Matthias Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 691; and Klatt and Meister (n 352) 85–108.

387 For the ECtHR's jurisprudence, see Patricia Popelier and Catherine Van Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 *Leiden Journal of International Law* 5; and Leonie M. Hujbers, 'The European Court of Human Rights' Procedural Approach in the age of subsidiarity' (2017) 6 *Cambridge International Law Journal* 177. For the EU, see Darren Harvey, 'Towards a Process-Oriented Proportionality Review in the European Union' (2017) 23 *European Public Law* 93. For a more holistic approach comparing the EU and ECHR regime, Başak Çalı, 'Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Courts' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds) *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016) 144.

388 Alexy (n 362) 388–425; Robert Alexy et al. (eds) *Verfassungsrecht und einfaches Recht-Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. Primär-und Sekundärrechtsschutz im Öffentlichen Recht: Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Würzburg vom 3. bis 6. Oktober 2001* (De Gruyter 2002); Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433; Robert Alexy, 'The Weight Formula' in Bartosz Brożek, Jerzy Stelmach and Wojciech Zbigniew Załuski *Frontiers of the Economic Analysis of Law* (Jagiellonian University Press 2007) 9.

389 'The more heavily interference in a constitutional right weighs, the greater must be the certainty of its underlying premises'. Alexy (n 362) 418.

between different, but equally legal possibilities'[390], whereas epistemic discretion stems from our limited knowledge both about empirical facts and normative questions[391]. For example, the 'evaluation of facts, the hearing of witnesses, the hearing of evidence' can be considered epistemic discretion granted to lower-order courts. By giving a place to these authority-related concepts, principles theory has situated itself between the model of absolute discretion (purely procedural model), in which the courts are not constrained with any rule, and the model of one right answer (purely substantive) once defended by Dworkin[392]. On this basis, Klatt called their approach the 'procedural-substantive model'[393].

The relationship between formal and substantive principles is the key to assessing the degree of deference shown to authority in the course of balancing. Accordingly, the following two questions become highly essential: i) how to integrate formal principles into the weight formula and ii) how to balance formal principles with substantive principles. In his 2014 article, 'Formal Principles: Some Replies to Critics', Alexy seeks to clarify how formal principles interact with substantive principles and talks about two different models, i.e., the combination and separation models. They differ in how they foresee the relationship between formal and substantive principles. The combination model requires that formal principles be combined with substantive principles before they affect the outcome of a legal decision. In contrast, the separation model permits formal principles to be balanced directly with substantive principles[394]. It is plausible to place both Dworkin's conservative principles and Alexy's conceptualization of formal principles (prior to the postscript) under the combination model, as in both cases, formal principles influence balancing only when paired

390 Matthias Klatt, 'Taking Rights Less Seriously. A Structural Analysis of Judicial Discretion' (2007) 20 *Ratio Juris* 506, 516.
391 Ibid 517.
392 Ibid 516.
393 Ibid.
394 Robert Alexy, 'Formal Principles: Some replies to critics' (2014) 12 *International Journal of Constitutional Law* 511.

with a substantive principle. In other words, formal principles serve to increase the weight of the substantive principles they support. The separation model, on the other hand, can be exemplified by the Radbruch formula, where the substantive principle of legal certainty and the formal principle of justice directly compete.

However, Alexy explicitly warned that balancing formal and substantive principles is a mistake, as it may lead to unwarranted interference with fundamental rights, for example, solely in favour of authority[395]. He also rejects the combination model for the same reason, noting that while the negative impact of authority is reduced in the separation model, it still distorts the balancing formula and results in insufficient optimization of substantive principles. by giving undue weights to formal principles. Indeed, it is not possible to escape from the under-optimization of substantive principles; nevertheless, what Alexy struggles to do is to diminish the negative impact of formal principles on the optimization of substantive principles to such an extent that it would be regarded as tolerable, defensible and justifiable. To address this, Alexy proposed a third approach—the epistemic model—which seeks to minimize the influence of formal principles in the weight formula as much as possible without disregarding them entirely.

Under the epistemic model, second order (meta-level) balancing exists to find a balance between 'constitutional rights as epistemic optimization requirements' and 'the formal principle of the democratically legitimated legislature'[396], which operates alongside the first-order balancing carried out via the weight formula. The purpose of this second-order balancing is to determine whether the epistemic variable, **R**, should be incorporated into the first-order weight formula. In simple terms, the inclusion of variable **R** in the weight formula depends on the outcome of this meta-level balancing. If there is no uncertainty, then there is no need to defer to legislative authority. As such, the epistemic model transfers the degree of epistemic uncertainty to second-order

395 Alexy (n 362) 417–418; Alexy (n 394) 518.
396 Alexy (n 394) 521.

balancing, where it functions as a substantive principle in contrast to the formal principle of democratically legitimated legislatures[397].

It seems that Alexy introduces this second-order balancing to reduce the potential overemphasis of variable **R** in the weight formula. Recall that the weight formula comprises three variables: **I** (intensity of interference), **W** (abstract weight of the principle), and **R** (reliability of empirical and normative assumptions). Given that **R** consists of two components—normative and empirical epistemic reliability—it could have disproportionately influenced the weight formula without second-order balancing. Therefore, Alexy utilizes second-order balancing to decide whether there exists a sufficient degree of uncertainty to defer to the legislative authority.

In developing this epistemic model, Alexy recourses the idea that constitutional rights call for epistemic optimization. However, this does not establish a clear connection between formal principles and epistemic uncertainty, as Wang points out: 'taking account of epistemic uncertainty in balancing is one thing; why deference should be shown to an authority' is another[398]. In this epistemic model, the formal principle of legislative supremacy is indirectly reflected in the variable **R**, making it a specific case of the separation model (substantive-formal balancing)[399]. For this reason, it remains to be seen whether Alexy's epistemic model fares better than its alternatives do[400]. In addition to Alexy's epistemic model, two other suggestions should be considered. The first argues that since formal and substantive principles are fundamentally different, they must be separated and balanced within differ-

397 Ibid 521.

398 Wang (n 386) 435.

399 Alexy (n 394) 521.

400 We can now see that formal principles and the balancing between material principles are two separate things. Alexy's model mixes and combines these aspects. … This is clear from the justification of the second law of balancing. This argument lacks clarity in so far as the second law of balancing does not in any way have regard to the formal principle. The second law of balancing does not lead to a balancing between the competency of the legislature and a material principle. Rather, it prescribes a balancing between epistemic uncertainties and the corresponding material principle.' Klatt and Meister (n 356) 140.

ent domains. Klatt and Meister's 'two-level model'[401] and Sieckmann's 'model of competing conceptions of law' are examples of this formal-formal balancing approach[402]. On the other hand, Borowski's proposal falls under the category of the combination model[403].

Klatt and Meister, who argue that formal and substantive principles are to be separated completely and balanced within different domains (two-level model), propose distinguishing between the level at which substantive principles are balanced (balancing level) and the level at which formal principles are balanced (review level)[404]. Their main purpose is to explain how the discretion granted to legislative authorities is connected with judicial review, as they consider them the 'two sides of the same coin'[405]. In the balancing level, substantive principles are weighted via a weight formula without regard to formal principles. However, epistemic uncertainties play a role in finding a balance between two substantive principles through the variable R in the weight formula[406]. In contrast, the review level seeks to determine how strictly the court is allowed to review legislative acts or rulings from lower courts. This second level determines the degree of judicial review or the degree of deference to be shown to the reviewed authority.

