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ENFORCING THE DECISIONS OF “THE PEOPLE”

UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS. By Yaniv Roznai.¹ Oxford: Oxford University Press. 2017. Pp. xxiv + 334. \$75.00 (cloth).

*Joel I. Colón-Ríos*²

Constitutional amendments can be “unconstitutional” in two main ways. First, they could be contrary to explicit limits to the amending power contained in the constitutional text itself. Second, they could be contrary to the fundamental principles in which the constitution rests. Although unamendability does not necessarily need to be judicially enforceable, the doctrine of unconstitutional constitutional amendments is usually accompanied by the idea that courts can declare the invalidity of an unconstitutional amendment. Each form of unamendability—explicit and implicit—involves its own particular problems, but they both raise a common set of questions. Yaniv Roznai’s *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, is, to my knowledge, the first book to deal with these problems and questions from both a theoretical and comparative (global) perspective. The book introduces readers to the subject through a rich historical account of the development of the doctrine, examines the current practice of explicit and implicit amendability in different jurisdictions and regions, advances a theory about the nature and scope of the amending power, and examines the question about whether the doctrine should be judicially enforced. In this brief review, far from providing a detailed summary of those discussions, I will make three comments that are directly connected to some of the main

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arguments presented by Roznai. In so doing, I hope to contribute to the debate that this important book is likely to continue to generate among constitutional theorists and comparative constitutional lawyers.

My comments apply to both forms of amendability, unless otherwise indicated. I will suggest, first, that the doctrine has an uneasy relationship with conservative and radical democratic notions of constitutionalism; second, that the distinction between the secondary and primary constituent power, defended through the book, is difficult to sustain in some contexts; and, third, that given the fact that most constitutions do not authorise their own democratic replacement, the judicial enforcement of the doctrine can only be justified exceptionally. Although these comments challenge some aspects of Roznai's approach, it will also be clear that I largely agree with the argument presented in the book.

I would like to begin where the book ends. Roznai notes in his conclusion, and I agree, that the alleged paradoxical character of the very idea of an unconstitutional constitutional amendment disappears once the doctrine is "correctly construed" (p. 233). As long as the ordinary amending power (the *secondary constituent power*) is understood as distinct from the exclusive constitution-making power of the people (*the primary constituent power*), there is nothing paradoxical in noting that the former cannot be used to change the existing constitution in ways so fundamental that amount to the creation of a new one. As I have noted elsewhere,³ however, the doctrine carries with it a different sort of paradox. On the one hand, particularly in the context of implicit unamendability, it is a profoundly conservative doctrine: it is about preserving the basic principles on which the constitution rests, *just because they are the basic principles in which the constitution rests* (that is, not because, for example, they are particularly good principles).

In this respect, the doctrine is conservative for the worst reason possible: it wants to preserve what exists just because it exists. The doctrine, however, also has a radical democratic potential. To the extent that it only applies to the amending power, it is not binding on "the people," who can change or replace those basic principles at any moment. Since the exercise

3. Joel I. Colón-Ríos, *On Albert's Unconstitutional Constitutions*, 50 CORNELL INT'L L.J. 17, 17 (2017).

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of the primary constituent power has traditionally been understood as extra-legal or extra-constitutional, what the doctrine suggests is that political acts that are sufficiently massive, popular, or participatory, can legitimately operate besides (or perhaps despite) a constitution's amendment rule. Thus, on the one hand, this is a very conservative doctrine; on the other, it is a very radical one. In his book, Roznai explores both sides of that paradox. Indeed, as he shows, in the United States, conservative lawyers and politicians were the ones who, in the past, tended to defend the notion of implicit limits on the amending power. For example, John Calhoun, the pro-slavery politician and commentator, argued that an amendment that is "inconsistent with the character of the constitution and the ends for which it was established—or with the nature of the system" (p. 41)—would be *ultra vires* the amending power. At the same time, Roznai recognizes the potential revolutionary character of the doctrine: "The fear of revolution is a legitimate concern that should act as a warning for constitutional designers to use unamendability carefully" (p. 131). This is why, he writes, the "further development of how the primary constituent power may peacefully 'resurrect' and change even unamendable constitutional subjects" is important (p. 131).⁴

It could be argued that the doctrine is only conservative superficially, that in the last instance, it is its radical nature that characterizes it. The reason why certain basic principles cannot be changed through the ordinary amendment process, this argument would hold, is precisely because those principles were established by the people, the primary constituent power, at the time the constitution was created. Accordingly, government officials who have been authorised by the people to amend "the constitution" cannot use that power, a secondary constituent power, to alter the basic principles in which the constitution rests. That would amount to the creation of a new constitution, not as the amendment of an already existing one. The problem with this argument, which Roznai largely defends in his book (and I have

4. Roznai does not engage in a detailed discussion of how the primary constituent power should be exercised. However, he directs readers to his forthcoming article, Yaniv Roznai, "We the People," "Oui, the People" and the Collective Body: Perceptions of Constituent Power, in *COMPARATIVE CONSTITUTIONAL THEORY* (Gary Jacobsohn & Miguel Schor eds., forthcoming 2018).

defended in my own work)⁵ is that, in the context of certain constitutions, it is based on an assumption that is empirically false. As a matter of actual constitutional practice, many constitutions are not adopted through processes that could be reasonably described as amounting to an “act of the people,” but by ordinary legislatures (sometimes even without a referendum) acting through processes similar to the ones that characterise ordinary amendment rules. For example, to say that a particular provision of the United States Constitution should be unamendable by the U.S. Congress and the state legislatures acting through Article V because it reflects a fundamental principle adopted by “the people,” is to assume that the Constitution was adopted through an inclusive and participatory process. There could be other reasons why a particular provision should be considered unamendable, but the idea that it should be unamendable because of its alleged popular origin is untenable in some contexts.

