

Canadian Constitutional Reform in Comparative Perspective: Some Reflections Occasioned by Richard Albert's Global Work on Constitutional Amendments

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I. INTRODUCTION

To understand the process and procedures by which the constitution of a country may be changed is to understand much about the defining features of the constitution itself: its nature, status, and structure, as well as its underlying principles and the type of constitutionalism—legal or political, liberal or illiberal—that imbues it. When the text or provisions of a written constitution have been altered by the formal processes of constitutional change authorized or prescribed by the constitution itself (or, as in the case of a historical, colonial or subordinate relationship, by the supreme legislature that possesses constituent power), we call the resulting change a constitutional amendment.

For more than two hundred and thirty years, Article V of the Constitution of the United States of America has been paradigmatic of

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the rational, legal and positivist approach to effecting constitutional change. It sets out, in reasonably clear terms, the process and procedures for proposing “Amendments to this Constitution” and declares that upon ratification through one or the other modes prescribed in the Article, the amendments “shall be valid to all Intents and Purposes, as Part of this Constitution.” Twenty-seven amendments to the Constitution of the United States have been ratified, including the first ten in 1791 by the addition of the Bill of Rights, the latter thus within two years of the final ratification of the original Constitution itself.

For close to forty years, the Constitution of Canada has been, in principle, alterable by resort to Part V of the *Constitution Act, 1982*, entitled, “Procedure for Amending Constitution of Canada.”¹ Part V sets out five procedures for constitutional amendment that have resulted in eleven amendments changing certain provisions of the Constitution.

Of course, many attempts to amend the Constitutions of the United States and of Canada, through Article V and Part V respectively, have failed to achieve ratification, including, in Canada, the amendments proposed by the Meech Lake and Charlottetown Constitutional Accords in 1987 and 1992, and a series of Senate reform proposals between 2006 and 2013. Clearly, an understanding of the operation of the amending procedures requires a historical and political perspective, as well as grounding in constitutional law.

Recent events around the world, including the rise of authoritarian or illiberal regimes that threaten the prospects of democracy under the rule of law, have contributed to a renewed interest in the promise that constitutions and constitutionalism may hold in restraining the authoritarian impulse and the capricious or ideological disregard for the separation of powers and for fundamental rights, liberties and values that often accompanies such regimes.² As well, questions relating to how best to

¹ *Constitution Act, 1982*, ss 38–49, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

² For a useful effort at defining a form of constitutionalism that tends towards authoritarianism, see “What is Illiberal Constitutionalism?” in Tímea Drinoczi & Agnieszka Bien Kacala, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2019) 20:8 *German LJ* 1140 at 1148–52, online: *Cambridge University Press* <www.cambridge.org/core/journals/german-law-journal/article/illiberal-constitutionalism-the-case-of-hungary-and-poland/01DA5EB12D2734935C659B96CE012BFD> [perma.cc/3AYE-6BBE].

tackle the modernization and reform of arguably outdated governmental institutions and structural arrangements, both in Canada and abroad, have become relevant once again. These too have led to an interest in understanding the potential of constitutional amendments in changing such institutions and structures. Moreover, a rising generation of enthusiastic, energetic and connected academics has begun to breathe new life into the intellectual examination of constitutional amendments, increasingly from a comparative perspective.³

Richard Albert's scholarship over the past ten years has been prolific in this regard, and his encouragement of other young comparativists, through the convening of conferences and the International Journal of Constitutional Law's weblog, I-CONnect, has been generous and admirable. Professor Albert's recent book, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*,⁴ published by Oxford University Press, is an ambitious project, written "to inspire interest in constitutional amendment and to guide those seeking to understand how constitutions change;" to be "useful to scholars" and to become "a focal resource for leaders involved in making or remaking their constitution."⁵ This is not mere hubris, however; Albert's book is thoughtful, erudite and often compelling in its analysis and conclusions, and the ambition is

³ For fresh comparative perspectives, see, notably, Yaniv Rosnai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017); Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (New York: Routledge, 2013); Joel I Colón-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (New York: Routledge, 2012); Dawn Oliver & Carlo Fusaro, eds, *How Constitutions Change: A Comparative Study* (Oxford: Hart Publishing, 2011). For Canadian-focused collections of recent scholarship, see Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019); Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), including chapter 12, "Amending the Constitution of Canada" by Benoit Pelletier, author of several previous articles and an excellent monograph on constitutional amendment, *La modification constitutionnelle au Canada* (Toronto: Carswell, 1996); Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016).

⁴ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019).

⁵ *Ibid* at 36 (Introduction).

tempered by a realistic, and characteristically collegial, acknowledgment that this is less the last word in this sweeping, comparative constitutional field than it is the genesis of “a research agenda for the years ahead” and the seeding of “conversation and collaboration in the study of constitutional amendment.” *Constitutional Amendments* “therefore doubles as an analysis of constitutional change and an invitation to join” Professor Albert “in further inquiry.”⁶

As a sometime scholar, part-time professor, and full-time practitioner in the field of constitutional law over the past four decades, I have viewed the exponential growth of academic work in the area of constitutional amendment with mixed feelings. On the one hand, theoretical and empirical research and analysis can help to aggregate factual information, contribute insights, and generally enrich the debate and deepen our understanding of the possibilities and pitfalls inherent in constitutional amendment procedures and their exercise. On the other hand, theoretical comparisons can sometimes be superficial and invidious in that they too often fail to take into account significant elements of context, history, and the prevailing political or legal culture. Occasionally, such comparisons also ignore or misapprehend the relevant domestic jurisprudence or misunderstand the technical meaning of the formal rules themselves.

II. THE COMPLEXITY OF CONSTITUTIONAL AMENDMENT IN CANADA: TWO RECENT EXAMPLES

A. The Succession to the Throne Act, 2013

Two recent examples in the Canadian context may assist in demonstrating this phenomenon. The *Succession to the Throne Act, 2013*,⁷ containing a preamble and a sole provision, is a statute that is elegant in its simplicity. It was meant, nothing more and nothing less, to signify the Parliament of Canada’s assent in principle to alterations in the law pertaining to royal succession, which changes were being proposed in a legislative bill, the *Succession to the Crown Act*, which was then pending before the Houses of the United Kingdom Parliament.

⁶ *Ibid.*

⁷ SC 2013, c 6.