According to Klatt and Meister, 'the minimum amount of review in any relation of judicial review'[407] that the court should conduct is an evaluation of how the internal justification has been established by lower courts or legislatures. They call this 'procedural review', as it is solely concerned with examining 'if the controlled authority has done the balancing correctly'[408]. Thus, any review authority is warranted to check whether epistemic and normative premises lead to the conclusion

401 See, Klatt and Meister (n 356) 100.
402 See, Jan-Reinard Sieckmann, *Recht als normatives System* (Nomos 2009) 200–204.
403 See, Martin Borowski, 'The Structure of Formal Principles: Robert Alexy's "Law of Combination"' (2010) 119 *Archiv für Rechts-und Sozialphilosophie*, 19.
404 Klatt and Meister (n 356) 136–148.
405 Ibid 136.
406 Ibid 142–143.
407 Ibid 143.
408 Ibid.

replaced by the lower-order authorities. For Klatt and Meister, the ability to perform procedural review is the essence of what we understand from judicial review[409]. Because it focuses primarily on assessing the internal justification step and detecting the structural errors made in the balancing process, procedural review grants lower authorities the highest degree of discretion possible[410]. They remain 'free to determine the underlying premises'[411] and assign different values to the variables of the weight formula when confronted with a different case. External justification, however, involves a much more complicated process, as it must also question the reliability of the underlying assumptions regarding the balancing formula. The fundamental issue at this second level is 'to what extent the controlling authority can overrule the decisions of the controlled authority'[412]. Therefore, in the case of stricter scrutiny, the reviewing authority could also challenge the external justification presented by the lower-order authorities.

Neither supreme courts nor constitutional courts hold a monopoly on balancing fundamental rights. Balancing is so pervasive that it is difficult to find any authority that is not expected to weigh competing rights. Borowski, by highlighting the heterarchical and cooperative aspects of balancing, argues that it is essential to distinguish between the 'decision to be reviewed' and the 'review decision'[413]. For example, consider a situation in which a prison administrative body must decide whether a prisoner has the right to keep more than 15 books in their cell[414]. In this case, the administrative body inevitably balances the right to receive information or education against the need for prison securi-

409 They consider 'errors in internal justification, namely, in the structure of balancing' 'so fundamental as to be included in any review of any type. If the reviewing body lacks this competence, one cannot speak of proper judicial review'. Ibid 143.

410 Ibid 143.

411 Ibid 143.

412 Ibid 144.

413 Martin Borowski, 'Limited Review in Balancing Fundamental Rights' (Unpublished manuscript) 13–14. Available at: https://icjp.pt/sites/default/files/cursos/documentacao/borowski_-_limited_review_.pdf.

414 See Turkish Constitutional Court's decision on following a constitutional complaint, AYM Özkan Kart, B. No: 2013/1821, 5/11/2014,

ty. Furthermore, administrative courts may then rule on whether the administrative body violated the prisoner's fundamental rights. Finally, a higher court may issue a judgment on the basis of the law rather than the merits of the case. In other words, there exists a 'chain of balancing decisions'[415] wherein courts and administrative bodies work collectively and cooperatively to strike a proper balance between competing rights.

From this temporal and sequential dimension of balancing, it follows that 'the review of whether a preceding decision is unlawful leaves structural discretion to the "decision to be reviewed" and the body that made that decision'[416]. This, in turn, leads to limited judicial review, as each authority is bound by the balancing decisions of the lower authority, whether it is a legislative act or an appellate court ruling. According to Borowski, the notion of limited review refers to the 'limitation of the review competence of the reviewing body'[417]. In summary, the reviewing authority is inherently constrained by the rulings or decisions of the preceding authorities. Those legal institutions that stand as the final courts in this chain of judicial review, such as constitutional or international courts such as the ECtHR or the ECJ, may enjoy wider discretion in their decisions[418]. However, it is misleading to assume that their discretion is unlimited. For instance, they need to rely on the judgments of the lower courts with respect to the evaluation of factual evidence unless there are significant reasons not to do so.

It would not be incorrect to argue that Alexy's weight formula is designed mainly from the perspective of a court of last instance. Borowski, to incorporate the limitations faced by such courts, suggested that a variable of formal principles (Pf) should be added to the weight formula[419], suggesting that the decision of the reviewed authority is to be respected unless epistemic uncertainty exists with respect to how

415 Borowski (n 413) 13–14.
416 Ibid 13.
417 Ibid 15.
418 For a classification of discretion into two different forms (weak and strong), see Dworkin (n 357) 32–33.
419 Borowski (n 413) 27. This formal principle will also be comprised of abstract weight of deference and the intensity of interference.

to balance competing substantive principles[420]. We may summarize his formula as follows: 'The greater the epistemic uncertainty, the more weight is accorded to the formal principle 'Pf,' and, in turn, the more limited the review of the balancing of substantive principles'[421]. Wang has recently taken a very similar position, arguing that formal principles are better viewed 'as a special kind of second-order reason: it is both a reason to act on the decision of some authority and a reason not to act on one's own judgment of what the objective balance of reasons requires'[422]. The point on which they differ from Razian exclusionary reasons is that they are reasons not to 'preempt balancing of first-order *pro tanto* reasons' but to 'disregard one's subjective assessment of the balance of reasons'[423]. Seen in this light, formal principles operate as conditional or "epistemically bounded reasons" in that the deferring authority's reliance upon the decision of the deferred authority will be conditional upon the degree of uncertainty at stake[424]. The result of the question of when and to what extent the deferring authority is to show deference will be determined only with case-specific second-order balancing[425].

4.3. How can Formal Principles be balanced?

Separating formal principles from substantive principles, as suggested by Klatt and Meister, may enable us to distinguish between judicial

420 Ibid 15.

421 Ibid 28. The new weight formula will be as such; $Wij = \frac{Wi.\,Ii.\,Ri + Pf}{Wj.\,Ij.\,Rj}$. The Pf may be either in the nominator or denominator in accordance with the decision to be reviewed.

422 Wang (n 386) 442. Indeed, Alexy already specifies in A Theory of Constitutional Rights that 'Raz takes the view that norms are reasons for actions. In contrast, the position taken here is that rules are reasons for norms. The gap between the two views is actually smaller than might seem, since if rules and principles are reasons for norms, they are indirectly reasons for actions.' Alexy (n 362) 59.

423 Wang (n 386) 443.

424 Ibid 447.

425 Ibid 448, Wang calls this 'variable epistemic threshold' upon which the deferring authority will continue to show deference to the other authorities.

deference and the balancing of substantive rights. This, in turn, provides a solid foundation for a more intelligible process in balancing formal principles. Regarding Borowski's limited review, it may be argued that it does not fundamentally alter Alexy's epistemic model, as the underlying logic in both models treats formal principles as secondary to substantive principles. In their frameworks, formal principles are contingent upon either second-degree balancing (Alexy) or the degree of uncertainty (Borowski and Wang). However, at the end of the day, formal principles impact the balancing formula only when they are combined with substantive principles. Thus, their models are merely different versions of the combination model.

Against this backdrop, I contend that the combination model should be discarded, as it is overly complex and has various shortcomings. Instead, I propose balancing formal principles directly with other formal principles. In this light, I argue that it is preferable to adopt the two-level model, as it is the clearest among the proposed alternatives. Its clarity lies in its sharp distinction between formal and substantive principles, even though they may influence one another. Moreover, it is plausible to focus solely on the review level in this model to determine the appropriate degree of review. This model allows for a balance between two formal principles, such as democratic legitimacy and judicial competence.