The apparently radical character of the doctrine, in the case of many constitutions, would thus rest in the (false) assumption that the existing constitution was created by “the people,” which would lead to the not necessarily correct conclusion that it should therefore be put out of the scope of the secondary constituent power. The implication would be, and this leads me to my second comment, that the doctrine of unconstitutional constitutional amendments should only apply in the context of constitutions that have been created through highly democratic procedures. In other words, constitutions that can somehow be seen as having been created by “the people.” A hypothetical example would be useful to illustrate this point. Suppose that a democratically elected parliament adopts a new constitution with no form of direct popular intervention. The new constitution contains an amendment rule that authorises its revision through a process that involves: (1) a referendum on whether a Constituent Assembly shall be elected to draft a new constitution; (2) a special election in which the members of that body are selected; and (3) a final referendum in which the draft constitution can be ratified or rejected. Both the initial creation of a constitution by parliament and its amendment by a Constituent Assembly could be described as democratic, but let’s suppose that most observers would tend to view the second process as *more* democratic (as will probably

5. See JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* (2012).

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be the case). To avoid unnecessary complications, let's also suppose that the constitution contains an explicit limit on the amending power which prohibits any amendment that abolishes the upper house of the legislature.

If a Constituent Assembly operating under the process described above decided to abolish the upper house, would it be appropriate for a court to invalidate its decision on the basis that "the people," in the exercise of their primary constituent power, decided that the upper house of parliament cannot be abolished through the amendment process? This example, in my view, suggests that distinguishing between the primary and the secondary constituent power on the basis that the former necessarily has a better claim to represent, or to speak on behalf of, the people, is highly problematic in some cases. Roznai is aware of this problem and provides a solution (the "spectrum of constitutional amendment powers") that at first sight appears satisfactory: "The more similar the characteristics of the secondary constituent power are to those of the democratic primary constituent power . . . the less it should be bound by limitations, including those of judicial scrutiny, and vice versa" (p. 162). Nevertheless, the question still remains whether the distinction between the secondary and the primary constituent power can be sustained *at all* in cases where the amendment procedure is more "popular" or "democratic" than—or, perhaps, as popular or democratic as—the process used in the actual creation of the existing constitution. However unusual such a case may be in practice, it forces us to think about the extent to which the democratic potential of the doctrine of unconstitutional constitutional amendments depends on what actually happened when the constitution was created and on the procedures (if any) that it provides for its own replacement.

The final comment, which follows directly from the previous point, is about whether the doctrine of unconstitutional constitutional amendments should only apply when there is a possibility to *legally* trigger an exercise of primary constituent power. My example above was from a certain perspective deceptive, because it could be argued that in cases where the constitution authorises the convocation of a Constituent Assembly as the one I described earlier, the doctrine of unconstitutional constitutional amendments simply does not apply. That is to say, when a popularly elected Constituent

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Assembly proposes fundamental constitutional changes that are later ratified in a referendum, it should be understood as a proper means for the exercise of the primary constituent power (and, therefore, as “unbound by prior constitutional rules” (p. 233)). This would be particularly true in cases where there is a tiered-amendment rule, and (in a way consistent with Roznai’s spectrum of constitutional amendment powers) one could say that the less demanding process would be subject to limits while the more demanding (both in terms of difficulty and degrees of popular involvement), would not. But all this raises, in my view, a basic question about the judicial enforcement of the doctrine. Should judges be authorized to apply the doctrine of unconstitutional constitutional amendments in situations in which there are no legal means available for the exercise of the primary constituent power? In those cases, legally speaking, the court would have the very final word as to what counts as acceptable constitutional content.

Roznai does not agree with such an approach. He thinks, in my view correctly, that a judicial declaration of invalidity should not necessarily close the door to fundamental constitutional changes: “Unamendability does not block all the democratic paths for constitutional change, but simply announces that one such path, namely the amendment process, is unapproachable for amending certain constitutional subjects” (p. 189). Since unamendability only limits the secondary constituent power, Roznai continues, “it is entirely consistent with ‘the people’s’ sovereignty, as manifested by the primary constituent power through which they can constitute a new constitutional order” (p. 190). Under this view, when a court declares a constitutional amendment invalid, it does not negate but vindicates the people’s will (p. 193). The problem, as suggested above, is that this is not the reality of most constitutional orders (including constitutional orders that have already embraced the notion of judicially enforceable unamendability). Modern constitutions rarely contain a mechanism, outside the ordinary amendment rule, which involves popular participation to an extent that it can be seen as a proper means for the exercise of the primary constituent power. In the context of such a (typical) constitution, the judicial application of the doctrine would make fundamental constitutional changes a legal impossibility. It would seem that a system like that would be in some way defective, in the sense that

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it makes certain rules only changeable through revolution. Given the prevailing approach to the exercise of primary constituent power, perhaps the judicial enforcement of the doctrine of unconstitutional constitutional amendments can only be justified in a handful of jurisdictions, if at all.