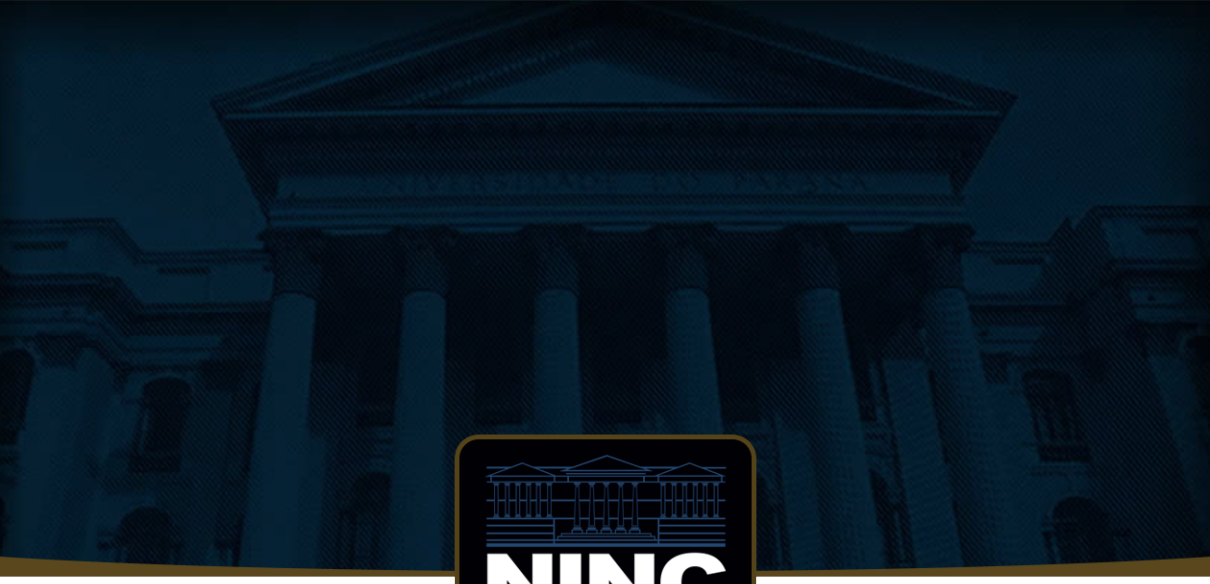

REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

JOURNAL OF CONSTITUTIONAL RESEARCH

vol. 7 | n. 3 | setembro/dezembro 2020 | ISSN 2359-5639 | Periodicidade quadrimestral

Curitiba | Núcleo de Investigações Constitucionais da UFPR | www.ninc.com.br

Revista de Investigações Constitucionais
ISSN 2359-5639
DOI: 10.5380/rinc.v7i3.73930

Self-enforcing constitutional amendments rules: a dialogue with Richard Albert's Constitutional Amendments: Making, Breaking, and Changing Constitutions

Regras auto-impositivas de emendas constitucionais: um diálogo com Constitutional Amendments: Making, Breaking, and Changing Constitutions de Richard Albert

JULIANO ZAIDEN BENVINDO [I, *]

[I] Universidade de Brasília (Brasília, Distrito Federal, Brasil)
julianobenvindo@gmail.com
https://orcid.org/0000-0001-5641-100X

Recebido/Received: : 21.05.2020 / May 21st, 2020
Aprovado/Approved: 30.10.2020 / October 30th, 2020

Abstract

Richard Albert's groundbreaking book Constitutional Amendments: Making, Breaking, and Changing Constitutions surely provides the most extensive analysis of constitutional amendments rules ever published. Particularly relevant is that, unlike part of the constitutional literature that overly stresses normative assumptions, Albert brings important insights about how constitutional amendment rules can influence certain outcomes and provide incentives for political players' behaviors. By drawing from rational choice theory, this Article aims to show the value of self-enforcing constitutional amendment rules for constitutional design. Although Richard Albert does not directly work with rational choice language, he certainly knows how to operate some of its premises when

Resumo

O livro inovador de Richard Albert, Constitutional Amendments: Making, Breaking and Changing Constitutions com certeza fornece a análise mais extensiva das regras de emendas constitucionais já publicada. É particularmente relevante que, diferente de parte da literatura constitucional que força suposições normativas, Albert traz importantes ideias sobre como as regras de emendas constitucionais podem influenciar certos resultados e fornecer incentivo para o comportamento de políticos. Partindo da teoria da escolha racional, este Artigo pretende mostrar o valor de regras auto-impositivas de emendas constitucionais para o desenho constitucional. Apesar de Richard Albert não trabalhar diretamente com linguagem de escolha racional, ele com certeza sabe operar algumas das suas premissas

Como citar esse artigo/*How to cite this article*: BENVINDO, Juliano Zaiden. Self-enforcing constitutional amendments rules: a dialogue with Richard Albert's Constitutional Amendments: Making, Breaking, and Changing Constitutions. **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 3, p. 733-753, set./dez. 2020. DOI: 10.5380/rinc.v7i3.73930.

[*] Professor de Direito Constitucional da Universidade de Brasília (Brasília-DF, Brasil). Doutor em Direito Público pela Humboldt-Universität zu Berlin com período de co-tutela na Universidade de Brasília. Mestre e Bacharel em Direito pela Universidade de Brasília. Realizou Pesquisa Pós-Doutoral no Zentrum für Europäische Rechtspolitik (ZERP), da Universität Bremen, Alemanha. Bolsista de Produtividade do CNPq. E-mail: julianobenvindo@gmail.com.

examining cases, raising hypotheses, creating models, and suggesting constitutional frameworks. His book is a relevant example of how constitutional design, when not excessively dominated by normative assumptions that are taken for granted, can be the much-needed response to challenges that a strong reliance on those normative assumptions may fail to overcome.

Keywords: constitutional amendments; constitutional theory; constitutional design; rational choice theory; Richard Albert.

quando examina casos, levanta hipóteses, cria modelos, e sugere armações constitucionais. Seu livro é um exemplo relevante de como o desenho constitucional, quando não é excessivamente dominado por suposições normativas que são tomadas como certas, pode ser uma resposta necessária para desafios que uma confiança forte naquelas suposições normativas pode falhar em superar..

