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Constitutional Amendment and “Fundament”: A Response to Professor Richard Albert

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I am delighted to offer some brief observations following Professor Richard Albert’s fascinating study of “constitutional amendment and dismemberment.”¹ At the outset, I must state that Professor Albert’s Article is a rich piece raising many comparative, theoretical, and doctrinal inquiries. This short response does not attempt to provide a complete elaboration of my thoughts on the subject. Instead, it presents several focused criticisms—a fairly difficult task, since I agree with much of what Professor Albert has written.

Professor Albert’s core claim is that “some constitutional amendments are not amendments at all.”² Rather, they are “self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations.”³ While these revisions “dismantle the basic structure of the constitution,” they also engage in the process of “building a new foundation rooted in principles contrary to the old.”⁴ Such transformative changes, he argues, are different from the traditional conception of a constitutional amendment—a “correction made to better achieve the purpose of the existing constitution”⁵—and should therefore be identified as moments of “dismemberment” rather than amendment.

I agree with both Professor Albert’s descriptive and conceptual claims. Certain constitutional “amendments” do not amend at all. They seek to *transform* the constitution, to *replace* it with a new one, and to *revolutionize* the

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1. See Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1 (2018).
2. See *id.* at 2.
3. *Id.* at 2-3.
4. *Id.* at 3.
5. *Id.*

constitutional order.⁶ However, in light of these various objectives, my first criticism concerns terminology. Professor Albert uses the term “dismemberment” to describe the type of fundamental constitutional change he is occupied with. Although this word seems apt—it rhymes with “amendment” and invokes an image of the constitution being torn apart—it does not accurately describe the phenomenon at issue. Dismemberment is the act of cutting, tearing, pulling, or otherwise removing the limbs of a living thing. It has been practiced upon human beings as a form of capital punishment. Accordingly, this term carries a negative normative connotation that I believe Professor Albert does not intend.⁷ Moreover, the term emphasizes the constitution’s *destruction*. While correct, destruction represents only one aspect of fundamental constitutional change. When a constitutional “dismemberment” passes, it not only destroys the old constitution, but also *reconstructs* a new constitution while maintaining legal continuity. The term “dismemberment” fails to encompass this latter element of reconstruction.

Indeed, a change to the constitution should be regarded as revolutionary so long as it entails a significant break or departure in the existing constitutional order, even if legal continuity is preserved.⁸ This view stands in contrast to Hans Kelsen’s understanding of constitutional “revolution” as a change to, or a replacement of, the constitution in a way that is incompatible with the constitutional amendment process.⁹ Process matters, of course, but substance matters more. Formal legal continuity should not mask a substantive discontinuity in the constitutional order. When a shift of such magnitude takes place, the existing legal order is replaced with a new one; it is revolutionized. Such a phenomenon may be captured by terms such as “constitutional replacement,” “constitutional transformation,” or “constitutional revolution.” But these terms are too broad for the kind of constitutional amendments Professor Albert describes. They encompass changes that occur outside of the formal amendment process, such as those introduced through a new constitution-making enterprise, judicial decisions, or even means outside of constitutional law.¹⁰ Thus, I prefer the term “fundamentally” to describe constitutional amendments that *fundamentally* change the constitution.

My second challenge to Professor Albert’s concept of constitutional “dismemberment” rests within the notion of constitutional transformation or

6. For discussion elsewhere regarding such amendments, see, for example, Yaniv Roznai, *Constitutional Transformations: The Case of Hungary*, in CONSTITUTIONALISM IN CONTEXT (David Law ed., forthcoming 2018).

7. I thank Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center, for making this point.

8. For further discussion on the notion of constitutional revolution, see, for example, Gary Jeffrey Jacobsohn, *Making Sense of the Constitutional Revolution*, 19 CONSTITUTIONS 164 (2012); Gary Jeffrey Jacobsohn, *Theorizing the Constitutional Revolution*, 2 J.L. & CTS. 1 (2014). This idea is further developed in GARY J. JACOBSON AND YANIV ROZNAI, CONSTITUTIONAL REVOLUTIONS (forthcoming 2018).

