

# Book Review

*Neliana Rodean\**

**Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford: Oxford University Press, 2017) by Yaniv Roznai, 368 pp.**

In 1890, John W. Burgess described the three fundamental parts of a *COMPLETE constitution* noting that “[t]he first is the organization of the state for the accomplishment of future changes in the constitution. This is usually called the amending clause, and the power which it describes and regulates, is called the amending power. This is the most important part of a constitution.”<sup>1</sup>

Writing in Canada’s *Review of Constitutional Studies*, I might just note that Canada certainly has experience with the significance of amendment clauses, with the debates over its amendment provisions spanning fourteen rounds of constitutional negotiation from 1926 to 1982,<sup>2</sup> as well as subsequent thought on matters like secession. Perhaps naturally, one of Canada’s internationally known constitutional scholars has devoted his entire body of scholarship to the topic of constitutional amendment.<sup>3</sup>

Over time, Burgess is certainly not the only scholar to highlight the value of the amending clause. One century later, Akhil Reed Amar described the unsurpassed significance of those rules that govern constitutional amendment and its entrenchment against it.<sup>4</sup> Their reasoning has been appropriate, and Yaniv Roznai opens his remarkable book in the same spirit, explaining “the meaning and importance of constitutional amendments” by arguing that “formal constitutional amendments not only remain an essential means

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1 John W Burgess, *Political Science and Comparative Constitutional Law* (Boston: Ginn & Company, 1890) vol 1 at 137 [emphasis in original].

2 See e.g. Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) Chapter 2.

3 I reference some of Richard Albert’s extensive writings on the subject below. I would also note his forthcoming *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, New York: Oxford University Press [forthcoming in 2019].

4 Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V” (1994) 94:2 Columbia L Rev 457 at 461.

of constitutional change<sup>5</sup> but ... raise imperative questions for constitutional theory” of our times.<sup>6</sup>

The theory of constitutional amendments, concerning both formal and informal amendment rules, has blossomed as one of the most central issues of modern constitutionalism. Constitutional change occurs in two different ways, constitutionally or unconstitutionally, depending on the conceivability of constitutional amendments to violate, or not to violate, the constitutional order. If a *constitutional* constitutional amendment shall be able to stand alone without compromising the spirit of the constitution within a formal constitutional amendment framework, the most challenging issue is who can declare constitutional amendments unconstitutional, and when or whether this should be done. In this sense, Roznai’s objective is both to investigate the phenomenon of *unconstitutional* constitutional amendments and to provide for a multifaceted constitutional unamendability.

Through a comprehensive and meticulous analysis of unconstitutional constitutional amendments, the book demonstrates the increasing tendency in contemporary constitutionalism to impose substantive limits on formal changes to constitutions. Roznai’s book, the first of its kind, draws on the imposing study of many constitutions and the scholarship and case law on constitutional amendments. This book is bound to become a turning point within comparative constitutional theory, (un)constitutional design, and constitutional adjudication. By focusing on a wide comparative study, Roznai stresses the theory of unamendability and gradually develops his arguments across three main lines. He first approaches unamendability from a comparative perspective (Part I). Secondly, he establishes the foundation of this theory (Part II). Finally, he defends the judicial enforcement of constitutional unamendability (Part III). Roznai concludes by infusing the philosophy of unamendability with an initial exploration of “eternity clauses”; the book definitely establishes the nature and scope of constitutional amendment power and provides an overview of the dynamics of the development of unamendability doctrines to answer whether a constitutional amendment may be considered unconstitutional.

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5 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017) at 2 citing Adrian Vermeule, “Constitutional Amendments and the Constitutional Common Law” in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 229; Heinz Klug, “Constitutional Amendments” 11:1 Annual Rev L & Soc Science 95.

