

Contents

| | |
|--|----|
| <i>Acknowledgments</i> | ix |
| Introduction—Uncharted Terrain in Constitutional Amendment | 1 |
| Scales of Change | 4 |
| The Routine and the Technical | 4 |
| Revolution and Renewal | 6 |
| The Range of Amendment Effects | 8 |
| Early Amendment Design | 13 |
| America's First Constitution | 13 |
| Neither Amendment nor Constitution | 14 |
| The State Tradition in Constitutional Amendment | 16 |
| Defying Amendment Rules | 18 |
| Constitutional Moments and the Basic Structure Doctrine | 19 |
| The Constitution as an Incomplete Code | 22 |
| Legal Amendment or Illegitimate Violation? | 24 |
| The Content-Procedure Distinction in Amendment Review | 27 |
| The Road Ahead | 30 |

PART ONE FORMS AND FUNCTIONS

| | |
|---|----|
| 1. Why Amendment Rules? | 39 |
| The Uses of Constitutional Amendment Rules | 40 |
| Formal | 41 |
| Functional | 45 |
| Symbolic | 47 |
| Authenticity in Amendment Design | 49 |
| Authoritarian Commandeering of Amendment Rules | 50 |
| Text and Reality | 51 |
| Amendment Values in Germany | 52 |
| Political Culture and Constitutional Commitment | 58 |
| 2. The Boundaries of Constitutional Amendment | 61 |
| An Amendment in Name Alone | 63 |
| The Social State in Brazil | 63 |
| Provincial Secession in Canada | 64 |

| | |
|--|----|
| Senate Reform in Ireland and Italy | 66 |
| The War on Japan's Pacifist Constitution | 67 |
| Amendment or Constitution? | 68 |
| The Conventional Theory of Constitutional Change | 69 |
| Four Propositions | 71 |
| Constitutional Destruction and Reconstruction | 73 |
| Amendment and Dismemberment | 76 |
| A Content-Based Approach | 78 |
| The Four Fundamental Features of Amendment | 79 |
| The Two Thirteenth Amendments | 82 |
| Three Types of Dismemberment | 84 |

PART TWO FLEXIBILITY AND RIGIDITY

| | |
|--|-----|
| 3. Measuring Amendment Difficulty | 95 |
| Studies of Amendment Difficulty | 98 |
| Ranking Constitutions | 98 |
| Constitutional Rigidity | 100 |
| More Art than Science? | 101 |
| The Missing Case of Canada | 105 |
| The Most Difficult Constitution to Amend? | 105 |
| Alternative Amendment Procedures | 107 |
| Cultures of Amendment | 110 |
| Amendment Culture as Acceleration | 112 |
| Amendment Culture as Redirection | 115 |
| Amendment Culture as Incapacitation | 116 |
| Temporal Variability in Amendment Difficulty | 119 |
| Amendment Failure in the United States | 119 |
| Amending Article V | 121 |
| The Progressive Era of Constitutional Amendment | 123 |
| Another Progressive Era? | 125 |
| Uncodified Changes to Formal Amendment Rules | 126 |
| Three Causes of a Global Phenomenon | 127 |
| Statutory Conditions on Codified Amendment Rules | 128 |
| Popular Expectations in Constitutional Amendment | 131 |
| Judicial Interpretation of Amendment Procedures | 133 |
| The Limits of Codification | 136 |
| 4. The Three Varieties of Unamendability | 139 |
| Codified Unamendability | 140 |
| Reassurance | 141 |
| Reconciliation | 143 |
| Preservation | 144 |
| Transformation | 146 |

| | |
|---|-----|
| Crisis Management | 147 |
| Settlement | 148 |
| Value Expression | 148 |
| Interpretive Unamendability | 149 |
| Continuity and Discontinuity | 150 |
| The Basic Structure Doctrine | 151 |
| Variations on the Basic Structure Doctrine | 153 |
| Conventions of Unamendability | 156 |
| Constructive Unamendability | 158 |
| The Equal Suffrage Clause | 160 |
| Constitutional Veneration | 162 |
| Omnibus Amendment Bills and Multi-Party Incompatibility | 165 |
| Unamendability in Measuring Amendment Difficulty | 169 |

PART THREE CREATION AND REFORM

| | |
|--|-----|
| 5. The Architecture of Constitutional Amendment | 175 |
| Pathways and Possibilities | 177 |
| Single-Track and Multi-Track Pathways | 178 |
| The Use of Amendment Pathways | 182 |
| Single-Subject Amendments | 186 |
| Codifying Procedures for Amendment and Dismemberment | 188 |
| Democracy and Unamendability | 194 |
| An Inherent Right | 194 |
| Constitution as an Action | 195 |
| A Democratic Requirement of Unamendability? | 198 |
| Alternatives to Codified Unamendability | 201 |
| Time and Change | 202 |
| Safe Harbors | 203 |
| Deliberation Requirements | 204 |
| Inter-Generational Ratification | 205 |
| Intra-Generational Ratification | 207 |
| Time and Brinkmanship | 210 |
| Time and Contemporaneity | 213 |
| Judicial Review of Constitutional Amendments | 217 |
| How a Court Becomes Supreme | 218 |
| Alternatives to Invalidation | 222 |
| Pre-Ratification Review in Canada | 223 |
| 6. Finding Constitutional Amendments | 229 |
| Four Models of Codification | 229 |
| The Appendative Model | 231 |
| The Disaggregative Model | 234 |
| The Integrative Model | 236 |

| | |
|--|-----|
| The Invisible Model | 238 |
| The Problem of Obsolescence | 240 |
| Time and Social Change | 241 |
| Reimagining the U.S. Constitution | 242 |
| The Appendative Model in Society | 244 |
| The Problem of Harmonization | 246 |
| The Canadian Hybrid Model of Codification | 246 |
| Reconciling Constitution Acts | 248 |
| When to Harmonize | 249 |
| The Problem of Incorporation | 250 |
| The Politics of Codification in Mexico | 251 |
| Confusion and Disorder in Codification | 253 |
| Constitutional Veneration and the Appearance of Finality | 254 |
| Fidelity and Authority | 257 |
| Conclusion—The Rules of Law | 261 |
| A Blueprint for Amendment Design | 262 |
| Foundations | 263 |
| Pathways | 265 |
| Specifications | 265 |
| Codification | 267 |
| The Democratic Values of Constitutional Amendment | 268 |
| <i>Notes</i> | 273 |
| <i>Index</i> | 323 |