Palavras-chave: *emendas constitucionais; teoria constitucional; desenho constitucional; teoria da escolha racional; Richard Albert.*

CONTENTS

1. INTRODUCTION

Constitutional law not rarely develops based on trendy topics. For example, for a long time, proportionality was the concept that appeared in almost every issue of the most distinguished journals in the field. Theoretical debates, from vehement defense of the rationality of balancing[1] to arguments pointing out the inconsistencies and potential arbitrariness of proportionality,[2] spread out following the rising activism of constitutional courts. Likewise, the longstanding debate over the limits of constitutional adjudication[3] and the countermajoritarian difficulty,[4] the potential dialogues[5] or the

[1] See ALEXY, Robert. **A Theory of Constitutional Rights**. Oxford: Oxford University Press, USA, 2010; ALEXY, Robert. Justification and Application of Norms. **Ratio Juris**, v. 6, n. 2, p. 157-170, 1993; ALEXY, Robert. Constitutional Rights, Balancing, and Rationality. **Ratio Juris**, v. 16, n. 2, p. 131-140, 2003; PULIDO, Carlos Bernal. The Rationality of Balancing. **Archiv für Rechts-und Sozialphilosphie**, v. 92, n. 2, p. 195-208, 2006.

[2] See GÜNTHER, Klaus. **The Sinn Für Angemessenheit: Anwendungsdiskurse in Moral Und Recht**. Frankfurt a.M.: Suhrkamp, 1988: 268; HABERMAS, J. A Short Reply. **Ratio Juris**, v. 12, n. 4, p. 445-453, 1999 HABERMAS, Jürgen. Reply to Symposium Participants, Benjamin N. Cardozo School of Law. **Cardozo Law Review**, v. n. p. 1994: 428; BENVINDO, Juliano Zaiden. **On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism**. Heidelberg; New York: Springer, 2010.

[3] TUSHNET, Mark. **Taking the Constitution Away From the Courts**. Princeton, NJ: Princeton University Press, 1999 HIRSCHL, Ran. **Towards Juristocracy : The Origins and Consequences of the New Constitutionalism**. Cambridge, Mass.: Harvard University Press, 2004; BENVINDO, Juliano Zaiden. **On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism**. Heidelberg; New York: Springer, 2010.

[4] BICKEL, Alexander Mordecai. **The Least Dangerous Branch: The Supreme Court At the Bar of Politics**. Yale University Press, 1986; FRIEDMAN, B. The History of the Countermajoritarian Difficulty: Part One: The Road to Judicial Supremacy. **NYUL Rev.**, v. 73, p. 333, 1998.

[5] MENDES, Conrado Hübner. **Constitutional Courts and Deliberative Democracy**. Oxford: Oxford University Press, 2013 SWEET, Alec Stone. Constitutional Dialogues: Protecting Human Rights in France, Germany, Italy and Spain. In: _____. **Constitutional Dialogues in Comparative Perspective.** Springer, 1999, '8-41 KENNEY, Sally; REISINGER, Williamet al. **Constitutional Dialogues in Comparative Perspective**. Springer, 1999.

conflictive relationship between parliament and courts,[6] all of which have flourished in recent constitutional debaters and forums, also following the trend of the rising role of constitutional courts.

A particular feature of such debates is the strong prevalence of normative discussions, which are naturally expected from a legal perspective. The questions normally revolve around whether, how, and to what extent such growing presence of constitutional courts in politically and morally disputed matters is democratically legitimate or not, whether such decisions are principled or politically motivated,[7] or, more deeply, what is the very meaning of justice or of the people in a democratic reality. Yet it is remarkable how many such analyses differ from those by political scientists or economists, who usually stress a more empirical and behavioral dimension of the constitutional context. See, for example, the fascinating books *Courts in Latin America*, edited by Gretchen Helmke and Julio Rios-Figueroa,[8] and Robert D. Cooter's *The Strategic Constitution,* [9] the former providing a powerful, empirically based, but unusual discussion of constitutional courts, and the latter, more broadly, suggesting that "constitutional theory needs more models and less meaning."[10]

Comparative constitutional law appears, on the one hand, largely influenced by this tradition of typical normative debates that prevail among constitutional lawyers. Constitutional courts have been likewise the focal point. Yet, by comparing distinct realities, a remarkable positive side effect has also been a stronger connection with what had been until then largely overlooked in constitutional law: a deep concern with methodological issues,[11] a more consistent connection with empirical studies, and - which is largely beneficial to constitutional law - a closer look into constitutional design and parliaments. Zachary Elkins', Tom Ginsburg's, and James Melton's *The Endurance of National Constitution* [12] is a paramount example of such a new look into constitutional law, providing an extensive discussion of how environment and, mainly, constitutional design matter for constitutional endurance. More recently, Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions*[13] provided the

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6 WALDRON, Jeremy. **Law and Disagreement**. Oxford: Oxford University Press, 1999.

7 See DWORKIN, Ronald. **A Matter of Principle**. Cambridge, MA: Harvard university Press, 1985.

8 HELMKE, Gretchen; RIOS-FIGUEROA, Julio. **Courts in Latin America**. Cambridge: Cambridge University Press, 2011.

9 COOTER, Robert Dandridge. **The Strategic Constitution**. Princeton University Press, 2002

10 COOTER, Robert Dandridge. **The Strategic Constitution**. Princeton University Press, 2002. p. 22.

11 See HIRSCHL, Ran. **Comparative Matters: The Renaissance of Comparative Constitutional Law**. Oxford: Oxford University Press, 2014.

12 ELKINS, Zachary; GINSBURG, Tomet al. **The Endurance of National Constitutions**. Cambridge: Cambridge University Press, 2009.

13 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019.

long sought-after analysis of a fundamental topic of constitutional law: constitutional amendments. It is at least intriguing that constitutional law took so much time to understand that constitutional design should be highly studied and explored in all its various nuances, and that formal constitutional change is at least as important as informal constitutional change. Naturally, there were previously other relevant and fascinating studies on such topics, but no one can deny the impact of these more recent works on the development of comparative constitutional law. They are breathtaking in their own right.