However, that simplicity belied its potential for controversy in some constitutional circles, and particularly, in some of the halls of academia. The validity of the Canadian legislation was challenged by two law professors at Laval University, supported by an Australian academic as an expert witness, and, in commentary, by several other academics and political scientists. Their principal line of argument was that the rules of royal succession were entrenched in the Constitution of Canada and that the Canadian statute was in purpose and effect a constitutional amendment in relation to the office of the Queen, and thus subject to the unanimous consent procedure set out in section 41 of the *Constitution Act, 1982*.⁸

The position of the Attorney General of Canada, who successfully defended the constitutional validity of the legislation at trial and again on appeal,⁹ was that the *Succession to the Throne Act, 2013*, did not purport to amend, nor did it in fact or effect amend, the Constitution of Canada in relation to the office of the Queen. It was, like its predecessor, the *Succession to the Throne Act of 1937*, the fruit of the exercise of the Parliament of Canada's general and residuary power to make laws for the peace, order, and good government of Canada pursuant to the opening words of section 91 of the *Constitution Act, 1867*.¹⁰ Alternatively, if the Act was indeed characterized as a formal constitutional amendment, then it was an amendment authorized by section 44 of the *Constitution Act, 1982*, which grants to the Parliament of Canada the power to make laws amending the Constitution of Canada in relation to the executive

⁸ For a helpful encapsulation, see Canada, Parliamentary Information and Research Service, *Legislative Summary of Bill C-53: Succession to the Throne Act, 2013*, by Michel Bédard, Publication No 41-1-C-53-E (Ottawa: Library of Parliament, 30 August 2013).

⁹ *Motard c Canada (Procureur général)*, 2016 QCCS 588, Bouchard JSC, aff'd 2019 QCCA 1826, Rancourt JA (*coram* Kasirer, Gagnon & Rancourt JJA), leave to appeal to SCC refused, 38986 (23 April 2005). For more detailed accounts, see Warren J Newman, "Some Observations on the Queen, the Crown, the Constitution, and the Courts" (2017) 22:1 *Rev Const Stud* 55; Warren J Newman, "The Succession to the Throne in Canada" in D Michael Jackson, ed, *Royal Progress: Canada's Monarchy in the Age of Disruption* (Toronto: Dundurn Press, 2020); Benoît Pelletier, «La validité de la Loi de 2013 sur la succession au trône» (2017) 49:2 *Ottawa L Rev* 33.

¹⁰ (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

government of Canada (subject to the special protection afforded to the office of the Queen by section 41).¹¹

It would be impossible—without a profound knowledge of the Canadian political, historical, and constitutional context; of Canada’s evolving relationship as a colony within the British Empire and subsequently a Dominion within the British Commonwealth of Nations, and then ultimately a fully sovereign state; of the preambles and provisions of the *Constitution Act, 1867* and the *Statute of Westminster, 1931*; of the relevant Canadian statutory precedents of 1937, 1947, and 1953; of the provisions of the *Canada Act 1982*, including the *Constitution Act, 1982*; of the jurisprudence of the Supreme Court of Canada; and of the central role played by underlying constitutional principles and conventions in this particular case—to come to an intelligible assessment as to the status of the *Succession to the Throne Act, 2013* with regard to the Canadian constitutional framework, and as to whether, in Canadian or even comparative terms, this statute constituted a constitutional amendment.

B. The proposed amendments to “the constitution of the province” of Quebec

The second example is the recent introduction, in the Quebec National Assembly, of a bill which would, *inter alia*, amend the *Constitution Act, 1867* to insert provisions in Part V dealing with “Provincial Constitutions” to set out, under a new, additional sub-heading, two fundamental characteristics of Quebec: that Quebeckers form a nation, and that French is the only official language of the province and the common language of the Quebec nation.¹² This legislative proposal immediately provoked a great deal of commentary and debate, both journalistic and academic, particularly outside of Quebec. Much of that controversy was premised on equating this to an amendment that would be entrenched within the Constitution of Canada, and its interpretive effect to something akin to the Meech Lake Constitutional Accord’s “distinct society” clause, or even an implied amendment to fundamental

¹¹ *Constitution Act, 1982*, *supra* note 1, s 44.

¹² Bill 96, *An Act respecting French, the official and common language of Québec*, 1st Sess, 42nd Leg, Quebec, 2021 (introduced in the Quebec National Assembly by the Minister Responsible for the French Language, Simon Jolin-Barrette, in April 2021). See clause 159, which would amend Part V of the *Constitution Act, 1867*.

provisions such as section 133 of the *Constitution Act, 1867*, which the Supreme Court has held guarantees “official status” to both English and French in the laws, legislature and courts of Quebec, just as section 23 of the *Manitoba Act, 1870* guarantees the use of those languages in relation to the laws, legislature and courts of that province.¹³

However, this is, once again, to belie the subtlety and complexity of the amending procedures. In introducing its proposed amendment to the *Constitution Act, 1867*, the government of Quebec is relying on the legislative authority expressly conferred on the legislature of each province by section 45 of the *Constitution Act, 1982*, to “make laws amending the constitution of the province.”¹⁴ This legislative power, which has existed since 1867, was employed prior to 1982 to enact organic legislation as well as to alter and in some cases, effectively repeal, indirectly, certain provisions of the *Constitution Act, 1867*, including those establishing the legislature’s upper house, the Legislative Council, which was abolished in 1968 by an ordinary legislative enactment.¹⁵ That said, this unilateral power of amendment is necessarily of narrow compass: it cannot, for example, be employed to affect the office and constitutional powers of the Lieutenant Governor,¹⁶ to alter provisions (such as those relating to the distribution of legislative powers) which are essential to the implementation of the federal principle, or to amend provisions that constitute a fundamental term or condition of the union (such as sections 93 and 133).¹⁷ Nor can this legislative authority “comprise the power to bring about a profound constitutional upheaval by the introduction of

¹³ See *Attorney General of Quebec v Blaikie et al*, [1979] 2 SCR 1016 [*Blaikie*] (“s. 133... not only provides but requires that official status be given to both French and English in respect of the printing and publication of the Statutes of the Legislature of Quebec” at 1022); *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032 [*Forest*]; *Re Manitoba Language Rights*, [1985] 1 SCR 721 (“[i]f more evidence of Parliament’s intent is needed, it is necessary only to have regard to the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, which was to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike” at 739).

¹⁴ *Constitution Act, 1982*, *supra* note 1, s 45.

¹⁵ *An Act respecting the Legislative Council of Quebec*, SQ 1968, c 9.

¹⁶ *In re Initiative and Referendum Act*, [1919] AC 935.