9. HANS KELSEN, PURE THEORY OF LAW 209 (Max Knight trans., 1967).

10. See, e.g., Georg Jellinek, *Constitutional Amendment and Constitutional Transformation*, in WEIMAR: A JURISPRUDENCE OF CRISIS 55-56 (Arthur J. Jacobson & Bernhard Schlink eds., 2000) (discussing the role of the judiciary in affecting the transformation of the U.S. Constitution).

revolution. Professor Albert focuses on formal constitutional amendments. However, constitutions change through various means.¹¹ While the text of a constitution can be formally modified through an amendment, important constitutional changes may also occur outside the formal amendment process—for instance, through judicial interpretation or governmental practice.¹²

A judicial modification of the constitution often impacts the constitutional system more than a formal amendment.¹³ One notable example is the radical transformation of the State of Israel from a parliamentary sovereignty system to a constitutional democracy. This transformation took place through a series of judicial decisions, all within the parameters of the existing constitution and without illegality, violence, or a new formal constitution-making process.¹⁴ Professor Albert neglects to address such cases. Only towards the end of his Article does he briefly mention a recent case from Honduras, in which the Honduran Supreme Court declared void an unamendable provision regarding presidential term limits. He notes that the decision “amount[ed] to a constitutional dismemberment,” but declines to discuss it further.¹⁵ Such cases deserve further study, despite Professor Albert’s reticence. What are the implications of such court-driven constitutional changes? I have argued elsewhere that such acts by the judiciary can themselves be regarded as unconstitutional.¹⁶ Thus, Professor Albert’s theory of constitutional “dismemberment” must be further developed to deal with informal constitutional changes that affect the constitutional order in a similar way as formal “dismemberments.”

At the core of Professor Albert’s Article lies the rule of mutuality. He proposes that this principle guide future constitutional design. According to Professor Albert, “the deep constitutional transformation that dismemberment entails can be legitimated, with few exceptions, only by at least the same or similar configuration of constitution-making bodies” that made the original constitution.¹⁷ In other words, the rule of mutuality authorizes the constitution’s dismemberment “using only the same procedure that was used to [ratify it].”¹⁸

11. For discussions of constitutional change, see, for example, *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* (Dawn Oliver & Carlo Fusaro eds., 2011) (providing a comparative analysis of constitutional change in fifteen countries); *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* (Xenophon Contiades ed., 2013) (comparing various models of constitutional change around the world).

12. See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457 (2001) (arguing that since the first few decades of the nation’s founding, formal amendments have not been the main avenue for constitutional change).

13. See Dieter Grimm, *Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics*, 4 *NUJS L. REV.* 15 (2011) (discussing the evolution of constitutional adjudication as a formal mechanism for resolving constitutional disputes worldwide).

14. See Yaniv Roznai and Gary J. Jacobs, *Judicial Activism, Courts, and the Constitutional Revolution*, in *JUDICIAL REVIEW: PROCESS, POWER, AND PROBLEMS—FESTSCHRIFT IN HONOUR OF UPENDRA BAXI* (Salman Khurshid, Lokendra Malik & Shruti Bedi eds., forthcoming 2018).

15. See Albert, *supra* note 1, at 68.

16. See Yaniv Roznai, *Unconstitutional Constitutional Change by the Courts*, 52 *NEW ENG. L. REV.* (forthcoming 2018).

17. See Albert, *supra* note 1, at 5.

18. *Id.* at 6.

This calls for at least two tracks of formal constitutional change—one for ordinary amendments and one for “dismemberments.”¹⁹

The idea of dual constitutional amendment procedures is by no means new. During the French National Assembly on the 1791 Constitution, Nicolas Frochot proposed creating different procedures for making partial and total changes to the Constitution. Different procedures were needed, he suggested, because partial and total overhauls involve different types of constituent power: a total revision requires *pouvoir constituant originaire*, or original constituent power acting outside of the Constitution; meanwhile, a partial revision invokes *pouvoir constituant derive*, or derived constituent power, which the Constitution itself regulates.²⁰ While Frochot’s idea was eventually rejected, both the distinction he made between the two constituent powers and his dual-track amendment proposal align with Professor Albert’s suggestions for constitutional design.

I believe that the principle of mutuality contributes greatly to the constitutional design and constitutional theory literatures. In the field of constitutional design, this rule would allow “all manner of changes to be made without breaking legal continuity”²¹ while sidestepping vague notions of constituent power. And herein lies the theoretical advantage. The concept of constituent power is highly perplexing. We do not know who “the people” are or how they can speak in one voice. Plainly put, we lack a precise formula for determining how citizens’ constituent power can be legitimately exercised.²² To this problem, Professor Albert suggests a simple solution: “the rule of mutuality gives shape to constituent power theory by establishing a rebuttable presumption that the people exercise their constituent power when they speak in the same way they did when they wrote the constitution to begin with.”²³ Combined with the dual-track amendment process, the rule of mutuality offers a welcome, relatively simple, and practical solution for identifying the proper procedure for revising and even replacing a constitution. It provides citizens with an orderly process to exercise their constituent power, thereby preserving its credibility. It also prevents charismatic leaders from abusing the primary constituent power,²⁴ and has the potential to “strengthen[] the stability, legality, and legitimacy of the new system.”²⁵

There are also some challenges to this framework. First, Professor Albert’s

19. *See id.*

20. *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 113-14 (2017).