This paper will examine the particular feature of this new trend in comparative constitutional law: the refocus on parliaments and, more specifically, on constitutional amendments. Moreover, it will argue in favor of the need of bringing to constitutional studies tools such as rational choice, which is largely adopted especially by political scientists and economists. It will obviously not discuss particularities of such tools - they are, after all, more than well documented in the literature. The purpose here is to merely observe that, when constitutional design applied to constitutional amendments are at stake, it is imperative to observe how political agents behave, how their strategies are planned (or not!), and how their choices can impact future developments. When parliaments and their procedures become a focal point, the image of a chessboard should immediately come into sight.

Richard Albert's groundbreaking book *Constitutional Amendments: Making, Breaking, and Changing Constitutions* , since it consistently and comprehensively examines the phenomenon of constitutional amendments, will be the example of a scholarship that manages this dialogue between the normative dimension of formal constitutional change and the crude strategic behavior of political agents and institutions. On the one hand, his concept of "constitutional dismemberment" is his most ambitious, though certainly controversial, bet in the normative value of constitutionalism. On the other hand, his book offers a rich and broad set of examples of how political actors' behaviors as well as the impacts of constitutional design on particular realities matter a great deal. The challenging relationship between the normative and the reality is the powerful conclusion that his book offers: if constitutional amendment rules are continuously bent and not able to be "self-enforcing" and thereby enhance cooperation among political players,[14] the odds are that they will prove unstable and destabilizing, jeopardizing the whole constitutional project.

[14] WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, p. 343.

2. THE POTENTIAL DIALOGUE BETWEEN RICHARD ALBERT'S BOOK AND RATIONAL CHOICE THEORY

Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions* is structured in an introduction and three parts, divided into six chapters. All over its almost three hundred pages, constitutional design is by far the central focus, with some concessions to normative debates. In some parts, where it would, at first sight, seem that Albert would fall into arguing that constitutional amendments should have one or other value, he assumes a more careful and pragmatic attitude and examines the strategic options normally on the table for political agents. For example, the last topic of his book - *The Democratic Values of Constitutional Amendment*- is very telling. Where we could, at first, assume that he discusses "the democratic values of constitutional amendment", thereby leaning to normative arguments, his first sentence in this topic starts by curiously pointing out that "there are advantages to changing the constitution outside the rules of formal amendment."[15]

His analysis is followed by a very detailed discussion of costs and benefits of such a behavior. He stresses the words "instability", "dialogic interactions", "contestability", "transparency", "civic engagement", "educative function", "coordination", "publicity",[16] among others. His normative defense largely revolves around a debate over the pros and cons of following the constitutional amendment rules. When he says that "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,"[17] it is clear that he defends that this is the democratic attitude - and this is his normative call -, but it is largely based on observing political agents' behaviors as well as the consequences of any of those strategic moves. If those rules are not followed - he argues - it would "give the impression that it is proper to create law 'on an ad hoc basis'", it would also mean a 'failure to publicize' the laws, and it would lead to a disconnection between those rules and practices, enhancing thereby "the possibility of arbitrary conduct."[18] In the end, he praises constitutional design by concluding that "the prime objective in amendment design, then, must be to create rules of change that keep the constitution stable and

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[15] ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 268.

[16] See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 268-270.

[17] ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 270.

[18] ALBERT, Richard. Constitutional Amendments: Making, Breaking, and Changing Constitutions. Oxford University Press, 2019.

true to popular values yet always changeable when necessary."[19] Constitutional design and political actors' behaviors are intrinsically correlated in Albert's main arguments.

This way of reasoning is replicated all over his book, sometimes in excessive details. His fifth chapter, for example, aimed at exploring the "architecture of constitutional amendments" is so detail-oriented, exploring all distinct constitutional variables for constitutional amendments that, in the end, the reader might find him or herself mentally challenged. Richard Albert provides plenty of interesting examples, which highly enrich the discussion, but it is undeniable he is so focused on providing an overarching categorization of the distinct types of amendments and amendment procedures - the so-called "formal amendment pathways"[20]- that we cannot but conclude that he works really hard in projecting models, categories, and concepts. It is impressive his capacity of linking examples with such well-planned reasoning to the point that it appears that he had effectively - if we could say so - exhausted the subject. It also shows that his look into the subject is largely anchored in the strength and value of constitutional design, or, in other words, his normative approach is largely design-oriented.

Whenever he suggests a more consistent avenue for constitutional amendments, it is design that matters for his prescriptions. In this fifth chapter, for example, when examining the U.S. Constitution and the gap between popular support for change and the highly rigid amendment framework, he says that "well-designed rules of change *should* offer more than one pathway for initiating an amendment and more than one for ratification, precisely to avoid the stasis that has for now paralyzed the United States."[21] He goes further, even appealing to the need of a more "creative" design, one that would "create multiple procedures for amendment and vary the degree of consent required for ratification according to the importance of change, restricting the use of each amendment rule to different parts of the constitution."[22] His normative approach does not restrict itself to the debate over the relevance of popular legitimacy for institutions to behave in one way or another. He already assumes that constitutional change ought to be democratic, the focus thereby leaning to understanding how, "designally" speaking, that democratic legitimacy could be better achieved. It is normative, sometimes based on hypothetical experiments, but better would be to say that it is prescriptive: his book provides a series valuable recommendations of how constitutions should design their amendment rules based on Albert's vast experience of delving into - and

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19 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 271.

20 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 179.

21 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 178 (emphasis added).

22 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019.

comparing - constitutional amendment rules and practices. Such an approach can only be so convincingly and comprehensively made by someone who has vast knowledge of all the stages of amendment production and their real and potential outcomes.

Richard Albert does not theoretically review the distinct nuances of behavioral analyses, rational choice and alike in his book. Yet, various interesting connections of Albert's conclusions can be made with some premises normally adopted by rational choice theorists. Constitutional design naturally demands analyses of how individuals - especially political agents - behave in the face of a certain institutional framework and constitutional procedures. There is, accordingly, a deep concern with strategic interaction, behavioral coordination, available information, and the way institutions and procedures can be best framed to provide expected outcomes. Constitutional designers should be rather aware that, if a certain condition applies, the consequence will be likely the one predicted in that model.[23] It is hypothetical in many respects, but it is also largely based on experience and cases, which gains strength with the advance of comparative constitutional studies. Typical concerns that are studied by rational choice, such as stability, equilibrium, and endurance, appear, in one way or another, in Albert's book.