¹⁷ *Blaikie*, *supra* note 13; *Forest*, *supra* note 13; *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 [OPSEU].

political institutions foreign to and incompatible with the Canadian system,”¹⁸ or *a fortiori*, to purport to authorize a unilateral declaration of independence and thereby, the unilateral secession of a province from the Canadian federation.¹⁹

Quebec’s proposed measures are likely to be read—or to be read down—as being no more and no less than amendments to “the constitution of the province,” within the meaning of section 45 of the *Constitution Act, 1982* and the scope of Part V (“Provincial Constitutions”) of the *Constitution Act, 1867*.²⁰ They do not purport to amend—nor can they amend—the scope or effect of the provisions of “the Constitution of Canada” within the meaning embraced by the four other amending procedures set out in Part V of the *Constitution Act, 1982*. Section 133 of the *Constitution Act, 1867*, is irrefutably an entrenched provision,²¹ alterable only through resort to the unanimous consent procedure of section 41 of the *Constitution Act, 1982* as respects the use of English and French in relation to records, journals and debates of the Houses of Parliament, their use in the enactment and promulgation of the Acts of

¹⁸ OPSEU, *supra* note 17 at 47, Beetz J. See *Reference re Senate Reform*, 2014 SCC 32 at paras 46–48 [*Senate Reform Reference*]; Warren J Newman, “Defining the ‘Constitution of Canada’ Since 1982: The Scope of the Legislative Powers of Constitutional Amendment under Sections 44 and 45 of the *Constitution Act, 1982*” (2003) 22 SCLR (2d) 423.

¹⁹ *Reference re Secession of Québec*, [1998] 2 SCR 217 [*Québec Secession Reference*]; *Henderson c Procureur général du Québec*, 2021 QCCA 565, Mainville JA (*coram*: Hilton, Mainville & Sansfaçon JJA; judgment rendered 9 April 2021) [*Henderson*].

²⁰ In *Henderson*, *ibid*, the Quebec Court of Appeal effectively read down the broadly-worded declaratory provisions of Quebec’s Bill 99, *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, 1st Sess, 36th Leg, Quebec, 2000 (assented to 13 December 2000), SQ 2000, c 46, to restrain the potential scope and application of the provisions to matters within the constitutional limits of the legislative authority of the province. In so doing, the Court of Appeal nuanced the Superior Court’s reasons and conclusions and made it clear that that the provisions of the Act cannot be employed at some future stage as a framework for unilateral secession or to support other unconstitutional actions.

²¹ *Re Manitoba Language Rights*, *supra* note 13 (“[t]he fundamental guarantees contained in the sections in question [s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*] are constitutionally entrenched and are beyond the power of the provinces of Quebec or Manitoba to amend unilaterally: *Blaikie No. 1*, *supra*; *Attorney General of Manitoba v. Forest*, *supra*” at 739). See also OPSEU, *supra* note 17.

Parliament, and their use in proceedings before the courts of Canada; and as respects their use in the legislature, legislative enactments and courts of Quebec, by the so-called bilateral procedure of section 43 of the *Constitution Act, 1982*. Thus, Quebec's proposed amendment to its provincial constitution declaring French to be the "only" official language of Quebec would have to be read as subject to the equal status afforded English and French in relation to those matters by section 133 of the *Constitution Act, 1867*.

Comparisons with the Meech Lake Accord in regard to this unilateral exercise of self-identification on the part of Quebec are also misleading. The *Constitution Amendment, 1987*, which was the subject of the multilateral amending procedures engaged between 1987 and 1990, would have added a new section 2 to the *Constitution Act, 1867*, to provide, as an express rule of construction, that the whole of the "Constitution of Canada shall be interpreted in a manner consistent with" Canada's English and French linguistic duality as "a fundamental characteristic of Canada" and Quebec's "distinct society," as well as setting out the respective roles of Parliament and the provincial legislatures in that regard.²² The current Quebec measures would not have the same broad ambit or specific interpretive effect on the provisions of the Constitution of Canada. Nor would Quebec's new provisions be entrenched as part of the Constitution of Canada, as some commentators have claimed: what can be enacted by one provincial legislature under the unilateral power of legislative amendment can, pursuant to the principle of parliamentary sovereignty, be amended or repealed unilaterally by a subsequent legislature, acting under the same power. To entrench provisions in the Constitution of Canada by way of constitutional amendment, one has to put them beyond the reach of legislative majorities at either the federal (section 44) or the provincial (section 45) level, by resort to the bilateral or multilateral procedures (sections 38 to 43 of the *Constitution Act, 1982*) in order to protect the provisions in question from unilateral amendment.

It is true that Quebec's proposed amendments would seek to amend the *Constitution Act, 1867* expressly by the addition of two new sections, 90Q.1 and 90Q.2, and that a direct amendment to the text of the

²² Meeting of the First Ministers on the Constitution, *The 1987 Constitutional Accord* (Ottawa: 3 June 1987), Schedule, proposed *Constitution Amendment, 1987*, clause 1 [Meech Lake Accord].

Constitution Act, 1867 by way of the unilateral provincial amending procedure is, to date, unprecedented. As well, the *Constitution Act, 1867* is part of the Constitution of Canada, as defined by section 52 of the *Constitution Act, 1982* and its schedule. Nevertheless, Part V of the *Constitution Act, 1867* is concerned with “Provincial Constitutions,” and has been subject to indirect amendment by the unilateral provincial procedure (except as concerns the office of the Lieutenant Governor, which has always been protected from unilateral amendment).

The hesitancy to amend the *Constitution Act, 1867* directly by the provincial unilateral procedure prior to 1982 can be explained, at least in part, by the fact that the *British North America Act* was a statute enacted by the Imperial Parliament. With the enactment of the *Canada Act 1982* and the relinquishment, by the United Kingdom Parliament, of its legislative authority in relation to Canada, the *Constitution Act, 1867* is now fully amendable domestically. Indeed, in *Re Eurig Estate*, Justice Major, writing for a majority of the Supreme Court, stated that the supremacy clause in subsection 52(1) of the *Constitution Act, 1982* “effectively requires any provincial legislation that seeks to amend the constitution of the province to do so expressly,”²³ and in the *Senate Reform Reference*, the Court observed that the “limited ability” of the Parliament of Canada and the provincial legislatures to amend unilaterally “certain aspects of the Constitution that relate to their own level of government,” without engaging the interests of the other level, “reflects the principle that Parliament and the provinces are equal stakeholders in the Canadian constitutional design.”²⁴

Of course, amendments made by the unilateral exercise of the federal and provincial legislative authority conferred by sections 44 and 45, respectively, of the *Constitution Act, 1982*, cannot “alter the fundamental nature and role of the institutions provided for in the Constitution.”²⁵ Recognition of diversity and identity, but also the preservation of the basic

²³ *Eurig Estate (Re)*, [1998] 2 SCR 565 at para 35 [emphasis in original]. This requirement of express amendment would extend to statutes effectively amending provisions of the *Constitution Act, 1867*, but not necessarily to other provincial legislation of an organic (i.e. “constitutional”) nature such as that which was examined in the *OPSEU* case, *supra* note 17.

