

Richard Albert v. the Venice Commission on Constitutional Amendments and the Rule of Law: A Systematic and Critical Comparison

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I. INTRODUCTION

Richard Albert's recent first monograph, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*,¹ is a major contribution to the study of the topic. It presents itself as a sort of

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¹ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019 [Albert, *Constitutional Amendments*]).

summa amendamenta,² whose erudition has its reader travel through space and time. It stands apart, not only by its historical and comparative scope, but also by its attempt at combining a legal approach to constitutional amendment with the currently prevailing more political study of constitutional change. More precisely, this legal approach is not merely positivistic and descriptive, but also normative, based on the value of legality or the rule of law.

As Erin Delaney suggests, “Albert reclaims the place of formal amendment.”³ In other words, Albert reclaims the place of law against pure politics, and even of written legal rules against judicial activism in the realm of constitutionalism in general and constitutional change in particular. At least insofar as the broader law/politics divide is concerned, Albert’s book seems to carry the voice of a new generation of Anglo-American and international constitutional scholars,⁴ succeeding that which was epitomized by Ran Hirschl, which “sought to collapse the law/politics distinction by demonstrating the constitutional politics of constitutional making and judicial power.”⁵ Indeed, the book “expresses a generational commitment to a certain form of legalism.”⁶

This third generation of constitutional scholars effectively looks to be an attempt at striking an equilibrium between the two previous ones. Are they succeeding? Do they propose articulated, coherent, and truly synthetic solutions and answers? Or are they just mechanically trying to cobble

² Mark Graber writes it might be re-entitled “The Encyclopedia of Constitutional Amendment.” Mark Graber, “Constitutional and Generational Change: For the Symposium on Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019)” (23 April 2020), online (blog): *Balkinization* <balkin.blogspot.com/2020/04/constitutional-and-generational-change.html> [perma.cc/GMQ7-X6XE].

³ Erin F Delaney, “Constitutional Amendments from Design to Culture: For the Symposium on Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019)” (21 April 2020), online (blog): *Balkinization* <balkin.blogspot.com/2020/04/constitutional-amendments-from-design.html> [perma.cc/D4MZ-RDGX].

⁴ According to Mark Graber, Albert’s *Constitutional Amendments* effectively “heralds the rise of a new generation in comparative constitutionalism and constitutional[ism] in general,” Graber, *supra* note 2.

⁵ *Ibid.*

⁶ *Ibid.*

together, on the one hand, rights-based judicial-review jurisprudence and, on the other hand, multi-source politicization in the field of constitutional studies? I am surely not the one who can answer this sweeping question, let alone here. However, this question will act as a background concern throughout my critical analysis of Albert's *Constitutional Amendments* the way I think it should for the appraisal of all the work of this third generation of constitutional scholars.

The foregoing implies that, even though Albert's monograph at times seems to be going in different directions, I take it for granted that its chief thesis consists of reclaiming the rule of law, or legality, in the field of constitutional change. Let Albert speak for his generation in his response to Graber:

Today, Graber explains, and I agree, the organizing framework for the new generation of scholarship in constitutionalism is the rule of law as an embankment against attacks on constitutional democracy.⁷

In the conclusion to his book, Albert indeed does feel strongly about the value of the rule of law for constitutional change, for he writes:

In a constitutional democracy governed by a codified constitution, lawmakers should abide by the codified rules for constitutional change where the change they seek to make is governed by a clear rule. Circumventing the codified rules of change may achieve a politically favorable outcome but in the end it degrades the constitution and undermines the rule of law.⁸

Relying on Lon Fuller, Albert explains that illegal constitutional change degrades the rule of law through anomy or adhocism (if no rules actually preside over the change), lack of publicity (if rules are followed but other than the codified ones), and failure of congruence (in either case, between the change and the codified rules thereof).⁹ Albert then places constitutional change under the ambit of the Fullerian rule of law. It is, indeed, my understanding that the real practical aim of Albert's

⁷ Richard Albert, "Standing on Shoulders of Colleagues for New Vistas in Constitutional Amendment: For the Symposium on Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019)" (28 April 2020), online (blog): *Balkinization* <balkin.blogspot.com/2020/04/standing-on-shoulders-of-colleagues-for.html> [perma.cc/B9TT-76CH] [Albert, "Standing on Shoulders"].

⁸ Albert, *Constitutional Amendments*, *supra* note 1 at 269–70.

⁹ *Ibid.*

Constitutional Amendments is to provide constitutional designers the world over with a method or guidelines for designing rules of constitutional change which strike, not a purely abstract equilibrium between rigidity/stability and flexibility/evolutivity, but a practical one, yielding rules whose chances to be obeyed are, for the sake of the rule of law, maximized.

What precedes is, I believe, the true overarching purpose, the chief aim of its contribution, and the main interest of Albert's first monograph. It is in this light, for instance, that the operation in Albert's book of his famous distinction between constitutional "amendment" and constitutional "dismemberment" must be understood: not as an ontological claim, but as referring to a relatively contingent set of substantive constitutional choices about what changes are minor and faithful and what changes are not. A set of choices which, however, should be formalized into an escalating structure of codified legal rules of constitutional change—something Rosalind Dixon and David Landau have called "tiered constitutional design"¹⁰—in order to foster legal constitutional change.

But at times, the foregoing interpretation sits uncomfortably with the purposes Albert expressly states and claims for his book. In the introduction to the latter, he writes:

There are two purposes animating this entire study of constitutional change: to inspire interest in constitutional amendment and to guide those seeking to understand how constitutions change. My objective will have been fulfilled if this book proves useful to scholars steeped in the field and those new to it, and if it becomes a focal resource for leaders involved in making or remaking their constitution.¹¹

This is an understatement by Albert, who at this moment passes over his normative stance and claim in silence. So, there is a tension in *Constitutional Amendments* between a seemingly descriptive discourse and an actually normative one. After a complete reading of the book, this strain is felt again in hindsight by the reader who recalls the passage in the introduction that addresses the Venice Commission's report on constitutional amendment. In this passage, Albert says that even though:

¹⁰ Rosalind Dixon & David Landau, "Tiered Constitutional Design" (2018) 86:2 *Geo Wash L Rev* 438.

¹¹ Albert, *Constitutional Amendments*, *supra* note 1 at 36.

[i]n its 2009 report on constitutional amendment, the Commission recognized that sometimes ‘irregular constitutional reform’ may be acceptable considering the intended objective... the Commission nonetheless underscored its general position against breaking from the prescribed rules of amendment.¹²

Yet, Albert does not seem to concur, but rather distances himself from the Commission, whose “strict adherence to law” and “formalist views” he criticizes.¹³ Albert does so because, as we will see in greater detail, the latter views have the Commission oppose recourse to a referendum that is not provided for in the constitution in order for the executive to circumvent the constitutional amendment procedure.

Albert bases his criticism on both a descriptive and a normative argument. His descriptive argument is that “appealing directly to the people in a departure from the formal rules of amendment is nothing new”¹⁴—something the Commission would not contest. His normative argument is that the Commission’s position is paradoxical: “the Commission resists the use of discretionary referendums—quite possibly the ultimate device for the expression and aggregation of popular will—out of fear that popular choice could weaken democracy.”¹⁵ It thus seems that Albert’s ambiguous, shifting approach between factual description and normative discourse overlaps with a conflation of two analytically distinct political values which, at times in the book, he treats as if they were the same: the rule of law and democracy (or “democratic constitutionalism”). This hypothesis tends to be confirmed by the fact that, aside from the claim that the rule of law requires constitutional amendment rules to be designed so that they can and will be obeyed by the state, Albert asserts that constitutional amendment is a “fundamental right,” as “[t]he right to amend a constitution is part of a larger bundle of democratic rights.”¹⁶ Although we may need to coordinate, combine, or even integrate these two ideas of the rule of law—at least in a formal/Fullerian sense like it is understood in the book under discussion—and democracy in the field of constitutional change, we might first have to acknowledge their initial separateness and then articulate them clearly with one another. Besides,

¹² *Ibid* at 25.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid* at 194.

Julie Suk observes quite relevantly that “most of the amendment rules discussed in the book—and certainly Article V of the U.S. Constitution—lack a language of rights.”¹⁷

Albert is one the few, but not the only one, to be fully aware that, perforce, constitutional amendment rules, whose existence notably allows for the formal (not substantive) distinction of constitutional from ordinary legal rules, should have never been considered as mere technicalities. Remember Dicey, according to whom “[t]he plain truth is that a thinker who explains how constitutions are amended inevitably touches upon one of the central points of constitutional law.”¹⁸ Closer to us, in its 2009 report on constitutional amendment, the Venice Commission, of which both Canada and the USA are now members, made the preliminary observation that “[t]he amending power is not a legal technicality.”¹⁹

To recapitulate: Albert briefly addresses the Commission’s report, but his critical take on it remains unclear and seems to stand at odds with other, and even more fundamental claims he makes. This ambivalence may reveal inherent and overlapping tensions between description and politics and between democracy and the rule of law, which permeate his book. Consequently, an in-depth critical comparison between Albert’s 2019 monograph and the Venice Commission’s 2010 report is warranted, if not required. Both make recommendations or, in other words, propose a method for the design of formal rules of constitutional “amendment” or change. Moreover, both necessarily base their recommendations on some form of methodology, in the sense of a theory underlying the methods they respectively advance. It is these methodologies (Part 3) and methods (Part 4) of constitutional-change-rules design that the present paper will compare in turn, after a short backgrounder on their respective authors

¹⁷ Julie Suk, “Constitutional Legitimacy and the Right to Amend: For the Symposium on Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019)” (17 April 2020), online (blog): *Balkinization* <balkin.blogspot.com/2020/04/constitutional-legitimacy-and-right-to.html> [perma.cc/DW3B-8SM6].

¹⁸ Albert Venn Dicey, “Constitutional Revision” (1895) 11:4 Law Q Rev 387 at 388.

¹⁹ Council of Europe, European Commission for Democracy through Law (Venice Commission), 81st Plen Sess, *Report on Constitutional Amendment*, Doc CDL-AD(2010)001 (19 January 2010) at 3, online (pdf): *Council of Europe* <www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)001-e> [perma.cc/7HS2-88W8] [Venice Commission, *Report on Constitutional Amendment*].

(Part 2). Is Albert accurate about the Commission? Does the Commission's report have its own internal tensions, too? To what extent and on precisely what do they diverge? For what reasons? Beyond empirical and historical encyclopedic comparative knowledge, what does Albert specifically provide constitutional designers with which the Commission does not, or on which it would disagree? Which position, including both a method and a methodology, is the more coherent and convincing, so it looks like the better guidance for the design of rules of constitutional change? Or are they just perfectly complementary? These are among the questions animating the comparison that follows, but which might not all find an answer. In any event, the systematic comparison of Albert's book and the Commission's report in itself should have the value of illuminating their respective reading.

II. RICHARD ALBERT AND THE VENICE COMMISSION: A BACKGROUNDER

A. The Venice Commission

At its creation in 1990, on an Italian initiative, the Venice Commission²⁰ was first tasked with offering constitutional assistance to Central European nations, a mission expanded to the new republics of Eastern Europe the following year, with the fall of the USSR. While that mission remains crucial, the Commission's work has expanded into new areas substantively as well as geographically. It now advises not only on constitutional matters in the strict, institutional sense of the word, but also on subjects concerning the judiciary, elections, referendums, and political parties. Among its members, an increasing number of Western and Northern European states have resorted to its services.

Originally set up by a partial agreement among 18 member states of the Council of Europe, the Venice Commission has, since 2002 (when all member states joined), been governed by an open agreement that allows

²⁰ See Sergio Bartole, *The Internationalisation of Constitutional Law: A View from the Venice Commission* (Oxford, UK: Hart Publishing, 2020); Paul Craig, "Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy", (2017) 2 UC Irvine J Intl Transnatl & Comp L 57; Wolfgang Hoffmann-Riem, "The Venice Commission of the European Council [sic]—Standards and Impact", (2014) 25 Eur J Intl L 579.

non-Council-of-Europe states to become full members. As such, its work increasingly tends to reflect global, rather than merely European, constitutional heritage and standards. Indeed, “[t]he Committee of Ministers may by the majority stipulated in Article 20.d of the Statute of the Council of Europe invite any non-member state of the Council of Europe to join the Enlarged Agreement.”²¹ In addition to the 47 member states of the Council of Europe, the Commission has 15 additional members (for a total of 62): Kosovo, Morocco, Algeria, Tunisia, Israel, Kyrgyz Republic, Kazakhstan, South Korea, Brazil, Chile, Peru, Costa Rica, Mexico, the United States, and Canada. Belarus is an associate member; Argentina, Uruguay, Japan, and the Vatican are observers; South Africa and the Palestinian Authority are special cooperators. The European Commission and the Office for Democratic Institutions and Human Rights of the OSCE²² participate in its plenary sessions. Moreover, any state that is not a member of the new open agreement “may benefit from the activities of the Commission by making a request to the Committee of Ministers.”²³

The Venice Commission is an advisory body on constitutional law matters, composed of independent experts designated by the member states, sitting as individual members for four-year terms. They “shall not receive or accept any instructions.”²⁴ Each member state appoints two individual members, a regular and a substitute one.²⁵ Members appointed by states that are not members of the Council of Europe are not entitled to vote on questions raised by its statutory bodies.²⁶ The Commission

²¹ Council of Europe, European Commission for Democracy through Law (Venice Commission), *Resolution RES (2002) 3 Adopting the Revised Statute of the European Commission for Democracy through Law*, (21 February 2002), art 2.5, online (pdf): *Council of Europe* <[www.venice.coe.int/WebForms/documents/?pdf=CDL\(2002\)027-e&lang=EN](http://www.venice.coe.int/WebForms/documents/?pdf=CDL(2002)027-e&lang=EN)> [perma.cc/W8QS-2V88] [Venice Commission, *Resolution Adopting the Revised Statute*].