In any case, a central concept normally adopted by rational choice theorists to explain the stability of institutions, and, more particularly, the stability of constitutions, should be more deeply examined, and then applied to the debate over constitutional amendments: self-enforcement.[24] Such a concept can help explain how this bridge between constitutional amendment rules and expected outcomes, both well explored in Albert's book, goes way beyond the typical normative debate by constitutional theorists. It is not that constitutional amendments need to fill certain premises to be called as such - even though he explores it somehow especially through his concept of "constitutional dismemberment".[25] They do not necessarily have to be anchored in a sort of "constitutional moment,"[26] demanding vast popular support and an institutional channeling of such support through a set of procedures that will enhance the exchange of opinions, for this would contradict the way many constitutional amendments in

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[23] See WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. A New Handbook of Political Science. Oxford University Press on Demand, 1998, '167-190: 174 (arguing that the hallmark of the rational choice approach to institutions is its ability to analyze how institutions influence outcomes).

[24] See MITTAL, S.; WEINGAST, B. R. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 282.

[25] See ALBERT, R. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 84 (arguing that a constitutional dismemberment entails a fundamental transformation of one or more of the constitution's core commitments).

[26] See ACKERMAN, B. A. **We the People, Volume 1**. Harvard University Press, 1993. See also BENVINDO, J. Z. The Seeds of Change: Popular Protests as Constitutional Moments. **Marquette Law Review**, v. 99, n. 2, p. 364-426, 2015 (bringing a more prosaic perspective of constitutional moments).

the world come to life. Although Albert certainly defends democratic values all over his book, one could say that constitutional change does not even need to be in principle democratic or legitimate, because - as he says in a very pragmatic way - "what matters is the present constitutional settlement and how changes are made to it."[27] However, constitutional amendments should operate in a stable environment, which is the basis for all those normative commitments. [28]. In other words, a constitutional system, in order to maintain stability and thereby its own existence, should operate as a "self-enforcing constitution."[29]

3. SELF-ENFORCING CONSTITUTIONAL AMENDMENT RULES

The core concept of self-enforcement,[30] in particular, is central for understanding constitutional change. If individuals find themselves motivated to change the constitution but the amendment rules are overly rigid, the outcomes can be several, for example: a) a broader consensus is sought; b) an informal avenue functions as a workaround; c) the framework proves itself unstable and foster instability. On the other hand, if it is too flexible, the outcomes can also be multiple, such as: a) consensuses are reached, but they can easily derive from bad and unreasonable judgments; b) the hierarchically superior position of the constitution in the legal framework fades away and can even compete with ordinary legislation, thereby creating instability; c) individuals may feel less motivated to follow the constitution as they see it less as the foundation of their legal system and more as just another legislation, albeit constitutionally qualified. A well-designed constitutional amendment framework would thus mean a self-enforcing constitutional amendment framework: it would allow changes if needed and also provide incentives for actors not to change the constitution unless that necessity is imperative and justified and, if so, according to the constitutional amendment rules. It should embrace both "the considered judgment of the community and the sociological

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[27] See ALBERT, R. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 84.

[28] MITTAL, S.; WEINGAST, B. R. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 282 (arguing that …the ability of a constitution to hold citizens to normative commitments hinges crucially on its stability).

[29] *Idem.*

[30] See WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998. p.167-190. p. 175 (arguing that a model of institutional stability must meet two conditions: first, the model must allow institutions to be altered by particular actors, and second, it must show hy these actors have no incentive to do so. When these conditions hold, we say that institutions are self-enforcing).

legitimacy that only deliberative procedures can confer."[31] In the end, there is an equilibrium between change and stability in order to stably change the constitution.

Self-enforcing amendment rules provide coordination both vertically and horizontally. Change is vertically coordinated when political agents can grasp the interests of society and properly use such knowledge for the constitutional amendment, and it is horizontally coordinated when political agents can build consensus despite conflicting interests. Coordination is a central concept in rational choice analyses, but in order for coordination to be reached, it is crucial that those amendment rules are designed to promote incentives so that political agents can both grasp those social interests and build consensus according to those rules. The concept of self-enforcement is largely structured in this perspective of incentives: if such incentives are strong and well-planned, there is a good chance that individuals will behave and make decisions through those rules and procedures. Constitutional change will be outcome of such deliberations, whose well-designed procedures and rules lead individuals to behave accordingly since they feel they are better-off by doing so. Even if some individuals do not see their proposals being approved in the end through such procedures, they accept the result as legitimate, since circumventing those rules can prove highly harmful for them - and also for the community - in another opportunity. Well-designed constitutional amendment rules are those that foster dialogue, promote consensus, but also are honored by the ones who saw their interests not prevailing in the end.[32]

Moreover, well-designed constitutional amendments rules are those that are part of a constitutional system that provides mechanisms to defend the constitution against transgression. Here appears another crucial concept: the "rationality of fear."[33] Such a concept derives from the perception that individuals will do whatever it takes to protect themselves against any harm, and, if necessary, they will resort to extra-constitutional means to do so. The idea of equilibrium pervades much of this understanding. If the constitution - and thus its amendment rules - is not prone to providing equilibrium among political agents and the society at large, there is a chance that it will not endure. If conflicts are not solved, and consensuses are not reached, the snow ball effect of harshly or gradually disrupting the constitutional system becomes a reality.

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31 ALBERT, R. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 270.

32 See MITTAL, S.; WEINGAST, B. R. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 279.

33 See WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, '343: 344 MITTAL, Sonia; WEINGAST, Barru. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 283.