²⁴ *Senate Reform Reference*, *supra* note 18 at para 48.

²⁵ *Ibid.*

constitutional structure, fundamental terms of union, the implementation of the federal principle (notably through the distribution of legislative powers); respect for entrenched provisions, rights, duties, and principles protected by the other amending procedures, as well as the value of maintaining consistency and coherency across the array of constitutional provisions and texts, would all be factors at play, as cases such as the *Senate Reform Reference* and *OPSEU* demonstrate.²⁶

Naturally, the subtlety and complexity of amending procedures alone should not—and if experience with the examples just outlined is anything to go by, does not—intimidate constitutional scholars of every discipline from examining and assessing whether a constitutional amendment has been undertaken, is warranted, or is on dubious legal ground. Complexity should, however, give comparative constitutional scholars pause before pronouncing prematurely, peremptorily, and definitively on these matters, as they may not always have a firm and full grasp of the relevant legal framework and context, and in the field of constitutional amendment, context is everything.

III. SOME OBSERVATIONS ON THE CANADIAN DIMENSION OF PROFESSOR ALBERT'S WORK

Turning back more specifically now to Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, Professor Albert makes a compelling case, in the first substantive and interrogative chapter of his book ("Why Amendment Rules?"), for the varied ends and objects that procedures for constitutional amendment serve, and for

²⁶ It was wise, for example, that the government of Quebec did not attempt to include, amongst its amendment proposals in relation to the *Constitution Act, 1867*, the overly-creative suggestion of one commentator that the term "Secretary General" be substituted for the "Lieutenant Governor" and the "Parliament" for the "Legislature of Quebec." The office of the Lieutenant Governor, including the constitutional status and dignity of the office as well as the constitutional powers associated with it, is protected by section 41 of the *Constitution Act, 1982* and constitutionally, Quebec, like all provinces, has a legislature, even if it is now styled in provincial legislation as the Parliament of Quebec. A rose by any other name might smell as sweet, but there is a formal institutional nomenclature present throughout the provisions of the Constitution of Canada and the constitutions of the provinces that may be seen as a common architectural feature of those constitutionally-entrenched institutions.

distinguishing between those *a priori* rules and the substantive content of a particular amendment:

Constitutional amendment rules... serve formal, functional, and symbolic uses in constitutionalism. They can be used to repair imperfections, distinguish constitutional from ordinary law, entrench rules against easy change, create a predictable procedure for constitutional change, counterbalance the court, promote democracy, heighten public awareness, pacify change, manage difference, and express values. It is important to identify these unique uses because too often we collapse our discussion of amendment rules into the nature of an amendment itself.²⁷

In the second chapter, using sometimes controversial or debatable examples, Professor Albert posits that there is, at least at the fundamental, conceptual level, a normative distinction to be drawn between a properly framed and scoped constitutional amendment and what he calls a “constitutional dismemberment:” the latter being a change so radical and dramatic that “the rules of amendment and dismemberment should differ in their degree of difficulty.”²⁸

For Albert, amendments have a “circumscribed purpose:” whether “corrective, reformative, elaborative, or restorative,” an amendment “must remain coherent with the pre-change constitution.”²⁹ While one can easily grasp the desirability of requiring broader or higher levels of consent to effect more sweeping constitutional changes—and in Canada, Part V of the *Constitution Act, 1982* contemplates such a hierarchy of consent—it is not self-evident that alterations of a profound, structural character are by definition, beyond what one would call constitutional amendments. First, the idea of coherency with the pre-change constitution is, to some degree, a matter of appreciation; one has to have a deep, fixed sense of the characteristics of a given constitution and also a firm view of what aspects of that constitution are to be held to be load-bearing and architectural, if not immutable. Secondly, how much emphasis should be placed on the value, or desideratum, of coherency when a constitution is being altered through formal processes? Is a constitution dismembered—the limbs of the living tree cut off, or the text torn into pieces—when alterations are made

²⁷ Albert, *supra* note 4 at 59.

²⁸ *Ibid* at 92.

²⁹ *Ibid*.

that are not “coherent” with the “pre-change constitution”?³⁰ Is the notion of “dismemberment” meant to convey anything else than a negative and pejorative image of constitutional mutilation? In other words, “dismemberment” is a baggage-laden term that may obscure, rather than reify, what types of constitutional amendment ought to be subject to procedures requiring a broad consensus before proceeding to ratification.

Professor Albert appears to put into question, for example, one of the Supreme Court of Canada’s central findings in the *Quebec Secession Reference*, namely that the secession of a province from Canada, to be undertaken lawfully, would require a constitutional amendment.³¹ He acknowledges that the Court had stated that the amendments necessary to that end could be radical and extensive, which suggests that “Canada’s amendment rules, at least as they have been interpreted by the Supreme Court” should be understood as “codifying procedures for the entire range of possible changes—from minor adjustments to major revisions.”³² However, he goes on to wonder—and given his theme, to doubt implicitly—“whether the Court is correct to claim that a constitutional change as sweeping as Quebec’s secession—a change that would transform the country and its constitution—should be understood as an ordinary constitutional amendment.”³³

Yet whether ordinary or extraordinary, the finding by the Supreme Court that the Constitution of Canada may respond to a desire for change as radical and profound as the secession of a province, and that in this country, a matter as grave as secession may be negotiated within the terms, provisions, and principles of the constitutional framework, through the Constitution’s multilateral amending procedures, is salutary for constitutionalism and the rule of law;—as well as for the peaceful accommodation of clear expressions of democratic will, in a carefully balanced manner that takes into account concurrent interests, including federalism and the protection of minorities. It seems beside the point to characterize such an amendment (or amendments, as the case might be) as

³⁰ *Ibid* at 80.

³¹ *Ibid* at 65; and see *Quebec Secession Reference*, *supra* note 19 at paras 84, 87–88.

³² Albert, *supra* note 4 at 65.

³³ *Ibid* at 65–66. On page 91, he is more definitive in including secession in Canada as amongst the “examples of constitutional dismemberment” that he has invoked in this chapter.

