

ESSAY

Informal Constitutional Change

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In response to Richard Albert's *Quasi-Constitutional Amendments*,
65 *BUFF. L. REV.* 739 (2017).

INTRODUCTION

Quasi-Constitutional Amendments is Richard Albert's proposal for how we should theorize a prominent puzzle in comparative constitutional law: the extent to which sub-constitutional law and practice may appear to supplement and change the legal standards contained in the master-text written constitution.¹ Claims that this phenomenon exists always appear self-contradictory. How could the constitution be amended without formal amendment? In this Essay, I review and suggest some adjustments to Albert's account of quasi-constitutional amendments. In particular, I contend that Albert is unwise to hold that a law counts as a quasi-constitutional amendment only if it was adopted with an intention to controvert the normal amendment rules for the constitution. This onerous requirement is extremely difficult to establish, and deprives us of a conceptual framework for many situations where the operation of norms in the master-text constitution is changed without formal amendment.

More broadly, I critically assess whether it is helpful to consider this phenomenon as a species of constitutional amendment. Albert helpfully focuses our attention on the

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1. Richard Albert, *Quasi-Constitutional Amendments*, 65 *BUFF. L. REV.* 739, 739 (2017).

question of whether there is an alteration to the *operation of the norms* in the master-text constitution. This alerts us to the theoretical possibility that the operation of norms can be altered without those norms being formally amended. I suggest, however, that this insight of Albert's should be taken further. Rather than adjusting our understanding of *constitutional amendment* to include quasi and informal amendment, we need a broader understanding of constitutions and constitutional change. We should recognize the two overlapping but competing senses of the word "constitution": (1) the set of laws and practices that *constitute* the governance structure of the state; versus (2) the written master-text *constitution*. Informal changes to constitutional laws and practices can alter the operation of the master-text constitution without *amending* it in any sense—whether formal, informal or quasi. This conceptualization is significant. The phrase "informal constitutional amendment" implies an improper subversion of formal processes. However, if the master-text constitution is supplemented and surrounded by a broader set of constitutional law and practices, we have no general reason to maintain that constitutional law and practice should only be changed through the mechanism prescribed for the formal amendment of the master-text constitution itself. Instead, we need an open-ended assessment of whether, in a particular case, formal amendment or informal change is more appropriate.

I. CONSTITUTIONS AND CONSTITUTIONS

The concept of quasi-constitutional amendments provides a new way of understanding mismatches between the constitutional law and practice of a state and its master-text constitution. Scholars have previously employed the ideas of informal constitutional amendment and (quasi)constitutional statutes to solve this puzzle. In simple terms, an *informal constitutional amendment* involves a change to a state's constitution that is achieved other than

through the formal amendment process.² A *(quasi)constitutional statute* is an ordinary statutory law that affects or forms part of the state's constitution.³ An ambiguity in the word "constitutional" underpins both concepts. At a descriptive level, the word "constitutional" bears two principal meanings.⁴ On the one hand, it refers to the whole set of laws and practices that constitute the governmental functions of the state. For ease of reference in this Essay, I will refer to this as the "informal constitution."⁵ On the other hand, it refers to a particular document with an entrenched status at the apex of the legal system: the master-text constitution.⁶ What distinguishes the informal constitution is content and function—do the laws and practices constitute the governance apparatus of a state? What distinguishes the master-text constitution is status—is this the highest law of the state? All states have an

2. For a useful recent account of the debate over informal constitutional amendments, see Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 *FORDHAM INT'L L. J.* 427 (2017).

3. For an account of constitutional statutes in the United Kingdom, see Farah Ahmed & Adam Perry, *Constitutional Statutes*, 37 *OXFORD J. LEGAL STUD.* 461 (2017). For an account of quasi-constitutional statutes in Canada, see Vanessa MacDonnell, *A Theory of Quasi-Constitutional Legislation*, 53 *OSGOODE HALL L. J.* 508 (2016).

4. This ambiguity and distinction reflects what Loughlin has referred to as the two conceptions of constitution. Martin Loughlin, *Constitutional Theory: A 25th Anniversary Essay*, 25 *OXFORD J. LEGAL STUD.* 183, 184 (2005) ("The contrast . . . reveals two senses of the term constitution. A constitution can be viewed not only as a text, but also as an expression of a political way of being.").