The premise is not that conflicts will be over, but they will be limited and channeled according to the rules of the game.[34]

If such an equilibrium is just a distant promise, constitutions will be unable to, first, "short-circuit the rationality of fear mechanism", and, second, "lower the stakes of politics."[35] On the one hand, individuals will not abide by the constitutional rules because they fear that they may be worse off by doing it or the very constitutional framework is unable to provide incentives for making them honor its rules and principles. Naturally, there might be a moral imperative for following the constitutional rules, but there is also a more prosaic movement that is clearly based on cost-benefits analysis. As Stephen Holmes puts it, "whatever the merit of the normative approach to law's binding character, it is also true that individuals often adapt their behavior to novel and complex rules because they anticipate gaining some advantage thereby."[36] On the other hand, a well-designed constitutional framework will "lower the stakes of politics" because political agents see advantages in cooperation, and the constitution is a focal point that may help achieve such an end, while also being an important instrument for coordinating individual's reaction against its transgression.[37]

Richard Albert's book explores various reasons why individuals may or may not abide by the constitutional rules, and he visibly stresses the need of engaging political elites in accepting the authority of any constitutional change as a condition for its very recognition. In his most normative call - when he introduces the concept of "constitutional dismemberment" - he acknowledges that "an amendment can survive a breach by reformers but when the relevant legal and political elites cease to accept the authority of the amendment it could cease to be recognized as valid."[38] In this passage, he agrees with the premise that coordination is linked to the capacity of involving the legal and political elites for change. Here appears another important premise in behavioral analyses: such cooperations are strategically identified in some influential groups, since

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[34] See PRZEWORSKI, Adam. Democracy as an Equilibrium. **Public Choice**, v. 123, n. p. 253-273, 2005. p. 270 (arguing that conflicts are regulated, processed according to rules, and thus limited).

[35] See WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, '343: 344 MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 283.

[36] HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law.** Cambridge University Press, 2003, p. 19-61. p. 24.

[37] See WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Roger; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence.** Cambridge: MIT Press, 2006. p. 343.

[38] ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 79.

"group power can never be fully equalized,"[39] and it is mainly by expanding competition among such groups that ordinary citizens may obtain some gains and be able to "defend their interests despite their relatively modest resources."[40] A central feature of such analyses is that they reduce the expectation that individuals will behave according to the rules based on a moral call, such as an imperative of justice, even though it also matters. To bet all the chips on such normative guidance would blur the potentials of constitutional design. For such a purpose, a more robust guidance, even because the worst-case scenario should always be on the table, would be to expect individuals to guide themselves through self-interest and not solidarity. There is an empirical argument which Stephen Holmes well portrays: "political and economic elites, who are all--too-human in this respect, often fail to behave justly even when it is in their manifest interest to do so."[41]

Constitutional amendment rules, for this reason, should be thought out as coordination devices that will promote constitutional change while keeping legal and political elites in equilibrium. They should provide procedures that will favor such an equilibrium, which, nonetheless, is not always just. In such chessboard, even though the normative call for greater inclusion and equality plays a role, in many cases what may prevail in the end are some powerful interests . It is such a crude dimension of social life that makes rational choice analyses so intriguing. They obviously see the value of those normative calls, but they also understand that, as Weingast says, "to succeed, a constitution must protect those with the power to disrupt democracy" and that "the theory of self-enforcing constitutions requires that these interests be protected."[42] If constitutional designers fail to see that such a premise also applies to constitutional amendment rules, they will lose sight of the dangers and threats those groups can inflict on the constitutional project, and, more serious, overlook the capacity of the constitution itself to promote inclusion by fostering cooperation and serving as a focal solution for conflicting behaviors.[43] "Democracy waxes and wanes. The determining factor is the perceived need of the political elite for cooperation from larger or smaller number of

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[39] HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law.** Cambridge University Press, 2003, p. 19-61. p. 22.

[40] HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 19-6. p. 22.

[41] HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 19-6. p. 60.

[42] WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, p. 343. p. 35-36.

[43] MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 285 (saying that in the face of a wide range of ways to coordinate - particularly when citizens have different preferences over the ways to coordinate - a focal solution changes citizen incentives).

ordinary citizens"[44]- said Stephen Holmes. Indeed, by fostering pluralism through coordination, constitutions can serve as a powerful tool for democratic consolidation,[45] as well as enhance the capacity of individuals to defend democracy against transgressions.[46] Constitutional amendment rules ought to follow this assumption: they should function as a focal solution for conflicting interests, define adequate procedures to foster cooperation, and create tools and boundaries to avert constitutional violation.

Finally, constitutional amendment rules should have what rational choice theorists call "adaptative efficiency".[47] They should be able to keep incentives for cooperation and limit the "stakes of power" also in circumstances of change. "A constitution that is self-enforcing under some circumstances may fail to remain self-enforcing as circumstances change."[48] This is a crucial element for understanding why some constitutions may endure and others not: the "adaptative efficiency" refers to a dynamic condition of constitutions. They are not only to be thought out as a framework for a given reality, but also for other potential realities. A well-designed constitution should embrace amendment rules that are capable enough for preserving the constitution's "self-enforcement" while changes take place.

A constitution that is overly rigid mail fail to efficiently adapt to new circumstances, and an equilibrium that existed in the past, if not disrupted, may need to be channeled through other means. It is no wonder that some democratic countries whose rigid constitutional amendment rules make any formal constitutional change a severe challenge resort to informal means, such as judicial interpretation and conventions[49] On the other hand, a very flexible constitution may also be efficient, but not adaptively efficient, since it may not foster cooperation and not really work as a coordination

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[44] HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law.** Cambridge University Press, 2003, p. 19-61.p. 38.

[45] See DIAMOND, Larry; LINZ, Juan Joséet al. (eds.). **Democracy in Developing Countries: Latin America**. London: Adamantine Press, 1999: 326 (arguing that what does seem clear is that democratic consolidation is highly implausible without reduction in class disparities).

[46] See MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013: 285 (sustaining that …constitutions create consensus by creating focal solutions that define transgressions and foster citizen coordination in the face of potential violations).

[47] See MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 286.

[48] MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013.