“more than an amendment,” or to conclude, *a priori*, that a secession amendment would not “cohere with the existing constitution,” or would not “keep the constitution consistent with its pre-change form.”³⁴

Not that Professor Albert actually concludes that that would be the case; his comparative examples (including secession) seem, for the most part, to be evocative, rather than conclusive, and to feed the germ of the idea, discussed in the balance of the chapter, that a constitutional “dismemberment” involves “a fundamental transformation of one or more of the constitution’s core commitments” that is “incompatible with the existing framework of the constitution;” whereas a constitutional amendment “does not go nearly as far because, properly defined, it keeps the altered constitution coherent with its pre-change identity, rights, and structure.”³⁵

Professor Albert states that this “theory of constitutional dismemberment is not rooted in a normative understanding of the constitution.” Rather, he takes constitutions as he finds them: “What matters is the present constitutional settlement and how changes are made to it. Constitutional dismemberment takes no prior view of what a constitution should do, entrench, or protect.”³⁶

A constitution, then, may be dismembered either to improve liberal democratic outcomes or to weaken them. We can accordingly speak of the dismemberment of the Turkish Constitution from democratic to authoritarian, just as we can interpret the Reconstruction Amendments as dismembering the infrastructure of slavery in the U.S. Constitution.³⁷

So, when is a constitutional amendment “more than an amendment” and instead a “dismemberment”? Professor Albert answers:

³⁴ *Ibid* at 82. For a deeply thoughtful and persuasive, comparative account of why not just authoritarian but also democratic states are averse to countenancing unilateral secession, see Stéphane Dion, “Democracy Against Unilateral Secession” in André Blais et al, eds, *Across Boundaries: Essays in Honour of Robert A. Young* (Kingston & Montreal: McGill-Queen’s University Press, 2021) 83 at 83–112. Ambassador (and former Professor) Dion was the federal Minister responsible for the Canadian unity question in the aftermath of the October 1995 Quebec referendum and also the sponsoring Minister for the *Clarity Act* (mentioned *infra* note 48).

³⁵ Albert, *supra* note 4 at 84.

³⁶ *Ibid*.

³⁷ *Ibid* at 85.

When reformers transform the constitution while seeking to retain legal continuity, whether by altering a fundamental right, a central structure, or a core feature of constitutional identity.³⁸

How does this add to our normative understanding of what is required when constitutional change is contemplated or effected on an “extraordinary scale”? Professor Albert affirms that given that a “dismemberment” is transformative, changing a constitution “beyond its natural bounds into an altogether new form as to rights, structure, or identity;”³⁹ therefore:

the execution and legitimation of a constitutional dismemberment should require a greater degree of consent than a constitutional amendment.⁴⁰

Returning to the secession example in Canada, how does Part V of the *Constitution Act, 1982*, with its sliding scale of necessary federal and provincial levels of consent, not meet that criterion? Professor Albert does not answer that underlying question.

Instead, in the next chapter, dealing with measuring amendment difficulty, he makes a strong case for classifying Canada’s amending procedures as coming in at “a very close second” on a formal scale of complexity, noting that the general, multilateral procedure’s threshold is “no doubt difficult to satisfy,” and then emphasizing that “Canada codifies an even harder threshold requiring approval in both houses of Parliament and in each and every provincial assembly,” the Constitution thereby requiring “reformers to satisfy this procedure to amend its most important rules.”⁴¹

Professor Albert rightly acknowledges that besides the general, default procedure and the unanimous consent procedure in sections 38 and 41, Part V of the *Constitution Act, 1982* is “even more complicated” in that Canada’s “escalating structure of formal amendment creates three more amendment thresholds,” through the one-or-more-but-not-all-provinces procedure set out in section 43, and the unilateral federal and provincial procedures in sections 44 and 45.⁴² He evokes the possibility that these

³⁸ *Ibid* at 91.

³⁹ *Ibid* at 92

⁴⁰ *Ibid* [emphasis added].

⁴¹ *Ibid* at 108.

⁴² *Ibid* at 109.

“escalating amendment thresholds” may be “less complementary than competing,” and therefore, “the uncertainty they generate as to which amendment threshold ought to be used for a particular constitutional change is itself a feature that aggravates amendment difficulty.”⁴³ He points, for example, to the recent efforts at Senate reform and injecting a modicum of democratic accountability into Senatorial selection, in which the government of the day favoured the proposed enactment of statutory measures over a formal constitutional amendment made pursuant to the complex, multilateral procedure under section 38.⁴⁴ He notes, not without reason, that the “complex design of Canada’s formal amendment rules may in fact discourage reformers from pursuing constitutional change through the normal channels of formal amendment;” instead, such complexity may impel them to seek what he considers to be “unconventional and irregular methods of informal amendment” to modernize the Constitution.⁴⁵

One can take issue with this last characterization; Canada has a long history of informal amendment, both through the development of unwritten conventions governing constitutional practices, and through the enactment of organic, quasi-constitutional legislation. However, for present purposes, “[t]he point here is that the complexity of whole formal amendment design packages may itself be a significant source of amendment difficulty that has so far not been quantified in studies of constitutional rigidity,”⁴⁶ and with that observation we can readily agree.

As has already been illustrated above, Professor Albert has done a masterful job in weaving, effortlessly and often, the complex strands of Canadian constitutional amendment narratives into a much broader and elegant comparative tapestry, rendering—and this is no mean feat—Canada’s recent constitutional history accessible, relevant, and engrossing for a cosmopolitan audience. Much of what he writes is also, of course, germane for Canadian scholars seeking to read about Canada’s constitutional experience against a larger backdrop of shared

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 110; and see *Senate Reform Reference*, *supra* note 18.

⁴⁵ Albert, *supra* note 4 at 110.

⁴⁶ *Ibid.*

constitutional ideas about the nature and processes of constitutional evolution, reform, alteration, and transformation.

However, much of this Canadian-based interpolation into a more universal whole requires a closer examination. This is not something that should be seen as mere caviling from a parochial, inward-looking corner, but ought rather to be approached as a good-faith continuation of the dialectal dialogue that Richard Albert, as a fine scholar with a catholic and diversified outlook, wishes to encourage in relation to these matters.