²² “Organization for Security and Co-operation in Europe”, online: *Wikipedia* <https://en.wikipedia.org/wiki/Organization_for_Security_and_Co-operation_in_Europe>

²³ *Ibid*, art 3.3.

²⁴ *Ibid*, art 2.1.

²⁵ *Ibid*, art 2.2.

²⁶ *Ibid*, art 2.5.

“may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, [and] the Secretary General”²⁷ of the Council of Europe, amongst others requestors.

Under the terms of its statute, the Commission “shall give priority” to work regarding:

- a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law;
- b. fundamental rights and freedoms, notably those that involve the participation of citizens in public life;
- c. the contribution of local and regional self-government to the enhancement of democracy.²⁸

Its statute provides that “the Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements.”²⁹ The Commission may also “establish links with documentation, study and research institutes and centres.”³⁰ Furthermore, it “co-operates with constitutional courts and courts of equivalent jurisdiction bilaterally and through associations representing these courts.”³¹ As was expressly provided for in its statute,³² the Commission has set up a Joint Council on Constitutional Justice, composed of some of its members and liaison officers appointed by constitutional courts and councils and courts of equivalent jurisdiction. The Joint Council meetings are co-chaired by a member of the Commission, elected at one of its plenary sessions, and a liaison officer, elected by their fellow liaison officers. As the Venice Commission itself explains, the Joint Council:

shapes the tools provided by the Commission that enable the exchange of information and cross-fertilisation between courts. These tools are the *Bulletin on Constitutional Case-Law*, the CODICES database and the Venice Forum. Upon request by the courts, the Venice Commission provides *amicus curiae* briefs.

²⁷ *Ibid*, art 3.2.

²⁸ *Ibid*, art 1.2.

²⁹ *Ibid*, art 3.1.

³⁰ *Ibid*, art 3.5.

³¹ *Ibid*, art 3.4.

³² *Ibid*.

While the Venice Commission is a European institution, it also extends some of these services—notably the CODICES database and the Venice Forum—to constitutional courts beyond its Member States. The Venice Commission cooperates closely with regional and language-based groups of constitutional courts (European, African, Southern African, Asian, Ibero-American, Eurasian, Arab, French-speaking, Portuguese-speaking, Commonwealth/Common Law). Cooperation with these groups grew into the World Conference on Constitutional Justice, for which the Venice Commission acts as the Secretariat.³³

From its members, the Commission elects a Bureau of eight for a two-year term.³⁴ It also sets up sub-commissions. The Commission meets in plenary session four times a year, while its sub-commissions “may meet whenever necessary.”³⁵ The Commission is assisted by the Secretariat General of the Council of Europe, “which shall also provide a liaison with the staff seconded by the Italian authorities at the seat of the Commission.”³⁶ The Commission may further use the services of consultants,³⁷ and it:

may also hold hearings or invite to participate in its work, on a case-by-case basis, any qualified person or non-governmental organisation active in the fields of competence of the Commission and capable of helping the Commission in the fulfilment of its objectives.³⁸

At its 81st plenary meeting held on December 11-12, 2009, the Venice Commission thus adopted its *Report on Constitutional Amendment*, “on the basis of comments” by Gret Haller (then the member for Switzerland), Fredrik Sejersted (then the substitute member for Norway), Kaarlo Tuori (then the member for Finland), and Jan Velaers (then the member for Belgium).

³³ Council of Europe, European Commission for Democracy through Law (Venice Commission), “Constitutional justice - Cooperation between the Venice Commission and Constitutional Courts” (last visited 19 August 2020), online: *Council of Europe* <www.venice.coe.int/WebForms/pages/default.aspx?p=01_Constitutional_Justice&lang=en> [perma.cc/98RL-Q3AY] [emphasis in original].

³⁴ Venice Commission, *Resolution Adopting the Revised Statute*, *supra* note 21, art 4.1.

³⁵ *Ibid*, art 4.3.

³⁶ *Ibid*, art 8.1.

³⁷ *Ibid*, art 5.1.

³⁸ *Ibid*, art 5.2.

B. Richard Albert

As for Richard Albert, he is an outstanding Canadian-American constitutional scholar currently the William Stamps Farish Professor in Law and Director of Constitutional Studies at the University of Texas at Austin. Prior to joining the University of Texas, he was a Professor of Law at Boston College Law School. Professor Albert was trained in both political science and law at Yale (BA, JD), Oxford (BCL), and Harvard (LLM). He focuses his research on constitutional change, a topic on which he has published around 60 papers and edited, or co-edited over 15 books. He is co-editor of three book series with Oxford University Press, Routledge, and Hart, was founding co-editor of I-CONnect, the blog of the *International Journal of Constitutional Law*, and has organized over 100 international conferences, symposia, colloquia, forums, roundtables, workshops, etc., on various public and comparative law subjects.³⁹ In this regard, Eugene Mazo relates:

Several months ago, Richard Albert introduced me to one of his former students, a fellow named Dylan, who worked as a political operative in Massachusetts before enrolling in law school. Dylan and I talked on the phone a few times, mostly because I was thinking of running for Congress and Dylan knew a lot about the ins and outs of political campaigns. During one of these conversations, I asked Dylan about Albert's class. Dylan took constitutional law with Albert. He learned a lot in the class, he told me, and then added a comment that struck me. Every weekend of the semester, Dylan said, Albert would jet off to some far-flung country to give a speech or host a conference. He would then return just in time to teach his regularly scheduled constitutional law class. "We called him the James Bond of comparative constitutional law," Dylan told me, referring to Albert.⁴⁰

There is much more to Albert's career, achievements, and public and community service, including awards, honours and visiting scholarships, and a notably unparalleled endeavor and success in making known and promoting the work of younger scholars, especially from outside the Anglo-American academic universe. Yet, as Eugene Mazo, again, put it,

³⁹ "Richard Albert" (2021), online: *The University of Texas at Austin School of Law* <law.utexas.edu/faculty/richard-albert> [perma.cc/72MX-8EHU].

⁴⁰ Eugene D Mazo, "The James Bond of Comparative Constitutional Law: For the Symposium on Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019)" (16 April 2020), online: *Balkinization* <balkin.blogspot.com/2020/04/the-james-bond-of-comparative.html> [perma.cc/W9VR-WYW9].

“James Bond has now written a monograph,”⁴¹ and it is now time to tackle it.

III. RICHARD ALBERT AND THE VENICE COMMISSION ON CONSTITUTIONAL AMENDMENTS: COMPARATIVE METHODOLOGY

A. The Venice Commission’s general working method

In order to understand how the Venice Commission has come up with a method for the design of constitutional amendment rules or, in other terms, if we want to grasp the Commission’s (constitutional) theory, or “meta-method”, for designing formal legal rules of constitutional change, we must first get acquainted with the Commission’s general working method.

As we have seen,⁴² the Commission is entrusted with advancing democracy, the rule of law, rights, and regional and local self-government (subsidiarity) through advising, researching, and networking. These first three ideas stand as the “three pillars” of the Council of Europe.⁴³ Yet, the Commission has not produced a detailed account of its understanding of the precise conceptual interconnectedness between these values, except, arguably, in its 2010 *Report on the Rule of Law*.⁴⁴ In that report, the Commission explored the idea of the rule of law, concluding that the rule, “enshrined in a number of international human rights instruments and other standard-setting documents,”⁴⁵ is not precisely defined, and yet it is the object of a consensus. On this basis, the Commission sketched an outline of a definition of the rule of law and a “checklist” thereof. The

⁴¹ *Ibid.*

⁴² Venice Commission, *Resolution Adopting the Revised Statute*, *supra* note 21, art 1.2 and corresponding text.

⁴³ *Statute of the Council of Europe*, 5 May 1949, 87 UNTS 103, preamble, art 3, online (pdf): *Council of Europe* <rm.coe.int/1680306052> [perma.cc/QT2U-8383].

⁴⁴ Council of Europe, European Commission for Democracy through Law (Venice Commission), 86th Plen Sess, *Report on the Rule of Law*, Doc CDL(AD)003rev (4 April 2011) online (pdf): *Council of Europe* <[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e)> [perma.cc/P2BF-PGP5] [Venice Commission, *Report on the Rule of Law*].

⁴⁵ *Ibid* at para 2.

Commission drew on the definition of the rule of law to which former senior law lord Tom Bingham⁴⁶ (also called Lord Bingham or Baron Bingham of Cornhill) adheres, that is, the definition of the rule of law as the idea that:

all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.⁴⁷

It then listed eight “necessary elements” of that idea, including:

- (1) Legality, including a transparent, accountable and democratic process for enacting law;
- (2) Legal certainty;
- (3) Prohibition of arbitrariness;
- (4) Access to justice before independent and impartial courts, including judicial review of administrative acts;
- (5) Respect for human rights; and
- (6) Non-discrimination and equality before the law.⁴⁸

First, it is noteworthy that the Commission adheres to the controversial idea that the rule of law applies not only to the state,⁴⁹ but also to private individuals and entities. Second, on its face, the Commission seems to endorse the substantive or, perhaps more precisely, the “rights” conception⁵⁰ of the rule of law, which, again, is controversial. Raz, for instance, opines that this conception is not only widely grounded in a misunderstanding of international documents,⁵¹ but also engages us

⁴⁶ “Tom Bingham, Baron Bingham of Cornhill. Online: *Wikipedia* <https://en.wikipedia.org/wiki/Tom_Bingham,_Baron_Bingham_of_Cornhill>

⁴⁷ Tom Bingham, *The Rule of Law* (London UK: Penguin Books, 2010) at 8; cited in the Venice Commission, *Report on the Rule of Law*, *supra* note 43 at para 36.

⁴⁸ Venice Commission, *Report on the Rule of Law*, *supra* note 43 at para 41. This list is further itemized in the Annex, titled “Checklist for evaluating the state of the rule of law in single states”.

⁴⁹ See generally the works of Lon Fuller and Joseph Raz. Lon L Fuller, *The Morality of Law*, revised ed (New Haven, CT: Yale University Press, 1969); Joseph Raz, “The Rule of Law and its Virtue” in *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press, 1979) at 210–29; Joseph Raz, “The Law’s Own Virtue” (2019) 39:1 *Oxford J Leg Stud* 1.

⁵⁰ Ronald M Dworkin, “Political Judges and the Rule of Law” in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 9–32.

⁵¹ Raz, “The Law’s Own Virtue”, *supra* note 47 at 10–11.

on a slippery slope towards an impossible rule of law: the rule of “good law,” where the rule of law becomes a complete social philosophy.⁵² The Commission’s precise position on the conceptual relationship between the rule of law and rights is that “there is a great deal of overlap between the two concepts and many rights enshrined in documents such as the [European Convention on Human Rights] also expressly or impliedly refer to the rule of law.”⁵³ Apart from procedural rights, the right to non-discrimination would be a major point of intersection between the rule of law and human rights, for the Commission writes:

Formal equality is nonetheless an important aspect of the rule of law—provided that it allows for unequal treatment to the extent necessary to achieve substantive equality—and can be stretched without damage to the underlying principle to the notion of non-discrimination which, together with equality before the law, constitutes a basic and general principle relating to the protection of human rights.⁵⁴

The idea seems to be that the rule of law and human rights are notably connected through equality before the law and the latter’s proximity with non-discrimination. As such, one can think it is a rather approximative and debatable idea.

At the same time that it overlaps with human rights, the rule of law would be “an inherent part of any democratic society.”⁵⁵ Is that to say that the rule of law is entirely situated within the boundaries of the modern conception of democracy, outside of which it would be unthinkable? The answer to that question is unclear. It cannot consist of a definite “yes” based on the rule of law’s overlapping with human rights—an overlapping which excludes political democratic rights. Therefore, if the rule of law constitutes a “standard to guide and constrain the exercise of democratic power,”⁵⁶ it is, in all likelihood, not a democratic built-in component (something like democracy’s immune system), but a discrete though overlapping idea. It could be that, for the Commission, legality can exist without democracy, but not modern democracy without legality. In any

⁵² Raz, “The Rule of Law and its Virtue”, *ibid* at 211.

⁵³ Venice Commission, *Report on the Rule of Law*, *supra* note 43 at para 59.