One of the best examples supporting the foregoing argument is that a two-level model is widely used by international courts when they resolve how much deference they need to show to the judgements of domestic authorities[426]. For example, the ECtHR has recently introduced a crucial factor to be considered when deciding whether to grant domestic authorities a margin of appreciation (MoA) or not—namely, 'the quality of decision-making, both at the legislative stage and before the courts'[427]. This variable allows the ECtHR to show deference to

426 See, e.g., Gabriel Encinas, 'The Idea of "Interlegal Balancing" in Multilevel Settings' in Maja Sahadžić et al. *Accommodating Diversity in Multilevel Constitutional Orders: Legal Mechanisms of Divergence and Convergence* (Routledge 2023) 21.

427 Robert Spano, 'Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487, 498. The relevant

domestic authorities when they 'act in good faith'[428] in that they strike a fair balance between conflicting rights and apply the proportionality analysis as it is done by the court itself. This new approach to judicial decision-making at the interface is termed by Spano 'process-based review'[429], as it aims to encourage national authorities to fulfil their obligations in securing convention rights through a reward mechanism. For this reason, this procedural turn is, for Spano, also normatively desirable because it regards successful domestication of the Convention as a factor in deciding whether to extend the domestic MoA. For this reason, it is viewed as a 'democracy enhancing approach'[430], indicating that the discretion that domestic authorities enjoy derives its normative value from the way in which they treat their citizens. The Court views the correct application of proportionality analysis as an indication that domestic authorities are progressing towards becoming established democracies where human rights are both respected and well protected. Simply put, domestic authorities have discretion only if it is demonstrated and justified

The institution of judicial review is caught between Scylla and Charybdis: it either risks undermining the principle of democratic governance by having the final say on human rights or leaves the protection of human rights at the mercy of parliamentary majorities[431]. As such, the legitimacy of judicial review of human rights focuses on finding a proper balance between these competing interests undergirding two different formal principles. In response, Klatt proposed a flexible model of judicial review by referring to the issue as a 'conflict

cases include Animal Defenders v. The United Kingdom, Parrillo v. Italy, S.A.S. v. France, Dakir v. Belgium.

428 Başak Çalı, 'Coping With Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35 *Wisconsin International Law Journal* 237, 242.

429 Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473, 480 480–494.

430 Spano (n 427) 497–499. Spano (n 429) 488–492.

431 Matthias Klatt, 'Positive rights: Who decides? Judicial review in balance' (2015) 13 *International Journal of Constitutional Law* 354, 357.

of competences': the competence of democratic governance and the competence of judicial review[432]. According to Klatt, 'the correct intensity of judicial review will always be sensitive to the circumstances'[433], as these competences are formal principles whose balance calls for a case-specific balancing exercise[434]. This is clear in Klatt's following remarks:

> *'Both the legislature's competence to decide and the court's competence to conduct constitutional review must, prima facie, be realized to the greatest extent possible. However, they pull in different directions. Only a balancing procedure can determine the definite degree of realization of both formal principles'*[435].

For Klatt, conflicts between institutions with respect to competences must be resolved through balance. This requires what he calls 'institutional practical concordance', whereby when institutional competences conflict, neither should be completely subordinated to the other[436]. Simply put, the competence of judicial review 'is not an either-or matter but one of degree'[437]. One of the best examples of this normative idea of institutional practical concordance may be found in what he calls the 'Bermuda Triangle'[438] of the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and national constitutional courts. Solange jurisprudence, where the principles of

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432 Ibid 363.

433 Ibid 366.

434 As Klatt states, 'only a balancing procedure can establish the definite degree of realization of both formal principles'. Klatt (n 379) 212.

435 Ibid.

436 Here, Klatt draws from Hesse's notion of 'practical concordance', which holds that 'when fundamental rights compete as they frequently do, neither of those rights has to give way completely. Rather they must be correlated in such a way that both gain reality'. Klatt transfers this idea from the substantive level of fundamental rights to the institutional level of legal authority and competence. Matthias Klatt, 'Judicial review and institutional balance. Comments on Dimitrios Kyritsis' (2019) 38 *Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava* 21, 24–25.

437 Ibid 26.

438 Klatt (n 379) 198.

proportionality and subsidiarity play crucial roles in mediating the conflicts of competence between the EU and member states, serves as a telling example of institutional practical concordance. In Solange I, the BVerfG denied the principle of supremacy of EU law, affirming that it would continue to carry out fundamental rights review so long as the EU legal order fills its gap in fundamental rights protection[439]. Nevertheless, 12 years later, in 1986, the Court ceased to carry out its fundamental rights review, finding the level of protection ensured by the EU legal order substantially equivalent to that of Germany. It further admitted that it would abstain from such a control activity, 'as long as the European Communities ensure effective protection of fundamental rights'[440].

Klatt underscores that the conflict of competences has a multi-faceted nature, including legal, logical, formal, actual, and concrete dimensions[441]. However, a comprehensive analysis of these dimensions falls beyond the scope of this study. Therefore, the focus here will be on his proposal to strictly distinguish between formal and material principles[442]. While substantive principles concern fundamental rights, formal principles include the rule of law, separation of powers, legal certainty, and protection of fundamental rights[443]. Given that discussions on the nature and scope of formal principles are still fledgling,

439 As long as [Solange] the integration process [in the European Communities] has not progressed thus far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution, a reference by a court in the Federal Republic of Germany to the Bundesverfassungsgericht in judicial review proceedings [involving conflicts of Community secondary law and fundamental rights under the German Basic Law] … is admissible and necessary.' See BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (29 May 1974), available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588.

440 BVerfGE 73, 339 2 BvR 197/83 Solange II decision, 22 October 1986, available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572.

441 Klatt (n 379) 200–201.

442 Ibid 203.

443 Ibid.

this monograph focuses on, for the sake of clarity and simplicity, competences such as legislative power, amendment power, and the judiciary's control over the amendment power as examples of formal principles.

Ultimately, in the process of balancing formal principles, each principle 'pulls in different directions'[444] with the goal of realizing its potential to the greatest extent possible under concrete circumstances. In his analysis of the Solange I and II cases, Klatt demonstrated how to balance formal principles. The key issue is determining the concrete weight of each principle through external justification. To facilitate this, Klatt proposed five external justification criteria: (a) democratic legitimacy, (b) the quality of the decision, (c) the quality and effectiveness of the legal system as a whole, (d) the significance of the material principles, and (e) the principle of subsidiarity[445]. For external justification, values are assigned to the variables in the weight formula via a triadic scale (severe, moderate, or light)[446]. Once external justification is completed, the internal justification phase begins. The internal justification unfolds in three stages. In the first stage, the degree of nonsatisfaction of the first principle is determined. In the second stage, the importance (degree) of satisfying the second principle is evaluated. In the third stage, it is determined whether it is justifiable to satisfy the second principle at the expense of the first[447].

The logic of internal justification is deductive, whereas the logic of external justification is inductive. For this reason, in external justification, unlike internal justification, the strength of the arguments depends on choices made from ethical, moral, and political perspectives. Simply, as reflected in the weight formula, internal justification is based on conclusions drawn from external justification. In addition, I think this is one of the most important aspect of balancing formula, that is, it helps draw a clear distinction between the internal and external

444 Ibid 212.
445 Ibid 214–216.
446 Ibid 213.
447 Ibid.

justification steps. This distinction allows us to separate which aspects of the decision are based on external assumptions (external justification) from those that are derived from the formal balancing process (internal justification). While the decision maker's value assignment might initially seem subjective, the underlying arguments must support the assigned values.

4.4. Transfer of Klatt's Five External Justification Criteria to the UCA Context

Judicial review of constitutional amendments is better seen not as something qualitatively[448] different from the judicial review of ordinary laws and regulations. This is because both involve similar competing principles: the legislature's competence in making policy choices and the judiciary's competence in overseeing the legislature. While the former stems from the principles of democracy and democratic legitimacy, the latter is grounded in the principle of constitutional supremacy. Transferring the notion of conflicts of competence to the context of unconditional constitutional amendments (UCAs) replaces the conflict between national and supranational legal orders with the conflict between amendment and constituent powers. While Klatt's case involves a conflict between two courts and two different legal orders[449], in the case of UCAs, the conflict lies between amendment and constituent powers.