Professor Albert closes his chapter on measuring amendment difficulty with criticism of the resort, in Canada, to federal, provincial, and territorial legislation providing for referenda on constitutional questions, the enactment of the regional veto legislation⁴⁷ and the *Clarity Act*,⁴⁸ as well as the Supreme Court of Canada's opinion in the *Supreme Court Act Reference*,⁴⁹ which had the effect of confirming, without formal constitutional amendment, the constitutional entrenchment of the Court's fundamental features. He also criticizes the Court's resort to unwritten constitutional principles in its analysis of the Canadian constitutional framework in the *Quebec Secession Reference*. His global criticism is that the "extra-textual requirements imposed by judicial decisions, parliamentary and provincial statutes, and arguably also by constitutional convention," amount to "uncodified rules" which, when layered upon "the codified rules of change," make "major constitutional reform virtually impossible in Canada." Furthermore, "none of these uncodified reforms to the codified rules were made the way the constitution requires: by formal amendment."⁵⁰

There is much to be said for Albert's critical analysis, and many other constitutional scholars have formulated similar critiques, but some of these points and the premises upon which they rest ought to bear closer scrutiny. To begin with, take the concern expressed about organic statutes such as the regional veto and federal or provincial referendum legislation:

⁴⁷ *An Act respecting constitutional amendments*, SC 1996, c 1.

⁴⁸ *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26.

⁴⁹ *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21 [*Supreme Court Act Reference*].

⁵⁰ Albert, *supra* note 4 at 128.

These laws risk eroding the distinction between the Constitution of Canada and a statute that is legally inferior to it. What makes the constitution *a constitution* is that it enjoys a higher status relative to a statute, that it is more difficult to amend than a statute, and that a statute is derivative of the constitution. These parliamentary, provincial, and territorial statutes affecting constitutional amendment now exercise a constitution-level constraint on the constitution's rules for formal amendment. The problem, however, is that these statutes have not earned their special status through the channels the constitution requires for achieving constitutional status.⁵¹

There is no gainsaying the legal fact that the Constitution of Canada, as defined in relation to the amending procedures set out in Part V of the *Constitution Act, 1982*, is as section 52 of the Act provides, the “supreme law of Canada,” and that a statute that is inconsistent with the provisions of the Constitution of Canada (as defined by section 52 and the schedule to the Act) will be declared by the courts to be of no force or effect. These statutes do not, therefore, have constitutional status, or even a special status beyond being statutes of an organic or constitutional nature, in the sense adverted to by Justice Jean Beetz of the Supreme Court in the *OPSEU* decision.⁵² As ordinary statutes, they cannot contradict with impunity the supreme law of the Constitution of Canada, including the rules and provisions respecting constitutional amendment set out in Part V of the *Constitution Act, 1982*. What such statutes can do is to complement or advance the implementation of constitutional provisions, principles, or values, without necessarily rising to the level of formal constitutional amendments and attracting the application of the more complex and onerous amending procedures.⁵³

⁵¹ *Ibid* at 130–31 [emphasis in original].

⁵² *OPSEU*, *supra* note 17 at 38–39:

is the enactment constitutional in nature? In other words, is the enactment in question, by its object, relative to a branch of the government of Ontario or, to use the language of this Court in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1024, does “it [bear] on the operation of an organ of the government of the Province”? Does it for instance determine the composition, powers, authority, privileges and duties of the legislative or of the executive branches or their members? Does it regulate the interrelationship between two or more branches? Or does it set out some principle of government?

⁵³ For further elucidation of the important, useful and legitimate role played by constitutional, quasi-constitutional and organic statutes, see Warren J Newman, “Constitutional Amendment by Legislation” in Macfarlane, *supra* note 3 at 105–25.

Moreover, what makes the Constitution of Canada a constitution is not simply its higher status relative to ordinary statutes, or that it is normally more difficult to amend than an ordinary statute,⁵⁴ or that the enactment of a statute derives from a legislative power conferred by the Constitution itself. There is a more venerable and comprehensive definition of a constitution beyond simply being supreme law. At the front end of our constitutional-law bookshelf, we find, in the preamble to the *Constitution Act, 1867*, that Canada was to have “a Constitution similar in Principle to that of the United Kingdom.”⁵⁵ That Constitution, as the Supreme Court explained in the *Patriation Reference*⁵⁶ and again in *OPSEU*,⁵⁷ is not a comprehensive, master document or instrument, but a long series of provisions and rules, written and unwritten, derived from statute and common law, and law, principle and convention. It is this uncodified and largely organic constitutional tradition that has exercised great influence on the interpretation and the operation of the Canadian constitutional structure and machinery.⁵⁸ It is also an important source of the Supreme Court’s resort to unwritten constitutional principles in the *Quebec Secession Reference*. A comparative constitutional study that omits a searching analysis of the importance of the British constitutional tradition in contributing to the development of Canadian constitutionalism will fail to provide readers with a full and accurate picture.

Professor Albert is keenly aware of the role played in Canada by constitutional principles, conventions, and ordinary statutes that have no claim to constitutional status yet are nonetheless constitutional in character, but perhaps more of a historical or contextual explanation

⁵⁴ Leaving aside, for the nonce, the place of the unilateral amending procedures set out in ss. 44 and 45 of the *Constitution Act, 1982*, which do permit certain constitutional amendments—even certain formal and express ones—to be made by ordinary legislation.

⁵⁵ *Constitution Act, 1867*, *supra* note 10, preamble.

⁵⁶ *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 876–78.

⁵⁷ *OPSEU*, *supra* note 17 at 37–39.

⁵⁸ For two recent, excellent accounts by Dean Walters of Queen’s University, see Mark D Walters, “The British Legal Tradition in Canadian Constitutional Law” in Oliver, Macklem & Des Rosiers, *supra* note 3 at 105–24; and Mark D Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge, UK: Cambridge University Press, 2020).

could have been given in this part of the book, although not an easy feat to accomplish, given the amount of attention he has already devoted to Canada in this sweeping and global portrait. The point remains nonetheless that however much Canada's written constitution resembles that of the United States—a division of legislative powers between federal and local legislatures, a supremacy clause, an entrenched bill of rights, written amending procedures—in its monarchical and parliamentary institutions and underlying constitutional principles, conventions and traditions, the Constitution of Canada has inherited much from the United Kingdom.

Thus, in speaking of the Constitution's "codified amendment rules" and "uncodified changes to formal amendment rules" (both expressions are employed throughout this part of Professor Albert's analysis), one might lighten one's analysis by recognizing that Canadian constitutionalism is open, to some degree, to accommodating both. One of the reasons is that these statutes may go some additional distance towards protecting certain provisions, principles, rights, values, or institutions, and since Canada's constitutional amending procedures serve the dual purpose of not only permitting constitutional change but protecting against it in certain circumstances, one ought not to condemn these legislative attempts at enhancement or experimentation *a priori*, without further study of the dynamics.