21. Albert, *supra* note 1, at 6.

22. *See* Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 742 (2011); Yaniv Roznai, “*We the People*,” “*Oui, the People*,” and the *Collective Body: Perceptions of Constituent Power*, in *COMPARATIVE CONSTITUTIONAL THEORY* (Gary J. Jacobssohn & Miguel Schor eds., forthcoming 2018).

23. Albert, *supra* note 1, at 6.

24. David Landau offers an engaging discussion of how autocrats use mechanisms of constitutional change to undermine the democratic order in his *Abusive Constitutionalism*, 47 U.C.D. L. REV. 189 (2013).

25. Venice Comm’n, Report on Constitutional Amendment, 81st Plen. Sess., Doc No. CDL-AD(2010)001, at 15 (Dec. 11-12, 2009), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)001-e).

proposal to separate “dismemberments” from regular amendments provides a vehicle for the exercise of constituent power. But due to its extra-constitutional nature, constituent power cannot be regulated by constitutional procedures.²⁶ The people can always replace the constitution via a new constitution-making process that breaks legal continuity. Thus, Professor Albert’s theory ultimately does not resolve the challenges posed by constituent power’s radical ability to disrupt constituted boundaries.

Second, Professor Albert maintains that the rule of mutuality should “operate[] as a default rule where the constitution is silent.”²⁷ But if a constitution does not include a separate “dismemberment” process to begin with, any transformation enacted according to the rule of mutuality would break legal continuity, and thus become effectively illegal, strictly speaking.²⁸ Therefore, Professor Albert’s theory provides *legitimacy* to constitutional “dismemberments,” but ultimately lends little support to their *legality*.

Finally, according to Professor Albert, courts “would not have the legal authority to invalidate a constitutional alteration.”²⁹ Instead, their role would be “advisory”: “[a] court would issue advisory judgments on the nature of the transformative change that amending actors are pursuing, and on the quantum of agreement that the court believes is necessary to legitimate that change.”³⁰ While this approach aligns with Professor Albert’s earlier work,³¹ I believe that his theory provides courts with a much greater role, as it should.

When separate constitutional procedures exist—one for regular amendments and another for “dismemberments”—the judiciary should determine what types of changes fall into each category. A constitutional court can conduct a “substantive-procedural” review of all proposed amendments to ensure that any “dismemberments” follow the appropriate, more demanding procedures for passage.³² Unless the proper procedures are followed, the amendment should not take effect.³³ It is difficult to take seriously the theory and

26. See CARL SCHMITT, *CONSTITUTIONAL THEORY* 132 (Jeffrey Seitzer trans., 2008) (“No constitutional law, not even a constitution, can confer a constitution-making power and prescribe the form of its initiation.”).

27. See Albert, *supra* note 1, at 57.

28. Cf. Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 *CORNELL INT’L L.J.* 169 (2017).

29. Albert, *supra* note 1, at 72.

30. *Id.*

31. See, e.g., Richard Albert, *Amending Constitutional Amendment Rules*, 13 *INT’L J. CONST. L.* 655 (2015); Richard Albert, *Constitutional Handcuffs*, 42 *ARIZ. ST. L. REV.* 663, 698 (2010); Richard Albert, *Counterconstitutionalism*, 31 *DALHOUSIE L. J.* 1, 37, 47-48 (2008).

32. Compare CONST. OF THE REPUBLIC OF ECUADOR, art. 443 (Oct. 20, 2008) (granting the Ecuadorian Constitutional Court the explicit authority to observe the triple amendment procedures outlined in the Constitution), with Vicki C. Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*, in *DEMOKRATIE-PERSPEKTIVEN: Festschrift für Brun-Otto Bryde zum 70. Geburtstag*, 47, 58-60 (Michael Bäuerle, Philipp Dann & Astrid Wallrabenstein eds., 2013) (describing how the California Supreme Court and the Austrian Constitutional Court both distinguish between regular “amendment” and more deliberative “revision” procedures).

33. In Austria, for example, the Constitutional Court supervises the different amendment processes and even invalidated a constitutional amendment that had passed through the ordinary revision process, calling it a “total revision.” See *Verfassungsgerichtshof [VfGH] [Constitutional Court]*, Oct. 11,

doctrine of constitutional “dismemberment” without providing courts the authority to conduct substantive review of all amendments.

In sum, constitutional “dismemberments” are already an existing practice worldwide. Professor Albert’s study is a very timely and important contribution on this phenomenon. It is an enriching and clever piece, which I predict will prove enlightening to comparative constitutional scholars. I hope it will guide future constitutional designers as well.