5. There is no particular magic to this phrase. The underlying phenomenon is broadly similar to what, in the U.S. context, Amar describes as the "unwritten constitution," see AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012), and Tribe describes as the "invisible constitution," see LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008). I believe "informal" is preferable to "unwritten" and "invisible" because many of the referenced laws are neither unwritten nor invisible; rather, the point is that they are not written in one place. However, there may well be better terms than "informal constitution."

6. For a discussion on master-text constitutions, see JOHN GARDNER, *LAW AS A LEAP OF FAITH* 90 (2012).

informal constitution; nearly all states have a master-text constitution.

There is considerable overlap between the content of the informal constitution and the content of the master-text constitution. The very fact that the master-text constitution is superior to all other laws means that it must contain the most important constituting laws. However, the overlap is rarely, if ever, complete. Not all laws that constitute the governance structure of the state must be contained in the master-text constitution. At the very least, some level of detail will usually be regulated outside the master-text constitution. Moreover, most constitutional systems contain constitutional conventions that are—by definition—located outside the master-text constitution.⁷ Conversely, master-text constitutions may contain many provisions that do not constitute the governance function of the state. For instance, master-text constitutions are a site for the expression of important national values,⁸ preambles being the paradigm example.⁹ Also, master-text constitutions contain laws that do not constitute the governance function of the state, most obviously fundamental rights provisions. The standard of what is constitutional—in the sense of being part of the informal constitution—is common across states. The standard of what is constitutional—in the sense of being contained in a master-text constitution—varies from state to state. Although the informal constitution of a state will include much of what is contained in the master-text constitution, for the rest of this Essay I shall use the term

7. For discussion of constitutional conventions in jurisdictions with a master-text constitution, see Lorenzo Cuocolo, *Constitutional Conventions and the Economic Crisis: The Italian Paradigm*, 38 DUBLIN U. L. J. 265 (2015); Greg Taylor, *Convention by Consensus: Constitutional Conventions in Germany*, 12 INT'L J. CONST. L. 303 (2014); Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L. J. 283 (2015).

8. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

9. WIM VOERMANS, MAARTEN STREMLER & PAUL CLITEUR, CONSTITUTIONAL PREAMBLES: A COMPARATIVE ANALYSIS 1 (2017).

“informal constitution” to refer only to those constitutional laws and practices that are not contained in the master-text constitution. This preserves a linguistic distinction that allows us to conceptualize the mismatch between what is contained in the master-text constitution and other constitutional laws and practices.¹⁰

A further understanding of “constitutional” derives from the fact that both the informal constitution and the master-text constitution contain norms. Laws and practices can therefore be classed as constitutional or unconstitutional depending on their conformity with the norms in the constitution, whether informal or master-text. Given that the master-text constitution is taken to be the highest law within the state, if aspects of the informal constitution are unconstitutional in the sense of contradicting norms in the master-text constitution, they can be deemed invalid. This lies at the core of the puzzle: how can the informal constitution change the master-text constitution without being deemed unconstitutional, and therefore of no legal effect?

We can usefully understand the concepts of (quasi)constitutional statutes, informal constitutional amendment and, as we shall see later, quasi-constitutional amendment in these terms. A (quasi)constitutional statute is part of the informal constitution but not the master-text constitution. An informal constitutional amendment involves a change to the informal constitution without formally amending the master-text constitution. It is easy to accept that the informal constitution supplements the master-text constitution. Much more difficult are cases where the informal constitution appears to change the master-text constitution. Any such attempt should surely be unconstitutional and therefore invalid. Nevertheless, sometimes the informal constitution appears to persist

10. I shall relax this stipulation in my concluding paragraphs to allow me develop one point.

notwithstanding inconsistency with the master-text constitution. Albert's article suggests that this amounts to quasi-constitutional amendment of the constitution.