[49] See ALBERT, Richard. Constitutional Amendment By Constitutional Desuetude. **American Journal of Comparative Law**, v. 62, n. 3, p. 641-686, 2014 ALBERT, Richard. How Unwritten Constitutional Norms Change Written Constitutions. **Dublin ULJ**, v. 38, n. p. 387, 2015 AHMED, Farrah; ALBERT, Richard; PERRY, Adam. Enforcing Constitutional Conventions. **International Journal of Constitutional Law**, v. 17, n. 4, p. 1146-1165, 2019 AHMED, Farrah; ALBERT, Richard; PERRY, Adam. Judging Constitutional Conventions. **International Journal of Constitutional Law**, v. 17, n. 3, p. 787-806, 2019 JACONELLI, Joseph. Do Constitutional Conventions Bind?. **The Cambridge Law Journal**, v. 64, n. 1, p. 149-176, 2005.

device that will lead to robust consensuses among conflicting interests. In the end, that equilibrium may prove very fragile because it could be easily disrupted without much effort. More serious, a very flexible constitution can lower the need of greater knowledge of the changing circumstances amid a constitutional change, and the new environment can prove in the end thereby much more unstable than first expected. By increasing the need of more qualified consensuses, conflicting interests may offer more reasonable arguments for their positions, which can prove relevant for the constitution's adaptative efficiency.[50]

4. AND THE NORMATIVE CLAIMS?

Such an approach is not a denial of the fundamental and necessary call for a normative approach when constitutional amendment rules are at stake. It is certainly not a good advice for constitutional designers to merely observe how individuals and institutions behave and project potential outcomes given a certain context. Rational choice, in any case, does not suggest an artificial separation between normative and behavioral analyses nor disregards the relevance of normative claims. By the same token, constitutional law would be severely handicapped in its concern with basic rights, fairness, greater inclusion and equality, among many other key values, if its focus were based uniquely on "[analysing] how institutions influence outcomes"[51]

Yet there is a wake-up call here. True, sometimes such analyses based on rational choice premises may sound way too critical of the excessively normative accent that is so common in constitutional law studies. It is well-known, for example, the words that José María Maravall and Adam Przeworski, in their introduction to their groundbreaking book *Democracy and the Rule of Law* bring in a very upfront way when examining the concept of rule of law: "The normative conception of the rule of law is a figment of the imagination of jurists."[52] It seems that they, as political scientists, want to differentiate themselves from typical jurists, who strongly praise normative arguments to explain legal concepts. Both authors argue that such normative calls are "implausible as a description" and "incomplete as an explanation" because they cannot give satisfactory

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[50] See MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 287 (arguing that competition forces law-making institutions to invest in skills and knowledge to survive and is the impetus behind institutional change. By incraesing the stock and quality of institutional knowledge, competition in law-making processes creates adaptative efficiency.).

[51] WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998, p. 167-190. p. 174.

[52] PRZEWORSKI, Adam; MARAVALL Jose Maria. Introduction. In: PRZERWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 1-18.

answers for people's behavior, for instance, why people obey laws. [53] It is harsh in many respects, for sure, and may even appear they are demeaning what lawyers have so brilliantly brought to this and other debates. Despite all that, they have a point: constitutional lawyers should be more aware of the relevance of those more prosaic elements of social life.[54] Perhaps individuals follow the constitutional rules not because they feel they have a duty to do so. It could be politically, economically, or personally a good strategy to follow the rules, as many of those rational choice theories sustain. Yet, individuals may follow the constitutional rules not for a duty and nor even strategy. Inertia[55] or even a passion-based impulses[56] may also matter a great deal. Constitutional designers cannot overlook that incentives need to operate in such multidimensional palette of social behavior.

It is fascinating to observe that comparative constitutional law, possibly more than any other areas of constitutional law, has more consistently embraced such a perception. Excessively normative calls are not enough for constitutional design. The crude perception that constitutions are pacts full of compromises - and compromises "[protecting] those with the power to disrupt"[57] the constitutional project - is not easily digestible for those who praise the values of democracy and social justice. Those normative values matter and should be pursued thereby. It does not follow, however, that such crude reality of individuals' and institutions' behaviors matter less. In fact, both spheres complement each other. The constitution as a coordination device, as previously seen, can be a strong resource for promoting equality, and a well-designed framework for constitutional change can be a fundamental mechanisms for enhancing this end throughout time.

Richard Albert plays well with this premise all over the chapters of his book: he observes real and potential outcomes given certain configurations of constitutional amendment rules, explores the stakes and nuances of a vast array of real and hypothetical procedures based on such rules, and - not to forget the value of normative

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53 PRZEWORSKI, Adam; MARAVALL Jose Maria. Introduction. In: PRZERWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 1-18.

54 See BENVINDO, Juliano Zaiden. The Seeds of Change: Popular Protests as Constitutional Moments. **Marquette Law Review**, v. 99, n. 2, p. 364-426, 2015. p. 386 (examining the prosaic nature of precommitments and the paradoxical nature of constitutional democracy).

55 See LEVINSON, Daryl. Parchment and Politics: The Positive Puzzle of Constitutional Commitment. **Harvard Law Review**, v. 124, n. p. 657, 2010. p. 691 (arguing that political arrangements will tend to display a significant measure of inertia for reasons running well beyond the interest-based calculations of rational and well-informed political actors).

56 See ELSTER, Jon. **Ulysses Unbound : Studies in Rationality, Precommitment, and Constraints**. Cambridge, U.K.; New York: Cambridge University Press, 2000 ELSTER, Jon. Don't Burn Your Bridge Before You Come to it: Some Ambiguities and Complexities of Precommitment. **Texas Law Review**, v. 81, n. p. 1751, 2003.

57 WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, p. 343. p. 35-36.

values - ends his book by praising democracy and the rule of law. He emphasizes, for example, that "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,"[58] which clearly set boundaries for strategic behaviors, however short-sighted they might be. He also points out the normative ideal that amendment design should "create rules of change that keep the constitution stable and true to popular values yet always changeable when necessary"[59] in a straight reference to a dynamic conception of popular will. However, on the other hand, he sees that behaviors matter significantly for such amendment designs, for example, when he sustains that "there are advantages to changing the constitution outside the rules of formal amendment",[60] even though "formal amendment has its own democracy-enhancing virtues."[61] This is the narrative that traverses his robust arguments throughout his book: constitutional design has to examine how "institutions influence outcomes"[62] but cannot overlook the normative call for democracy.

However, there is a central concept in his book that challenges this balance between institutions' and individuals' behaviors and those normative assumptions: "constitutional dismemberment." This concept is possibly his strongest bet in coining a parameter that may serve as tool and guidance for constitutional designers, and it is also one that seeks to qualify certain types of constitutional amendments based on their contents. According to him, "[constitutional dismemberments] are transformative changes with consequences far greater than amendments. They do violence to the existing constitution, whether by remaking the constitution's identify, repealing or reworking a fundamental right, or destroying and rebuilding a central structural pillar of the constitution."[63]It is clear, from this definition, that the concept of constitutional dismemberment is content-dependent, and thereby substantive in nature. It is also strongly normative for two reasons: it is structured on a *call for coherence* and a *call for validation*. It calls for coherence because it is linked to the preservationist argument that constitutions should be amended only to the point that they are not dismembered.

