

Contents

<i>Table of Cases</i>	xiii
<i>Table of Legislation</i>	xix

Introduction: The Rise of Eternity Clauses in Democratic Constitutionalism	1
The rise of eternity clauses	1
Existing work in the area	3
The case for a democratic critique of unamendability	7
Structure of the book	9

I. ETERNITY CLAUSES IN CONSTITUTION-MAKING: BETWEEN MILITANT DEMOCRACY AND POLITICAL BARGAINING

1. Eternity and Democratic Precommitment: Unamendability as an Instrument of Militant Democracy	17
1.1 Eternity clauses as precommitment and militant democracy instrument	18
1.2 Protecting fundamental characteristics of the state	21
<i>Unamendable republicanism, unamendable monarchism</i>	22
<i>Unamendable federalism and unitary statehood</i>	25
<i>Unamendable territorial integrity</i>	30
<i>Unamendable religion or secularism</i>	31
1.3 Eternity clauses protecting pluralist democracy	34
<i>Protecting democracy through political party bans</i>	35
<i>Protecting democracy through minority rights</i>	40
<i>Protecting a democracy governed by the rule of law</i>	45
1.4 Conclusion	48
2. Eternity in Post-Conflict Constitutions: Unamendability as a Facilitator of Political Settlements	51
2.1 Post-conflict constitutions and eternity clauses: correcting core assumptions	54
<i>The prevalence of post-conflict constitution-making</i>	55
<i>The dynamics of post-conflict constitution-making</i>	56
<i>The internationalization of post-conflict constitution-making</i>	57
<i>Post-conflict constitution-making as state-building</i>	57
<i>Post-conflict constitutional incoherence</i>	61

2.2 Unamendability after conflict: signalling compliance, political insurance, insulating elites	62
<i>Signalling compliance: unamendable human rights commitments</i>	62
<i>Political insurance: unamendable term limits</i>	72
<i>Insulating elites: unamendable amnesties and immunities</i>	80
2.3 Conclusion	84

II. ETERNITY CLAUSES IN CONSTITUTIONAL ADJUDICATION: CONSTITUTIONAL IDENTITIES, BASIC STRUCTURES, AND MINIMUM CORES

3. Eternity and Expressive Values: Unamendability as the Embodiment of Constitutional Identity	89
3.1 Constitutional law as expressive of constitutional identity	90
<i>Defining constitutional identity</i>	90
<i>Amending constitutional identity</i>	94
<i>The specificity of constitutional identity</i>	97
<i>Exclusionary constitutional identity</i>	98
3.2 Eternity clauses as sites of constitutional expression	101
<i>Amendment rules as repositories of constitutional identity</i>	101
<i>One site among many: preambles as expressive of constitutional identity</i>	104
<i>Eternity clauses atop a constitutional hierarchy</i>	106
<i>Eternity clauses as expressive of exclusionary constitutional identity</i>	110
3.3 Constitutional identity as a limit to European integration	113
<i>Constitutional identity review in Germany</i>	114
<i>Constitutional identity review beyond Germany</i>	119
3.4 Abusive constitutional identity review	121
3.5 Conclusion	123
4. Eternity as Judicially Created Doctrine: Implicit Unamendability as the Embodiment of the Constitution's Basic Structure or Minimum Core	125
4.1 The contours of implicit unamendability	126
<i>Defining implicit unamendability</i>	126
<i>Locating implicit unamendability</i>	129
4.2 Basic structure doctrines: India and beyond	131
<i>India's basic structure doctrine</i>	131
<i>The basic structure doctrine beyond India</i>	138
4.3 Restraining doctrines of implicit unamendability	145
<i>Positing judicial self-restraint as a limit on unamendability</i>	145
<i>Unamendable judicial independence and the limits of judicial self-restraint</i>	152
4.4 Implicit unamendability as protection against democratic backsliding?	158
4.5 Conclusion	165

III. ETERNITY CLAUSES IN CONTEMPORARY
CONSTITUTIONAL REFORM PROCESSES:
TRANSNATIONAL FORCES, POPULAR PARTICIPATION,
AND CONSTITUTIONAL RENEWAL

5. Eternity in a Global Context: Unamendability, Internationalized Constitution-Making, and Transnational Values	169
5.1 Internationalized constitution-making and unamendability	171
<i>Internationalized constituent power</i>	171
<i>Transnational norm diffusion and the globalization of constitution-making</i>	177
5.2 Constitutional adjudication of unamendability in a transnational context	186
<i>Supranational illegality of constitutional amendments: unamendability review against a transnational referent</i>	186
<i>Unamendability in international adjudication: a supranational unconstitutional constitutional amendment doctrine?</i>	199
5.3 Conclusion	203
6. Eternity Faces 'the People': Unamendability and Participatory Constitutional Change	204
6.1 The rise of participation in constitutional change	206
<i>The promises of participatory constitutional change</i>	206
<i>The limits of participatory constitutional change</i>	209
<i>Examples of participation in constitutional change: referendums and constitutional conventions</i>	210
6.2 Case studies: unamendability and participation in constitutional change	215
<i>South Africa's 1996 Constitution: tiered amendment and the rejection of unamendability</i>	215
<i>Kenya's 2010 Constitution: implied limits on constitutional amendment and court-mandated participation in constitutional change</i>	221
<i>Iceland's 2011 draft constitution: 'crowdsourcing' constitutional openness</i>	224
<i>Tunisia's 2014 Constitution: participatory constitutional change embracing unamendability</i>	226
6.3 Conclusion	229
7. Relinquishing Eternity: Amending Unamendability Out of the Constitution	234
7.1 Case studies: eternity clauses in constitutional reform processes	235
<i>Turkey's constitutional review process</i>	236
<i>Calls for renouncing India's basic structure doctrine</i>	239
7.2 Repealing eternity clauses as by definition illegal	242

7.3 Reversing judicial doctrines of unamendability	245
7.4 Eternity clauses as a tool encouraging deliberation	248
<i>Unamendability's chilling effect</i>	248
<i>The tenuous link between unamendability and deliberation</i>	250
7.5 The difficult distinction between amendment and repeal	254
<i>Defining amendment</i>	255
<i>Amendment and judicial interpretation</i>	257
<i>Informal amendment</i>	258
<i>Amendment and revolution</i>	259
7.6 Conclusion	263
Conclusion	264
<i>Bibliography</i>	269
<i>Index</i>	297