If the distinction between the judicial review of constitutional amendments and legislative acts is indeed a matter of degree, then

448 Alexy and Bernal defends the nonidentity(separability) thesis. 'There can be no identity between constitutional review of constitutional amendments and constitutional review of ordinary laws. This can be called the *nonidentity thesis* (I owe this remark on the nonidentity thesis to *Robert Alexy.*)'. Bernal (n 60) 356. For a criticism of the sharp distinction between constitutional amendment and replacement, see Dixon and Landau (n 278). Raz similarly notes: 'Constitutional politics may not be the same as parliamentary politics, but they are not altogether separate either.' Raz (n 1) 327.

449 Klatt (n 431). 357.

the scope of judicial review could also extend to constitutional amendments. Since both involve similar underlying principles—the check on legislative and amendment powers in favour of constituent power—it is appropriate to transpose Klatt's external justification criteria to the UCA context. Klatt outlines five external justification criteria[450], but owing to the unique importance of the principle of subsidiarity in the EU context and its irrelevance in the UCA context, it will be replaced by the 'political capital criterion'. This is because constitutional courts, in their decisions, often grapple with policy choices regardless of their significance. Moreover, in the context of UCAs, the relationship between political and legal domains gets further blurred and complicated, as is already shown when discussing the concept of constitutional identity. Constitutional amendments typically concern highly debated topics and inevitably encompass important sociopolitical questions concerning the past and future of a political community. Accordingly, the five external justification criteria that determine the concrete value of each formal principle in our balancing analysis are (a) democratic legitimacy, (b) the quality of the decision, (c) the effective functioning of the legal system as a whole (rule of law criteria), (d) the content of the amendment, and (e) the political capital of the courts.

Given the democratic legitimacy criterion, it is worth underscoring that constitution-making is a collaborative and collective activity. Thus, this criterion suggests that 'the more democratic the process is in terms of 'the degree of deliberation, time, participation and public support', the less will be the degree of judicial scrutiny'[451]. As Roznai incisively observes, 'we the people' is distinct from 'oui the people'[452], contrasting

450 Klatt determines 5 very similar external justification criteria while he is analysing positive rights: i) 'the quality of primary decision', ii) 'the epistemic reliability of premises used', iii) the democratic legitimacy, iv) the material principles at stake, and v) 'the specific function fulfilled by the relevant competences'. Klatt (n 427). 354–382.

451 See Jackson (n 127) 338–339. For the argument that the weaker the democratic legitimacy of an institution, say the ECB or Bundestag, the more it will be under stricter judicial review, see BVerfG, 2 BvR 859/15, 05 May 2020, para. 115 (PSPP judgment).

452 Roznai (n 49) 295–316.

a genuine exercise of constituent power with mere acquiescence to a leader's will, as exemplified by Napoleon Bonaparte, who presents himself as 'the constituent power'[453]. Democratic legitimacy demands more than a simple yes/no referendum[454] so much that its 'exercise should incorporate actual, well-deliberated and thoughtful, free choice by society's members' in an 'inclusive, participatory, time-consuming, and deliberative' way[455]. As such, a decision taken behind the closed doors and then ratified with a referendum does not suffice to endow it with the title of democratic legitimacy.

Today, we are witnessing *a turn from legal interpretation to public reason-oriented justification*'[456] not only in the judiciary but also across legal systems. This shift enhances the overall quality of parliamentary decisions because it strengthens the idea that no decision-making authority should be left unchecked regardless of its legitimacy from the perspective of democracy. Historically, a key question has been whether parliamentary decisions are legitimate solely because they reflect the will of the Parliament or if the quality of the parliamentary decision-making process also matters. What we are witnessing today is a procedural turn in judicial review, as evidenced by the rulings of the ECtHR, ECJ, and BVerfG, where courts are increasingly focused on the quality of the parliamentary process as indicative of the quality of the outcome rather than merely the outcome itself[457]. For instance, once regarded as

453 Hannah Arendt, *On Revolution* (Penguin Books 1963)163, cited from Roznai (n 49) 298.

454 Roznai (n 49) 312.

455 Ibid 313.

456 Mattias Kumm, 'The idea of Socratic contestation and the right to justification: the point of rights-based proportionality review' (2010) 4 *Law & Ethics of Human Rights* 142.

457 For the ECtHR, see Janneke Gerards and Eva Brems (Eds.) *Procedural Review in European Fundamental Rights Cases* (CUP 2017); for the CJEU see Patricia Popelier, 'Procedural Rationality Review after Animal Defenders International: A Constructively Critical Approach' (2019) 15 *European Constitutional Law Review* 272; and for the BVerfG as an example of domestic courts see Klaus Meßerschmidt and A. Daniel Oliver-Lalana (eds) *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016).

a sacred domain immune to scrutiny by the courts, the parliamentary process has begun to be viewed as important factual evidence illustrating the participatory and deliberative quality of decision-making[458]. Various terms have emerged to describe this trend, including semi-procedural review[459], procedural review[460], evidence-based law-making[461], and legisprudence[462]. They all converge on the fundamental idea that the legitimacy of a legislative act relies on the quality of the decision-making process as well as the outcome itself. Accordingly, it is crucial to recognize our second criterion—the quality of decision—which posits that 'the more qualified and elaborated the outcome of a constitutional amendment is, the less the degree of judicial scrutiny'[463] will be, reflecting this procedural shift as part of a broader culture of justification and rational law-making.

The third criterion for external justification is the rule of law (RoL), which posits that 'the more qualified and elaborated the outcome of a constitutional amendment is, the less the degree of judicial scrutiny'[464]. This criterion is grounded in the assumption that as principles of the rule of law[465]—such as predictability, generality, and nonretroactivity—

458 See, e.g. Suzei Navot 'Judicial Review of Legislative Process' (2006) 39 *Israel Law Review* 182.

459 Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

460 Gerards and Brems (n 457).

461 Rob Van Gestel and Jurgen de Poorter, 'Putting Evidence-Based Law-Making to the Test: Judicial Review of Legislative Rationality' (2016) 4 *The Theory and Practice of Legislation* 155.

462 Luc J. Witgens, 'The Rational Legislator Revisited. Bounded Rationality and Legisprudence' in Luc J. Witgens and A. Daniel Oliver-Lalana (eds) The Rationality and Justification of Legislation: Essays in Legisprudence (Springer 2013) 1.

463 When applied to the relationship between a lower and higher order courts, this formula requires assessing the quality of judicial reasoning. For an edited volume on this issue, see Mátyás Bencze and Gar Yein Ng (Eds) *How to Measure the Quality of Judicial Reasoning* (Vol. 69) (Springer 2018).