6 Roznai, *supra* note 5 at 2.

The fundamental question answered by the book relates to the very essence of unamendability. The author wonders, “Is the idea of an ‘*unconstitutional constitutional amendment*’ an actual paradox[?]”<sup>7</sup> It did not take too long to search for examples, which would help to state this issue. Roznai skillfully begins by describing a global trend towards explicit limitations on constitutional amendment powers, though he claims that “eternity clauses” entrenched in constitutions are neither eternal nor unchangeable. Through a laborious study of thousands of constitutions and their revisions, Roznai provides a range of substantive limitations on constitutional amendments contained in constitutional texts, conceptualizing and establishing a taxonomy of unamendable provisions. In his effort to demonstrate how this constitutional phenomenon successfully migrated across jurisdictions over time and became a prominent feature of the modern constitutional design, he first reviewed the origins, structure, and content of explicit unamendability (Chapter 1).

Unamendability is examined through an innovative mixture of functional and expressive approaches. Following and advancing other scholars’ work and empirically focusing on the core of values and principles enshrined in different constitutions and deemed unamendable, Roznai explores the facets of unamendable provisions and identifies different features of unamendability. In a modest but prevalent way, Roznai frames it into the classical constitutional change structure, only to ascertain that it fits perfectly with the idea of a compromised “genetic code” of the constitution.<sup>8</sup> Behind this logic there are the unamendable provisions that he investigates from the perspectives of the following dimensions: “preservative”<sup>9</sup> (the core of constitutional values), “transformative”<sup>10</sup> (the essence of the political communities), “aspirational”<sup>11</sup> (the prevailing culture and conditions of society), “conflictual”<sup>12</sup> (the essence of reconciliation), and “bricolage”<sup>13</sup> (the characteristics of compromise and contingency).<sup>14</sup>

Considering Article V of the US Constitution, Roznai appears primed to clear up the shadow side of any expressed limitation on the amendment power and go beyond the meaning of the constitutional text in order to disclose the

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7 *Ibid* at 7 [emphasis added].

8 *Ibid* at 38.

9 *Ibid* at 26.

10 *Ibid* at 28.

11 *Ibid* at 32.

12 *Ibid*.

13 *Ibid* at 35.

14 *Ibid* citing David Schneiderman, “Exchanging Constitutions: Constitutional Bricolage in Canada” (2002) 40:3 *Osgoode Hall LJ* 401 at 401-402.

implicit unamendability framework (Chapter 2). He looks to the United States because there he found useful conceptual tools and the genesis of the implicit unamendability useful to identifying the scope of the amendment power, which does not concern only explicit limitations but the existence of any implicit constraints on it. It is interesting how the substantive dimensions of the amending power in the early United States do raise questions and problems similar to those presented in the EU related to supra-constitutionality (Chapter 3). After his effort to demonstrate how the amendment power philosophy reflects a move from an explicit to an implicit unamendability doctrine, Roznai shifts away from the US's Article V interpretations, and takes the reader through the last century's 'Basic Structure Doctrine' because his broader project needs not hinge on a close analogy to the US constitutional amendment process. Once more, the book shows that implicit unamendability does not remain a marginal theoretical debate but also has become a global phenomenon reproposing the idea, already expressed elsewhere, of the 'Basic Structure Doctrine' as migratory from Europe to Asia, concretely from Germany to India, and subsequently in other jurisdictions. While "the term 'supra-constitutional' is often attributed to the explicit or implicit superiority of certain rules and principles over the content of the constitution", in the words of Roznai, the 'Basic Structure Doctrine' provides a clear example of the same.<sup>15</sup> The importance of the conclusion concerning the Indian doctrine's essence is not to be underestimated: "... certain principles have a *supra-constitutional* status. Yet these [implied] limitations derive from within the constitutional order rather than from a source external to constitutional order."<sup>16</sup>

At first glance, the theory of unamendability seems intertwined with the broadest concept of substantive limitations to the amendment power, which refers to both explicit and implicit unamendability. Nevertheless, there are other external limits on the constitutional amendment power considering the relationships between domestic constitutional law and natural law, international law, or regional law, most notably with regard to European Union law. After describing the constitutional limitations' essence of the amendment power, Roznai turns to the analysis of the supra-constitutional limits to establish the core of unamendability placed *above* the domestic constitutional order, and documents the gradual move from natural to international dimension, which also allows for the making of important predictions about the development of the theory in the future. Roznai's choice to explore what he terms *supra-*

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15 Roznai, *supra* note 5 at 72 citing Serge Arné, «Existe-t-il de normes supra-constitutionnelles» (1993) 2 R du Dr public 460 at 461.

