

Contents

<i>Acknowledgements</i>	v
<i>Notes on Contributors</i>	xv

Introduction: The State of the Art in Constitutional Amendment.....	1
<i>Richard Albert</i>	

I. Defining the Field	3
II. The Architecture of Constitutional Amendment Rules	4
A. Unamendability	7
B. The Operation of Constitutional Amendment.....	8
C. Three Challenges in the Study of Constitutional Change	11
III. Amendment as Constitution	12
A. Perspectives on Constitutional Amendment	14
B. The Future of Constitutional Amendment	19

Part I: The Foundations of Constitutional Amendment

1. Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures.....	23
---	----

Yaniv Roznai

I. Introduction	24
II. Unamendability and Constituent Power	24
A. A Three-Track Democracy in a Nutshell.....	24
B. Primary Constituent Power and Popular Sovereignty	26
III. The Constitutionalisation of Primary Constituent Power.....	31
A. The Fallacy of Prescribed Constitution-Making Procedures	31
B. We The 'Limited' People?.....	33
IV. The Spectrum of Constitutional Amendment Powers	37
A. Demanding and Facile Amendment Powers	37
B. Linking Amendment Procedure and Unamendability	41
C. The Spectrum of Amendment Powers and Judicial Review of Amendments	46
V. Conclusion	48

2. Constitutional Theory and Cognitive Estrangement: Beyond Revolutions, Amendments and Constitutional Moments	51
---	----

Zoran Oklopcic

I. Introduction: The Person of 'The People' and A Three-Fold Cognitive Estrangement.....	51
II. Beyond 'The People': New Tropes, Old Anxieties.....	54

III.	Three Forms of Estrangement-prevention: Holmes, Pettit, Dworkin	56
IV.	<i>Tertium Datur</i> : Mapping Constitutional Change Between the Revolution and the Amendment.....	59
V.	Towards a Different Familiarity: ‘The People’, The Paradox and The Sacrifice.....	69
3.	Constraints on Constitutional Amendment Powers.....	73
	<i>Oran Doyle</i>	
I.	Introduction.....	73
II.	A Doctrine of Unconstitutional Constitutional Amendments	74
A.	Unconstitutional Amendments: Positive, Moral and Conceptual Claims.....	74
B.	Morally Unconstitutional Constitutional Amendments	75
C.	Conceptually Unconstitutional Constitutional Amendments	77
D.	A Problematic Rubric	80
III.	Constraint and Powers of Constitutional Change	81
IV.	The Types of Constraint on Constitutional Amendment Powers	83
A.	Process or Content	83
B.	Rule or Standard	84
C.	Legislator or Court.....	84
D.	Values Served by Constraint: Foundational, Majoritarian, or Counter-Majoritarian.....	86
V.	Distribution of Power and the Justification of Constraint	87
VI.	Justification of Constraints on Constitutional Amendment Powers	89
A.	Parameters of Justification.....	89
B.	Illustrative Schema of Constraints	89
C.	Contextual Factors.....	91
D.	Majoritarian Constraints.....	92
E.	Foundational Constraints.....	94
F.	Counter-Majoritarian Constraints	94
VII.	Conclusion.....	95
4.	Comment on Doyle’s Constraints on Constitutional Amendment Powers.....	97
	<i>Mark Tushnet</i>	
5.	Constituting the Amendment Power: A Framework for Comparative Amendment Law.....	105
	<i>Thomaz Pereira</i>	
I.	Introduction.....	105
A.	Sieyès’ Two Different Problems	107
i.	Constituting the Constituent Power.....	108