II. QUASI-CONSTITUTIONAL AMENDMENTS

Albert defines quasi-constitutional amendments as follows:

A quasi-constitutional amendment is a sub-constitutional alteration to the operation of a set of existing norms in the constitution—a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function, though not the formal status, of constitutional law over time as a result of its subject-matter and importance—making it just as durable as a constitutional amendment.¹¹

Albert also adds a requirement of intentionality:

quasi-constitutional amendments are the result of a self-conscious circumvention of onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution.¹²

Taking these together, we can identify four criteria for a quasi-constitutional amendment:

- It does not have the same legal status as the master-text constitution.
- It may achieve the function of constitutional law over time making it just as durable as a constitutional amendment.
- It alters the operation of the existing norms in the constitution.
- It must have been adopted as a self-conscious attempt to circumvent the formal rules of amendment.

There is some inconsistency in how Albert treats status, function, and durability. He later refers to constitutional

11. Albert, *supra* note 1, at 740. Albert, I suspect that those who first learn constitutional law in a jurisdiction without a master-text constitution, principally those from the United Kingdom and New Zealand, will emphasise the constitution in the first sense. Those who learn their constitution from jurisdictions with a master-text constitution, such as the US or Ireland, will emphasise the constitution in the second sense. Canada lies somewhere between the two.

12. *Id.* at 741–42.

actors having “recourse to these sub-constitutional strategies for constitution-level changes,”¹³ and characterizes his three Canadian examples (discussed below) as “constitution-level changes.”¹⁴ In his conclusion, he suggests that “quasi-constitutional amendments may nonetheless over time acquire constitutional status as a result of their subject-matter or importance.”¹⁵ Merging these points with his earlier definition, it seems that a quasi-constitutional amendment, although not made in a way that immediately confers formal constitutional status on it, may acquire something akin to that status over time if it is as durable as a formal constitutional amendment. If we read Albert’s analysis in this way, the first two criteria largely reflect the interaction of the informal and master-text constitution: a law can regulate matters of constitutional significance without being part of the master-text constitution. These criteria are also met by (quasi)constitutional statutes.

The third criterion is more onerous. Altering “the operation of the existing norms in the constitution” is, on its face, ambiguous between the two senses of constitution. However, because all laws that meet the first two criteria necessarily alter the operation of norms in the informal constitution, it is appropriate to read the third criterion as referring to the master-text constitution. Otherwise, it would be redundant. This explains Albert’s choice of “quasi-amendment”: the law does not *actually amend* the norms in the master-text constitution but does something akin to amendment by altering the operation of those norms. Albert uses “norm” in the standard sense of constraints on behavior.¹⁶ The master-text constitution contains norms that

13. *Id.* at 742.

14. *Id.*

15. *Id.* at 765.

16. For a discussion of constitutional constraints in the context of amendment, see Oran Doyle, *Constraints on Constitutional Amendment Powers*, in *THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT* (Richard Albert et al. eds., 2017).

constrain the behavior of constitutional actors. These norms can be amended through the formal process for amendment. But what does it mean to change the operation of a norm, without changing the norm itself? It seems to me that Albert envisages something like the following.

Where norms are followed, one can observe a pattern of norm-compliant behavior. For instance, we might observe a pattern of drivers stopping their cars at a red traffic light at a junction as a pattern of norm-compliant behaviour. Suppose that many pedestrians need to cross the road at the junction following a major sporting event. A police officer begins to direct traffic in a way that does not cohere with the sequence of traffic lights. At this point, the pattern of behavior is no longer norm-compliant, although the norm has not been changed. We might say that there has been a temporary alteration to the operation of the norm. If we apply this to the constitutional context, we would say that there is a quasi-constitutional amendment where constitutional officials change their pattern of behavior such that it no longer matches what one would expect if officials were following the norms in the master-text constitution. This fleshes out Albert's understanding of the status of the quasi-constitutional amendment: it does not have quite the same status as a formal constitutional amendment, but it is close to that status because it alters the operation of norms in the master-text constitution.