⁵⁴ *Ibid* at para 63.

⁵⁵ *Ibid* at para 16.

⁵⁶ *Ibid* at para 69.

case, the tension between democracy and the rule of law remains unresolved.

The way in which the Commission first looked to positive legal sources of international and domestic law for a definition and then, failing that, invoked a “consensus,” speaks to the Commission’s general methodology, which is neither strictly positivistic, nor jusnaturalistic or philosophical. The global standards it sometimes identifies—because not all constitutional-law issues have such standards—are not one-size-fits-all solutions. Seeking to identify standards or ‘best practices’ of constitutional law is both juristic and normative, and it must be carefully distinguished from identifying legal indicators.⁵⁷ It is indeed a task not oriented towards measuring socio-legal outcomes or other proxies. Neither social-political science nor applied legal-political philosophy, the Venice Commission’s method is thus truly a legal one. The Commission makes use of functional comparative constitutional law, but its method has an irreducible normative component, based on a cautious, cumulative, and inductive approach that may well be akin to what Waldron had (a bit methodologically vaguely) in mind with his conception of “*ius gentium*.”⁵⁸ Moreover, although an advisory body (which is far from being an adjudicative one), the Commission—whose work is not the product of one or many individuals but the collective work of an institution—uses a general working method that has an inductive and prudent core component, making it akin to the common law or, more broadly, to law conceived of as “artificial reason.”⁵⁹ Indeed, it is most often after considering, patiently and prudently, numerous *ad hoc* opinions that the Commission will produce a number of reference documents on general subjects. In that regard, its report on constitutional amendment is no exception.

Although it governs an actual and fruitful practice, the Venice Commission’s method must still be theoretically fleshed out and

⁵⁷ David Restrepo Amariles, “Legal Indicators, Global Law and Legal Pluralism: An Introduction” (2015) 47:1 J Legal Pluralism & Unofficial L 9 at 10.

⁵⁸ Jeremy Waldron, “Partly *Laus Common to All Mankind*”: *Foreign Law in American Courts* (New Haven, CT: Yale University Press, 2012).

⁵⁹ Maxime St-Hilaire & Joanna Baron, “Introductory Essay: The Rule of Law as the Rule of Artificial Reason” (2019) 92 SCLR (2d) 1.

situated.⁶⁰ Against the foregoing general background, nonetheless, we can better appreciate the Commission's approach to constitutional amendment in its 2010 report, perhaps with its inherent ambiguities.

B. The theoretical assumptions (and difficulties) underlying the Venice Commission's report on constitutional amendment

The origins of the Venice Commission's 2010 *Report on constitutional amendment* can be traced to a 2007 recommendation of the Parliamentary Assembly of the Council of Europe calling on the Committee of Ministers to draw up guidelines for the elimination of functional deficits of democratic institutions after examining, among other issues, "whether the current national arrangements for changing the constitution require a sufficiently high approval level to prevent abuses of democracy."⁶¹ That same year, the Council of Europe's *Forum for the Future of Democracy* encouraged the Venice Commission to address these issues. Following its normative—but nonetheless juristic and not jusnaturalistic or otherwise philosophical—general methodology, the Commission first took the preliminary step of compiling the relevant constitutional provisions of the Council of Europe member states as well as several other states.⁶² Then, the rapporteurs submitted their final report, which was eventually adopted at the Commission's 81st Plenary Session on December 11–12, 2009, and officially released on January 19, 2010.⁶³

⁶⁰ Maxime St-Hilaire, «Standards constitutionnels mondiaux: épistémologie et méthodologie» in Mathieu Disant, Gregory Lewkowicz & Pauline Türk, eds, *Les standards constitutionnels mondiaux* (Brussels, BE: Bruylant, 2017) at 11–75.

⁶¹ Council of Europe, PA, *State of human rights and democracy in Europe*, Recommendation 1791 (2007), online: *Council of Europe* <rm.coe.int/090000168046062f> [perma.cc/Y35U-FFKE] [Council of Europe, *State of human rights and democracy*].

⁶² Council of Europe, European Commission for Democracy through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, Doc CDL(2009)168 (4 December 2009), online (pdf): <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2009\)168-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2009)168-e)> [perma.cc/2GGG-AGCZ]. Acting as rapporteurs were: Gret Haller, then the member for Switzerland; Fredrik Sejersted, then the substitute member for Norway; Kaarlo Tuori, then the member for Finland; and Jan Velaers, then the member for Belgium.

⁶³ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19.

The report presents itself as “primarily a descriptive and analytical text” which “will not attempt to formulate any new European ‘best model’ or standards for constitutional change,” something the Commission says to be “neither possible nor desirable.”⁶⁴ Normative assessment is possible short of identifying and relying on a unique standard, which, in turn, does not have to be a one-size-fits-all solution. However, the Commission claims in its report that “[n]either will it... critically assess the existing national constitutional amendment procedures.”⁶⁵ As far as direct criticism is concerned, this is certainly true. Concerning implicit criticism, however, the accuracy of this claim is much less granted. The report discussed here aims not only at “identifying and analysing some fundamental characteristics and challenges of constitutional amendment,” but at “offering some normative reflections” as well.⁶⁶ This is one more instance of the need for explicit epistemological and methodological elucidation of the Venice Commission’s normative legal work. The Commission does believe that constitutional amendment is a concern for standards of “democracy, rule of law and human rights,”⁶⁷ but its report on constitutional amendment does not cite or otherwise rely on its report on the rule of law or any other account of the relationships between these three ideas, values, or principles.

As a consequence of its general methodology, an important feature of the Venice Commission’s approach to the issue of how rules of constitutional amendment should be designed lies in its focus on “formal,” that is, legal, amendment:

The scope of the study is limited to formal constitutional amendment, meaning change in the written constitutional document through formal decisions following prescribed amendment procedures. The substantial contents of a constitution may of course be altered in many other ways—by judicial interpretation, by new constitutional conventions, by political adaptation, by disuse (*désuétude*), or by irregular (non-legal and unconstitutional) means. The study will not examine these issues in depth, but it will to some extent address

⁶⁴ *Ibid* at para 17.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* at para 24.

the relationship between formal amendment and other forms of constitutional change.⁶⁸

An important takeaway here is, on the one hand, how the Commission considers it crucial not to conflate or amalgamate legal and non-legal but purely political, social or “cultural” change. On the other hand, the Commission tends to consider truly legal constitutional change as formal, that is, brought to the text of the constitution by following a special procedure rather than something which can essentially be of judicial origin (something the Commission puts into the same category as purely political forms of constitutional change). This distinction, of course, does not mean that the Commission is unaware of “informal” constitutional change. The same is true for the Commission’s awareness of extra-legal and “informal” factors of the (actual) difficulty level of (even formal) constitutional amendment:

While the Commission has not conducted an empirical study on how the amendment formulas have actually functioned over time in the member states of the Council of Europe, [it is perfectly aware that] there is literature on the subject in political science, and references will be made to this. The studies conducted indicate that the formal rigidity or flexibility of a given constitution does not necessarily determine the actual threshold for constitutional change, the number of times that the amendment procedure has been used in practice, nor the importance of each reform (great or small). Political, economic and other social factors are also important, and so is the national “constitutional culture.”⁶⁹

This is why the Commission even warns “against exaggerating the importance of formal constitutional differences”⁷⁰ regarding amendment:

The effects of different amendment mechanisms are thus complex and will depend on a number of factors in addition to the formal provisions themselves. Obstacles to change that look strict on paper may sometimes in practice turn out not to be so. On the other hand, seemingly easy requirements, as that of popular referendum, may in effect turn out to have very restrictive effects (or not).⁷¹

The Commission therefore:

wishes to stress that when drafting and applying formal provisions on constitutional amendment, there is a need for great awareness of the potential effects and functions of such rules—which requires both general and comparative

⁶⁸ *Ibid* at para 18.

⁶⁹ *Ibid* at para 19.

⁷⁰ *Ibid* at para 65; see also paras 96, 98, 132.

⁷¹ *Ibid* at para 102.

analysis as well as thorough knowledge of the national constitutional and political context. If this is not done properly, then one might end up with very different actual thresholds for constitutional change than originally planned and envisaged.⁷²

In addition to judicial interpretation and political conventions/custom, the Commission acknowledges not only the role of what it refers to as the “more vague concept of ‘constitutional culture,’”⁷³ but also, and more precisely, the origins/democratic legitimacy and the age of the constitutional text—which both have a bearing on the country’s constitutional “culture.”⁷⁴

In light of the foregoing, Richard Albert’s critical depiction of the Commission’s approach to constitutional amendment as “formalist views”⁷⁵ might seem exaggerated. On the descriptive plane, one can hardly say that the Commission is formalistically blinded to “informal” constitutional change and vectors thereof, at least at this point of the argument. However, the Commission does justify its focus on formal amendment by making the following claim:

Nevertheless, under normal political conditions there will usually be a significant correspondence between how the formal amendment rules are construed and how often the constitutions are changed. The formal rules matter.⁷⁶

This presents itself as a descriptive claim: formal constitutional amendment rules are effectively determinative of constitutional change under normal circumstances. As such, the claim is not supported or buttressed by any citation or argument in the Commission’s report. However, I suspect it to be rather a normative claim in disguise. What the Commission really means by “normal” and “matter” is that the formal rules “ought” to matter. Like Richard Albert, then, the Venice Commission likely wants to assist constitutional drafters in designing rules of constitutional change which will be followed. Hence, taking into account Albert’s commitment to bringing constitutional change under the normative guidance of the Fullerian rule of law political ideal,⁷⁷ his

⁷² *Ibid* at para 103; see also para 243.

⁷³ *Ibid* at para 118.

⁷⁴ *Ibid* at paras 125–27.

⁷⁵ Albert, *Constitutional Amendments*, *supra* note 1 at 25.

⁷⁶ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 20.

⁷⁷ See Albert, *Constitutional Amendments*, *supra* note 1 at 269–70.

criticism of the Commission's "formalist views" is a bit hard to explain. The only reason for it seems to be that the Commission, as we will see, opposes recourse to a referendum that is not provided for in the constitution in order for the executive to circumvent the constitutional amendment procedure. This is, indeed, a specific instance where Albert gives precedence to the "democratic right" to constitutional change over the rule of law. It is a specific point of disagreement, not a general methodological one. However, it is too early to say whose position, between Albert's and the Commission's, is the more consistent with their respective general approaches.

So far, we have seen how Richard Albert and the Venice Commission are committed to promoting designs of constitutional amendment rules that serve the rule of law, by laying down rules which have better chances to be followed. At the same time, we also know that they are committed not only to "rights," but to democracy, and that the latter may conflict with the rule of law. Finally, we know that Albert and the Commission will not strike the same equilibrium between the rule of law and democracy on every issue of constitutional change, as is evidenced by their disagreement on the executive's holding of a referendum which is not provided for in the text of the constitution. This disagreement sees the Commission standing more on the rule-of-law side than Albert, who stands more on the side of the democratic ideal.

Another telling feature of the Venice Commission's approach to the question "What method for the design and drafting of formal rules of constitutional change?" is its (true) stance on "constitutional revolutions." The Commission claims that its report addresses neither "the creation of entirely new constitutions, replacing the old system with a new order, following a constitutional break or revolution"⁷⁸ nor "the question of *legitimacy* of constitutional change."⁷⁹ This is inaccurate. True, the Commission focuses on "amendments to *existing* constitutions and the adoption of a new constitution following the procedure laid down in the previous one,"⁸⁰ but it does not escape a little comparison, not even on normative terms.

⁷⁸ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 21.

⁷⁹ *Ibid* at para 22 [emphasis in original].

⁸⁰ *Ibid* at para 21 [emphasis in original].

Initially, the Commission observes that:

In most constitutions the amendment procedure is the same regardless of whether the amendment only relates to a single provision, or to large parts, or even the whole. A number of constitutions however; [sic] expressly provide for a special, reinforced procedure for a total revision of the constitution or for the adoption of a new constitution. With regard to the latter term, it is to be stressed that it is not intended to mean a break in the constitutional continuity.⁸¹

A few points must be noted here. First, the Commission does not acknowledge the full scope of tiered, multi-layered, or escalating formal rules structures of constitutional change, which can cover an intermediate space between minor changes and total revision, or the adoption of a new constitution. This seems to be explained by what the Commission says about the distinction between constitutional amendment and constitutional replacement:

From a formal standpoint the distinction is readily identifiable, depending on whether the existing amendment procedures have been applied. From a more substantive standpoint the distinction is less clear.⁸²

In other words, the Commission's more purely legal approach has refused to address the question that Albert frames as a distinction between constitutional "amendment" (in a stricter sense) and constitutional "dismemberment." This looks like a missed opportunity. Recall that what was to become Albert's famous distinction between "amendment" and "dismemberment" or, more generally, the idea that constitutional changes do not all have the same importance or show the same fidelity to the constitution, could always be understood not as an ontological claim, but as a contingent set of substantive constitutional choices to be formalized into an escalating structure of formal legal rules of constitutional change.