464 This directly follows from the second criterion, that is, the quality of amendment process.

465 These include generality, promulgation, prospectivity, coherence, clarity, practibility, constancy, coherence in the implementation. Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 33–91. To this list Raz adds following principles mostly associated with the functioning of courts: the independence of the judiciary must be guaranteed; natural justice must be observed; courts must

are upheld, the judiciary has less reason to intervene in the political decision-making process. This assumption results from the idea that the RoL serves to create a stable and predictable sociopolitical environment in which individuals can live an autonomous life by making both short- and long-term plans. Taking a cue from Gardner, I suggest thinking of the RoL as 'a modal ideal' whose purpose is to ensure that political authorities work functionally well and operate 'in good shape'[466]. For this reason, it is better viewed as 'subsidiarity' to the primary services that a political authority is supposed to deliver, as well as to the 'various purposes of the various rules that are upheld, regulated by external morality'[467]. It is, therefore, 'an intermediate destination'[468], primarily concerned with the mode of governance between authority and subject, i.e., the way in which political authority treats its subjects and delivers them various services, including authoritative guidance. The fact that the RoL ensures stability and predictability because it provides guidance to authorities with respect to how to govern their societies is well captured by Raz:

> 'The RoL consists of principles that constrain the way government actions change and apply the law – to make sure, among other things, that they maintain stability and predictability, and thus enable individuals to find their way and to live well.'[469]

One thing that follows from the definition of the RoL as a modal ideal subject to external morality is that there are many values to be realized, and interests protected by law and the RoL are only one political value, such as living a life according to one's own preferences, living a life with liberty and happiness, and living a prosperous life without being wor-

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have the reviewing power over some principles; courts should be accessible; and the discretion of crime-preventing agencies should not be allowed to pervert the law. Raz (n 221) 217–219.

466 John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 211.

467 Ibid.

468 Ibid.

469 Joseph Raz, 'The Law's Own Virtue' (2018) 39 *Oxford Journal of Legal Studies* 1, 12–13.

ried about poverty[470]. Additionally, this criterion assumes that political authorities respecting the principles of the RoL are likely to be more resistant to populist capture than those authoritarian regimes where these principles are apparently neglected[471]. It is worth remembering, however, that this modal quality of the RoL also risks failing to detect the potential backsliding experienced in a political system with this criterion only[472]. However, we have other criteria in our weighting formula to mitigate this shortcoming.

The fourth criterion for external justification is 'the content of the amendment', expressed by the following formula: 'the more the amendment is related to the constitutional structure and mechanisms of checks and balances, the greater the degree of judicial scrutiny'**.** This formula suggests that some provisions hold more constitutional significance than others do, as indicated by concepts such as constitutional identity, the constitutional escalator, and the tiered-amendment rule. In addition, I believe that the best way to determine these constitutional provisions that are more significant than others is to look at the constitutional history and tradition of a particular political system through the normative principles of constitutionalism. As such, this criterion is subject to some degree of social and historical contingencies. For instance, while Turkish and Indian political communities assign more importance to secularism, French views republicanism as an indispensable value enshrined in their constitutional system. Additionally, greater emphasis may be placed on the independence of the judiciary, as it is not only one of the first frequently targeted institutions by

470 As aptly put by Gardner: 'Legalists overstate the importance of the rule of law (or of everyone's 'playing by the rules', as their deceptively chummy expression has it) as compared with other moral and political ideals. For some, indeed, the rule of law is the be-all-and-end- all of sound government, the one and only valid political ideal'. Gardner (n 466) 197.

471 For an example from Turkish context see, Çapar (n 353).

472 'And, what may be good and fair in one democratic setting may be unfair and authoritarian in another. One could indeed put together quite an authoritarian system by choosing some particular mix of regulations from various liberal democratic states.' Andrew Arato, 'The constitutional reform proposal of the Turkish government: The return of majority imposition' (2010) 17 *Constellations* 345, 347.

populist governments but also a necessary condition for living under a political regime observing the principles of the RoL.

The fifth criterion is 'the political capital' accumulated by the court. According to this criterion, the accumulated legitimacy of the court increases the possibility that the court is warranted to exercise a judicial review of constitutional amendments[473]. As Whittington observes, 'the independence of the judiciary cannot be assumed', as it must be understood as 'interdependent' on the cooperation of elected officials[474]. Given that courts function as political actors[475], it follows that 'if they get too far out of line, they may well end up in serious trouble'[476]. Conversely, these constraints imply a mutual and interdependent relationship between courts and political actors; that is, courts are not only limited by political actors but also rely on them to enforce their rulings. Against this backdrop, I draw on Raz's argument that there is a 'principle of political morality'[477] whereby public officials and institutions should be accountable to individuals for their actions and decisions. From here, it springs that when courts are faced with incommensurable options and reasons, they 'should develop or adopt distancing devices—devices they can rely on to settle such issues in a way that is independent of the personal tastes of the judges or other officials involved'[478]. One very useful distancing device available to judges is that they can rely on the well-known historical argument that they make their decisions solely according to legal considerations and nothing more. Relying on legal doctrine when faced with incommensurable choices, Raz says, is justified unless it 'prevents a court from adopting

473 For an article exploring how judicial institutions accumulate political capital over time, Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wis. L. Rev.* 683.

474 Keith E. Whittington, 'Legislative sanctions and the strategic environment of judicial review' (2003) *International Journal of Constitutional Law* 446.

475 For constitutional courts as political actors, see Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002).

476 Bary Friedman, 'The importance of being positive: the nature and function of judicial review' (2003) 72 U. *Cin. L. Rev.* 1257, 1278.

477 Raz (n 1) 369.

478 Ibid.

an innovative interpretation that could improve the constitution'[479]. Be that as it may, it is prudent for the courts to support their arguments with the legal doctrine, as much as possible, particularly when they are deciding on politically salient issues such as the constitutionality of a constitutional amendment.

479 Ibid.

5. Colombian Re-Election Saga as an Example of Balancing Formal Principles

> *'On this occasion, the Court had to define, regardless of the consequences and risks implied in the decision, whether Colombia is a democracy exclusively founded on the principle of the majority or a constitutional democracy in which the majority—no matter who leads it—must comply with the limits and restrictions established in the Constitution.'*
>
> **Justice Jaime Cordoba Trivino**[480]

Having taken stock of the external justification criteria, the internal balancing phase determines whether the court should strike down the constitutional amendment or uphold its constitutionality. To shed light on how this balancing process unfolds, this essay draws upon the two re-election cases of the Colombian Constitutional Court. Just as Klatt analysed the Solange 1 and Solange 2 decisions to explain how formal principles are balanced, it similarly scrutinizes the first and second re-election cases of the Colombian Constitutional Court to highlight how the courts, perhaps unconsciously, applied the balancing formula. In doing so, it aims not only to provide a descriptive analysis but also to make a normative claim about how courts should implement the balancing formula on UCAs.

480 Dissenting Judge in Colombia Constitutional Court's C1040/05 (First Re-Election Case) decision.

5.1. The First and Second Re-Election Cases

The Colombian Constitutional Court ranks among the most successful courts globally, alongside the Indian and South African Supreme Courts. The court's success lies not only in its proper use of UCAD but also in its progressive rulings on social rights and terror-related cases[481], all of which have significantly impacted the country's political landscape in the last two decades. In one of its most renowned decisions, the second re-election case, the court invoked the UCAD to strike down the constitutional amendment that would have allowed incumbent president Álvaro Uribe to be elected for a third time. The significance of this decision is underscored by the fact that, while the court upheld a similar constitutional amendment in the First Re-Election Case of 2005, it declined to do so in 2010 in a nearly identical case. Despite the apparent inconsistency at first glance, a closer investigation reveals continuity between the two rulings.

Pursuant to Article 241[482] of the Colombian Constitution, the judicial review of constitutional amendments does not fall within the constitutional court's competence. Furthermore, the Constitution does not contain any eternity clauses that could aid in the advancement of the UCAD. Despite these limitations, the Colombian Constitutional Court, in its C-551/03 decision, stated the following:

> '*… even though the 1991 Constitution does not establish any express petrified or unmodifiable clause, this does not mean that the power of reform lacks limits. The power of reform, a constituted power, has material limits, because the power to reform the Constitution does not*

481 For the Colombian Constitutional Court's progressive and activist rulings in areas related to socioeconomic rights, Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health' (2010) 52 *Latin American Politics and Society* 67.

