by state representatives. Incorporating such perspectives could unsettle the statist and judicial absolutism which remains central to liberal legal and democratic philosophy.

At the very least, the notion of constituent power lays the groundwork for future research projects to build on *Constitutionalism Beyond Liberalism*. As it stands, despite methodological limitations Dowdle and Wilkinson's edited volume provides a valuable new perspective on the place of comparative inquiry within constitutional theory. By foregrounding its overall intervention in terms of political philosophy, the book shows how a comparative lens can allow scholars in constitutional studies to rethink the kinds of correlations they draw between liberalism and government structures. It raises key questions about whether constitutional rule requires liberalism and whether liberal norms themselves take the same shape in different contexts. This is a new, philosophically motivated orientation to comparative law that demonstrates its importance for political and legal thought more generally. I hope it sets a precedent for further work in the field.

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Yaniv Roznai. *Unconstitutional Constitutional Amendments*. Oxford University Press, 2017. Pp. 368. £60.00. ISBN: 9780198768791.

1. Unamendability: Beyond the "merely normative"

The German presidential election of 1932 took place in the midst of a deep political and economic crisis. In order to prevent Hitler from becoming the new *Reichspräsident*, the democratic parties of the so-called Weimar coalition reluctantly agreed to support Hindenburg, the arch-conservative incumbent. Because the eighty-four-year-old Prussian ex-general did not want to campaign publicly for reelection, the coalition proposed an amendment to Article 41 of the Weimar Constitution that would enable the *Reichstag* to extend Hindenburg's term through simple parliamentary vote. Unfortunately, this maneuver provided Hitler with the opportunity to appear as the "guardian of the constitution." In an open letter to the German public, Hitler justified his opposition to the amendment on "purely constitutional grounds" and argued that in light of the democratic principle of Article 1 of the Constitution the direct election (*Urwahl*) of the *Reichspräsident* according to Article 41 constituted a "fundamental pillar of our state." If, however, the constitution was "a real foundation of the state's life," constitutional amendments should not touch this foundation. The Nazi party would be unable to vote for an amendment, which would not only change the democratic process but break the constitutional framework.[1]

While it is highly unlikely that Hitler's letter was drafted by Carl Schmitt, who in 1932 was still trying to make his career in the conservative *Kamarilla* around Hindenburg, it was clearly inspired by Schmitt's writings. In his 1928 book, *Verfassungslehre*, Schmitt had argued against the overwhelming majority of German constitutional lawyers that certain parts of the Weimar constitution were unamendable, because they represented the "identity and continuity of the constitution as an entirety."[2] According to Schmitt, liberal scholars like Anschütz and Thoma, who were opposed to any restrictions on the amendment power, reduced the amendment procedure to something "indifferent and neutral" vis-à-vis the very structure of the polity.[3] The formalists failed to see that the constituent power—for Schmitt the central category of constitutional theory—did not disappear with the act of constitution-giving, but was permanently present "alongside and

[1] 3 Ernst Rudolf Huber, Dokumente zur deutschen Verfassungsgeschichte 457 (2d ed., 1966).

[2] Carl Schmitt, Constitutional Theory 150 (Jeffrey Seitzer trans., 2008).

[3] Carl Schmitt, Der Hüter der Verfassung 113 (1931).

above" the constitution.[4] And because only the constituent power was sovereign, everything inside the constitution, including the amendment power, had to be subordinated. Consequently, as long as the people acted within the constitutional framework or in the sphere of the "merely normative,"[5] they could not change the original decision over the form of their political existence.