16 *Ibid* at 70 [emphasis in original].

*constitutional unamendability*, related to natural law and international law constraints on the amendment power, is fundamental in order to find that no external limitation exists as such. Neither of these norms interferes with the supremacy of domestic constitutional law; their normative value stems from the constitution itself.

Confining his project to an assessment of the relationship between natural law principles and implicit constraints, Chapter 3 also presents the examples of Germany and Ireland in order to assert that there is no basis to regard the principles with “a ‘minimal content’ of natural law”<sup>17</sup> . . . as the yardstick for determining the *legal validity* of an amendment.”<sup>18</sup> Then, the author proceeds to analyze the *alleged supremacy* of international law emphasizing the role of national courts. There is no better choice to describe the supranational unamendability than through the explicit and implicit unamendability. Through his selective examples, Roznai concludes that “[i]t is unamendability within the constitution itself that is used in order to render valid limitations on the amendment power affecting supranational standards.”<sup>19</sup>

The following two parts of the book represent the “special part” dedicated to the masterful investigation of the constitutional amendment powers. The second part focuses on the nature of the amendment power and its limitations (chapters 4-6), in order to explain, finally, the role of constitutional courts in enforcing limitations on constitutional amendments (chapters 7-8). Thus, the work draws on constitutional amendments from the prism of the nature (chapter 4), the scope (chapter 5), and the spectrum of the constitutional amendment powers (chapter 6), as well as their judicial review (chapters 7-8) in order to trace the most important line within the constitutional change framework: that is, the erection of the theory of constitutional unamendability and its enforcement.

First, Roznai develops his arguments for a constitutional unamendability theory, exploring the nature and the scope of the constitutional amendment power and demonstrating its multiple facets. Indeed, the most original feature of this book is its demonstration that the amending power fits comfortably neither into categories of constituent powers nor constituted powers; it is a *sui generis* power that rests within a *spectrum* between the constituent power and the regular legislative power. Roznai brilliantly sets out to explain these powers through supremacy, procedural, and consequential arguments.

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17 *Ibid* citing HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 193-200.

18 *Ibid* at 80 [emphasis in original].

19 *Ibid* at 102.

The core of his theory regards the amendment power as a *secondary constituent power*. Drawing on the French doctrine that distinguishes between “original” and “derived” constituent power, he argues that the amendment power needs to be grasped in terms of *delegation* as long as it acts *per procuracionem* of “the people.”<sup>20</sup> Delegation and trust are the conceptual keys to the nature and the scope of amendment power in Roznai’s account. Adding some terminological explanations about primary and secondary constituent powers, and distinctions between power and authority, Roznai highlights a *delegation theory* based on a constant power of “the people” to establish and change the constitutional order. As long as the amendment power, which is a secondary constituent power, is bounded by unamendability, he wonders whether the people’s constituent power might be restricted by unamendable provisions. Identifying three tracks of a constitutional democracy — legislative, amendment, and primary constituent power — and recalling the well-known Article 79(3) of German Basic Law, Roznai demonstrates that “the people” can freely change the constitution’s grounds, yet this power originates not from the constitutional amendment procedure, but resides in the primary constituent power of the sovereign people.<sup>21</sup>

Roznai claims that unamendability does not bound the popular primary constituent power but the constitutional amendment power as delegated competence “that acts in trust” on behalf of the people is explicitly and implicitly limited. On the one hand, such a power must comply with those explicit constraints entrenched in the constitution related to the content of certain amendments.<sup>22</sup> On the other, the holder of this power cannot use it in order *to destroy the constitution*, from which its authority emanates.<sup>23</sup> Through the amendment power is built that mechanism of constitutional self-preservation. In this perspective, replacing the constitution earns an *ultra vires* action by the delegated amending power undermining its own *ethos*. Since the toolkit of basic values and principles governs the entirety of constitutional orders and makes up the spirit of the constitutions and their identity,<sup>24</sup> the constitutional amendment power cannot abolish or alter them without triggering constitutional collapse and replacement involving again popular participation and deliberation.<sup>25</sup>

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20 *Ibid* at 117-118 [emphasis in original].