Albert's fourth and final criterion for quasi-constitutional amendments grafts an element of intentionality onto the third criterion. Not only must the operation of the existing norms in the constitution be altered; there must have been a "self-conscious circumvention of onerous rules of formal amendment . . ."¹⁷ This requirement of intentionality introduces significant epistemological difficulties. Intentionality is a notoriously slippery concept, even in the straightforward context of one individual

17. Albert, *supra* note 1, at 741–42.

intending to carry out an empirically observable act.¹⁸ In the context of constitutional practice, an intentionality requirement is especially demanding. We must establish the intention of a collective actor, not an individual human, with respect to (a) a set of contestable legal standards that indicate what is permitted by the formal rules of amendment and (b) whether the proposed action subverts those standards. Even allowing for the possibility of such an intention, there would be significant difficulties in establishing it in any particular case. It also rules out the inclusion of constitutional conventions as a mode of quasi-constitutional amendment because conventions are not intentionally formed but rather depend on an emerging attitude to an existing pattern of behavior. Given the difficulties in satisfying this criterion, we will likely be faced with examples of laws and practices that meet Albert's first three criteria, but not this fourth criterion. Because the function of such practices in a constitutional system is the same, irrespective of intentionality, it would be inappropriate to develop two discrete concepts. A simpler approach would be to discard the intentionality criterion: quasi-constitutional amendments would therefore be established once the first three criteria are satisfied. An intentional quasi-amendment might be the occasion of greater political criticism, but it is not a discrete analytical concept.

III. CANADIAN EXAMPLES OF QUASI-CONSTITUTIONAL AMENDMENTS

Albert offers three Canadian examples of quasi-constitutional amendments.¹⁹ In 1996, the Federal Parliament passed the Regional Veto Law. The law requires a Cabinet Minister to first obtain the consent of each of the

18. For a discussion of the difficulties of intention in the criminal context, see BEBHINN DONNELLY-LAZAROV, *A PHILOSOPHY OF CRIMINAL ATTEMPTS* 7–34 (2015).

19. Albert, *supra* note 1, at 740, 745–46, 748.

five major regions as well as a majority of all provinces before introducing a major amendment proposal under the multilateral default amendment procedure.²⁰ Ontario, Quebec and British Columbia are each treated as a region, giving each of these Provinces a veto.²¹ For the Prairie and Atlantic regions, two Provinces that together represent at least half of the regional population can exercise the veto.²² Therefore, the substantive effect—if not the form—of the Regional Veto Law is to introduce a statutory requirement that must be satisfied in addition to the requirements contained in the master-text constitution.²³ This makes amendment more difficult by granting an effective veto power to constitutional actors who otherwise would not have such a power.

The Regional Veto Law meets the first two of Albert's criteria for quasi-constitutional amendments. It is part of the informal constitution but not part of the master-text constitution. The question remains, however, whether it alters how the existing norms in the Constitution operate. The default amendment procedure produces a certain pattern of behavior by constitutional actors in the context of constitutional amendment.²⁴ The pattern of constitutional amendment, taking account of the Regional Veto Law, must be different. In fact, no amendments have been passed under this procedure since the Regional Veto Law, and it is impossible to know whether any amendments would have been passed in absence of the Regional Veto Law. Nevertheless, it seems reasonable to conclude that the Regional Veto Law has affected the behavioral pattern of

20. *See An Act Respecting Constitutional Amendments*, (S.C. 1996, c. 1) (Can.).

21. *Id.*

22. *Id.*

23. The Law does not appear to preclude ordinary Members of the Federal Parliament, as distinct from the Government, from introducing amendment proposals. However, there is little likelihood of success for such an amendment where the Government is all but guaranteed a majority in Parliament.

24. Albert, *supra* note 1, at 747.

constitutional actors, thereby altering the operation of norms in the master-text constitution.

Finally, was the Regional Veto Law a “self-conscious circumvention of onerous rules of amendment”?²⁵ Albert reports that the Law “fulfilled the federal government’s promise to give Quebec a veto over future constitutional amendments, a pledge made as an inducement to encourage Quebec voters to reject secession.”²⁶ It is reasonable to infer that the law was a self-conscious attempt to make the constitution more difficult to amend. However, the law was not necessarily an attempt to circumvent the formal rules of amendment. We cannot straightforwardly count comments by members of the federal government as evidence of the later intention of a different collective actor. Perhaps the Parliament chose to enact the Regional Veto Law, rather than formally amend the constitution, because it wanted to reserve for itself the possibility of repealing the Regional Veto Law in future. This would not have been possible if the substance of the Regional Veto Law were contained in a constitutional amendment. Although it is possible that the Regional Veto Law meets Albert’s fourth criterion for quasi-constitutional amendment, we cannot be reasonably sure that it does so. This example supports my suggestion that Albert is unwise to include this criterion in his concept of quasi-constitutional amendment. The way in which the Regional Veto Law operates and its constitutional and political implications have little if anything to do with the intentions of those who enacted it. Why should we make our ability to conceptualize it hostage to the difficulty of establishing those intentions?