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58 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 270.

59 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 271.

60 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 268.

61 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions.** Oxford University Press, 2019. p. 269.

62 WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998, p. 167-190. p.174.

63 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 78.

"The amended constitution must remain coherent and consistent with the pre-amendment constitution."[64] The qualifying gap between amendment and dismemberment leads to the *call for validation*: the assessment of constitutional core values. It is thus normative not only in the dimension of defining the "existing framework and fundamental presuppositions"[65] but also how those core values project themselves throughout time. They are validated as core constitutional values and coherently interpreted as such in time. These are the normative parameters separating constitutional amendments from constitutional dismemberments.

Interestingly enough, Albert suggests that his "theory of constitutional dismemberment is not rooted in a normative understanding of the constitution"[66] Instead, it should be interpreted more as an assessment of the quality and weight of the constitutional change than of what that change should embody. As he says, "a constitution, then, may be dismembered either to improve liberal democratic outcomes or to weaken then."[67] As a constitutional lawyer, it should be expected that he would defend the typical normative approach that constitutions should strengthen democratic values, but Albert did not choose this avenue. For him, "what matters is the present constitutional settlement and how changes are made to it" and that "constitutional dismemberment takes not prior view of what a constitution should do, entrench, or protect." [68] He is certainly concerned with providing a baseline from where constitutional designers can define whether and when a constitutional change oversteps the boundaries of a constitutional amendment, so they can better foresee potential outcomes. In this regard, it sounds pragmatic rather than normative despite being largely reliant on understanding what he calls "constitution's right, structure, or identity."[69] It is a smart move, in which he highlights his purpose of providing a "blueprint for building and improving the rules of constitutional change,"[70] but, even though seemingly "not rooted in a nor-

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64 ALBERT, Richard. Constitutional Amendments: Making, Breaking, and Changing Constitutions. Oxford University Press, 2019. p. 82.

65 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions.** Oxford University Press, 2019.

66 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 85.

67 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019.

68 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 84.

69 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions.** Oxford University Press, 2019. p. 85.

70 ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions.** Oxford University Press, 2019. p. 4.

mative understanding of the constitution,"[71] it is still very much normative in his *call for coherence* and *call for validation* for this concept.

This is not a problem, and indeed it reveals that Albert is aware that constitutional design should operate in this dialogue with different perspectives. Coherence and preservation of core values matter notwithstanding the controversies that naturally arise when assessing such other contents, which are also very controversial. The criticisms the concept of constitutional dismemberment raises likely derive from this reliance on such controversial concepts: what is "constitutional identity", "fundamental presuppositions", "structural pillar of the constitution", for example? Even if his concern is not to discuss such concepts and merely provide a tool that may help constitutional designers themselves interpret those contents and then assess whether an amendment is a dismemberment or not, it hinges on those normative assumptions - the call for coherence and the call for validation -, which can nonetheless be a relevant goal. However, from a rational choice perspective, this concept would likely be drafted according to some other parameters. Instead of connecting to core constitutional principles or being coherent with the pre-amendment constitution, rational choice would simply posit that a constitutional amendment should preserve the self-enforcement quality of the constitution and thereby be "adaptively efficient" to the new circumstances. Both perspectives complement each other, but, while Albert's stresses the call for coherence and validation, rational choice would point out that what matters for the sake of the constitution's stability is that it keeps being "self-enforcing" and able to vertically and horizontally coordinate people's behavior.

5. CONCLUSION

Constitutional law has had a longstanding relationship with a vast array of normative assumptions.[72] The natural and necessary call for democracy, rule of law, justice, just to cite some of the best-known concepts, has provided the richest debates in all legal fields. Constitutional law has been one of the main reasons why, as Jürgen Habermas puts it, "legal philosophy, in search of contact with social reality, has migrated into the law schools."[73] For a long time, there has prevailed debates over the limits of constitutional adjudication, the countermajoritarian difficulty, conceptions of justice, among many other fascinating topics. Yet constitutional law has also failed to provide a stronger connection with debates that have flourished in other connected areas of

[71] ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 82.

[72] WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998, p. 167-190. p. 174.

[73] HABERMAS, Jürgen. **Between Facts and Norms**. Cambridge, MA: MIT Press, 1996. p. xxxiv.

knowledge, such as political science and economy. For example, it has had a difficult relationship with analyses that focus on people's and institutions' behaviors and their influence on potential outcomes. Rational choice theory, in its distinct configurations, has not rarely been seen as the black sheep in various constitutional debates, most of which overly dominated by normative assumptions.

When such normative conceptions are called a "figment of the imagination of jurists" that are "implausible as a description" and "incomplete as an explanation",[74] it is certainly a harsh - and unfair - criticism, but it is also a wake-up call. Constitutional law has provided one of most fascinating, challenging, and intriguing debates in legal theory, but it may have gone too far in its belief in the transformative capacity of such normative values. The empirical dimension of social life has increasingly demanded that distinct tools be brought to constitutional law, and an overlooked one in law - though largely employed in those other correlated fields - can provide relevant analyses for distinct constitutional phenomena and complement many of the conclusions that already take place in constitutional law: rational choice theory.

This Article focused on briefly discussing some key concepts that rational choice theory provides for constitutional law, such as "self-enforcement", "rationality of fear", "adaptative efficiency", in order to show their analytical potentialities for constitutional law. More particularly, they can be a resource for constitutional design, which, more than any other field of constitutional law, has made the much-needed bridge between behavioral analyses and normative assumptions.

For such an end, Richard Albert's groundbreaking book *Constitutional Amendment: Making, Breaking, and Changing Constitutions* was adopted as a compelling example of a book which, though not directly making use of those rational choice concepts, is largely concerned with connecting people's and institutions' behavior with potential outcomes when examining the distinct nuances of constitutional amendment rules. The success of Albert's book largely hinges on his impressive capacity of examining distinct constitutional frameworks, analyzing empirical cases, but also creating models, classifications, and concepts. His book is certainly the most comprehensive and best designed treaty of constitutional amendment rules ever produced. It has naturally its controversial parts, especially the concept of "constitutional dismemberment", in which the normative claim may have gone a bit further than the traditional balance between behavioral and normative approaches he could deliver throughout his book, but even there it is clear that he acknowledges the limits of a typical normative narrative.