482 See Articles 374–378 and 379 of the Colombian Constitution.

include the possibility of derogating it, subverting it, or substituting it in its entirety."[483]

This was the first time that the court distinguished between constitutional amendment and replacement. In this case, without annulling the amendment in its entirety, the court struck down two provisions: a) the preliminary questions asked to voters in a manipulative manner and b) the block vote requirement. Having partially and deferentially implemented the UCA doctrine in 2003, the court in the First Re-Election Case of 2005 faced an amendment to Article 197, which prohibited the re-election of the president. The amendment, approved by Congress, was challenged by citizens on the grounds that it contradicted the article itself. In its C-1040/05 decision, the Colombian Constitutional Court, by a seven-to-two majority, ruled that the amendment was constitutional. For the court, although constitutional amendments and replacements are distinct concepts, Congress retains the authority to alter the Constitution in accordance with 'society's evolution and citizens' expectations'[484]. Nevertheless, the court explicitly stated that the responsibility to demonstrate the difference between an amendment and a replacement rests with the court if the amendment is to be annulled as unconstitutional[485]. By shifting the burden of proof, the court indicated that annulling a constitutional amendment requires a higher level of justification than annulling a legislative act. Furthermore, in this case, the court held the following:

"... allowing presidential re-election for a single additional term ... is not an amendment that substitutes the 1991 Constitution with a wholly different text. The essential elements that define our democratic and social state of law, founded on human dignity, were not replaced by amendments. The people will freely decide who to elect as president, institutions with powers of control and review will continue

483 Decision C-551 of 2003 (Colombia Constitutional Court), cited from Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017) 355.

484 Decision C-1040 of 2005, cited from Espinoza and Landau (n 483) 343.

485 Ibid. 345.

> *to have full authority, the system of checks and balances will still operate, the independence of constitutional bodies is safeguarded, and the executive is not granted new powers…"*[486]

Strikingly, the court held the view that the re-election of the incumbent president would neither weaken checks and balances nor compromise the independence of the judiciary, deeming it insufficient to qualify as a constitutional replacement. Additionally, the court, drawing upon examples from other Latin American countries, argued that the re-election of an incumbent is neither an uncommon nor a unique phenomenon, even in fully developed democratic states. Although the prohibition of re-election holds special significance in Colombian constitutionalism—being the result of specific societal and historical experiences—the court argued that this clause is not beyond renegotiation or reform, provided that due consideration is given[487]. In conclusion, after thoroughly addressing the objections raised by opponents of the amendment, particularly regarding the separation of powers and fundamental rights, including the right to be elected, the court determined that the proposed amendment was not unconstitutional[488].

Following Uribe's second re-election in 2006, he served as president until 2010. As Uribe's second term neared its end, his supporters at Congress proposed an amendment to allow him to serve a third term. The issue once again came before the court, which, in its well-known decision, was ruled by a 5–4 majority that the proposed amendment was unconstitutional. The court reasoned that a third term, amounting to 12 consecutive years in office, posed a significant threat to the separation of powers and the rule of law[489] to the extent that 'the 1991 Constitution would not be recognizable once a second presidential re-election had been authorized.'[490] Moreover, the court underscored that

486 Ibid.
487 Ibid 346.
488 However, it is worth stressing that the court struck down a provision whose purpose is to give the highest administrative court the authority to enact statutory law under certain conditions during the electoral process. Ibid 349.
489 Ibid 355–358.
490 Ibid 358.

the constitution makes no meaningful distinction between a legislative amendment and a popular amendment approved by referendum—neither equates to constituent power, implying that both are constrained by the Constitution[491]. After scrutinizing the proposed amendment for its constitutionality, the court concluded that a third term would have such a detrimental effect on the existing constitutional structure that only a constituent assembly, under Article 376 of the Constitution, would have the authority to enact it[492].

In these cases, the court struggled to address two distinct issues and find a balance between two different competences. On the one hand, it sought to evaluate the negative impact of a third presidential term on the separation of powers, particularly concerning the legislative branch. On the other hand, it wrestled with balancing the right to run for presidential office with the need to preserve institutional checks and balances. Some courts in Latin America have framed the conflict over presidential re-election as a clash between constitutional rights and the separation of powers[493]. Unfortunately, this can lead to the misuse of constitutional rights to bypass constitutional limits. This tension is also evident in the two re-election cases of the Colombian Constitutional Court. In the first case, the court placed considerable emphasis on the right to be elected, whereas in the second re-election case, it underscored the importance of institutional balance and the potential negative impact a third term could have on it.

491 Ibid 352; For the Court, only a constitutional assembly, which is convened by the people may be the constituent power. Even under this situation, the constituent power cannot act unlimitedly, and it is limited by 'the imperative norms of international law and of international human rights treaties, to give two examples.' Ibid 353.

492 Article 376: 'By means of a law approved by the members of both chambers, Congress may stipulate that the people decide by popular vote if a Constituent Assembly should be called with the jurisdiction, term, and members determined by that same law.'

493 For Honduras case Landau, Dixon, and Roznai (n 295).

5.2. The Implementation of Formal Principles in the Re-Election Cases: Balancing Unconstitutional Constitutional Amendments

Allow me to proceed with demonstrating how the Colombia Constitutional Court's two re-election cases present us with a telling example of how to use formal principles in balancing UCAs. Recall that balancing involves two competing formal principles: the legislature's ability to amend the constitution and the judiciary's ability to review constitutional amendments. Importantly, the external justification criteria (the content of the amendment, democratic legitimacy, the rule of law, the quality of the decision, and political capital) collectively determine the specific weight assigned to each principle. Furthermore, it is crucial to note that the balancing of formal principles occurs at the 'review level' in Klatt and Schmitt's two-level model. The analysis will therefore focus on a relational comparison of the two decisions. Not only is it nearly impossible to apply an objective criterion in this context, but it is also necessary to draw a contextual comparison between the cases.

The Content of the Amendment (C): First, although both re-election cases involved the extension of the presidential term limit, the court, in each ruling, assigned different weights to the degree of interference with unamendable principles. In the second re-election case, the court concluded that the proposed amendment would have a serious adverse impact on checks and balances—unamendable principles—and thus assessed the degree of interference with the constitution's basic structure as severe. However, in the first re-election case, despite acknowledging the negative effects of the amendment on the basic structure, the court noted that other countries allow a second presidential term. Therefore, in the first case, the degree of interference was assessed as moderate or light. Additionally, while the court considered the negative effects of an eight-year presidency, it found that they were insufficient to seriously undermine the constitution's basic structure. In contrast, in the second case, the court explicitly focused on the impact that a 12-year presidency

could have on the constitutional structure, noting that such a long tenure could allow the president to reshape independent authorities and the judiciary according to his ideological preferences. Consequently, the court concluded that the proposed amendment would seriously interfere with unamendable principles[494].

The Democratic Legitimacy (D): Regarding the democratic legitimacy criterion, there is little reference to the amendment procedure, making it difficult to assess the democratic qualities of the amendment process in terms of participation, deliberation, timing, and public support. However, in the second re-election case, the court clearly emphasized that the approval of a constitutional amendment by referendum does not grant it greater legitimacy than an amendment passed by parliament. Both are expressions of constituted power and are, therefore, limited by the Constitution. Consequently, the court assigned equal weight to the degree of democratic legitimacy in both decisions.