Second, neither in the quote above nor elsewhere in its report does the Commission seem to accept the thesis that, even in the form of a procedure for total revision or replacement, the legal "secondary constituent power" can only "imitate," but never substitutes itself for the "primary constituent power." According to this thesis, although sometimes a decent option for it, an existing codified procedure for constitutional change could never, as such, be binding upon the (primary) constituent power, and should not be held so by constitutional or supreme courts,

⁸¹ *Ibid* at para 56.

⁸² *Ibid* at para 21.

which would even be entrusted with protecting this ultimately extra-legal constituent power against its usurpation by public authorities through the use of formal legal rules of constitutional amendment.⁸³ On the contrary, the Venice Commission reminds us that:

An important element of the constitutional processes in Central and Eastern Europe in the 1990s is the fact that the drafting and adoption of what were in effect totally new constitutional regimes have been introduced in the great majority of cases following the existing formal amendment procedures in the earlier constitutions.... This procedure was supported by the Venice Commission as an instrument of peaceful reform, which also served to strengthen the principle of the rule of law. In general, the Commission strongly endorses the principle of “constitutional continuity”, under which even new constitutions should be adopted following the prescribed amendment procedures in the old one—thus strengthening the stability, legality and legitimacy of the new system.⁸⁴

Therefore, when the Commission writes that “[c]onstitutional change should preferably be adopted by way of formal amendment”⁸⁵ because “one of the central objectives of strict procedures is to guarantee the legitimacy of constitutional change,”⁸⁶ it means not only minor constitutional change, and not even both minor and “any major constitutional change,”⁸⁷ but also the adoption of an altogether new constitution. The Commission recognizes that, due to its democratic origins, a constitution’s legitimacy can be possible despite a lack of legal continuity. However, it nonetheless believes that “[w]hen substantive informal (unwritten) changes have developed these should preferably be confirmed by subsequent formal amendment.”⁸⁸ It should also be emphasized that the Commission does not rule out that a constitution could be legitimate, notwithstanding its undemocratic origins. In other

⁸³ For a defence of this thesis, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford, UK: Oxford University Press, 2017). Yet, Roznai favours the use of a legally-regulated process for constitutional replacement, where it exists, over not only “establishing a new constitution through the amendment process” but also “ignoring any procedure whatsoever in the name of the *pouvoir constituant*” (*ibid* at 166-167).

⁸⁴ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 68.

⁸⁵ *Ibid* at para 246.

⁸⁶ *Ibid* at para 22.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at para 246.

words, the Commission “does not mean that all constitutions that were originally adopted by way of undemocratic procedures automatically are in need of replacement.”⁸⁹ Of course, all other things being equal, democratic constitutional origins will always be better than undemocratic ones. The takeaway here is that with legal/formal constitutional continuity, the Venice Commission seems to be applying to constitutional change Fuller’s idea of legality, or the rule of law, as having a procedural (not substantive) form of self-standing moral/political value.⁹⁰ This value, therefore, could be balanced against that of democracy. So, what does Richard Albert (who also juggles the rule of law and democracy) think? True, as we have seen, Albert writes generally that:

In a constitutional democracy governed by a codified constitution, lawmakers should abide by the codified rules for constitutional change where the change they seek to make is governed by a clear rule. Circumventing the codified rules of change may achieve a politically favorable outcome but in the end it degrades the constitution and undermines the rule of law.⁹¹

Albert indeed clearly recognizes legal legitimacy alongside democratic or popular legitimacy.⁹² However, as far as revolutionary constitutionalism in particular is concerned, Albert does not reiterate his commitment to the rule of law so as to possibly criticize such an informal constitutional change in the name of legal continuity. This seems to be consistent, in the form of an *a fortiori* argument even, with his endorsement of an executive’s holding of a referendum not provided for in the constitution. Again, the Venice Commission, which insists on maintaining a clear separation between law and pure politics, stands further towards the rule-of-law end of the spectrum.

As we have seen, the Venice Commission has no stated intention to formulate any new “best model” or standards for constitutional change.⁹³ Its opinion is that the design of formal rules of constitutional change is a matter of striking a proper balance between rigidity and flexibility, that “[t]he final balancing act can only be found within each constitutional

⁸⁹ *Ibid* at para 124.

⁹⁰ Fuller, *supra* note 47.

⁹¹ Albert, *Constitutional Amendments*, *supra* note 1 at 269–70.

⁹² *Ibid* at 270.

⁹³ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 17.

system, depending on its specific characteristics,”⁹⁴ and that “[w]hether or not a given constitutional system has managed to strike a good constitutional balance is something that can be evaluated on a case-to-case basis.”⁹⁵ However, even on a case-by-case basis, one might wonder: how, concretely, is an equilibrium between rigidity and flexibility to be found? The Commission writes that “the balancing act can be more or less successful, depending on a general understanding of the mechanisms and principles involved.”⁹⁶ Nevertheless, it remains to be seen in the next part of this article the extent to which the method it proposes can provide guidance for constitutional design. Extra-legal factors have been said to matter to a limited extent, since the Commission believes that under normal conditions, formal rules of constitutional change do matter more, and that in any case, the legal dimension of constitutional change must, epistemologically and methodologically, be kept separate and isolated from its extra-legal ones. This will allow for a clearer study and understanding of the interplay between, on the one hand, legal and, on the other hand, political, social, and cultural aspects of such change. Moreover, striking a proper balance in the design of formal rules for constitutional change is not only a matter of understanding “mechanisms” but of interpreting and applying “principles.” In other words, it ultimately remains a matter of normative choice, and this is why the Commission had no choice but to recognize that its report contains “normative reflections.”⁹⁷

On this normative plane, it remains unclear in the Venice Commission’s *Report on Constitutional Amendment* how the (undeniably made) distinction between the rule of law and democracy relates to that balance between rigidity and flexibility of formal rules of constitutional change. Recall that the origin of the report was a 2007 recommendation of the Parliamentary Assembly of the Council of Europe, worrying “whether the current national arrangements for changing the constitution require a sufficiently high approval level to prevent abuses of democracy.”⁹⁸ In all likelihood, the underlying reasoning of this concern was that, although the

⁹⁴ *Ibid* at para 88. See also *ibid* at para 239.

⁹⁵ *Ibid* at para 105.

⁹⁶ *Ibid* at para 88. See also *ibid* at para 239.

⁹⁷ *Ibid* at para 17.

⁹⁸ Council of Europe, *State of human rights and democracy*, *supra* note 59, art 17.20.

flexibility of formal constitutional change seems more democratic, too much of it, that is to say, insufficient rigidity, may yield abuses of democracy. Is it that democracy must be checked with something else in order to prevent its excesses? Is that something else the rule of law? Or is it rather, and more precisely, the extension of the rule of law ideal to that of “modern,” supra-legislative constitutionalism? Indeed, what about the risks of “abuses of democracy” in countries with English-style constitutionalism, where parliamentary sovereignty is, in Lord Bingham’s words, the “bedrock of the British constitution?”⁹⁹ The fact of the matter is that the Venice Commission’s *Report on Constitutional Amendment* perpetuates this confusion between the ideas of democracy, rights, the rule of law, and supra-legislative constitutionalism, so that their position on striking a proper balance between the rigidity and flexibility of formal rules of constitutional change remains opaque. For instance, the Commission writes that it is itself:

of the opinion that having stronger procedures for constitutional amendment than for ordinary legislation is an important principle of democratic constitutionalism, fostering political stability, legitimacy, efficiency and quality of decision-making and the protection of non-majority rights and interests.¹⁰⁰

In this passage, the requirement of sufficiently rigid formal rules of constitutional change is thus explained by the purported value of supra-legislative constitutionalism, which is not a necessary implication of the rule of law in its less controversial sense, but an implication to which the rule of law could be extended. In any case, it is to supra-legislative constitutionalism and its upholding that the Commission attaches the values of political stability, legitimacy, efficiency and quality of decision-making, and the protection of non-majority interests. However, it can only do so by incorporating rights and the rule of law (and the idea of legal legitimacy). In other terms, the Commission dissolves the rule of law into vague ideas (or a juxtaposition of ideas) of modern, supra-legislative, democratic, and rights-based constitutionalism. Consequently, readers are left with the suggestion that, in the end, democracy is a case for both enough flexibility and enough rigidity in respect of rules of constitutional change. What then about the rule of law? Is it possible that, in addition to

⁹⁹ *Jackson and others v Her Majesty’s Attorney General*, [2005] UKHL 56 at para 9 (Lord Bingham).

¹⁰⁰ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 238.

demanding enough rigidity, it calls for enough flexibility too? It is as follows that the Commission identifies “potential pitfalls” of both too rigid and too flexible rules of constitutional change:

1. That the rules on constitutional change are too rigid. The procedural and/or substantial rules are too strict, creating a lock-in, cementing unsuitable procedures of governance, blocking necessary change. This means too tight confinements on democratic development, and disenfranchisement of the majority that wants reform.
2. That the rules on constitutional change are too flexible. The procedural and/or substantial rules are too lax, creating instability, lack of predictability and conflict. Democratic procedures, core values and minority interests are not sufficiently protected. The issue of constitutional reform becomes in itself a subject of continuous political debate, and the political actors spend time arguing this instead of getting on with the business of governing within the existing framework.¹⁰¹

Such an account stands at odds with the Commission’s strong commitment towards legal constitutional legitimacy and even constitutional legal continuity.¹⁰² Here again, the Venice Commission has democracy working on both sides, with the rule of law instrumentally and unavowedly dissolved into a catch-all concept of “modern democratic constitutionalism,” which—as it is distinguished from previous or other forms of democracy—works for rigidity only. It is an indication of its seeming unawareness of the fact that too-rigid rules of constitutional change have poor chances to be followed by rulers, so that the rule of law is not only an argument for enough rigidity, but also for enough flexibility. More precisely, the rule of law is a case for sufficiently-rigid legal rules of constitutional change only in legal systems where a distinction between formally constitutional and formally ordinary laws is to be found and preserved—which exclude systems of parliamentary sovereignty.

There is more, for the Commission does not seem fully aware of the fact that a legal form of constitutional stability, predictability, and protection is not only to be sought against governmental powers, but also against courts, so that, again, the rule of law is a call not only for enough rigidity, but also for enough flexibility, as two sides of the same coin. On the one side, where the formally-codified legal rules of constitutional change are too lax, constitutional or supreme courts increasingly tend to

¹⁰¹ *Ibid* at para 12. See also *ibid* at paras 104, 239.

¹⁰² Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at paras 22, 68.

retighten them, even to the point of declaring and adjudicating “implicit unamendability.”¹⁰³ Such a judicial practice bases itself on the idea of a primary “*pouvoir constituant*,” which is ruled out by the Venice Commission’s strong stance on legal legitimacy and continuity. Moreover, we will see that the Commission’s “normative reflections” that accompany its proposed method for constitutional design logically imply a rejection of judicial review of implicit constitutional unamendability. On the other side, where the formally-codified legal rules of constitutional change are too stringent, courts can indulge in loosening them. However, on this account, Richard Albert’s talk and use of “judicial minimalism”¹⁰⁴ as a value that somehow stems from the rule of law witnesses a clearer understanding of this ideal’s implications for constitutional-change-rules design.

C. The theoretical assumptions (and difficulties) underlying Richard Albert’s book on constitutional amendment

Speaking of Richard Albert, we have started to acquaint ourselves with his methodology in the introduction to this paper,¹⁰⁵ so that we already know about the humble dual purpose he claims for his book: “to inspire interest in constitutional amendment and to guide those seeking to understand how constitutions change.”¹⁰⁶ However, as I said at the outset, my understanding of the real practical purpose of the book is to provide constitutional designers of the world with a method for designing rules of constitutional change which strike not a purely abstract equilibrium between rigidity/stability and flexibility/evolutivity, but a practical one, as rules whose chances to be obeyed are (for the sake of the rule of law) maximized. This confers the first advantage to Albert over the Venice Commission, as the Commission is not fully aware that the rule of law requires not only sufficient rigidity, but also sufficient flexibility. Hence, with his higher awareness of that stealth threat to the rule of law, Albert also edges out “implicit unamendability” and other instances of judicial

¹⁰³ See Roznai, *supra* note 81.

¹⁰⁴ Albert, *Constitutional Amendments*, *supra* note 1 at 269.

¹⁰⁵ I note here that Albert’s work on constitutional change is an individual scholarly production and not the collective work of an international public institution.