Albert’s second Canadian example concerns a new method, introduced in 2016, for the appointment of Senators.²⁷ The Government established a non-statutory

25. *Id.* at 741–42.

26. *Id.* at 746.

27. Albert, *supra* note 1, at 748.

Independent Advisory Board to make appointment recommendations to the Prime Minister.²⁸ Under section 24 of the Canadian Constitution, the Governor General appoints Senators.²⁹ By convention, the Governor General follows the advice of the Prime Minister.³⁰ The new process introduces a further preliminary stage whereby the non-statutory Independent Advisory Board makes a recommendation of five possible names for each vacancy.³¹ Again, this example easily satisfies the first two of Albert's criteria: this is a practice—not a law—on a matter of constitutional significance that is not contained in the master-text constitution. However, it seems to me that it does not alter the operation of the norms in the master-text constitution. On the one hand, the practice of the Governor General following the advice of the Prime Minister is not itself contained in the master-text constitution; it is a matter of constitutional convention. On the other hand, even if we were to treat Prime Minister's nomination as governed by the master-text constitution, we still cannot say that the establishment of the Independent Advisory Board alters the operation of those norms. The Prime Minister remains free to nominate anyone she wishes. Given that the Independent Advisory Board does not alter the operation of the norms in the master-text constitution, it is difficult to establish that it was adopted with an intention to circumvent the norms of constitutional amendment.

Albert's third Canadian example is the Canadian Bill of Rights, which was enacted in 1960. As presented by Albert, the Bill of Rights imposed an obligation on the Minister for Justice "to review every government bill for consistency with the list of recognized rights and freedoms, and to report any

28. *Id.*

29. *Constitution Act, 1867*, 30 & 31 Vict., c 3 § 24 (U.K.).

30. *See id.*

31. Press Release, Gov't of Can., Government Announces Immediate Senate Reform (Dec. 3, 2015), <http://www.marketwired.com/press-release/government-announces-immediate-senate-reform-2079118.htm>.

inconsistency to the House of Commons.”³² This example again satisfies the first two criteria with relative ease: it is part of the informal constitution (the process for the enactment of legislation), but is not contained in the master-text constitution. However, as above, it’s doubtful whether it satisfies the third and fourth criteria. The only obligations are on the Minister for Justice to: (1) review government bills, and (2) report inconsistencies to the House of Commons.³³ It is a significant stretch to characterize this as an alteration to the operation of the norms in the master-text constitution. Since the master-text Canadian Constitution is silent on these issues, any changes made by the Canadian Bill of Rights are to constitutional norms that already operate outside the master-text constitution. At most, it seems to be the addition of a supplementary practice. For the same reason, it cannot be said that the Bill of Rights was a self-conscious attempt to circumvent the formal amendment rules.

In sum, Albert’s three Canadian examples substantiate the concerns about the difficulty of satisfying the criterion of intentionality. They support the view that it would be better not to include that criterion. Of the three examples, only the Regional Veto Law meets the criterion of altering the operation of norms in the master-text constitution. Nevertheless, Albert is right—in my view—to include this criterion. The first two criteria amount to the relatively uninteresting proposition that there is an informal constitution that can be amended by the informal constitution. The criterion of altering the operation of norms in the master-text constitution distinguishes a phenomenon that raises altogether different concerns. Because of the highest legal status afforded to the master-text constitution, its interaction with the informal constitution raises a

32. Albert, *supra* note 1, at 102 n.3.

33. There is no alteration to the operation of norms in respect of rights protection. Parliament is not constrained to comply with fundamental rights; the courts are not empowered to review legislation.

discrete set of moral-political concerns, highlighted by further reflection on the Regional Veto Law.