Importantly, however, as Roznai suggested, the more an amendment process excludes people from the process, the more it resembles governmental power[495]. Conversely, the more it includes the people in the process of amending the Constitution, the more it aligns with popular (amendment) power[496]. All things considered, it is still arguable that a constitutional amendment ratified by the people in a referendum carries greater legitimacy, and annulling such an amendment may pose

494 'The lengthening of the presidential term to twelve years implies the rupture of the equilibrium between the president invested with relevant powers by the presidential system, with reinforced nomination powers and whose term would coincide with those of the officials in the distinct control organisms and courts which he designated ..., and the role played by those organisms of control in assuring checks and balances on presidential power. In addition, a president who is part of a political majority with congressional majorities, will control not only the executive and legislature but also organs of the judicial branch and autonomous and independent organs like the Bank of the Republic and the National Television Commission, precisely by virtue of those previously described nomination powers.' Decision C-551 of 2003, cited from Espinosa and Landau (n 483) 355.

495 Roznai (n 49) 163.

496 Ibid. For the sake of simplicity, allow me to treat the popular amendment power as constituent power.

significant challenges in terms of democratic legitimacy. This is why 'courts have frequently denied jurisdiction over amendments passed through popular vote, showing self-restraint'[497]. To overcome this difficulty, constitutional review of amendments is said to occur 'after the approval by the legislature but before the entry into force of an amendment'[498]. This *a priori* review would allow courts to avoid facing amendments ratified by the people, ultimately helping them maintain democratic legitimacy in the public's eyes. Additionally, this type of review would help courts conserve their limited political capital.

The rule of law (R): As mentioned earlier, the weaker a country's rule of law mechanism is, the greater the level of judicial scrutiny that is needed. Thus, it seems reasonable to assert that in fragile democracies, courts tend to have more freedom than do those in well-established democracies. Additionally, it can be argued that the longer a president remains in office, the less effective the rule of law mechanisms will likely become. On the basis of these two assumptions, it can be inferred that the second re-election case was poised to make the Colombian political system more vulnerable to rule of law backsliding because of President Uribe's eight consecutive years in office. Therefore, while the court assessed the degree of interference with the constitutional structure as light in the first re-election case, it evaluated it as severe or moderate in the second case when applying the rule of law criterion.

The quality of decision (Q): In terms of decision quality, neither ruling provides clear indications of the overall quality of judicial reasoning. However, in the historical context, there appears to be no significant backsliding in terms of judicial independence. Therefore, it is reasonable to conclude that the quality of judicial reasoning in both cases is comparable.

Political Capital (P): In terms of political capital, the Court's decision to uphold the constitutional amendment in the first re-election case allowed it to accumulate legitimacy for future rulings, enhancing

497 Sabrina Ragone, 'The Limits of Amendment Powers' (2018) 12 *ICL Journal* 345, 352.

498 Ibid 355.

its standing in the eyes of other political actors. Additionally, the political context in which the Court operates contributed to the legitimacy of the exercise of UCAD in the second re-election case. When President Uribe took office in 2002, he waged a strong campaign against organized criminal groups such as the FARC (Revolutionary Armed Forces of Colombia) and drug-trafficking organizations. As a result, the 'substantial decline in the rate of murder and kidnapping across the country' dramatically boosted Uribe popularity[499].

However, between 2005 and 2010, Uribe supporters coalesced into a political party, which helped mature the country's political culture to the extent that party affiliation surged from 26% in 2004 to nearly 66% in 2010[500]. This shift meant that, by the time of the second re-election case, 'the choice was not simply between Uribe and the prior chaos'[501], as there were other alternative political coalitions. By 2009, the popularity of President Uribe had also declined, mostly because of the 2008 global economic crisis and the ensuing decrease in the country's annual GDP (gross domestic product). As Landau noted, despite Uribe's popularity and his supermajority coalition in Congress, that coalition was composed of various movements and individuals rather than a single, strong party[502]. This fragmentation not only prevented political backlash against the Court but also allowed the loose coalition supporting Uribe to begin unravelling. For all these reasons, it seems, in hindsight, that the second-re-election case was an opportune moment for the court to invoke the UCAD in 2010 because its political capital was at the peak and the political climate was permissive to such a ruling.

Comparing the Colombian case with other countries where the UCA doctrine has been employed, such as Ecuador and Venezuela, it becomes clear that Colombia's political context was more favourable. For once, In Ecuador and Venezuela, the courts 'have faced presidents

499 Dixon and Issacharoff (n 473) 717.
500 Ibid 718.
501 Ibid 718.
502 David Landau, 'Substitute and Complement Theories of Judicial Review' (2016) 92 *Indiana Law Journal* 1283, 1317.

commanding much more cohesive movements and with much weaker oppositions'[503]. Colombia's success story stems not only from the sophisticated application of the UCA doctrine by the Court but also 'because the court had initially avoided a confrontation with Uribe, and instead had delayed intervention until it would have maximum effect and might generate more public support'[504]. In sum, the Court, by deferring to the amendment power in the first case, accumulated the political capital necessary to act decisively when the time came in the second case.

These five external justification criteria help determine the concrete weight of each formal principle, i.e., the legislature's amendment competence and the judiciary's control competence. In our balancing formula, the five external justification criteria, like a hydraulic system[505], pull in opposite directions, with the final outcome determining whether the court should uphold or strike down an amendment. In the first re-election case, the court, after considering the five criteria—C (Content), D (Democratic Legitimacy), R (Rule of Law), Q (Quality of Decision), and P (Political Capital)—give more weight to the legislature's amendment competence than to the judiciary's control competence. It could also be said that, given the legal and factual circumstances, the principle of amendment power took precedence over judicial review. This conditional relationship can be explained via Alexy's 'law of competing principles', according to which

503 David Landau, 'Political Support and Structural Constitutional Law' (2015) 67 *Alabama Law Review* 1069, 1118.

504 Aziz Huq, 'Democratic Erosion and the Courts: Comparative Perspectives' (2018) 93 *New York University Law Review* 21.

505 Jackson makes a normative argument about the legitimacy of UCAD, noting that the legitimacy of an amendment should not solely depend on democratic consent but also on its justness and fairness. She highlights a 'hydraulic' or complementary relationship between the justness of an amendment and the democratic consent on which it is based. Simply put, the more legitimate an amendment is from a democratic perspective, the more it may diverge from justness, and vice versa. Jackson (n 127) 338–339.9.

> *"If principle Pi takes precedence over principle Pj in circumstances C: (PiPPj)C, and if Pi gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apodosis: C → Q"*[506].

It stands to reason from this formula that under conditions C1, D1, R1, Q1, and P1, the rule dictates that the court should defer to the legislature and refrain from striking down the constitutional amendment. Similarly, under conditions C2, D2, R2, Q2, and P2, the rule requires the court to declare the constitutional amendment unconstitutional[507]. Consequently, in each specific situation where the relevant conditions are met, the corresponding rule will apply.

Notably, the 'law of competing principles' serves to establish a concrete rule capable of giving its subjects conclusive reasons for action on the basis of the result of the balance struck between two principles through the weight formula[508]. It is stated before that there is a norm-theoretical distinction between rules and principles. However, this does not mean that there is no relationship between rules and principles. Rules are derived from principles, and whenever two principles compete with each other in a concrete case, a new rule comes into existence.

506 Alexy (n 362) 47.

507 For an analysis of a similar case where the Court struck down another constitutional amendment on the basis that it constitutes an unnecessary infringement with unamendable principles that form the identity of Colombian constitutional system (e.g. respecting human dignity and being a social welfare state), see Manuel Iturralde Sánchez and Daniel Bonilla Maldonado, *Lifetime Imprisonment and the Identity of the Constitution: The Colombian Constitutional Court, Human Dignity, and the Substitution of the Constitution, VerfBlog*, 2022/2/01, DOI: 10.17176/20220202–001420–0.

508 'The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence'. Ibid 54.