¹⁰⁶ Albert, *Constitutional Amendments*, *supra* note 1 at 36.

activism. This awareness attains special value when combined with the realization that the seemingly substantive distinction between “amendment” (in the stricter sense) and “dismemberment” in fact coincides with a set of contingent political choices which are legally transposed into an escalating structure of procedures for constitutional change. Indeed, “tiered constitutional design”¹⁰⁷ works as an alternative, not only to rules of change which governments would disobey for being too rigid, but also to rules of change which courts would disobey for being too flexible. Still, one further point goes to Albert at the Commission’s expense for his less controversial, but more accommodating, precise and operational, conception of the rule of law, which roughly follows Fuller’s interpretation, especially his desiderata of generality, promulgation (or publicity), and congruence.¹⁰⁸ Besides, since Albert both considers constitutional amendment as a right of the people and wants rules of constitutional change to be capable of being followed, it is surprising he does not mobilize the “not requiring the impossible” (or practicability) desideratum more.¹⁰⁹

However, Albert’s theoretical approach to guidance on constitutional-change-rules design also has its drawbacks. Working chiefly as a comparative constitutional lawyer and incidentally as a comparative “constitutional studies”¹¹⁰ scholar, Albert takes an ambivalent, shifting approach between factual descriptions/explanations and normative discourse. This results in the entanglement and conflation of two analytically distinct political values, which at times in the book he, in his own way, treats as if they were the same: the rule of law and democracy (or “democratic constitutionalism”). This hypothesis is likely confirmed by the fact that, aside from the claim that the rule of law requires constitutional amendment rules to be designed so that they can and will be obeyed by the state, Albert claims that constitutional amendment is a “fundamental right,” as “the right to amend a constitution is part of a larger bundle of democratic rights.”¹¹¹ Given the role of governments in formal

¹⁰⁷ See Dixon & Landau, *supra* note 10.

¹⁰⁸ Albert, *Constitutional Amendments*, *supra* note 1 at 269–70.

¹⁰⁹ Fuller, *supra* note 47 at 70–79.

¹¹⁰ See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) at 151–90 (chapter 4).

¹¹¹ Albert, *Constitutional Amendments*, *supra* note 1 at 194.

constitutional amendment, this claim, which perhaps could have bridged the gap between the rule of law and democracy as far as constitutional change is concerned, is not sufficiently fleshed out in his book.

Another weakness of Albert's methodology comes again from his hesitating posture between legal and political constitutionalism. Unlike the Venice Commission, Albert amalgamates legal and extra-legal factors and aspects of constitutional change. This shortfall is, in my opinion, the reason why, for instance, Erin Delaney could observe that Albert's "own analysis leaves underexplored the connection between amendment culture and the amendment rules themselves."¹¹² Consequently, Albert spends numerous strongly-felt pages suggesting that any attempt at measuring constitutional amendment difficulty is probably illusory.¹¹³ Albert makes "an important observation that has been all but lost among scholars of constitutional change: codified amendment rules alone cannot tell us how difficult it is to amend a constitution."¹¹⁴ As we have seen, the Venice Commission does not exactly dispute this claim, but thinks that under normal conditions, formal legal rules of constitutional change "matter," and that there is no epistemological or methodological gain to make in melting away the legal dimension of such change. I concur with this view. Since designing formal rules of constitutional change is a balancing exercise between rigidity and flexibility, how could any attempt at striking the correct balance work without any measuring of the difficulty to amend the constitution at all?

As for the Venice Commission, which otherwise purposefully focuses its methodology in the legal field, it relies on work by Bjørn Erik Rasch and Roger Congleton, according to whom the two most important criteria for determining the level of rigidity/flexibility of a given set of constitutional amendment rules are the number of decisions ("veto points") and the number of actors ("veto entries") they involve.¹¹⁵

¹¹² Delaney, *supra* note 3.

¹¹³ Albert, *Constitutional Amendments*, *supra* note 1 at 95-138 (chapter 3). See especially *ibid* at 137-38.

¹¹⁴ *Ibid* at 96.

¹¹⁵ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 99, citing Bjørn Erik Rasch & Roger D Congleton, "Amendment Procedures and Constitutional Stability", in Roger D Congleton & Birgitta Swedenborg, eds, *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Cambridge,

Although not perfect, I find this approach more coherent and fruitful than Albert's. However, there is something even more puzzling in Albert's realistic methodological openness: although he wants "to guide those seeking to understand how constitutions change,"¹¹⁶ Albert does not seem to have a unified concept of what a constitution is. Effectively, after identifying three different categories of "uses" which formal constitutional amendment rules serve, namely formal, functional, and symbolic/value-signalling/expressive ones, Albert writes that "[t]hese many uses of amendment rules may not all be possible at the same time and in the same constitution."¹¹⁷ It is unclear the extent to which any of these uses are a matter of choice or a possibility for given constitutional designers at any given time. As we will see, it is unclear how each use bears on the particular proper balance which must be sought—unless there are many substantially different proper balances one can arbitrarily pick.

IV. RICHARD ALBERT AND THE VENICE COMMISSION ON CONSTITUTIONAL AMENDMENTS: COMPARATIVE METHODS

To recap, both Richard Albert and the Venice Commission intend to provide guidelines for the design of written legal rules of constitutional change. Neither proposes a one-size-fits-all system or set of rules. Rather, both insist that this design is a matter of striking a proper balance on a case-by-case basis. *Prima facie*, for both Albert and the Commission, the balance sought is between rigidity and flexibility. However, without ignoring the reality of extra-legal constitutional change and extra-legal factors of legal constitutional change, the Commission's approach to the matter is purposefully more juristic.

In contrast, Albert vacillates between legal and political constitutionalism as he weighs the rule of law and democracy against one

MA: The MIT Press, 2006) 319. See also Bjørn Erik Rasch, "Foundations of Constitutional Stability: Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures" (Paper delivered at the ECPR Joint Sessions of Workshops, Rennes, France, 11-16 April 2008) [unpublished], online (pdf): [ecpr <ecpr.eu/Filestore/PaperProposal/d634bfdc-6239-40a0-98b6-38b5fbb9f43.pdf>](http://ecpr.eu/Filestore/PaperProposal/d634bfdc-6239-40a0-98b6-38b5fbb9f43.pdf) [perma.cc/RN2L-K6DD].

¹¹⁶ Albert, *Constitutional Amendments*, *supra* note 1 at 36.

¹¹⁷ *Ibid* at 262.

another. After all, his thesis of constitutional amendment as a “fundamental right” is not sufficiently fleshed out. Keeping law and pure politics separate, the Commission is better positioned to appreciate the interplay between the legal and extra-legal aspects of constitutional change and maintain some sense of the equilibrium to be struck between rigidity and flexibility. This is thanks to their possession of a yardstick, although imperfect, for measuring amendment difficulty by focusing on legal difficulty. Yet Albert’s greater openness to—or detour via—the political leads him to “tiered constitutionalism,” an enriched understanding of the legal dimension of constitutional change.

Moreover, Albert subscribes to a much clearer and less controversial conception of the rule of law than the Commission, whose version dissolves the rule of law into a catch-all concept of modern (and rights-based) democratic constitutionalism. Paradoxically enough, however, in practice, the Commission seems more strongly committed to the rule of law ideal and legal continuity, while Albert tends to yield more easily to democratic exceptionalism, as he does in the case of the executive resorting to a referendum not provided for in the constitution. In contrast, Albert better serves when it comes to the threat of judicial activism.

Another advantage of Albert’s methodology over the Commission’s is that it contains the seeds of a better understanding that both the rule of law and democracy require an equilibrium between rigidity and flexibility, though they can come into conflict. Thus, the balance to be struck in designing legal rules of constitutional change becomes two-layered, and the fundamental legal issues of constitutional change to be addressed include the opposition between legal continuity and revolutionary constitutionalism, theories (and rhetoric) of *pouvoir constituant*, unamendability (both explicit and implicit), and the legal, illegal, and “extra-legal” uses of constitutional referendums. However, and perhaps most troubling, not only does Albert suggest that any attempt at assessing amendment difficulty will likely be to no avail, but he does not even hold to a unified concept of a constitution. Against the foregoing backdrop on Richard Albert and the Venice Commission’s respective theoretical approaches to the design of rules of constitutional amendment or change, we can now intelligently, critically, and thus usefully compare the concrete guidelines for constitutional designers they each propose.

A. The Venice Commission's guidelines for the design of constitutional amendment rules

1. *Four Factors*

The Venice Commission identifies four great factors bearing upon the particular proper equilibrium that must be sought between rigidity and flexibility by designers of constitutional amendment rules on a case-by-case basis.

The first factor is the constitution's origins. Even though the Commission "does not mean that all constitutions that were originally adopted by way of undemocratic procedures automatically are in need of replacement," it nonetheless contends that "such constitutions should not be too rigid."¹¹⁸

The second factor is the constitution's age. If "old age is not an argument against a national constitution," it remains the case that "old constitutional texts are in particular need of flexibility in order to adjust to transformations in society, if they are to retain their importance as a relevant and operational framework for political action."¹¹⁹

The third factor is the constitutional text's level of detail, as "[t]he lengthier and more operational a constitutional text is, the more it resembles ordinary legislation, and the more prone it should and will be to relatively frequent amendment."¹²⁰ The Commission here suggests that striking a proper equilibrium between legal rigidity and flexibility of constitutional amendment is notably a matter of maintaining a difference between constitutional and ordinary laws through different wording and length. In order for lengthier constitutions to uphold this distinction and achieve an acceptable balance, the Commission recalls the possibility of having two separate categories of constitutional provisions with two corresponding different amendment procedures: "one that includes the most fundamental rules and principles and which is very difficult to amend, and another that contains the more detailed rules on the machinery of government and which is easier to change."¹²¹ This

¹¹⁸ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 124.

¹¹⁹ *Ibid* at para 127. On this topic, see also David S Law & Mila Versteeg, "The Declining Influence of the United States Constitution" (2012) 87:3 NYUL Rev 762.

¹²⁰ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 128.

¹²¹ *Ibid*.

categorical approach remains short of recognizing tiered constitutionalism, which allows for more than just two different amending formulas. Still, like Richard Albert, the Venice Commission sees in this possibility an alternative to unamendability. Moreover, given the Commission's views on unamendability, it is more than likely that it considers such an alternative "almost equivalent to making the provisions unamendable,"¹²² or "unamendability in practice,"¹²³ an alternative which should be favoured. At any rate, the Commission writes:

The constitutional amendment procedures should be drafted in a clear and simple manner, and applied in an open, transparent and democratic way.¹²⁴

[...] if the rules and procedures on constitutional change are open to interpretation and controversy, or if they are applied too hastily or without democratic discourse, then this may undermine political stability and, ultimately, the legitimacy of the constitution itself.¹²⁵

By contrast, operational clarity does not seem to be a concern for Albert. He argues—incidentally, without any unified concept of what a constitution is—that constitutions, including their amendment rules, serve a symbolic function in that they express or signal the values of society. This is all the more surprising from him, given that clarity is one of Fuller's desiderata of legality.¹²⁶

The fourth and last factor identified by the Commission is the constitution's level of justiciability:

In general, it may be held that the more legally operational a constitutional text is, the more flexible it should be. At the same time, the more often a constitution is invoked before the courts, the more room there is for reform through judicial interpretation—requiring less need for formal amendment.¹²⁷

It is unclear what the Commission is telling constitutional designers here. It may well be that a high level of justiciability is desirable because, by way of judicial interpretation, it allows for both legal operability and rigidity of the constitution at the same time. I would find such a guideline questionable for being insensitive to the risk of judicial activism as a

¹²² *Ibid* at para 53.

¹²³ *Ibid* at para 216.

¹²⁴ *Ibid* at para 202.

¹²⁵ *Ibid* at para 204.

¹²⁶ Fuller, *supra* note 47 at 63–65.

¹²⁷ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 129.

threat to the rule of law. As a matter of fact, the Commission does give signs of awareness of this peril, but in a fragmented manner. For instance, the Commission believes that “a deliberative and democratic political procedure following the prescribed procedures for constitutional amendment is clearly preferable to a purely judicial approach.”¹²⁸ The Commission might well be aware of the risk that too rigid amendment rules could be disobeyed, not only by rulers, but also by courts, for it writes: “The more difficult it is to amend a given constitution, the more likely it is that calls for change will be channelled into legal action, and the more likely the courts will be to follow such invitations.”¹²⁹ The Commission could have added that, conversely, a constitutional text that is too easy to amend may induce courts to carry a substantive form of review of constitutional amendments and to forge rules or principles of “implicit unamendability.” Nevertheless, the Commission recommends against substantive judicial review of constitutional amendments.¹³⁰

Except for this very case, the point from which the Commission considers constitutional change by way of judicial interpretation to be problematic is unclear. However, the Commission does warn against judicial activism, at least insofar as judicial review of constitutional amendment is concerned. The Commission writes:

If judicial review of constitutional amendment is provided for in the national constitutional system, then this should be carried out with care and consideration, allowing a margin of appreciation for the national constitutional legislator.¹³¹

In that regard, “[a]s far as the Venice Commission can judge, the experiences with... mandatory a priori judicial review of proposals for constitutional amendment are mixed.”¹³² For instance, such a mandatory review is provided for in Azerbaijan, Kyrgyz Republic, Moldova, and Ukraine. It has sometimes led to excessive rigidity and the curtailment of democratic constitutionalism, notably by preventing amendments from

¹²⁸ *Ibid* at para 112.

¹²⁹ *Ibid* at para 111.

¹³⁰ *Ibid* at paras 234–35.

¹³¹ *Ibid* at para 251.