In order to reconstruct his constitutional existentialism in legal terms, Schmitt used a popular strategy among nineteenth-century public lawyers: taking a concept from private law doctrine, here from the law of agency, and applying it to constitutional law. In this sense, Schmitt distinguished sovereignty and competence and argued that every competence is formally and materially limited, because it is granted by a principal to an agent as part of a fiduciary relationship. Analogously, the "competence–competence" to amend the constitution has been granted by the sovereign constituent power to an agent within the constitutional framework, making this agent an organ "competent" to change the constitution. Consequently, the amendment power could not legally go beyond the will of the sovereign constituent power.[6]

The limits to the amendment power proposed by Schmitt in 1928 were designed to unmask a supposedly "legal" revolution such as the amendment of Article 41. However, they were never meant to prevent something like the Nazi seizure of power, which was openly illegal.[7] In this sense, Schmitt was consistent when he declared in 1933 that the new Nazi state stood "on its own ground" and not on a constitutional foundation that was "fundamentally foreign and hostile to its essence" (*wesensfremd*). For Schmitt, the *pouvoir constituant* had spoken in 1933 and had changed the constitutional identity by extraconstitutional means.

After 1945, however, even liberals like Thoma embraced the self-justificatory myth that 1933 had been a legal revolution and fell for the lie that formalists and legal positivists rather than political extremists like Schmitt had undermined the Weimar constitution. This helped to put unamendability on the agenda of the West German constituent assembly. And although most experts agreed that the so-called eternity clause of Article 79 (3) of the German Basic Law would probably not suffice to prevent a new fall into barbarism, it was considered to be at least something to "prevent the return of a seemingly legitimate dictatorship."[8]

Soon, not only Germans were convinced that unamendability is a necessary feature of constitutionalism.[9] Roznai's impressive new book shows how the concept of unamendability has spread worldwide since 1945. While this process has caught the attention of comparative lawyers and constitutional theorists from early on,[10] the interest in amendments and unamendability has increased again in the past years, probably due to the recent global backlash against constitutionalism.

2. A theory of delegation

Unconstitutional constitutional amendments are maybe not the "ultimate conundrum of

[4] Schmitt, *supra* note 2, at 126, 140.

[5] *Id.* at 154.

[6] Few contemporary scholars were impressed by Schmitt's voluntaristic theory of constituent power or by his suggestion to explain the problem of unamendability with reference to private law. *Cf.* 3 Michael Stolleis, Geschichte des öffentlichen Rechts in Deutschland 113 (1999).

[7] Horst Dreier, *Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus, in* 50 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 9, 20 (2001); Karl Dietrich Bracher, Stufen der Machtergreifung 222 (1979).

[8] Richard Thoma, *Über die Grundrechte im Grundgesetz für die Bundesrepublik Deutschland (1951), in* Rechtsstaat—Demokratie—Grundrechte 468, 470 (Horst Dreier ed., 2008).

[9] Of course, Germany did not invent the concept of constitutional unamendability. *See* Yaniv Roznai, Unconstitutional Constitutional Amendments 18 (2017).

[10] *Cf.* Peter Häberle, *Verfassungsrechtliche Ewigkeitsklauseln als verfassungsstaatliche Identitätsgarantien, in* Rechtsvergleichung im Kraftfeld des Verfassungsstaates 597 (1992).

constitutionalism" (Gerhard Casper), but they certainly pose a major challenge for public law. Roznai has taken up this challenge and has produced an illuminating analysis of the problem. His book has already been the subject of much praise. Various workshops and conference panels have been devoted to the work and its author. This popularity is well-deserved. The book summarizes the previous debate concisely, argues diligently, and makes an innovative contribution to a genuinely difficult problem. Probably the greatest strength of the book is its truly global approach, which sets new standards for comparative constitutional studies. The clarity and rigor of his writing helps Roznai to navigate the reader through dozens of jurisdictions and decades of legal scholarship. And one can only agree with Ulrich Preuss that "in times when liberal democracy is under severe stress almost everywhere [. . .] this book could not be more timely."

Roznai's theory of unamendability closely follows Carl Schmitt's *Verfassungslehre* and the doctrinal path set by it: For Roznai, constitutional theory starts with Sieyes's distinction of constituent and constituted power. And with Schmitt and others, Roznai construes the relationship of constituent power and constituted power as a relation of subordination: "Constituted powers are legal powers, or competence, derived from the constitution and limited by it" (at 109). But how to classify the power to amend the constitution? As Hartmut Maurer has put it, the amendment power "is constituted power, because it is based on the constitution and bound by the constitution; however, it is, to a certain extent, also constituent power, because it changes the constitution and thus becomes the basis of and yardstick for legislation."[11] Numerous terms and concepts have been proposed in the past to capture the essence of this particular power. Popular are Burdeau's *pouvoir constituant constitué* and *pouvoir constituant institué* (in contrast to the *pouvoir constituant originaire*). Roznai distinguishes between "primary" and "secondary constituent power" (the latter describing the amendment power, which is subordinated to the primary constituent power). It remains to be seen whether this rather technical terminology will find wider acceptance.