Professor Albert is right to insist on the role of the amending procedures as "gatekeepers to the codified text:" constitutional amendment rules "specify procedures for altering the constitution, with instructions on who may exercise the amendment power, how an amendment may be initiated, where it must be ratified, when an amendment proposal becomes effective, and what within the text is susceptible to change."⁵⁹ He is also correct in stating that "[m]odern constitutionalism has given us good reason to celebrate the written tradition in which the rules of formal amendment are anchored."⁶⁰ We can also lament, as the late, great Professor Peter Hogg did,⁶¹ the Supreme

⁵⁹ Albert, *supra* note 4 at 136.

⁶⁰ *Ibid* at 137.

⁶¹ Peter W Hogg, "Senate Reform and the Constitution" (2015) 68 SCLR (2d) 591 ("[t]he Court is actually remarkably frank about its unorthodox interpretative process.... If it is interpretation, then, in my view, it is the wrong way to interpret a

Court's apparent suggestion that the written amending procedures are simply "guides" for creative judicial interpretation,⁶² rather than a blueprint with clear directives.⁶³ As I wrote in the aftermath of the *Senate Reform Reference*, Part V of the *Constitution Act, 1982* is fundamentally a rules-based part of the Constitution, not a series of broadly-textured and open-ended provisions admitting of infinite variations on an impressionist theme. It is important for political actors devoting valuable time and resources to constitutional design to know in advance, with some degree of reasonable certainty, the scope and application of the formal procedural requirements for constitutional change. A rule that is so vague, contingent, or indeterminate as to be unpredictable and thus, practically speaking, unknowable, is no rule at all.⁶⁴

That said, Professor Albert's critique of the Supreme Court's companion opinion in the *Supreme Court Act Reference* (which was rendered one month before the Court's ruling in the *Senate Reform Reference*) is somewhat overstated in that it is at variance in one material respect with the actual outcome. He states that the Court declared that its own essential features, including the Court's jurisdiction as the final general court of appeal for Canada, notably in matters of constitutional interpretation, and its judicial independence, "cannot be amended outside of the unanimity procedure."⁶⁵ He commends the Court for clarifying "the ambiguity in the text as to whether the Court's essential features are amendable using either the default multilateral amendment procedure or the unanimity procedure," but underscores that:

the Court's chosen interpretation is not mandated by the constitutional text, which states only that amendments to 'the composition of the Supreme Court of

constitutional text as detailed as Part V of the *Constitution Act, 1982*" at 605).

⁶² *Ibid* at 607 (Hogg actually characterized this as "radical reconstruction").

⁶³ *Senate Reform Reference*, *supra* note 18 ("[t]he words employed in Part V are guides to identifying the aspects of our system of government that form part of the protected content of the Constitution" at para 64).

⁶⁴ Warren J Newman, "Putting One's Faith in a Higher Power: Supreme Law, the *Senate Reform Reference*, Legislative Authority and the Amending Procedures" (2015) 34:2 NJCL 99 at 110 (making substantially the same point).

⁶⁵ Albert, *supra* note 4 at 133.

Canada' shall require the unanimity threshold and that most other amendments to the Court must satisfy the lower default multilateral amendment procedure.⁶⁶

He adds that “[t]he skeptical reading of the *Supreme Court Act Reference* suggests that the Court has chosen for strategic purposes to make it even harder to make amendments to the Court than the constitution requires.”⁶⁷

Yet in point of fact, the Supreme Court did not find that the unanimous consent procedure applies to any feature of the Court besides its “composition” (which, the Court held, includes the eligibility requirements for appointment to the Court as they existed in 1982).⁶⁸ The Court hewed to the basic structure of the amending procedures by holding that its other essential features are protected by the general amending procedure, not the unanimity procedure.⁶⁹ Moreover, the Court left room for the continuing operation of Parliament’s legislative authority, under section 101 of the *Constitution Act, 1867*, in relation to the Court and the *Supreme Court Act*, as long as that power is exercised “to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court.”⁷⁰

Putting aside the occasional over-generalization and the hidden devil in the details, Richard Albert’s book contains many valuable analytical insights and promising methodological approaches for Canadian constitutional scholars and global comparativists alike. His discussion reminding us of the multiple factors at play in the failure to ratify the

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Supreme Court Act Reference*, *supra* note 49 at paras 91, 93, 104–05.

⁶⁹ *Ibid* at para 94:

Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all the provisions of the *Supreme Court Act*... These essential features include, at the very least, the Court’s jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

⁷⁰ *Ibid* at para 101. “As a result, what s. 101 now requires is that Parliament maintain—and protect—the essence of what enables the Supreme Court to perform its current role” (*ibid.*). For the genesis of this three-tiered approach to reforming and maintaining the Court, see Warren J Newman, “The Constitutional Status of the Supreme Court of Canada” (2009) 47 SCLR (2d) 429, notably at 440–43.

Meech Lake and Charlottetown Constitutional Accords is illuminating,⁷¹ as his hypothesis that constitutional amendment proposals are more likely to be held to be invalid in reference opinions than actual constitutional amendments that have already been authorized, enacted, or proclaimed, and only then challenged in court.⁷² Drawing on the *Patriation Reference*, the *Quebec Secession Reference*, the *Senate Reform Reference*, and the *Supreme Court Act Reference*, he offers this highly perceptive analytical insight:

Pre-ratification review of constitutional amendment gives the Supreme Court of Canada considerable power. It allows the Court to achieve the same result that foreign courts achieve when they invalidate a duly-passed constitutional amendment. Yet the Canadian Court avoids having to nullify the expressed will of the people and their elected representatives. This makes it less likely that the Court will fear the consequences of defying popular will and more likely that the Court will feel liberated to review the amendment question on the merits without worrying about the fallout from undoing an amendment that has already been promulgated with the support of the people. Pre-ratification review in Canada relieves the Court of the pressure it might otherwise feel to approve a popularly supported amendment—one that has survived the veto gates in the amendment process and by the fact of its survival enjoys a considerable measure of legal and sociological legitimacy. Put another way, pre-ratification review frees the Court to do what other courts do when they invalidate an amendment, but without confronting the strongest version of the countermajoritarian critique that faces any court daring to invalidate a promulgated constitutional amendment.⁷³

In the penultimate chapter of the book,⁷⁴ Professor Albert examines how constitutional designers and drafters record amendments: “The *how* concerns whether to keep the superseded text or to strike it altogether, and the *where* involves whether to integrate the amendment into the original text or to codify it elsewhere.”⁷⁵ He describes four models of codification: the appendative model (typified by the Constitution of the United States); the disaggregative model (exemplified by the Constitutions of the United

⁷¹ Albert, *supra* note 4 at 165–68 (chapter 4, “The Three Varieties of Unamendability”); see also the further discussion *ibid* at 209–10.