¹³² *Ibid* at para 195.

being democratically debated at all.¹³³ I should add, however, that according to a recent study by Michael Hein:

whereas only 18.4 percent of all court decisions taken outside post-socialist Europe are cases of judicial activism [over constitutional amendment], this share amounts to 23.5 percent in the post-socialist countries. When calculating this number without the *ex officio a priori* review, which is only available in Central and Eastern Europe and could therefore strongly bias the result, the share of activist decisions in post-socialist Europe rises further to 31.3 percent.¹³⁴

The Venice Commission characterizes judicial activism as an extreme and reprehensible case of judicial informal constitutional change. The Commission indeed distinguishes between two types of informal constitutional change: judicial and political. It also writes:

Institutional and rights-provisions also differ as to the typical mechanism of informal change. The former are complemented by constitutional conventions, while the latter are reinterpreted and specified by courts and other bodies involved in constitutional review.¹³⁵

For our own analysis, the point here is that even short of judicial activism in particular, the Venice Commission tends to generally disapprove of informal change in favour of formal constitutional change.¹³⁶ This should serve as a caveat to the Commission's thesis that a higher level of justiciability of rules of constitutional change can reduce the need of formal amendment.

2. "Normative reflections"

Although the Venice Commission, like Richard Albert, insists that the proper equilibrium between the rigidity and flexibility of constitutional amendment rules can only be struck on a case-by-case basis so that there simply cannot be any single, universal standard model thereof, it nonetheless observes that:

If there is not a "best model", then there is at least a fairly wide-spread model—which typically requires a certain qualified majority in parliament (most often

¹³³ *Ibid* at paras 195, 245.

¹³⁴ Michael Hein, "Do constitutional entrenchment clauses matter? Constitutional review of constitutional amendments in Europe" (2020) 18:1 *Intl J Const L* 78 at 102 [emphasis in original].

¹³⁵ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 134.

¹³⁶ *Ibid* at para 117.

2/3), and then one or more additional obstacles—either multiple decisions in parliament (with a time delay), or additional decision by other actors (multiple players), most often in the form of ratification through referendum.¹³⁷

Effectively, if a number of European constitutions “require convening of a special body for the purpose of amending specific provisions or adopting a new constitution,”¹³⁸ then in “most countries Parliament serves both as ordinary legislator and as the constitutional legislator.”¹³⁹ In order to procedurally distinguish these two parliamentary capacities, “[t]he two most widely used mechanisms in European constitutions are (i) qualified majority in parliament and (ii) time delays.”¹⁴⁰ Other mechanisms include the imposition of a special higher quorum, requiring multiple or more readings, providing for intervening elections, and holding ratification referendums. One would hardly recognize the essence of the Canadian procedure in what precedes. Nevertheless, the Commission does have a word about the fact that “in federal systems sometimes ratification by the [federated] entities”¹⁴¹ is required. This is still quite below the level of provincial participation and initiative for constitutional amendment in Canada.

Yet, the Commission does not confine itself to descriptively sketching out this outline of a typical European constitutional amendment procedure. Indeed, it follows up with quite a few “normative reflections.” First and foremost, the Commission is of the opinion that “the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy.”¹⁴² We will see that Richard Albert makes no such claim. Secondly, the Commission asserts that “[a] good amendment procedure will normally contain (i) a qualified majority in parliament, which should not be too strict, and (ii) a certain time delay, which ensures a period of debate and reflection.”¹⁴³ Regarding the latter, the Commission contemplates only time thresholds, whereas Albert

¹³⁷ *Ibid* at para 62.

¹³⁸ *Ibid* at para 44.

¹³⁹ *Ibid* at para 35.

¹⁴⁰ *Ibid* at para 92.

¹⁴¹ *Ibid* at para 6.

¹⁴² *Ibid* at para 183. See also *ibid* at para 240.

¹⁴³ *Ibid* at para 241.

discusses both time thresholds and time ceilings, which leads him to tackle rather tricky and important issues of inter-generational amendment.

Regarding ratification referendums, the Venice Commission considers that “it is equally legitimate either to include or not include”¹⁴⁴ them as part of the procedure. However, in line with its idea that national parliaments are the most appropriate forums for constitutional amendment, the Commission thinks that “[a]s a main rule, a referendum on constitutional amendment should not be held unless the constitution explicitly provides for this.”¹⁴⁵ More specifically, “[r]eferendums unforeseen by the Constitution should not be used to circumvent the constitutional amendment procedures laid down in the Constitution,”¹⁴⁶ and:

there is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies.¹⁴⁷

In the introduction to this article, I indicated that Richard Albert quarrels with this normative stance by the Venice Commission, which he describes as a “formalist view” and “strict adherence to law.”¹⁴⁸ Lastly, the Commission cautions us about the fact that “the requirement that all constitutional amendments be submitted to referendum risks making the Constitution excessively rigid, and the expansion of direct democracy at the national level may create additional risks for political stability.”¹⁴⁹

3. Tiered constitutionalism and the government vs rights distinction

We saw above how the Venice Commission considers the possibility—for lengthier constitutions to uphold the distinction between constitutional and ordinary laws and achieve an acceptable balance between rigidity and flexibility of constitutional change—of having two separate categories of constitutional provisions with two corresponding

¹⁴⁴ *Ibid* at para 184.

¹⁴⁵ *Ibid* at para 185.

¹⁴⁶ *Ibid* at para 68. See also *ibid* at para 189.

¹⁴⁷ *Ibid* at para 191. See also *ibid* at para 242.

¹⁴⁸ Albert, *Constitutional Amendments*, *supra* note 1 at 25.

¹⁴⁹ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 187.

different amendment procedures. One category would consist of more rigid rules for fundamental rules and principles and the other for more flexible rules for “the more detailed rules on the machinery of government.”¹⁵⁰ Later in its report, the Commission applies a new version of this distinction that opposes provisions relating to the state machinery to provisions protecting rights. This new use of the distinction is not dependent on the length of constitutions but seems to be claiming a self-standing substantive value. The Commission writes that “each state is free” to amend provisions on its machinery “as long as certain fundamental democratic requirements of international law are fulfilled,”¹⁵¹ but that “amendments strengthening or prolonging the power of high offices of state... should have effect only for *future* holders of the office, not for the incumbent.”¹⁵²

Regarding the amendment of human-rights provisions, the Commission claims that it is different for three reasons:

First, these provisions are usually formulated in a general and abstract way, which is open to legal interpretation. Second, they are continuously being invoked before the courts, and thereby developed through case law. Finally, the national constitutional bills are supplemented by international law (inter alia, the UN treaties on human rights, in Europe the ECHR and the EU Charter on fundamental rights[.] now strengthened by the Lisbon Treaty). The protection offered by international law supplements the national catalogue—especially so with regard to European countries where the ECHR can be invoked directly before the courts.¹⁵³

The Commission is implicitly arguing here that rights are less of a political/voluntarist and more of a properly legal/epistemic matter of constitutional law than political institutions. As such, rights provisions should be amended less easily and less often, and judicial activism would be less of a threat in the field of human rights. The Commission indeed further notes that:

when it comes to constitutional reform of fundamental rights, there is an important distinction between the first transformation of a given “right” into a provision of positive constitutional law (the “positivisation”), and the subsequent interpretation and application of the same provision. The first step should in

¹⁵⁰ *Ibid* at para 128.

¹⁵¹ *Ibid* at para 136.

¹⁵² *Ibid* at para 145 [emphasis in original]. See also *ibid* at para 249.

¹⁵³ *Ibid* at para 137.

principle preferably be done through democratic procedures, while the second legitimately belongs with the courts.¹⁵⁴

However, the Venice Commission comes to qualify the foregoing in terms that eventually show an awareness of the threat of judicial activism in human-rights interpretation and review too. I say “eventually” because it comes at the second stage of its two-stage qualification. The first stage consists of the following three reasons why the importance of amendments to rights provisions remains high notwithstanding the international dimension of human rights:

First, as was said before, national constitutional rules may still in many areas of law (notably social and economic rights) reach further than the international and European rules, offering better protection to the individual. Second, national constitutional rules may in many countries carry greater legal and actual authority than European rules, thus ensuring better enforcement and a higher level of acceptance. Third, there may be important symbolic value attached to the fact that fundamental rights are not only protected under European law but also by the national constitution.¹⁵⁵

The Commission then comes to the second stage of its qualification of the claim that rights provisions are “different,” so that they should be made more difficult to amend:

To this can be added that the framework for democratic discourse and development of fundamental rights are by far best at the national level. At the international or European level the actors of human rights negotiation and shaping carry only an indirect and limited democratic legitimacy.¹⁵⁶

Foreshadowing this, the Commission had already said a bit earlier in its report that, in general, the substantive relationship between national and international human rights:

has been a one-way process—introducing new rights and extending the scope and protection of existing ones. This process is still clearly going on. But there are also signs that in the future there may be more calls for adjusting or limiting or even reducing the legal reach of some constitutional rights; either because they must be balanced against other conflicting rights, or because they have in some cases been judged as going too far, thereby unduly restricting the legitimate democratic powers of parliament and the government.¹⁵⁷

¹⁵⁴ *Ibid* at para 174.

¹⁵⁵ *Ibid* at para 168.

¹⁵⁶ *Ibid* at para 169.

¹⁵⁷ *Ibid* at para 157.

Therefore, “[i]t should be possible to discuss and amend not only constitutional provisions on government, but also provisions on fundamental rights and all other parts of the constitution.”¹⁵⁸

4. Unamendability and judicial review of constitutional amendments

One last constitutional amendment-related topic on which the Commission’s position deserves a few separate words is unamendability and judicial review of constitutional amendments. The Commission seemingly claims not to hold “any general view as to whether a given national system should include provisions on unamendability or not.”¹⁵⁹ However, it surely “considers that unamendability is a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order.”¹⁶⁰ Furthermore, this talk of “principles” does not mean that the Commission thinks unamendability should take the form of unamendable principles rather than of provisions. Indeed, since the Commission is, as we have seen, against substantive¹⁶¹ (but not formal, procedural¹⁶²) judicial review of constitutional amendments, it follows that it believes that constitutional unamendability should, where chosen, take the form of unamendable provisions, not of substantive principles.

On this account, let us not forget what was just said above. According to the Commission, “[i]t should be possible to discuss and amend not only constitutional provisions on government, but also provisions on fundamental rights and all other parts of the constitution.”¹⁶³ Moreover, since unwritten, “implicit,” that is, judicially-made unamendability could hardly be procedural,¹⁶⁴ but can only be substantive—for if a court declares a specific constitutional provision to be unamendable, it will give reasons for it—, the Commission simply cannot accept it as a form of judicial

¹⁵⁸ *Ibid* at para 248. See also *ibid* at para 175.

¹⁵⁹ *Ibid* at para 217.

¹⁶⁰ *Ibid* at para 218.

¹⁶¹ *Ibid* at paras 234–35.

¹⁶² *Ibid* at para 237.

¹⁶³ *Ibid* at para 248.

¹⁶⁴ There is no standard procedure for constitutional amendment, and empirically, it is not procedural. See Roznai, *supra* note 81 at 39–70.

review of constitutional amendments. Therefore, I think the following quote by the Commission should be interpreted in this light:

it can be held that proposals for unacceptable constitutional amendments should be met with open debate, and criticised on substance (as well as on the basis of binding international law and European standards) –not by formally invoking unwritten and unclear principles of implicit unamendability.¹⁶⁵

Yet, as we are about to see, the Commission characterizes any type of permanent unamendability as substantial. Therefore, even where it is explicit and allows for procedural judicial review only, (permanent) unamendability remains something the Commission is not fond of. Indeed, the Commission asserts that “absolute entrenchment will never in practice be absolute”¹⁶⁶ while it favours uninterrupted constitutional legality.¹⁶⁷ It is unlikely that the Commission endorses any type of judicial review of constitutional unamendability—of which it reminds us that it is found only in a few constitutional systems.¹⁶⁸ This is why “the Venice Commission would as a general principle advocate a restrictive and careful approach to the interpretation and application of ‘unamendable’ provisions.”¹⁶⁹

The Venice Commission also addresses explicit temporary unamendability provided for in times of war, emergency, or otherwise exceptional circumstances, something Richard Albert calls “defense mechanisms” or “safe harbors.”¹⁷⁰ The Commission characterizes such exceptional unamendability as “temporal” instead of “substantial,” which is how it labels normal/permanent unamendability. Following this distinction, the rationale behind each of these two types of unamendability is very different. However, the Commission emphasizes:

that it should preferably be for the constitutional legislator itself to decide when such an extraordinary situation exists. It may be problematic if such rules result

¹⁶⁵ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 223.

¹⁶⁶ *Ibid* at para 219.

¹⁶⁷ *Ibid* at paras 22, 68, 239, 246.

¹⁶⁸ *Ibid* at para 208.

¹⁶⁹ *Ibid* at para 220. See also *ibid* at paras 250–51.