Roznai also adopts Schmitt's doctrinal figure for conceptualizing the relationship between primary and secondary constituent power: While Roznai speaks of "delegation," where Schmitt uses "competence," both authors think of the problem in terms of agency (at 118, 119 n. 82, and 142). They agree that whoever is competent to amend the constitution acts as an organ within the constitution and is therefore bound by the decision of the principal, i.e., the constituent power: "As a trustee, [the amendment power] possesses only fiduciary power; hence, it must *ipso facto* be intrinsically limited by nature" (at 133). Amendments to constitutional amendment provisions cannot change or undermine the categorical distinction between primary and secondary constituent power. And even if "the people" are directly involved in amending the constitution (e.g., through a referendum), they act as a constituted people, not as the democratic *pouvoir constituant originaire*. Roznai emphasizes that radical change remains nevertheless possible but has to be organized outside the constitutional order and is naturally *ultra vires*. This also applies where the constitution itself seeks to moderate the transition to a new constitutional regime. While a constitution can "recognize" or "declare" the existence of the constituent power (at 166), it can never bind the "primary power."

The most important consequence of this theory is that unamendability becomes a necessary feature of constitutionalism. All amendment power is limited, even if the constitution is silent on unamendability, because all constitutions reflect "certain basic political-philosophical principles, which form the constitution's foundational substance, its essence or spirit" (at 143). Amendments can

[11] Hartmut Maurer, *Verfassungsänderung im Parteienstaat*, *in* Festschrift für Martin Heckel zum siebzigsten Geburtstag 821, 832 (Karl-Hermann Kästner, Knut W. Nörr, & Klaus Schlaich eds., 1999).

never break the internal "hierarchy of constitutional values" (at 144) or destroy the "constitutional identity" (at 148). But how do we know the identity of a constitution? Roznai emphasizes that spirit and identity are "not to be understood in terms of natural law" (at 143 n. 39) but have to be found through a synthetic interpretation of the written goals and principles of the constitution.

While Roznai remains committed to his binary distinction between primary and secondary constituent power, he acknowledges that it can be difficult to differentiate between the two categories in practice, especially when taking into account the great variety of methods and processes for amending constitutions globally. Roznai proposes a pragmatic solution to ease the theoretical tension by applying a "the more–the greater" formula: "The more similar the characteristics of the secondary constituent power are to those of the democratic primary constituent power described as the 'popular amendment power,' the less it should be bound by limitations, including those of judicial scrutiny, and vice versa" (at 162). His idea of a "constitutional escalator" is modeled after the Canadian and the South African Constitution (at 164) and is based on the idea that public participation is strengthening the deliberative quality and the inclusiveness of the amendment procedure, whereas amendments that are enacted merely by elected representatives enjoy less legitimacy (at 173).

Roznai's theory culminates in the question of judicial review. While for Schmitt the president is the guardian of the constitution, Roznai now opts with Hans Kelsen for a strong court (at 181, 186 n. 31). But should a constitutional court also review amendments? Roznai thinks that all standard reasons for constitutional review are also applicable in the case of amendments (ch. 7). Ultimately, the judicial review of the amendment process protects the decision of the *pouvoir constituant*, and thus the "democratic base of the constitution." When judges enforce unamendability, "they are vindicating, not defeating, the will of 'the people'" (at 193). This does not lead to a *gouvernement des juges*, because "the people" can always reactivate their primary constituent power to overrule the judiciary.

