

Generational and constitutional change

by Mark A. Graber

Abstract: *Revisione costituzionale e revisione generazionale* – The text discusses the work of Prof. Richard Albert by situating it in the cycles of comparative constitutional studies that have animated legal scholarship over the second half of XX century and underlining the thorough research that has enabled the author to distinguish between constitutional amendment and constitutional dismemberment. Specific reference is made to the (ab)use of legalistic theories to justify changes to the constitutional framework that apparently defy the unity of the original constitution making process.

Keywords: Constitutional amendments; Constitutional dismemberment; Legalism; Amendment culture; Constitution making coherence.

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1. - *Constitutional Amendments: Making, Breaking, and Changing Constitutions*¹ is a three-dimensional *tour de force*. Professor Richard Albert provides readers with a comprehensive tour of the different theoretical issues presented by constitutional change. He offers readers a comprehensive tour of how constitutions are changed in regimes throughout the universe of constitutional democracy. *Constitutional Amendments* also gives readers a window into the constitutional problems deemed most pressing and the conceptions of the constitutional universe deemed most valuable by the generation that came of scholarly age during the present right-wing populist revolt against inherited notions of constitutional democracy. The end result is a seminal work on constitutional amendments, comparative constitutionalism, constitutional development, and contemporary constitutional thinking.

Constitutional Amendments offers a remarkable menu of the different issues raised by constitutional amendments. Professor Albert discusses what constitutional changes ought to count as constitutional amendments, the different rules for constitutional amendments, limits on constitutional amendments, judicial power to declare constitutional amendments unconstitutional and the proper placement of constitutional amendments in a constitution.

¹ Oxford University Press, New York, 2019.

Two discussions are particularly pathbreaking. First, Professor Albert points out that one size need not fit all. The process for constitutional amendment might vary depending on the nature of the constitutional change. An amendment that merely changes the date of the presidential inauguration might require simply majorities and a moderate deliberative process. Constitutional amendments that convert a parliamentary regime into a presidential regime, by comparison, should be adopted by supermajorities and only after significant, lengthy discussion. Second, *Constitutional Amendments* is the first text that discusses the significance of the placement of constitutional amendments. Such amendments might be placed at the end of the text, as in the Constitution of the United States, or within the text. The amended provisions might be retained or deleted. These are not cosmetic choices. *Constitutional Amendments* explains in loving detail the commitments to constitutional memory and change entailed by each form of what Professor Albert calls «architecture of constitutional amendment»².

Professor Albert is as stunningly thorough in his review of different countries. His native Canada may have a place of pride, but at some point *Constitutional Amendments* touches on pretty much every constitutional democracy that presently exists or existed in the past. The index for A includes Afghanistan, Albania, Algeria, Argentina, Australia and Austria. Canada, Japan, South Korea and Spain are included under the item, “amendment culture”. These are not superficial references. Professor Albert demonstrates as much expertise discussing the Constitution of the United States as he does the Constitutions of Columbia and the Central African Republic. Unlike a great many works on constitutional democracy, the text gives equal weight to the constitutions of the global south as the usual suspects. I am fairly certain that the Planet Vulcan of Star Trek fame is not a constitutional democracy because if there was a Constitution of Vulcan, Professor Albert would have discussed how that constitution has been formally changed.

Professor Albert has covered his subject matter so thoroughly that no comprehensive analysis of constitutional amendments is likely to be necessary for at least twenty years. The text might be renamed “The Encyclopedia of Constitutional Amendment”. A researcher interested in the constitutional amendment process in a particular regime will find the answers in *Constitutional Amendments*. provides constitutional designers in a new republic with the full list of alternatives they might choose from when drafting a constitutional amendment process. The future will no doubt bring new regimes and new alternative processes for constitutional change, but until that future comes, *Constitutional Amendments* is the definitive source for thinking about contemporary formal constitutional change.

Constitutional Amendments heralds the rise of a new generation in comparative constitutionalism and constitutional in general. The generation of the Warren Court celebrated courts and constitutions, while articulating a strong law/politics distinction. Ronald Dworkin, the seminal figure of that life,

² *Constitutional Amendment*, 175.

spent his career attempting to convince various regimes to adopt American style judicial review and offering theories of American style judicial review that treated courts as a distinctive “forum of principle” in the constitutional regime. The next generation sought to collapse the law/politics distinction by demonstrating the constitutional politics of constitutional making and judicial power. Ran Hirschl, whose *Towards Juristocracy* may be the seminal work of this generation, insisted that the new constitutions of the late twentieth century did not subordinate politics to law, as Dworkin maintained, but were efforts by elites to buttress their fading political power by converting political questions into legal questions. The central concern of the scholarly generation coming of age in the era of right-wing populism is the perceived collapse of the rule of law among new and old constitutional democracies. Such scholars as David Landau, Rosalind Dixon, Yaniv Roznai have made constitutional change central to their research agenda. When doing so, they have returned to a certain kind of insistence on the rule of law as being at the heart of constitutional democracy.

The generation of constitutional scholars who came of age during the 1960s and 1970s obsessed about the distinction between law and politics. Normative constitutional scholars sought to develop theories of constitutional interpretation and the judicial function that would enable justices to make decisions on the basis of law rather than politics. Empirical political scientists insisted that none of these models explained judicial behavior, that judicial decisions were based on political variables rather than legal variables.