21 *Ibid* at 126-128.

22 *Ibid* at 137.

23 *Ibid* at 141 [emphasis in original].

24 *Ibid* at 148.

25 *Ibid* at 142-143.

Given its nature, what is the scope of the amendment power? Drawing attention to explicit and implicit unamendability, Chapter 5 elucidates *how* the amendment power is limited. As demonstrated, a delegated power may be restricted by a primary constituent power, and the theory advanced in this book supports implicit unamendability by means of judicial interpretation. To this end, Roznai introduces another innovative argument: *foundational structuralism*. The implied limitations do not derive only from the theory of delegation but also from the way by which the amending power, like any governmental institution, acts.<sup>26</sup> In summary, not all amendment powers are equally limited; there is a “spectrum of amendment powers” that helps to better understand the path to follow in order to lay the foundations for the theory of unamendability. In this sense, drawing attention again on the role of “the people” within the amendment process, Roznai underlines the need to regard the amendment power neither in a binary manner (limited or unlimited), but to relate it to the polymorphic nature of constitutional orders. However, depending on the type of *delegation* as to its similarity to the constituent power or the regular legislative power, he argues that the amendment power fluctuates within a *spectrum*; thus, the more it resembles the constituent power, the broader is the scope of its authority. This viewpoint is developed by comparing *popular and governmental powers* and amendment procedures. It clearly appears that popular amendment powers should be awarded wider scope than governmental ones, and a “constitutional escalator” idea is endorsed and supported in order to employ unamendability as a protective constitutional mechanism.<sup>27</sup>

This journey towards the unamendability theory could only dwell on the link between unamendable provisions and constitutional amendment procedures. As the nature of amendment powers is directly linked to their scope, amendment processes are linked to unamendability. Following various scholars, Roznai couches his justification of a constitutional escalator as a practical safeguard of certain constitutional principles or institutions, and as a means of generating legitimacy for a specific amendment process. In this regard, focusing his theory most on popular amendment processes, “the people” are described as a “legitimation escalator” able to increase the legitimacy of constitutional changes, but such amendment powers are limited too, moving only inside a spectrum. It is here that Roznai engages with his main thesis: that unamendability may be regarded as involving a deeper struggle among substantive and procedural aspects of constitutionalism. The spectrum of amendment powers,

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<sup>26</sup> *Ibid* at 143.

<sup>27</sup> *Ibid* at 166.

tangled by amendment procedures and constitutional constraints, attempts to complement such traits.<sup>28</sup>

As each coin has two sides, even unamendability may mirror both the spectrum of amendment powers and the spectrum of intensity of judicial scrutiny and restraint exercised by the courts over constitutional amendments. Roznai's complete mastery of unamendability is not for a casual observer of the constitutional amendment powers; he assumes a fair amount of knowledge of constitutional history, theory, and worldwide practice regarding judicial review of constitutional amendments. It is the last part and the second aspect of the "special core" of his book that offers a thorough and comprehensive systematic and critical review of "eternity clauses" and examines the judicial enforcement of constitutional unamendability (Chapters 7-8).

For those prepared for the next steps, this part of the book provides many interesting and challenging insights. According to Roznai, the effectiveness of unamendable provisions is directly related to their enforcement through judicial review. Employing the theory of delegation and foundational structuralism previously advanced, he also defends substantive judicial review of constitutional amendments even in legal orders in which the courts are not explicitly authorized to intervene. Obviously explicit unamendability implies that judicial review of constitutional amendments enjoys greater legitimacy,<sup>29</sup> but this book also offers a framework of implicit unamendability stressed by how even in the absence of "eternity clauses," constitutional courts have recognized a core of basic principles to protect. In such circumstances, the challenges of constitutional amendments' limits to constitutional theory turn into an even more complex issue for constitutional courts enforcing such limitations and declaring the *unconstitutionality* of constitutional amendments.