The exercise of judicial review should be based on a theory of constitutional principles, which has to be developed through a "holistic reading" (Akhil Amar) or a "structural interpretation" of the constitution as a coherent "whole" (at 215).[12] Obviously, this a very vague standard, but Roznai hopes that its openness stimulates public discourse. As far as the crucial practical question is concerned whether unamendable provisions are completely inviolable or protect only against "fundamental abandonment," Roznai refers to his "spectrum of constitutional amendment powers" (at 219) and argues that "[t]he more the amendment is the product of multi-procedural, inclusive, and deliberative popular amendment powers, which enjoy a very high degree of democratic legitimacy and minimize risks of misuse, the less intense the judicial review of amendments should be, and vice versa" (at 219–220).[13]

3. A truer democracy outside the constitution?

Certainly the most original chapters of Roznai's book are the comparative ones. The book starts with a comprehensive analysis of 742 constitutions enacted between 1789 and 2015. Based on this data, Roznai shows convincingly that more and more constitutions contain ever more detailed (explicit) provisions on unamendability. Additionally, Roznai offers a *tour d'horizon* of the Basic Structure Doctrine from Bangladesh to Belize (at 42–69)

[12] In terms of German constitutional theorists Roznai is now taking sides with Rudolf Smend against both Schmitt and Kelsen.

[13] Roznai refers in this context to the German Federal Constitutional Court's decision in BVerfGE 30, 1, 25 (1970) (*Klass*), which applies a fundamental abandonment standard. It should be noted, however, that German constitutional law does not organize the amendment process as an "inclusive, participatory, and deliberative mechanism that aim[s] to imitate the re-emergence of the primary constituent power" (at 221).

and demonstrates that the idea of implicit unamendability is gaining traction worldwide, too. Roznai uncovers numerous interesting cases and discourses that enrich the study of global constitutionalism and will be valuable for future research. Beyond the proof of a global trend, however, the explanatory value of his quantitatively informed approach is mostly limited.[14] When Roznai reexamines the standard categories for unamendability clauses, which were developed on the basis of a much smaller sample of constitutions, the extensive material uncovered by his analysis helps him to propose valuable additions and modifications. In his study of the Basic Structure Doctrine, however, the individual data points are not sufficiently contextualized to help the reader understand how the developments in the different countries are connected and which factors motivate the trend.

And while Roznai describes his method as "comparative and theoretical" (at 9), he does not use the comparative material to develop his theory of unamendability, which is instead derived almost deductively from the abstract concept of constituent power. But if Roznai is correct in stating with Markman that the amendment procedure is ultimately a "microcosm of the most fundamental principles of our constitutional structure," we cannot expect too much from purely conceptual theories of unamendability or constituent power that are methodologically unable to pay close attention to individual contexts.[15] Generally, it is an open question whether constitutional theory should strive for abstraction, or, as the famous German legal scholar Peter Häberle once proposed, should develop general concepts that are nonetheless context-sensitive and "leave room for the 'historical-individual'" in constitutional theory.[16] And certainly the relation between macro and micro is not a relationship of either/or. But it is striking that those passages, which deal closely with specific institutions, actors, or court decisions, are the more compelling parts of Roznai's book.

Context-insensitivity of a different kind is noticeable in Roznai's references to Carl Schmitt. This does not mean that Roznai should distance himself more clearly from Schmitt's "dangerous mind."[17] Rather, the core of Schmitt's argument, namely, his idea of the democratic sovereign as the subject of the constituent power, remains somewhat undertheorized in Roznai's book. While Schmitt is developing his concept of the amendment power as a "competence" on the basis of his theory of democracy, Roznai asserts a similar connection between democracy and delegation (at 123, 190) without developing a sufficient theoretical basis for his account of democratic sovereignty or delegation.[18] The references to Sharon Weintal's three-track democracy, which is based on Ackerman's dualism (at 127),[19] or the association of democracy with inclusiveness and participation (in his "spectrum of constitutional amendment powers") would need more elaboration to convince skeptical readers.

The lack of a robust theoretical basis may also be responsible for the fact that Roznai takes the concerns about unamendability ultimately not seriously enough. While he collects and evaluates every argument for unamendability, Roznai's engagement with critical voices is rather eclectic. Moreover, those who are skeptical of the idea that there exists a "truer" democracy outside the written constitutional order or those who think that self-determination is only possible within the domain of a constituted community get no real answers from Roznai,

[14] Cf. Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law 151 (2014).