ii.	Limiting the Constituent Power	109
iii.	Lessons from Failure and Success	111
B.	Constituting the Amendment Power	113
i.	People Who?	115
ii.	People When?	117
a.	'The People' has Left the House	117
b.	'We' are Always Open	118
c.	Follow the Yellow Brick Road.....	119
II.	Conclusion.....	120
6.	Sieyès: The Spirit of Constitutional Democracy?.....	121
	<i>Luisa Fernanda García López</i>	
I.	Introduction.....	121
II.	Towards a Representative Democracy.....	124
A.	From the <i>Tiers État</i> to the National Constituent Assembly.....	125
B.	From Citizenship to Constituent Power: The Foundation of Political Representation.....	127
III.	Towards a Constitutional Democracy	129
A.	The Sovereign People.....	130
B.	The Sovereign Constitution	131
IV.	Conclusion.....	133
7.	Revolutionary Reform in Venezuela: Electoral Rules and Historical Narratives in the Creation of the 1999 Constitution	137
	<i>Joshua Braver</i>	
I.	Introduction.....	137
II.	Carl Schmitt's Unfortunate Victory over Hannah Arendt in the Analysis of Popular Constitution-Making	139
III.	Hannah Arendt's Revolutionary Reform.....	141
A.	The Dangerous Freedom of the People	141
B.	Renewal and Revolutionary Reform.....	143
C.	Extrapolating from Arendt: Unconventional Adaptation.....	144
IV.	Hugo Chávez's Radical and Original Constituent Power	145
V.	The Turning Point: The Electoral Rules for the Constituent Assembly	148
A.	The Difficulty of Fighting Against the Referendum.....	149
B.	Ex-Ante Control of the Constituent Assembly through Electoral Rules	150
VI.	Radical Breaks and Exclusionary Mandates.....	151
A.	Liberal Democracy's Potential for Revolutionary Reform.....	152
B.	First Past the Post: The Revolutionary Mandate to Destroy the Past	153
C.	Proportional Representation: Inclusion and the Pluralised People.....	154
VII.	Conclusion.....	156

8.	‘Revolutionary Reform’ and the Seduction of Constitutionalism.....	157
	<i>Juliano Zaiden Bemwindo</i>	
	I. A Revolution in Crisis: Braver’s Narrative of the Creation of the 1999 Constitution in Venezuela.....	157
	II. The Dilemma of the Sovereignty of the People.....	162
	III. The Seduction of Constitutionalism: When Constitutionalism Faces the Contingencies of Social Life.....	168
	IV. Conclusion.....	172
	Part II: The Traditions of Constitutional Amendment	
9.	Constitutional Sunrise	177
	<i>Sofia Ranchordás</i>	
	I. Introduction.....	177
	II. Sunrise Clauses	180
	A. Automatic and Contingent Sunrise Clauses	182
	i. Automatic Sunrise Clauses.....	182
	ii. Contingent Sunrise Clauses.....	183
	B. Sunrise Clauses and the Use of Conditions	184
	C. Sunrise Clauses and By-Laws.....	186
	III. Contingent Constitutional Change Between Retrospective and Foresight	187
	A. Sunset Clauses.....	189
	B. Sunrise Clauses and Aspirational Constitutionalism.....	190
	IV. The Constitutionality of Sunrise Clauses.....	191
	A. <i>Riordan v An Taoiseach</i>	192
	B. Sunrise Clauses and the Constituent Power	194
	V. Conclusion.....	196
10.	Constitutional Change and Interest Group Politics: Ireland’s Children’s Rights Referendum	199
	<i>Oran Doyle and David Kenny</i>	
	I. Introduction.....	199
	II. Referendums and Constitutional Change.....	201
	III. Political Cleavages and Narratives for Change.....	202
	IV. Children’s Rights: From Lawyers to Interest Groups and Back Again	204
	V. The Referendum Campaign	211
	VI. Conclusion.....	216
11.	Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution	219
	<i>Xenophon Contiades and Alkmene Fotiadou</i>	
	I. Introduction: Does the Frequency of Amendment Relate to Constitutional Quality?.....	219

II.	Constitutional Length and the Economy: An Unexpected Relationship.....	220
A.	Using Metrics to Evaluate the Quality of Constitutions.....	220
B.	Persuasion through Numbers: Dubious Explanations.....	223
III.	Poor Countries, Lengthy Constitutions and High Amendment Rates: In Search of an Explicable Correlation	228
A.	Correlating History and Political Culture to Constitutional Length.....	228
B.	When do Constitutions Change?	232
C.	The Greek Example: Testing the Neutrality Amendment Proposals for a Shorter Constitution	234
IV.	Is There Such Thing as the 'Ideal Constitution'?	236
V.	Conclusion.....	239
12.	Comment on Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution	241
	<i>James E Fleming</i>	
I.	Introduction: Does the Frequency of Amendment Relate to Constitutional Quality?.....	241
II.	The Notion of a Bad Constitution.....	242
III.	Criteria for a Good Constitution	245
IV.	The Purposes of Amendment	248
V.	The Fallacy of Confusing Correlation with Causation	249
VI.	Conclusion.....	251
13.	Constituting 'the People': The Paradoxical Place of the Formal Amendment Procedure in Australian Constitutionalism	253
	<i>Lael K Weis</i>	
I.	Introduction.....	253
A.	Australia's Amendment Procedure in Context	255
B.	The Place of the Formal Amendment Procedure in Australian Constitutionalism.....	258
i.	Section 128 as the locus of Australian Popular Sovereignty.....	258
ii.	Section 128 as the Site of Ordinary Politics	262
II.	Evaluation and Conclusion	268
14.	Hard Amendment Cases in Canada.....	273
	<i>Kate Glover</i>	
I.	Part V and Hard Amendment Cases.....	275
A.	The Logic of Part V.....	275
B.	Hard Amendment Cases.....	277
II.	Principles of Application.....	278
A.	Supporting Characteristics and Qualitative Assessments	279
i.	The Principle	279
ii.	The Principle in Action.....	279
iii.	The Case of Supreme Court Reform.....	281