⁷² *Ibid* at 223–26 (this hypothesis is developed in the final portion of chapter 5, “The Architecture of Constitutional Amendment,” subtitled, “Pre-Ratification Review in Canada”).

⁷³ *Ibid* at 226.

⁷⁴ *Ibid* at 229–60 (chapter 6, “Finding Constitutional Amendments”).

⁷⁵ *Ibid* at 229 [emphasis in original].

Kingdom, New Zealand, and Israel); the integrative model (illustrated by the Constitution of India); and the invisible model (the approach taken in relation to the Constitution of Ireland).⁷⁶ For Albert, the Constitution of Canada is “both disaggregative and integrative;” a “hybrid model of codification.”⁷⁷

It is disaggregative like the British Constitution because there is no single master text constitution in Canada to which amendments must be made and in which all amendments appear.... Yet the Constitution of Canada also simultaneously takes the integrative approach to codifying change. When an amendment is made to one of its many disaggregated constitutional items, the constitution records the change directly in the text of the act or order, accompanied by an explanatory footnote indicating what in the original constitutional item was changed, and when the change was made.⁷⁸

Would that it were so; the helpful footnotes in question are actually not part of the Constitution of Canada, but simply the part of the collective efforts of the legislative drafters and constitutional law advisers in the Department of Justice of Canada, who beginning with the late Dr. E. A. Driedger, have compiled and maintained an office consolidation of the *Constitution Acts, 1867 to 1982*, that is published and updated from time to time under the auspices of the Department.⁷⁹

There is, however, much to be commended in Richard Albert’s typology of how constitutional amendments are presented, integrated, or

⁷⁶ *Ibid* at 230-40.

⁷⁷ *Ibid* at 246.

⁷⁸ *Ibid* at 246-47 (“The Canadian Hybrid Model of Constitutional Change”).

⁷⁹ The most recent consolidations prepared by the Department of Justice—*Consolidation of the Constitution Acts, 1867 to 1982*, and *Consolidation of the Constitution Acts, 1867 to 1982* (1990 Report Version)—may be consulted on the Justice Laws Website, in both html and PDF, bilingually-formatted versions, and are current to January 1, 2021. See “Constitutional Documents” (last modified 12 August 2021), online: *Justice Laws Website* <laws-lois.justice.gc.ca/eng/Const/Const_index.htm> [perma.cc/7E4A-TM9W]; “Constitutional Documents (1990 Report Version)” (last modified 12 August 2021), online: *Justice Laws Website* <laws-lois.justice.gc.ca/eng/ConstRpt/Const_index.html> [perma.cc/ZEX7-3J4L]. The “1990 Report Version” includes the French version of the *Constitution Act, 1867* that was presented by the French Language Drafting Committee in its Final Report and tabled by the Minister of Justice in December 1990. It has been updated by the Department of Justice to include amendments to the Act made since 1867, and notably since the tabling of the Report in 1990, but it remains an administrative consolidation.

otherwise codified in relation to the original text. Indeed, in the Canadian context, the ambitious project inherent in section 55 of the *Constitution Act, 1982*—of preparing and enacting an official French version of those parts of the Constitution of Canada that were originally enacted solely in English by the United Kingdom Parliament (or passed by the Queen in Council only in English) might one day present an opportunity for examining the possibility (and potential advantages) of enacting a more fully codified Constitution of Canada.⁸⁰

IV. CONCLUSION

In his brief, final chapter, “The Rules of Law,” Richard Albert summarizes the normative ordering, typologies, and analytical methods he favours and has brought to bear throughout the book, and embarks on charting “a general roadmap to build the rules of amendment for any codified constitution.”⁸¹ Constitutional designs and blueprints have hitherto neglected, in too many cases, one of the most pivotal features of constitutionalism: each constitution’s rules for amendment.

No part of a constitution is more important than its rules of change. Reformers can use them to enhance or weaken democracy, to expand or retrench rights, and to improve or indeed destroy the constitution itself. Constitutional designers must accordingly be especially careful when they construct the rules of amendment. These rules set the default standard for what counts as a valid change, who may initiate and ratify it, what threshold of agreement is required and how long lawmakers have to reach it, and whether anything in the constitution should be unchangeable.⁸²

Professor Albert closes with a plea for the “democracy-enhancing virtues” of formal constitutional amendment rules. Adherence to the rules also buttresses the constitution and the rule of law, while circumvention “degrades the constitution by signaling that the constitutional text does

⁸⁰ For a more searching analysis of the questions relating to the French version of the Constitution, see the collection of essays published in Linda Cardinal & François Larocque, eds, *La Constitution bilingue du Canada: Un projet inachevé* (Québec: Les Presses de l’Université Laval, 2017), including Warren J Newman, «L’obligation de rédiger et de déposer pour adoption la version française de certains textes constitutionnels» at 179.

⁸¹ Albert, *supra* note 4 at 262.

⁸² *Ibid* at 261.

not in fact bind in all cases, and that its authority is contingent on variable political preferences,” and “undermines our expectations for the rule of law” in terms of *ad hoc* law-making, failing to publicize, if not to promulgate, the changes in the law, and exacerbating incongruity between the rules as written and the rules as applied. The legitimacy as well as the validity of constitutional amendments flows, or ought to flow, in no small measure from the process and procedures by which such amendments come into being.⁸³

One can applaud Professor Albert for this eloquent expression of deep commitment to the formal amending processes and the constitutional rules of change. Certainly, in the Canadian context, adherence to the constitutional framework and design, as well as to the spirit of constitutionalism in a democracy respectful of the rule of law, has been amongst our most enduring values. Part V of the *Constitution Act, 1982* sets out the legal procedures for constitutional amendment in this country, and the rules therein are not to be taken lightly. That said—and indeed, emphasized—there is still in Canada some room for constitutional experimentation and advancement through statutory and other measures that, as long as they respect the constitutional structure and do not run afoul of the rules, may advance the Constitution’s basic precepts and modernize aspects of its protected institutional architecture.

Professor Albert has performed an immense service to all who are (or who should be) interested in the basic questions pertaining to constitutional change and reform. *Constitutional Amendments: Making, Breaking, and Changing Constitutions* is a ground-breaking, comparative contribution to the field. We can (as was presaged in his introduction) find much therein to guide and inspire academic colleagues, legislative drafters and political actors alike, and we are impelled to take up Professor Albert’s enthusiastic invitation to join him in further inquiry and research, conversation and collaboration in the study of constitutional amendment.

⁸³ *Ibid* at 269–70.