[15] Stephen Markman, *The Amendment Process of Article V: A Microcosm of the Constitution*, 12 Harv. J. L. & Pub. Pol'y 113, 115 (1989).

[16] Häberle, *supra* note 10, at 610.

[17] Jan-Werner Müller, A Dangerous Mind: Carl Schmitt in Post-war European Thought (2003).

[18] Additional ideas are developed in 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).

[19] Bruce Ackerman, We The People: Foundations 6–16, 266–294 (1991); Sharon Weintal, *The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory*, 44 Israel L. Rev. 449 (2011).

who keeps repeating that unamendability protects the democratic base of the constitution.[20] Already during the Weimar era, authors who argued against unamendability, such as Thoma and Anschütz, did so because for them democratic freedom was real only where no ultimate "guardian" existed. They believed that representation was not a hindrance for, but a means to achieve, democracy. (And again: The Republic of Weimar certainly did not fail because its constitution lacked an eternity principle.) Against this backdrop, it seems to be a particularly doubtful argument in the current situation that one should have more confidence in the amorphous mass of the *pouvoir constituant* rather than in the forms and institutions of the constitutional state.

Ernst-Wolfgang Böckenförde, Carl Schmitt's most brilliant pupil and a former justice at the German Constitutional Court, once criticized the inherent "totalitarianism" of eternity clauses and questioned the stability and self-confidence of a people who believed that they could petrify "their basic social and political values by the force of law inviolably, for itself and for the generations to come, who are denied their own autonomy in advance."[21] Engaging with this challenge more fully would have made Roznai's excellent book longer, but it would have added an additional layer of reflection to his analysis.

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[20] Additionally, the content of many unamendability provisions is rather questionable. Even in countries with relatively narrow eternity clauses, it is often highly controversial whether everything mentioned in them should enjoy this kind of protection. In Germany, e.g., unamendability is often seen as a serious obstacle for a substainable reform of the federal structure. *Cf.* Horst Dreier, Gilt das Grundgesetz ewig? 69 (2009).

[21] Ernst Wolfgang Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs, in* Festschrift für Adolf Arndt zum 65. Geburtstag 53, 75 (Horst Ehmke, Carlo Schmid, & Hans Scharoun eds., 1969).

Scott Stephenson. *From Dialogue to Disagreement in Comparative Rights Constitutionalism*. Federation Press, 2016. Pp. 272. $90.00. ISBN: 9781760020675.

What (if anything) is distinctive about the new bills of rights to have emerged in the Anglo-Commonwealth jurisdictions of Canada, New Zealand, the United Kingdom, and Australia? What advantages (if any) do they hold out over more traditional forms of human rights constitutionalism? And how (if at all) can these benefits be realized in practice?

These questions lie at the heart of Scott Stephenson's award-winning new monograph, *From Dialogue to Disagreement in Comparative Rights Constitutionalism*.[1] And, indeed, they are questions that have intrigued scholars of comparative constitutional law ever since Mark Tushnet coined the term "weak-form judicial review" in the mid-1990s to describe the (apparently) non-conclusive powers of judicial review of legislation conferred on the courts by the Canadian Charter of Rights and Freedoms.[2] What Tushnet, and others, soon noticed was that this trait of non-conclusiveness is also a feature of the statutory bills of rights that emerged around this time in New Zealand (1990), the United Kingdom (1998), and the Australian subnational jurisdictions of the Australian Capital Territory (2004) and the state of Victoria (2006). And as well, these instruments seem to reapportion constitutional responsibilities in other ways—notably, through mechanisms that confer formal responsibility for assessing the human rights compatibility of legislation on the legislative and executive (as well as the judicial) branches.

In these regulatory mechanisms, scholars such as Tushnet and, in his ground-breaking

[1] Winner of the inaugural 2015 Holt Prize.

[2] Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 Mich. L. Rev. 245 (1995).