¹⁷⁰ Albert, *Constitutional Amendments*, *supra* note 1 at 202–04.

in providing the executive power with the possibility to block legitimately proposed reform by declaring a state of emergency.¹⁷¹

By the “constitutional legislator’s decision,” the Commission does not seem to mean “constitutional provisions” or “written rules,” but an actual declaration of an exceptional situation. It is silent on the possible judicial review of such a decision (or lack thereof).

Unlike Richard Albert, who points to an instance of explicit temporary unamendability in periods immediately following the adoption of a new constitution, the Commission discusses the opposite claim that democratic transitions are a special case for flexibility of constitutional amendment rules. The latter claim is posited by Stephen Holmes and Cass Sunstein.¹⁷² For three reasons, the Commission rejects the idea that the equilibrium to be struck by amendment rules differs between old and new democracies:

First, all democracies have at one point in history been “new”, and for most of them this happened in times of radical transition. It is not easy for a constitutional system to change its amendment rules once the first period of change has passed, and there might be quite different views on when that is. What a new democracy should aim for is therefore rather an amendment formula designed to last for a while. Second, new democracies are not only in special need of flexibility, but arguably also in more need of constitutional stability and rigidity than more established democratic systems. Third, even old and mature constitutional systems may be in need of substantive constitutional reform in order to improve effective and democratic governance.¹⁷³

B. Richard Albert’s guidelines for the design of constitutional amendment rules

For Richard Albert, although “[n]o part of a constitution is more important than its rules of change,” the question of how to design constitutional-amendment rules “remains unaddressed in any comprehensive way,” and “we know from experience that amendment

¹⁷¹ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 224.

¹⁷² Stephen Holmes & Cass R Sunstein, “The Politics of Constitutional Revision in Eastern Europe” in Sanford Levison, ed, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995) 275 at 275–306.

¹⁷³ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 200.

rules are often the last thing on the agenda in constitution-making.”¹⁷⁴ The guidelines he proposes are organized around four sets of choices he describes as many steps in the design process: choices of “foundations;” choices of “pathways;” choices of “specifications;” and choices of “codification.” However, the criteria for these choices are not fixed but made contingent and dependent upon one another, for instance the choice of particular “uses” and “purposes.” Remember what we have seen:¹⁷⁵ Albert does not have a unified concept of what a constitution is but instead identifies three different categories of “uses” that formal constitutional amendment rules may (or may not) serve:

They have formal uses in constitutionalism, namely repairing imperfections, distinguishing constitutional from ordinary law, entrenching rules against easy repeal or revision, and creating a predictable procedure for constitutional change. Amendment rules also have functional uses, including counterbalancing courts, promoting democracy, raising public awareness, pacifying change, and managing difference. Amendment rules have an important symbolic use as well: they can be designed to express a rank-ordering of constitutional values. These many uses of amendment rules may not all be possible at the same time and in the same constitution. But they offer constitutional designers many possibilities for self-governance.

As is true of building an edifice, constructing the rules of constitutional change requires careful thought about design and operation. The task is complex and can be done most effectively after arriving at a fulsome self-understanding of the purposes of the constitution for which the rules are being designed.¹⁷⁶

To be sure, one can hardly think of rules of constitutional change whose uses do not include “creating a predictable procedure for constitutional change.”¹⁷⁷ Moreover, by implication, all legal written rules of formally constitutional change fulfil a function of “distinguishing constitutional from ordinary law.”¹⁷⁸ Even though the chief purpose of Albert’s book is to assert the value of legality in the field of constitutional amendment, his normative stance is diluted by the further suggestion that

¹⁷⁴ Albert, *Constitutional Amendments*, *supra* note 1 at 261.

¹⁷⁵ *Ibid* at 262.

¹⁷⁶ *Ibid*.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid*. For Canada, see e.g. Maxime St-Hilaire, Patrick F Baud & Elena S Drouin, “The Constitution of Canada as Supreme Law: A New Definition” (2019) 28:1 Const Forum Const 7.

singular facts normatively speak by themselves: “Constitutional designers can sequence these four sets of fundamental choices as a guide for building amendment rules specifically suited to their own local history, experience, and ambitions for the state and its people.”¹⁷⁹ There is an essential difference between what precedes and what now follows—where Albert the political constitutionalist takes over from Albert the constitutional lawyer—in his claim that the proper equilibrium between rigidity and flexibility can only be struck on a case-by-case basis. Besides, in the introduction to his “blueprint for amendment design,” which forms the bulk of the conclusion to his book, Albert eventually makes the striking of such an equilibrium a secondary issue, as the excerpt above is immediately followed by: “Designers should also weigh how to balance competing interests between flexibility and rigidity, concentrated and decentralized authority, and direct and representative participation by the people.”¹⁸⁰

1. Foundations

With respect to the choice of “foundations of the polity,”¹⁸¹ Albert points to three interconnected ones: the choice of distinguishing between what will count as an “amendment” and what will count as a “dismemberment,” which he strongly recommends; the closely-connected choice of (explicit) unamendability, which he eventually recommends against; and the choice of judicial review of constitutional changes, which he seemingly leaves open at the same time he argues for a “democratic alternative” to judicially-pronounced invalidity. I think it makes them clearer to discuss Albert’s three choices in reverse order.

Albert indicates two democratic alternatives to judicial nullification of constitutional changes: first, judicial declarations of “incompatibility”¹⁸² and, second, *a priori* or, as he calls it, “pre-ratification” advisory judicial review.¹⁸³ With respect, I think the idea of importing mere “declarations of incompatibility” (something Jeremy Waldron calls “soft” rights-based

¹⁷⁹ Albert, *Constitutional Amendments*, *supra* note 1 at 262–63.

¹⁸⁰ *Ibid* at 262 [emphasis added].

¹⁸¹ *Ibid*.

¹⁸² *Ibid* at 222–23.

¹⁸³ *Ibid* at 223–27.

judicial review of legislation¹⁸⁴) into the domain of judicial review based on formally constitutional, that is, supra-legislative, rights (something Waldron labels “hard” rights-based judicial review of legislation)¹⁸⁵ rests on an unfortunately common Anglo-American comparative mistake. Albert now wants to extend this common error from the field of rights to that of rules of constitutional amendment. As Xavier Focroulle Ménard and I have argued elsewhere:

Neither New Zealand nor the United Kingdom has a supreme written law in the sense of formally constitutional, supra-legislative provisions. Their constitutional law, despite the wishes of some authors, remains governed by the principle of parliamentary sovereignty, as opposed to constitutionalism, in the formal, supra-legislative sense of the term. In the case of Australia, the latter principle applies because it is a federation, yet the protection of fundamental rights is essentially excluded from it. This already explains why compliance with any human rights act adopted by the legislature or, in the case of the Australian federation, by one of its legislative authorities, cannot be a prerequisite for the *validity* of other legislative provisions.

However, the attachment of these legislators to parliamentary sovereignty, at least in matters of fundamental rights, has convinced them to go so far as to rule out the possibility that their legislation on the latter subject might, in the event of a conflict of laws, render other legislative provisions *inoperative*. This is precisely how the possibility for courts in these countries to declare the mere *inconsistency* of given legislative provisions with their human rights legislation was either expressly provided for by their human rights legislation or recognized by the courts themselves: as a means of ensuring that rights recognized in the legislation do not remain absolutely without a remedy against... the legislation. This is clear from the reasoning of the New Zealand Supreme Court decision in *Taylor*.¹⁸⁶

To his credit, Albert is, in fact, aware that his alternative to invalidation of constitutional amendments would have to be explicitly provided for in the text of the constitution, for he writes: “This would be a variation on the design of the United Kingdom Human Rights Act and

¹⁸⁴ Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 115:6 Yale LJ 1346.

¹⁸⁵ *Ibid.*

¹⁸⁶ Maxime St-Hilaire & Xavier Focroulle Ménard, “Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause” (2020) 29:1 Const Forum Const 37 at 42–43 [emphasis in original].

the New Zealand Bill of Rights Act for the judicial review of statutes.”¹⁸⁷ However, the first “formal use” of constitutional-amendment rules being a distinguishing of formally constitutional from formally ordinary laws, these very rules can hardly just have a “quasi-constitutional” status, the way some human-rights acts do, which allow them to serve as the basis of declarations of mere “inconsistency” or “incompatibility.”¹⁸⁸ Again, the Venice Commission’s position is that “[i]f judicial review of constitutional amendment is provided for in the national constitutional system, then this should be carried out with care and consideration, allowing a margin of appreciation for the national constitutional legislator,”¹⁸⁹ in the form of procedural, not substantive, review. Is Albert’s proposition of making constitutional-amendment rules “quasi-constitutional” rules grounding “declarations of incompatibility” in line with this? I doubt it. At any rate, this seems to stand at odds with a strong commitment towards legality in the field of constitutional change.

As for Albert’s second “democratic alternative” to judicial nullification of constitutional amendments, that is, “pre-ratification” advisory judicial review, it does not necessarily coincide with the peculiar type of *ex officio a priori* judicial review of constitutional amendment that is found in certain Central and Eastern European countries. Rather, Albert relies on the Canadian example, even though in Canada, judicial review of constitutional amendments is not exclusively *a priori*. Moreover, Albert’s use of the Canadian example amalgamates judicial advisory opinions on the law and judicial advisory opinions on constitutional conventions, which are not part of Canadian law. Relying on this conflation, Albert “democratically” accepts that political leaders disobey such “pre-ratification” judicial opinions on constitutional amendments, up to the point of admitting the executive’s holding of a constitutional referendum not provided for in the constitution,¹⁹⁰ something he has since then

¹⁸⁷ Albert, *Constitutional Amendments*, *supra* note 1 at 223.

¹⁸⁸ See Maxime St-Hilaire, “‘Quasi Constitutional’ Status as *Not* Implying a Form Requirement” (8 August 2017), online (blog): *I-CONnect* <www.iconnectblog.com/2017/08/quasi-constitutional-status-as-not-implying-a-form-requirement> [perma.cc/D2JK-2KYD].

¹⁸⁹ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 251.

¹⁹⁰ Albert, *Constitutional Amendments*, *supra* note 1 at 224.

reaffirmed.¹⁹¹ Once again, this stands at odds with a strong commitment towards legality in the field of constitutional change.

Regarding the foundational choice of whether or not to adopt unamendability, Albert's clearer normative position is to be found, not in his monograph, but in his response to participants of the *Balkinization* symposium on his book: "I therefore resist suggestions that constitutional designers should adopt unamendability, even though I have argued and continue to believe that unamendability serves important expressive functions."¹⁹² The same goes for Albert's normative stance on implicit or, in his words, "interpretive" unamendability: it is clearer in his response post. Indeed, again in the monograph, Albert the (accommodating) political/descriptive constitutionalist overshadows the (more principled) legal/rule-of-law advocate, who, it is to be remembered, is wary of judicial activism, which runs against Fuller's desideratum of congruence:

[T]he doctrine of [interpretive] unconstitutional constitutional amendment [...] is most important in countries where the constitution can be easily amended, as in India, whose constitution is in most cases amendable by a simple legislative majority. In contexts like these, courts can arguably serve as a check on bare legislative majorities that might exploit the permissive rules of constitutional amendment to make transformative constitutional changes without sufficient deliberation or popular support. This is the strongest justification for the doctrine of unconstitutional [though procedurally perfect] constitutional amendment.¹⁹³

In his *Balkinization* post, by contrast, Albert writes:

Despite [David] Landau's strong arguments, I find it difficult to accept the democratic legitimacy of a court purporting to invalidate a procedurally-perfect constitutional amendment that has been legitimated by legislative and popular votes.¹⁹⁴

However, his book makes it clear that Albert is willing to accept the "democratic alternative" of either a judicial *a priori* advisory opinion or a judicial declaration of "incompatibility" based on implicit unamendability

¹⁹¹ Richard Albert, "Trudeau's Threat: The Referendum at Patriation" in Noura Karazivan & Jean Leclair, eds, *The Political and Constitutional Legacy of Pierre Elliott Trudeau* (Toronto: LexisNexis Canada, 2020).

¹⁹² Albert, "Standing on Shoulders", *supra* note 7.

¹⁹³ Albert, *Constitutional Amendments*, *supra* note 1 at 221–22.

¹⁹⁴ Albert, "Standing on Shoulders", *supra* note 7.

and the theory of constituent power.¹⁹⁵ It has to be noted that, indeed, Albert is not opposed to any substantial judicial review of constitutional amendments the way the Venice Commission is. His commitment to legality comes with more concessions, not only to political constitutionalism, but also to judicial activism, not to say juristocracy or judicial populism.

Instead of unamendability, Albert favours another foundational choice: distinguishing between what is to be counted as an amendment and what is to be considered a “dismemberment.” In this sense, according to its subject, authority, scope, and purpose,¹⁹⁶ an “amendment” is “an authoritative change to higher law that corrects, elaborates, reforms, or restores the meaning of the constitution consistent with its existing framework and fundamental presuppositions.”¹⁹⁷ As for a “dismemberment,” it is “simultaneously a destruction and reconstruction of the constitution,”¹⁹⁸ which occurs “[w]hen 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.”¹⁹⁹ Despite such ontological language, we can interpret Albert’s distinction as a legal-political choice to be made.