6. Conclusion

This monograph has made several contributions to the literature on constitutional interpretation, with a particular focus on how to properly use and justify the UCAD. In doing so, it first made the case that the amendment power is subject to three different limitations: i) constitutionalism constraints, ii) human rights constraints, and iii) constitutional identity constraints. Upon showing that there are normative reasons for a constitutional court to strike down a constitutional amendment, it addresses the question of how the courts can exercise the UCAD in a legitimate and morally acceptable way. This means that it is exercised without prejudice to the authority to amend a constitution.

While scholars propose various solutions to the potential misuse of the UCA doctrine, they share a common ground that deserves highlighting. Identifying this commonality helps reveal the broader issues we face. The first shared feature is the emphasis on conditional, context-based solutions rather than categorical, one-size-fits-all approaches. Roznai's amendment spectrum and constitutional escalator, Dixon and Landau's recommendation for tiered-constitutional design and transnational constitutional norms as a secondary check, and Albert's rule of mutuality all clearly demonstrate this conditionality.

These suggestions do not strike me as surprising, given that we are often said to live in an 'age of justification' characterized by the view that 'every exercise of power is expected to be justified'.[509] This trend is evident in the evolving and more active role of judicial institutions at

509 Of course, not all countries accompany this trend See, Michael Ignatieff (Ed.) *American Exceptionalism and Human Rights* (Princeton University Press 2009), and Jackson (n 228).

both the domestic and international levels, with increasing support for the use of different interpretive methods such as proportionality analysis and balancing. This prompts constitutional lawyers and theorists to develop new theories to explain the nuanced role that judicial institutions play in constitutional democracy. For example, Klatt advocated for a 'flexible model of judicial review'[510], whereas Rivers proposed the concept of 'variable intensity of review'[511]. Although the idea of a flexible judicial role is not entirely new—many previous studies have emphasized the political nature of constitutional courts from a political science perspective, such as Ginsburg's insurance thesis—the difference in the current trend lies in its normative dimension. As argued by Klatt, what differentiates the flexible model from the traditional models that envision a 'certain standard of review and deference generally' is that it allows for not making 'in the abstract, once and for all', the decision on how much to defer to other legal institutions (in our case, the amendment power) and instead determining 'the correct intensity of control in each particular case, depending on the factual and normative circumstances'[512]. It is plausible to observe a general trend away from categorical towards flexible solutions to problems such as how much deferral to other legal institutions and how much discretion the courts enjoy in determining the scope of deference[513]. A flexible approach to judicial review also calls for a more contextual perspective, as exemplified by the Colombian Constitutional Court. As Roznai and Brandes argue, what makes 'a second term … a valid constitutional

510 Klatt n (431).

511 Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *The Cambridge Law Journal* 174.

512 Klatt n (431) 363.

513 For a suggestion on how to solve conflict of competences between the CJEU and the BVerfG, Matthias Goldmann, 'Constitutional pluralism as mutually assured discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB' (2016) 23 *Maastricht journal of European and Comparative Law* 119. For a similar response to the question of what the courts can do in addressing populism, Samuel Issacharoff, 'Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World' (2019) 98 *North Carolina Law Review* 1; and Çapar (n 295).

amendment, but a third term … an unconstitutional replacement' is the aggregated vision gained through judicial review by virtue of which the courts 'review a specific amendment together with the surrounding legal environment with which it would interact'[514].

It is no coincidence that the rise of proportionality, balancing, and a culture of justification has coincided with a trend towards increasing institutional pluralism, primarily caused by the emergence of international and supranational organizations exercising authority of different intensity and quality over states[515]. As underscored by many, this institutional legal pluralism brings with it various problems for domestic legal orders, making it harder for them to preserve their normative coherence under the increasing relevance and pressure of international and supranational norms[516]. This is in addition to the potential negative impacts that international law as such may have on domestic democracies. For instance, international law destabilizes domestic democracies and creates fertile ground for the flourishing of populism because it is primarily formed by a neoliberal ideology that assigns more importance to market freedoms over the rights of individuals, workers, animals, and nature[517].

One consequence of this institutional pluralism is that it calls on domestic courts to decide on many issues, often considered to lie be-

514 Yaniv Roznai and Tamar Hostovsky Brandes, 'Democratic erosion, populist constitutionalism, and the unconstitutional constitutional amendments doctrine' (2020) 14 *Law & Ethics of Human Rights* 19, 38.

515 Berman calls it global legal pluralism, depict it as an attempt to apply the plurality lens to 'the hybrid legal spaces created by a different set of overlapping jurisdictional assertions (state v. state; state v. international body; state v. nonstate entity) in the global arena', which once applied to the 'clashes within one geographical area, where formal bureaucracies encountered indigenous ethnic, tribal, institutional or religious norms'. Paul Schiff Berman, 'The Evolution of Global Legal Pluralism' in Roger Cotterrell and Maksymilian Del Mar (eds) *Authority in Transnational Legal Theory* (Edward Elgar Publishing 2016) 154.

516 For an edited volume that partially explores the impact of global legal pluralism on domestic legal adjudicative practices, see Jan Klabbers and Gianluigi Palombella (Eds) *The Challenge of Interlegality* (CUP 2019).

517 Gürkan Çapar, 'The Paradox of Global Constitutionalism: Between Sectoral Integration and Legitimacy' (2023) Global Constitutionalism (First View), DOI: https://doi.org/10.1017/S2045381723000072.

yond their purview and imagination for various historical and political reasons such as the principle of legislative supremacy. They play a much more crucial role than have historically been in creating norms that govern domestic and international affairs. For this reason, a trend toward an ex-post judiciary-centred decision-making process is quite visible at both the domestic and international levels. This does not mean, however, that it has gained more importance than the formal aspects of law, which favour abstract, general, and predictable ex ante rule-making. It means instead that judicial institutions are inclined to resolve disputes more through mechanisms such as balancing and proportionality analysis than through subsumption and interpretation of authoritative texts and documents. Notably, balancing is 'neither ad hoc nor definitional' because it 'seeks to combine flexibility with legal certainty; a case-by-case assessment of conflicting norms with the production of rules that can guide future assessments'[518]. For example, the law of competing principles, which establishes a connection between rules and principles, is instrumental in overcoming the old-age tension between formal and substantive justice, i.e., the application of the same rules to the same cases on the one hand, and the administration of justice in the concrete case on the other[519].

Beyond its 'elective affinity' with the culture of justification in the era of institutional pluralism, balancing can also be valuable in combating abusive constitutionalism, as it is as fluid and adaptable as the phenomenon it seeks to address. As Scheppele noted, governance checklists alone are inadequate in confronting the challenges posed by abusive constitutionalism. However, the holistic methodology of balancing, which does not exclude any arguments ex ante, seems fit for the task of combating abusive constitutionalism. In response to

518 Giorgio Bongiovanni and Chiara Valentini, 'Balancing, Proportionality and Constitutional Rights' in Giorgio Bongiovanni et al. *Handbook of Legal Reasoning and Argumentation* (Springer 2018) 604.

519 For an explanation about formal qualities of law and anti-formalist and justice-related tendencies as its attendant consequences, see Max Weber, *Economy and society: An outline of interpretive sociology* (Univ of California Press 1978) 880–889.

the challenges of the third wave of democracy, implementing Alexy's formal principles, particularly in Klatt's evolved version, will be especially useful. First and foremost, balancing helps distinguish between the formal and substantive elements of legal argumentation. This differentiation allows for a clearer separation between the evaluative and nonevaluative components of legal reasoning. In the evaluative aspect, preferences about which values to prioritize will inevitably lead to defending certain ends over others in the nonevaluative part.