Roznai carefully separates the closely related issues of constitutionality of constitutional amendments and judicial enforcement, thereby emphasizing the political check of unamendability on the amendments process too. Although he does not dwell on it much, it is clear that, as a political theory of structuring vertical powers, unamendability had strong force in some jurisdictions, such that a real movement towards a model can be observed. However, the comprehensive approach of Part III — ranging from rationales to practice of judicial review of amendments — works well in convincing the reader that un-

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<sup>28</sup> *Ibid* at 175.

<sup>29</sup> *Ibid* at 39.



amendability does indeed reflect democratic ideals and safeguards the popular primary constituent power.

Beyond the amendability/unamendability dynamics, Roznai also addresses in some detail specific doctrines of courts and the ways in which a “foundational structuralist interpretation” should be articulated in order better to reflect the principle of *vertical* separation of the primary and secondary constituent powers. With this approach, Roznai claims that, once the nature and scope of the constitutional amendment power are correctly construed, “the alleged paradox [of unconstitutional constitutional amendment] disappears.”<sup>30</sup>

At first glance, the idea of an “unconstitutional constitutional amendment” is puzzling, yet intriguing. So as not to disappoint the reader, Roznai closes the circle and concludes his book with a clear answer to the question raised in the Introduction: the unconstitutionality of constitutional amendments does not entail a paradox. He demonstrates that unconstitutional constitutional amendments do exist and delivers a theory around the concept of the constitutional amendment power that finds ample room in contemporary constitutionalism. In this way, his book accurately bridges a constitutional gap by proposing a theoretical underpinning and a sophisticated justification for constitutional unamendability.

Roznai does hint at an answer to the “why” for limits on the amendment power. He argues that substantive unamendability, compatible with the limited nature of amendment powers, is “the ultimate expression of democracy” because limitations on the amendment power merely uphold the more fundamental democratic act of the primary constituent power, indispensable to preserve the “constitutional identity.”<sup>31</sup> From this perspective, foundational structuralism seems to be indifferent to the substantive content of the “constitutional identity” that requires protection as adopted by the primary constituent power. Only “the people” as holders of primary constituent power should decide upon fundamental constitutional transformation. And Roznai skillfully underscores how this power, nowadays, may be regarded as limited by supra-constitutional norms which may be referred to as the “genetic code of constitutional arrangements.”<sup>32</sup> Perhaps this is the underlying claim of the book; a

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30 *Ibid* at 233.

31 *Ibid* at 196.

32 *Ibid* at 229 citing Carlo Fusaro & Dawn Oliver, “Towards a Theory of Constitutional Change” in Carlo Fusaro & Dawn Oliver, eds, *How Constitutions Change: A Comparative Study* (Oxford: Hart, 2011) 405 at 428.

simple argument that is, at the same time, complex and a greater challenge to the literature on amendment powers.

With this analysis on the character of the amending power (“an exceptional authority, yet a limited one”), Roznai has published an excellent book, and the larger questions his project raises are worthy of attention. First of all, the book provides full and in-depth analysis of a doctrine — unconstitutional constitutional amendment — which gains its growing role in modern constitutional law. It also proposes a theoretical framework for constitutional unamendability based on an original collection of unamendable provisions that still exist, and its judicial enforcement drawing on global jurisprudential thinking.

In recent years, scholars have produced copious literature on constitutional amendments, particularly in analyzing such phenomena as constitutional endurance,<sup>33</sup> constitutional amendments rules,<sup>34</sup> the competence of constitutional courts to rule on constitutional amendments,<sup>35</sup> and “abusive constitutionalism” or stealth authoritarianism.<sup>36</sup> However, until now, there has still been little scholarly debate on the amendment power, and even less on the

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33 See Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009); Tom Ginsburg, “Constitutional Endurance” in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011) 112.

34 See Richard Albert, Xenophon Contiades, and Alkmene Fotiadou, eds, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart, 2017); Richard Albert, “The Structure of Constitutional Amendment Rules” (2014) 49:4 *Wake Forest L Rev* 913; Rosalind Dixon, “Constitutional Amendment Rules: A Comparative Perspective,” in Ginsburg & Dixon, *supra* note 33, 96.