B.	Enhancements and Alterations of Architectural Interests.....	283
i.	The Principle	283
ii.	The Principle in Action.....	283
III.	The Case of Mandatory Bilingualism at the Court.....	285
IV.	Conclusion.....	291
15.	Formal Amendment Rules and Constitutional Endurance: The Strange Case of the Commonwealth Caribbean.....	293
	<i>Derek O'Brien</i>	
I.	Introduction.....	293
II.	The Rationale for the Inclusion of Formal Amendment Rules in Commonwealth Caribbean Constitutions.....	295
A.	Special Legislative Majorities.....	295
B.	Referendum Requirements	297
C.	Constitution-Making in the Eastern Caribbean	298
III.	Post-Independence Constitutional Reform and Amendment Culture.....	301
A.	Special Legislative Majorities.....	302
B.	Referendums	302
i.	Guyana.....	303
ii.	Nevis.....	304
iii.	The Bahamas.....	305
iv.	St Vincent and the Grenadines.....	306
C.	Amendment Culture	307
IV.	Conclusion.....	312
16.	The French People's Role in Amending the Constitution: A French Constitutional Analysis from a Pure Legal Perspective.....	315
	<i>Jean-Philippe Derosier</i>	
I.	The Position of the People: Fundamental and Absolute, in Appearance.....	317
A.	The People's Fundamental Desire for the Present Constitution	317
B.	The People's Central Role in the Constitution's Amendment Procedure	319
C.	The People's Absolute will Reflected in the Constitution	320
II.	The Position of the People: Limited and Relative, in Law	322
A.	Social People and Legal People	322
B.	The 1962 Legal Revolution	323
C.	The Amending Procedure of Article 11 Questioned.....	325
17.	The Implication of Conflation of Normal and 'Constitutional Politics' on Constitutional Change in Africa	327
	<i>Duncan Okubasu</i>	
I.	Introduction.....	327
II.	Decision Making in a Polity	329

III.	Expression of Normal Politics in Constitutional Politics	331
IV.	Revisiting Effectiveness and Stability.....	336
V.	Constitutional Irrelevance.....	338
VI.	Conclusion.....	340
18.	Direct Democracy and Constitutional Change in the US: Institutional Learning from State Laboratories	343
	<i>Jurgen Goossens</i>	
I.	Introduction.....	343
II.	Article V of the US Constitution	344
	A. The Four Classic Paths to Amendment	344
	B. Exclusive Reading of Article V	346
	C. Non-Exclusive Reading of Article V.....	346
III.	State Laboratories	350
	A. Amendment by Proposal of the State Legislature.....	351
	i. One or Two Legislative Sessions—Supermajority vs Simple Majority Vote	352
	ii. Special vs General Election	353
	iii. Size of Popular Vote	354
	B. Amendment by Popular Initiative	355
	C. Constitutional Convention	357
	D. Constitutional Commission	360
IV.	Alterations to the Federal Amendment Procedure	361
	A. Initiative Petitioning	361
	B. Constitutional Referenda.....	363
	C. Simple Majority for Popular Votes	365
V.	Conclusion.....	366
VI.	Attachment: Methods for Constitutional Amendment Provided by the State Constitutions	367
	Conclusion: The Emergence of Comparative Constitutional Amendment as a New Discipline: Towards a Paradigm Shift	369
	<i>Xenophon Contiades and Alkmene Fotiadou</i>	
I.	A Paradigm Shift in Comparative Constitutional Change.....	369
II.	The Amendability Factor: Understanding Constitutions through their Change	371
III.	New Taxonomies of Constitutional Change	374
IV.	Symbolism and Functionality of Formal Amendment Rules	377
V.	Conscious Constitutional Design: Drafting Amendment Rules	379
VI.	Legitimacy and Constitutional Change.....	383
VII.	Conclusion: Toward a Holistic Conceptualisation of Comparative Constitutional Amendment	387
	<i>Index</i>	389