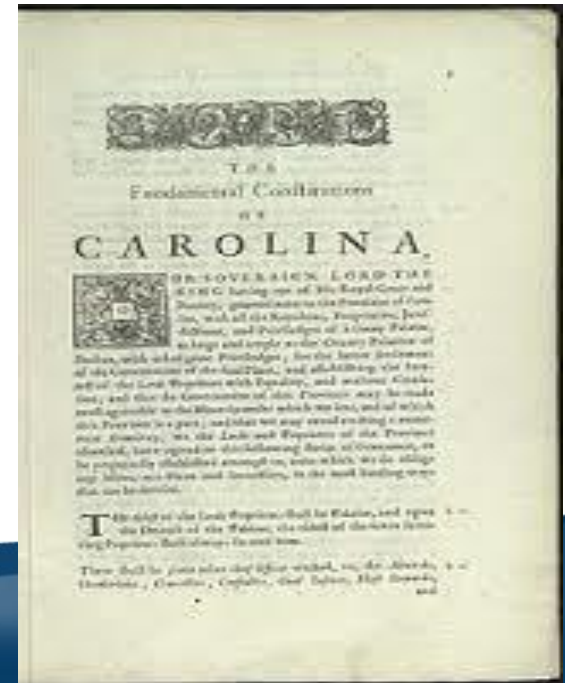

Can there be Unconstitutional Constitutional Amendments?

Constitutional Unamendability

- Imposing limitations on amending certain constitutional subjects (provisions, principles or institutions)

- John Locke, *The Fundamental Constitutions of Carolina (1669)*: “shall be and remain the sacred and unalterable form and rule of government of Carolina forever”



Unamendability 1.0: Explicit Unamendable Provisions

	Number of Constitutions	How Many Included Unamendable Provisions
Pre WWII (1789-1944)	306	52 (17%)
Post WWII (1945-1988)	287	79 (27%)
Post 1989	149	81 (54%)
Total	742	212 (28%)

Unamendability 2.0: Implicit Limitations on Amendments

➤ The Indian Basic Structure

Kesavananda Bharati v. State of Kerala (1973):

The power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity.

➤ Basic Structure Doctrine: *A Tour d'Horizon*

Bangladesh; Pakistan; Kenya; South-Africa; Taiwan; Colombia; Peru; Belize ...

Unamendability 3.0: Judicial Review of Amendments

Eduard Lambert – *Le Gouvernement des Juges* (1921)

Carl Schmitt – *Constitutional Theory* (1928)

Turkey (2008): The Constitutional Court annulled amendments which were aimed to abolish the headscarf ban in universities because they “infringed upon the constitutionally enshrined principle of secularism.” The Constitutional Court declared the constitutional amendments ‘unconstitutional’.

Czech Republic (2009): the Czech Constitutional Court annulled a Constitutional Act on shortening the Fifth Term of Office of the Chamber of Deputies, declaring it “unconstitutional” for violating the unamendable principle of “the rule of law”.

A paradox?

- The authority to amend a constitution presupposes the same kind of authority as the one to constitute a constitution.
- According to the *lex posterior derogat priori* principle, a later norm should prevail over a conflicting earlier norm of the same normative status.
- All constitutional norms have equal value and as such they must be constitutional.

Main Arguments

OXFORD CONSTITUTIONAL THEORY



Unconstitutional Constitutional Amendments

The Limits of Amendment Powers

YANIV ROZNAI

- A wide pattern of a constitutional behavior
- The global trend of accepting the idea of limitations (explicit or implicit) on the constitutional amendment power and judicial review of amendments rests on a solid theoretical basis

The Nature of Amendment Powers

➤ Constituent Power v. Constituted Power

‘Une Constitution suppose avant tout un pouvoir constituant’!

(Sieyès, 1789)

‘The constitution does not establish itself’

(Schmitt, 1928)

➤ The Amendment Power as Sui Generis

‘does not fit comfortably into either category. It inhabits a twilight zone between authorizing and authorized powers. ... The amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the constitution.’

(Stephen Holmes and Cass R. Sunstein, 1995)

The Scope of Amendment Powers

A Theory of Delegation

➤ The Validity of Unamendable Provisions

lex posterior derogat priori or lex superior derogat inferiori?

➤ The amendment power cannot be used in order to destroy the constitution

The fruit grower does not forbid his servants from poisoning his apple trees (Thomas Cooley, 1893)

➤ The amendment power cannot be used in order to destroy the basic principles of the constitution.

Every constitution consists essentially of a set of principles, which determine the totality of the constitutional order and make up the “spirit of the constitution” and which are intrinsic to its specific identity.

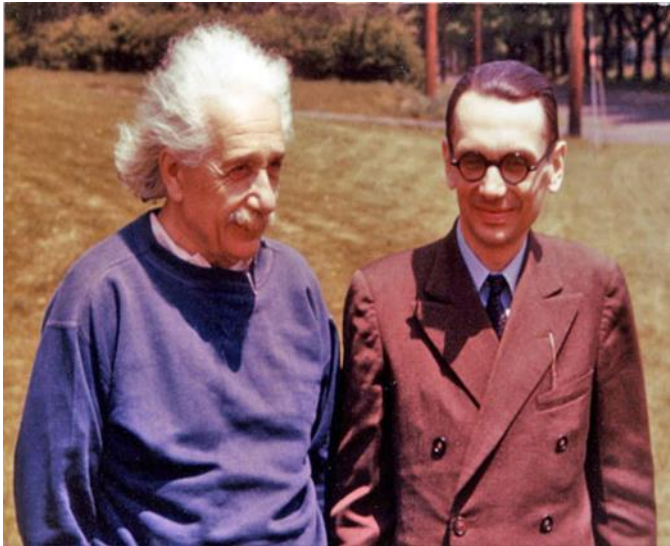
➤ Textualism

Effectiveness



- Eternity? Cláusula pétrea? Unamendable!

Gödel's Loophole



Unconstitutional Constitutional Amendments

The Limits of Amendment Powers

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OXFORD CONSTITUTIONAL THEORY



Unconstitutional Constitutional Amendments

The Limits of Amendment Powers

YANIV ROZNAI

Combining historical comparisons, constitutional theory, and a wide comparative study, Yaniv Roznai sets out to explain what the nature of amendment power is, what its limitations are, and what the role of constitutional courts is and should be when enforcing limitations on constitutional amendments.

“Providing a comprehensive overview of worldwide practice regarding judicial review of constitutional amendments, Yaniv Roznai offers the most sophisticated theoretical account yet of constitutional amendments.” -
**Mark Tushnet, William Nelson Cromwell
Professor of Law, Harvard Law School**

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