35 See Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa: Ekin Press, 2008); Sabrina Ragone, *I controlli giurisdizionali sulle revisioni costituzionali: Profili teorici e comparative* [Judicial Review of Constitutional Amendments: Theoretical and Comparative Profiles] (Bologna: Bononia University Press, 2011); Yaniv Roznai, “Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea” (2013) 61:3 *Am J Comp L* 657; Michael Freitas Mohallem, “Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts’ Authority” (2011) 15:5 *Intl JHR* 765.

36 See David Landau, “Abusive Constitutionalism” (2013) 47:1 *UC Davis L Rev* 189 at 195; Rosalind Dixon, “The Swiss Constitution and a Weak-Form Unconstitutional Amendment Doctrine?” (2017) UNSW Law Working Paper No 17-75 at 2; Gábor Halmai, “Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective” (2015) 50:4 *Wake Forest L Rev* 951; Rosalind Dixon & David Landau, “Transnational Constitutionalism and a Limited Doctrine of Constitutional Amendment” (2015) 13:3 *Intl J Constitutional L* 606 at 609-13; Vicki C Jackson, “The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism” (2015) 13:3 *Intl J Constitutional L* 575; Richard Albert, “The Expressive Function of Constitutional Amendment Rules” (2013) 59:2 *McGill LJ* 225; Samuel Issacharoff, “Constitutional Courts and Democratic Hedging” (2011) 99:4 *Geo LJ* 961; Vincent J Samar, “Can a Constitutional Amendment be Unconstitutional?” (2008) 33:3 *Okla City UL Rev* 667; Gary Jeffrey Jacobsohn, “An Unconstitutional Constitution?: A Comparative Perspective” (2006) 4:3 *Intl J Constitutional L* 460.

role of “the people” within constitutional changes.<sup>37</sup> The narrowness of the literature regarding people’s capacity to strengthen constitutional rigidity is not because their amendment power is irrelevant or is a secondary matter within democratic constitutional design,<sup>38</sup> nor is it because of its misperceived “secondary-ness” within the institutional structure of political system. The need for further discussion exists because constitutional change is a complex “labyrinth” of relationships and interactions between amendment procedures, political actors, and centers of authority, and these processes must be studied in any part, considering them from an integrated perspective. I found this aspect less underlined in Roznai’s book; it is not necessarily a critique, but more an observation of its incompleteness. He addresses with an unusual thoroughness the problem of unamendability as a constitutional theory but insists less on the political features of it.

Exploring and modelling constitutional change demands a correlation between the actors and mechanisms within a given legal order, and this process inevitably touches all areas of constitutional law and the allocation of powers. As long as amendment procedures are designated as adaptive approaches to changing circumstances, formal changes provide means for resolving conflicts between constitutional actors, especially with regard to the allocation of amendment power. The principle of vertical separation of powers, the role of “the people,” and the enforcement of the theory by the courts are described well. But there could be more scrutiny on the serious constitutional law problems behind the formal amendments stressing the people’s role in the phase of initiating the constitutional amendment procedure, proposing amendments, or within the final phase, with an eventual deliberation on the constitutional amendment.

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- 37 See Xenophon Contiades & Alkmenes Fotiadou, eds, *Participatory Constitutional Change: The People as Amenders of the Constitution* (London: Routledge 2017); Ragone, *supra* note 35; Zachary Elkins, Tom Ginsburg & Justin Blount, “The Citizen as Founder: Public Participation in Constitutional Approval” (2008) 81:2 Temp L Rev 361 at 362; Michel Rosenfeld, “Putting the People back in the Constitution: On Arab Popular Revolt and Other Acts of Defiance” (2010) 8:4 Intl J Constitutional L 685; Cheryl Saunders, “Constitution-Making in the 21st Century.” (2012) 2012:1 Intl Rev L 1; Joel Colon-Rios, “Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America” (2013) 44:3/4 VUWLR 521; Mila Versteeg, “Unpopular Constitutionalism” (2014) 89:3 Ind LJ 1133; Silvia Suteu, “Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland” 38:2 Boston College Intl & Comp L Rev 251.
- 38 See David A Strauss, “The Irrelevance of Constitutional Amendments” (2001) 114:5 Harv L Rev 1457 at 1460; Brannon P Denning & John R Vile, “The Relevance of Constitutional Amendments: A Response to David Strauss” (2002) 77:1 Tul L Rev 247 at 274; Bjørn Erik Rasch and Roger D Congleton, “Amendment Procedures and Constitutional Stability” in Roger D Congleton & Birgitta Swedenborg, eds, *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Cambridge, Mass: MIT Press, 2006) 319 at 323.