Bruce Ackerman was the constitutional scholar in this generation who most focused on constitutional change. His work insisted that constitutional change in the United States rarely played by formal rules. The founders of the American constitutional order did not play by the rules specified by the Articles of Confederation when ratifying what become the Constitution of the United States. Reconstruction Republicans manipulated beyond recognition the rules mandated by Article V when ratifying the Thirteenth and Fourteenth Amendment. New Deal Democrats and the Civil Rights movement ignored Article V entirely when constitutionalizing the welfare state and racial equality, respectively.

While Ackerman’s methods were profoundly original, his goals were prosaic. His purpose was to identify practices that would enable justices and other constitutional decision makers to based rulings on law rather than politics. Ackerman differed from such contemporaries as Robert Bork and John Hart Ely in that his theory of constitutional change led him to strikingly different understandings of the constitution he was interpreting.

2. - Professor Albert articulates the first core principle of his generation when he insists «No part of a constitution is more important than its rules of change» (261). Dworkin and his generation emphasized Bills of Rights. My generation, to the extent we emphasized constitutional provisions, focused on the institutional structures that facilitated the political construction of judicial power and the relative autonomy if courts in a political system. The most exciting works by younger scholars focus on the use and abuse of processes for

constitutional amendments. Yaniv Roznai has outlined the use and abuse of unconstitutional constitutional amendments in his *Unconstitutional Constitutional Amendments*. David Landau and Rosalind Dixon have been exploring the notion of “abusive constitutionalism,” the ways in which regimes invoke processes for constitutional change that subvert a constitutional regime. Professor Albert’s work simultaneously synthesizes this past work, captures that work’s concern with constitutional change, and gives scholars working on constitutional change a vocabulary for discussing that phenomenon. In short, *Constitutional Amendments* is both a scholarly work and a work that makes more scholarship possible.

Constitutional Amendment also expresses a generational commitment to a certain form of legalism. Professor Albert spends a good deal of energy explaining why not every constitutional change that follows the letter of the constitutional amendment process is a constitutional amendment. «[F]or a change to be correctly defined as an amendment», *Constitutional Amendments* insist, «the change must keep unbroken unity with the constitution being amended, signaling that the act of amendment is a coherent continuation of the constitution making project initiated at the founding and at intervening moments of refounding» (263). “Amendment,” in this view, implies an improvement that retains the form of the original. We mend a shoe, when we repair a tear. We are doing something different when bronze a baby’s first shoes. This deep commitment to legalism has two virtues. The first is pragmatic. Professor Albert believes that regimes are more likely to achieve their aims when they adopt formal amendment rules that specify what constitutional changes may be made, how those constitutional changes may be made and where those constitutional changes shall be placed in the national constitution. More important, I think, Professor Albert and his associates are providing fellow scholars and citizens with a vocabulary to describe the “dismemberment” of constitutions throughout the world. Leaders ranging from Maduro in Venezuela to Orbán in Hungary claim to be merely following existing codified rules for constitutional change. This veneer of legalism suggests a certain legitimacy to their regime. *Constitutional Amendments* reveals the unconstitutional ambitions behind these programs. Following the rules does not make a constitutional change when the purpose of the constitutional change is to abandon basic national constitutional commitments, if not the central commitments underlying constitutionalism more generally.

The job of senior scholars in the field is to encourage younger scholars to pursue their distinctive paths and then patiently explain to them why the paths we choose are better than the paths they are choosing. Members of the Hirschlian generation of constitutionalism scholars may question some aspects of the effort Albert and other leading young comparativists are making to revive legalism. One distinctive feature of *Constitutional Amendments* is that while text discusses every regime known to humankind, Albert rarely uses proper names. Ecuadorians amend the national constitution, not a political faction led by the named persons. For those of us who spent a political career attempting to

collapse the law/politics distinction, this tendency to speak of actions without actors is problematic.

The difference between what Professor Albert calls “a constitutional amendment” and what he calls “a constitutional dismemberment” may fail to capture how constitutions rules simultaneously structure and are structured by political conflict. Professor Albert describes the Thirteenth Amendment as a dismemberment because he believes the Constitution of the United States before the Civil War was committed to retaining slavery. Some anti-slavery advocates agreed with this position. Others did not. Whether the Constitution of the United States permitted anti-slavery advocates to pass a constitutional “amendment” banning human bondage was as much a political struggle over the identity of the Constitution of 1787, structured to some degree by the constitutional rules for political change, as whether the Constitution of the United States would be improved by passing a constitutional amendment banning human bondage.

The generation reared on the crisis of constitutional democracy is likely see the democratic world in different ways than generations with different political experiences. As problems of constitutional change supplant problems of constitutional interpretation and constitutional politics as the most pressing issues for constitutional democracies, the processes for altering constitutional orders is supplanting constitutional hermeneutics and the political construction of judicial power as the most pressing issues on both political and scholarly agendas. Professor Albert and his generational peers regard restoring a more sophisticated conception of the rule of law as vital both for understanding and combatting contemporary constitutional developments. They see constitutions as having identities that channel and limit constitutional change within a particular constitutional order. *Constitutional Amendments* is a landmark work because Professor Albert takes on the most important constitutional question his scholarly generation is asking and provides that generation with an extraordinary set of tools for understanding and responding to the ways in which constitutions are changing throughout the world.