The minimal ambition of this Article is to remind us that constitutional law - and, more particularly - constitutional design - should explore further the potentialities of

[74] PRZEWORSKI, Adam; MARAVALL Jose Maria. Introduction. In: PRZEWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003. p. 1-18.

various tools that other correlated areas of knowledge largely adopt, especially in times when constitutional law is under growing stress and the movements of political players becomes so central for constitutional analyses. Rational choice is one such tools and, even when not directly adopted - as in Richard Albert's book - it is clear that institutions and people's behavior, strategically or not, rationally or passionately, are to be taken seriously. Richard Albert's book brightly applied this understanding for constitutional amendment rules. A similar effort should take place in the other rich areas of constitutional law.

6. REFERENCES

ACKERMAN, Bruce. **We the People, Volume 1.** Harvard University Press, 1993.

AHMED, Farrah; ALBERT, Richardet al. Enforcing Constitutional Conventions. **International Journal of Constitutional Law**, v. 17, n. 4, p. 1146-1165, 2019.

AHMED, Farrah; ALBERT, Richardet al. Judging Constitutional Conventions. **International Journal of Constitutional Law**, v. 17, n. 3, p. 787-806, 2019.

ALBERT, Richard. Constitutional Amendment by Constitutional Desuetude. **American Journal of Comparative Law**, v. 62, n. 3, p. 641-686, 2014.

ALBERT, Richard. How Unwritten Constitutional Norms Change Written Constitutions. **Dublin ULJ**, v. 38, n. p. 387, 2015.

ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions.** Oxford University Press, 2019.

ALEXY, Robert. Justification and Application of Norms. **Ratio Juris**, v. 6, n. 2, p. 157-170, 1993.

ALEXY, Robert. Constitutional Rights, Balancing, and Rationality. **Ratio Juris**, v. 16, n. 2, p. 131-140, 2003.

ALEXY, Robert. **A Theory of Constitutional Rights**. Oxford: Oxford University Press, USA, 2010.

BENVINDO, Juliano Zaiden. **On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism**. Heidelberg; New York: Springer, 2010.

BENVINDO, Juliano Zaiden. The Seeds of Change: Popular Protests as Constitutional Moments. **Marquette Law Review**, v. 99, n. 2, p. 364-426, 2015.

BICKEL, Alexander Mordecai. **The Least Dangerous Branch: The Supreme Court at the Bar of Politics.** Yale University Press, 1986.

COOTER, Robert Dandridge. **The Strategic Constitution**. Princeton University Press, 2002.

DIAMOND, Larry; LINZ, Juan Joséet al. (eds.). **Democracy in Developing Countries: Latin America.** London: Adamantine Press, 1999.

DWORKIN, Ronald. **A Matter of Principle.** Cambridge, MA: Harvard university Press, 1985.

ELKINS, Zachary; GINSBURG, Tomet al. **The Endurance of National Constitutions**. Cambridge: Cambridge University Press, 2009.

ELSTER, Jon. Don't Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment. **Texas Law Review**, v. 81, n. p. 1751, 2003.

ELSTER, Jon. **Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints**. Cambridge, U.K.; New York: Cambridge University Press, 2000.

FRIEDMAN, Barry. The History of the Countermajoritarian Difficulty: Part One: The Road to Judicial Supremacy. **NYUL Rev.**, v. 73, n. p. 333, 1998.

GÜNTHER, Klaus. **The Sinn für Angemessenheit: Anwendungsdiskurse in Moral und Recht**. Frankfurt a.M.: Suhrkamp, 1988.

HABERMAS, Jürgen. Reply to Symposium Participants, Benjamin N. Cardozo School of Law. **Cardozo Law Review**, v. n. p. 1994.

HABERMAS, Jürgen. **Between Facts and Norms**. Cambridge, MA: MIT Press, 1996.

HABERMAS, Jürgen. A Short Reply. **Ratio Juris**, v. 12, n. 4, p. 445-453, 1999.

HELMKE, Gretchen; RIOS-FIGUEROA, Julio. **Courts in Latin America**. Cambridge: Cambridge University Press, 2011.

HIRSCHL, Ran. **Towards Juristocracy: The Origins and Consequences of the New Constitutionalism**. Cambridge, Mass.: Harvard University Press, 2004.

HIRSCHL, Ran. **Comparative Matters: The Renaissance of Comparative Constitutional Law.** Oxford: Oxford University Press, 2014.

HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, Adam; MARAVALL, José Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p.19-61.

JACONELLI, Joseph. Do Constitutional Conventions Bind?. **The Cambridge Law Journal**, v. 64, n. 1, p. 149-176, 2005.

KENNEY, Sally; REISINGER, Williamet al. **Constitutional Dialogues in Comparative Perspective.** Springer, 1999.

LEVINSON, Daryl. Parchment and Politics: The Positive Puzzle of Constitutional Commitment. **Harvard Law Review**, v. 124, n. p. 657, 2010.

MENDES, Conrado Hübner. **Constitutional Courts and Deliberative Democracy.** Oxford: Oxford University Press, 2013.

MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability In America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013.

RZEWORSKI, Adam. Democracy as an Equilibrium. **Public Choice**, v. 123, n. p. 253-273, 2005.

PRZEWORSKI, Adam; MARAVALL Jose Maria. Introduction. *In:* PRZERWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 1-18.

PULIDO, Carlos Bernal. The Rationality of Balancing. **Archiv für Rechts-und Sozialphilosphie**, v. 92, n. 2, p. 195-208, 2006.

SWEET, Alec Stone. Constitutional Dialogues: Protecting Human Rights in France, Germany, Italy and Spain. In: _____. **Constitutional Dialogues in Comparative Perspective**. Springer, 1999, p. 8-41.

TUSHNET, Mark. **Taking the Constitution Away from the Courts**. Princeton, NJ: Princeton University Press, 1999.

WALDRON, Jeremy. **Law and Disagreement.** Oxford: Oxford University Press, 1999.

WEINGAST, Barry. Designing Constitutional Stability. *In:* CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, p. 343.

WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. *In:* GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998, p. 167-190.