Constitutions usually contain rules about constitutional amendments, and sometimes people could be called to approve any constitutional change. Nevertheless, as demonstrated, democratic constitutions undermine the people's involvement in the constitutional amendment processes. In this sense, firstly, I wonder what legal consequences are when an unconstitutional constitutional amendment is proposed by "the people" as bearer of the right of initiative for constitutional reforms, but such popular initiative is not granted by the legislator on the basis of its unconstitutionality. Secondly, what opportunity really exists for "the people" to overcome their representatives' decisions regarding a constitutional change? There should always be consideration that, within this process, and because of different qualifications for constitutional referenda, the relationship between the Parliament and the popular interference within the constitutional amendment process is liable to change. So, would it not be better to invest the people with decision-making power within a constitutional change process initiated by other political actors in order to combine their interests and respond to their needs in that particular moment?

In any case, this is an overwhelmingly important book, and Roznai brilliantly exposes the phenomenon of unconstitutional constitutional amendments, develops a theory to explain unamendability, and provides cogent justification for it. I found this book unique and interesting from many standpoints. Given the issue investigated, namely the unamendable provisions, the book seems taken for granted and easy to criticize. But, this is not the case. It reveals the complexity of the argument and provides the foundation of constitutional theory. It is true that it relates only to formal constitutional changes, but it is complete and comprehensive on a contemporary phenomenon, bringing the reader within the world of modern constitutional changes. Its merits are three-fold: firstly, this book delivers a rich and illuminating analysis of the amendment power, responding to who holds this power, explaining what its nature is, what the scope is, and what its limitations are; secondly, answering these questions, it constructs the framework of unamendability as a path towards a theory, in order to explain, thirdly, the dimension and role of constitutional courts when enforcing constitutional amendments' constraints.

For each of these issues, Roznai proposes an in-depth study, combining theory and practice, academic and jurisprudential issues. After analyzing explicit and implicit unamendable provisions within a wide range of constitutions, the originality of this part regards the thin line between primary and secondary constituent power. Another innovative issue faced by this book relates to the *sui generis* character of amendment power that moves within a spectrum. Amendment power is also presented in terms of *delegation*, and Roznai's rich

and enlightening reconstruction of the role of “the people” and connotations of democracy responds to most intriguing issues of contemporary constitutional orders. Coining the term *foundational structuralism*, according to which the foundations of the constitutional structure are unamendable, Roznai gives another addendum to this book.

The uniqueness of Roznai’s book is to set clear boundaries for constitutional unamendability. Unamendability emphasizes “the thin line between constitutional success and constitutional failure.”<sup>39</sup> Developing a theory, in addition to being the most complex issue of nature and scope of constitutional amendment powers, Roznai determines how unamendability blocks certain constitutional modifications through the exercise of amendment procedures, and how the primary constituent power always has the ability to re-emerge and disregard it. According to this theory, it is demonstrated that certain constitutional amendments can be unconstitutional because they attempt to create a new constitution. And following this *fil rouge*, Roznai supports the idea of constitutional change not only through amendment but also by means of constitutional interpretation and practice. The spectrum of amendment power mirrors a spectrum of intensity of judicial interpretation. He gives another distinctive response to this theory, wondering which are the limitations imposed upon the judiciary in interpreting substantive constraints of amendment power and whether such interpretation can be unconstitutional. The unconstitutionality of constitutional amendments pursues the objectives set out in this indispensable book as starting point of the advance of unamendability theory for years to come, especially in these times of backsliding democracy.

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39 Roznai, *supra* note 5 at 229.