2. Pathways

Following Richard Albert’s method for designing rules of constitutional change, after the choice of foundations comes the choice of a “pathway.” According to him:

Codified constitutions generally adopt one of six formal amendment pathways. What determines a constitution’s formal amendment pathway are answers to two questions: (1) how many amendment procedures are available, including options for initiation and ratification; and (2) may these procedures be used to amend all or only some parts of the constitution? The first question yields two broad categories: single-track, for formal amendment rules that codify only one procedure for amendment; and multi-track, for those codifying more than one. The second question yields three categories: comprehensive, which makes all amendable rules susceptible to amendment by all available procedures for formal

¹⁹⁵ Albert, *Constitutional Amendments*, *supra* note 1 at 222–23.

¹⁹⁶ *Ibid* at 79–82.

¹⁹⁷ *Ibid* at 82.

¹⁹⁸ *Ibid* at 263.

¹⁹⁹ *Ibid* at 91.

amendment; restricted, where each amendable rule is amendable only by a specifically designated procedure; and exceptional, which is otherwise a comprehensive pathway except for its creation of a single extraordinary procedure reserved exclusively for one constitutional rule or a set of related rules.²⁰⁰

In the conclusion to his book, Albert reminds the reader that, in Chapter 5, he explained “what each option offers as strengths and weaknesses”²⁰¹ and “how constitutional designers can use these pathways to achieve any number of objectives in governance, for instance to reinforce federalism, to enhance or diminish the judicial role, and to express constitutional values.”²⁰² Albert, for instance, does not consider that “the main arena for procedures of constitutional amendment should be the national parliament” the way the Venice Commission does.²⁰³ However, beyond this seeming buffet approach—which I suspect to stem from his lack of any unified concept of what a constitution is and to proceed from his affiliation with political constitutionalism—, Albert can hardly not favour the restricted multi-track pathway. Why? Because it is an implication of his preference for the foundational choice of genuinely tiered constitutional design.

3. Specifications

The third step of Richard Albert’s method for the design and drafting of rules of constitutional change consists of choices of “specifications,” which are aimed at detailing and operationalizing the previous choices of foundations and pathways. These choices include: parliamentary/referendum quorums and/or thresholds; possible “subject-matter restrictions,” such as on the number of subjects allowed—through a single-subject amendment rule, for instance, or on the quality of subjects allowed, as with unamendability—; time limitations—both deliberation floors and ceilings, as well as temporary safe harbors/defense mechanisms; and intervening elections.²⁰⁴ Albert takes a normative stance on a few of these choices only. We have seen that he “resists” unamendability. In the

²⁰⁰ *Ibid* at 179.

²⁰¹ *Ibid* at 265.

²⁰² *Ibid*.

²⁰³ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 240.

²⁰⁴ Albert, *Constitutional Amendments*, *supra* note 1 at 265–67.

body of his monograph, he also makes it relatively clear that his preference goes to a single-subject amendment rule, which “prohibits the use of omnibus bills for amendments and instead requires lawmakers to propose individual amendments that focus on one subject alone.”²⁰⁵ Indeed, elsewhere Albert advocated for Canada to adopt such a rule, which “would be inserted into Part V of the *Constitution Act, 1982* and would require that ‘no amendment shall embrace more than one subject, which shall be expressed in its title.’”²⁰⁶ The reason for such a rule would be to prevent logrolling, incoherence, sham debates, and mismatch between actual votes and subjects thereof. The idea of legally limiting the number of amendments that may be proposed simultaneously is completely absent from the Venice Commission’s report. The reason for this is likely because single-subject constitutional amendment rules are scarce, if extant, outside the constitutions of some American federated states, where “the way the rule is applied by the state courts varies dramatically.”²⁰⁷ To his credit, Albert, who is concerned about the peril of judicial activism and even of juristocracy, acknowledges that:

Yet the almost-certain consequence of adopting a single-subject rule for amendment in Canada would involve the judiciary: the Supreme Court would take on an even bigger role in managing the process of constitutional reform. If amendments in Canada were governed by a single-subject rule, the Court would be called upon using the reference procedure to determine whether a given amendment proposal conforms to the requirement that it must concern only “single subject.”²⁰⁸

Once again, Richard Albert seems to find himself torn between his political constitutionalist/constitution-making enthusiast and his constitutional lawyer/rule-of-law-advocate selves. At any rate, had Fuller had the opportunity to agree on a single-subject amendment desideratum, he certainly would have considered it to be an aspiration for a legal system,

²⁰⁵ *Ibid* at 186.

²⁰⁶ Richard Albert, “Single-Subject Constitutional Amendments” (Paper delivered at the Rewriting the Canadian Constitution Conference, Boston College Law School, 20 October 2017) at 15, online (pdf): *Digital Commons @ Boston College Law School* <lawdigitalcommons.bc.edu/lspf/1099> [perma.cc/6BYZ-DKLE].

²⁰⁷ Rachael Downey, Michelle Hargrove & Vanessa Locklin, “A Survey of the Single Subject Rule as Applied to Statewide Initiatives” (2004) 13:2 *J Contemp Leg Issues* 579 at 579.

²⁰⁸ Albert, *Constitutional Amendments*, *supra* note 1 at 188.

not a duty convertible into a legal constitutional rule.²⁰⁹ With respect to time limitations, in addition to “safe harbors” and “defense mechanisms” (which the Venice Commission accepts), as well as deliberation floors (which the Venice Commission recommends²¹⁰), Albert discusses deliberation ceilings (which escape the Venice Commission’s report).²¹¹ His final normative stance thereupon seems to be that deliberation ceilings, along with deliberation floors, should be part of the equation that exists in search of a proper bespoke equilibrium between political brinkmanship and lack of contemporaneity.²¹²

4. Codification

The last choice facing designers of rules of constitutional change is, according to Richard Albert, that of a mode of “codification,” to wit, “[h]ow to record changes to the constitution.”²¹³ It is in Chapter 6 that Albert identifies four models of amendment codification: disaggregative (like in the UK), appendative (like in the USA), integrative (like in India), and invisible (like in Ireland). These models form a promising line of inquiry about textual obsolescence and the need for harmonization and incorporation. Although he writes that “none of these four models of amendment codification reflects an optimal design for recording constitution-level changes,”²¹⁴ beyond these models, Albert seems to favour dealing with a problematic past by symbolically erasing its marks from the text of the constitution²¹⁵—something I personally consider highly debatable.

However, the real problem is that, for now, this step of Albert’s method is confused. It is so because, in reality, it is not just about “how” and “where” constitutional amendments are “recorded” but also about how they are formally legally made.²¹⁶ Albert thus conflates merely

²⁰⁹ Fuller, *supra* note 47 at 43.

²¹⁰ Venice Commission, *Report on Constitutional Amendment*, *supra* note 19 at para 241.

²¹¹ *Ibid* at para 95.

²¹² Albert, *Constitutional Amendments*, *supra* note 1 at 204–17.

²¹³ *Ibid* at 267.

²¹⁴ *Ibid* at 230.

²¹⁵ *Ibid* at 245–46.

²¹⁶ See *ibid* at 250.

administrative with formally legal consolidation—a mistake the Supreme Court of Canada, surprisingly, is also capable of.²¹⁷ He further overlooks the important distinction between, on the one hand, a legal supra-legislative constitution (or “supreme law”) made of many acts or, like in Canada,²¹⁸ of an indefinite number of scattered provisions and, on the other hand, the non-consolidation of an amended legal supra-legislative constitution which was originally laid down in a single document. Moreover, Albert conflates the concept of constitutional law in a formal (supra-legislative) sense with that of constitutional law in a merely substantive sense. Of course, changes “of constitutional importance” to the “British Constitution” or the “Constitution of New Zealand” “do not appear in a single codified constitutional document.”²¹⁹ On many levels here, Albert is comparing the incomparable.

V. CONCLUSION

In this paper, I set out to assess the contribution made by Richard Albert to the study of constitutional amendment. I proceeded through a systematic comparison of Albert with the Venice Commission, whose report on constitutional amendment is one of the few studies of the subject whose ambition and sweep make it comparable to Albert’s monograph.

Richard Albert and the Venice Commission both intend to provide guidelines for the design and drafting of written legal rules of constitutional change. Neither proposes a one-size-fits-all system or set of rules. Rather, they both insist that this design is a matter of striking a proper equilibrium on a case-by-case basis. For both, the *prima facie* balance to be found is between rigidity and flexibility. However, without ignoring the reality of extra-legal constitutional change and extra-legal factors of legal constitutional change, the Commission’s approach to the matter is purposefully more juristic. In contrast, Albert vacillates between legal and political constitutionalism as he weighs the rule of law and

²¹⁷ See *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 65, n 1.

²¹⁸ See St-Hilaire, Baud & Drouin, *supra* note 176. Cf Albert, *Constitutional Amendments*, *supra* note 1 at 246–48.

²¹⁹ Albert, *Constitutional Amendments*, *supra* note 1 at 234.

democracy against one another. Moreover, Albert's thesis of constitutional amendment as a "fundamental right" is not sufficiently fleshed out. Keeping law and pure politics separate, the Commission is in a better position to appreciate the interplay between legal and extra-legal aspects of constitutional change and to maintain some sense of the equilibrium to be struck between rigidity and flexibility, thanks to its possession of a yardstick, if an imperfect one, for measuring amendment difficulty by focusing on legal difficulty.

Yet Albert's greater openness to, or detour via, the political, leads him to "tiered constitutionalism," an enriched understanding of the legal dimension of constitutional change. Moreover, Albert subscribes to a much clearer and less controversial conception of the rule of law than the Commission, whose version dissolves it into a catch-all concept of modern (and rights-based) democratic constitutionalism. Paradoxically enough, however, in practice, the Commission seems more strongly committed to the rule-of-law ideal and legal continuity, while Albert tends to yield to democratic exceptionalism more easily, as he does with the case of the executive resorting to a constitutional referendum that is not provided for in the constitution.

In contrast, the rule of law is better served by Albert when it comes to the threat of judicial activism. Another advantage of Albert's methodology over the Commission's is that it contains the seeds of a better understanding of the fact that both the rule of law and democracy require an equilibrium between rigidity and flexibility, even as they come into conflict. Thus, the balance to be struck in designing legal rules of constitutional change becomes two-layered, and fundamental legal issues of constitutional change become, for instance, the opposition between legal continuity and revolutionary constitutionalism, theories (and rhetoric) of *pouvoir constituant*, unamendability (both explicit and implicit), and the legal, illegal, and "extra-legal" uses of constitutional referendums. However, and perhaps most troubling, not only does Albert suggest that any attempt at assessing amendment difficulty will likely be to no avail, but he does not even hold to a unified concept of what a constitution is.

On a more practical level, the comparison of Albert's and the Commission's concrete guidelines for the design of rules of constitutional change revealed quite a few inconsistencies, some of them more surprising. Although the Commission first asserts that age is a factor that weighs on the equilibrium between rigidity and flexibility, which

constitutional amendment rules must strike on a case-by-case basis, it eventually rejects the idea that this equilibrium differs between old and new democracies. Furthermore, the Commission eventually proves to be quite strongly opposed to judicial activism, in rejecting not only political but also judicial substantial constitutional change as another form of informal constitutional change. Whereas Albert's seemingly strong commitment towards legality—an idea which he grounds in a clearer and more parsimonious concept than the expansive, possibly muddled one on which the Venice Commission relies—eventually becomes laden with concessions, not only to political constitutionalism, but also to judicial activism.

Oscillating between descriptive/political and normative/rule-of-law constitutionalism to the point of adhering to no unified concept of constitution, at times Albert writes as if facts normatively spoke for themselves. Moreover, his real normative preferences are sometimes hidden in the body of his argument (and not repeated in the conclusion) or expressed elsewhere than in the book. Despite subscribing to a more robust and clearer concept of the rule of law, Albert shows no strong commitment to legal continuity or deep concerns for illegal constitutional referendums. He does not recommend operational clarity of the text of formal rules of constitutional change the way the Commission does, when in fact clarity is one of Fuller's eight desiderata of legality. Speaking of Fuller, it is highly unlikely that he would have believed that the idea of "single-subject amendments" could be the possible subject of a codified constitutional legal rule rather than a mere aspiration for legal systems.

Nonetheless, Albert's study covers a broader range of issues and realities, including deliberation time ceilings (not just thresholds) and inter-generational amendment. Albert is also right in not necessarily making the national parliament the standard or most appropriate arena for constitutional amendment, showing more sensitivity to the circumstances and requirements of federations whose central parliament does not comprise a genuinely federative upper house. Lastly, both Albert and the Commission prefer variable rules of constitutional change to constitutional unamendability. However, while full tiered constitutionalism is addressed in Albert's arguments, it escapes the Commission's survey and analysis.

Albert's monograph leaves no doubt that the study of comparative constitutional amendment is promising, particularly if greater

philosophical, epistemological, and methodological clarity can be achieved, something which presumably is not the task of one person or institution.