The Regional Veto Law altered the operation of the existing amendment norms in the master-text constitution *for future cases*. In other words, constitutional actors used a less onerous change procedure in order to make formal change more onerous in the future. Furthermore, the Regional Veto Law intruded into an area that might have been thought to be comprehensively regulated by the master-text constitution. Section 38(1) of the Canadian Constitution allows for constitutional amendments, on the stipulated topics, where there are (a) resolutions of the Senate and House of Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty percent of the population of all the provinces.³⁴ The Regional Veto Law, in substance if not in form, introduces an additional requirement, meaning that what the master-text constitution envisages as adequate support for a constitutional amendment no longer amounts to adequate support. Moreover, section 38(1) takes its place within a schema of amendment procedures that make different distributions of amendment powers among constitutional actors. The Regional Veto Law disrupts that distribution of powers, pushing the multilateral procedure towards (but not quite reaching) the requirements of the unanimity procedure. In this regard, it also draws a differentiation between Provinces that is not present in any of the other amendment processes—some Provinces have the veto right, others do not.

For all of these reasons, the Regional Veto Law provides a paradigm case of the political-moral concerns that Albert raises with quasi-constitutional amendments. They “risk obscuring the ordinary hierarchy of authority” in a

34. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 38(1) (U.K.) [hereinafter *Constitution Act, 1982*].

constitutional state and “undermine the very purpose of codification.”³⁵ Albert suggests that the Regional Veto Law may “quite possibly [be] unconstitutional.”³⁶ However, even if such an argument cannot be successfully made under Canada’s master-text constitution, the political-moral concerns of federalism remain. Albert’s third criterion distinguishes what is special about this law: it is more than a (quasi)constitutional statute. Laws and practices that alter the operation of norms in the master-text constitution raise distinct concerns that require distinct analysis.

IV. CONSTITUTIONS AND CONSTITUTIONAL CHANGE

I shall conclude, however, by sketching an argument that a proper understanding of informal constitutions and master-text constitutions provides a simpler and more accurate understanding of the puzzle identified at the start of this Essay: the extent to which sub-constitutional law and practice can appear to supplement and change the legal standards contained in the master-text written constitution. Once we recognize that there is an informal constitution separate from the master-text constitution, we can readily understand that laws and practices of constitutional significance can exist outside the master-text constitution. The stipulated process for amending the master-text constitution simply does not apply to those constitutional laws and practices that are located outside the master-text constitution. The informal constitution can of course be changed informally. What is more difficult to explain are situations where the informal constitution appears to change the master-text constitution.

The concepts of informal constitutional amendment and quasi-constitutional amendment both suggest that there has been something akin to an amendment of the master-text constitution. However, it is unhelpful and misleading to

35. Albert, *supra* note 1, at 742.

36. *Id.* at 766.

understand what has occurred as a watered-down version of amendment. If we consider again the Regional Veto Law, we can see that there has been no textual change to the master-text constitution: the Regional Veto Law could be repealed by ordinary legislation and it might be declared unconstitutional by a court. This is inconsistent with a conclusion that there has been an amendment, even an informal or quasi-amendment, of the master-text constitution. In short, there has been no change to the master-text constitution at all. Rather, there has been a change to how the master-text constitution is treated. A change in the informal constitution has led to the norms of the master-text constitution no longer being followed, perhaps temporarily or perhaps indefinitely. The real challenge is to explain how the informal constitution could be used to achieve such an outcome without being declared “unconstitutional” (with reference to the master-text constitution) and thereby eliminated from the legal order.

If the superiority of the master-text constitution is simply a postulate of the legal system, then such an outcome is incomprehensible. However, if we treat the status of the master-text constitution not as a postulate but as something that requires explanation, then new possibilities open up. Adapting H.L.A. Hart, I suggest that master-text constitutions derive their legal status through patterns of acceptance by legal officials. However, legal officials may also accept other laws and practices, independent of the master-text constitution, as being valid within their legal system. For example, in Ireland, legal officials all accept that previous judicial decisions are a source of law for future cases, despite the fact that nothing in the constitution or any law validated by the constitution establishes a doctrine of precedent. If the validity and superiority of the master-text constitution is not an unquestionable postulate but rather a fact contingent upon the behavior of legal officials, then it follows that those legal officials may act in a way that is inconsistent with the master-text constitution. In this way,

the informal constitution may not only supplement, but also change the operation of the norms of the master-text constitution without amending the master-text constitution in any sense.

For both the informal constitution and the master-text constitution, what matters is not the document, laws, or practices, but rather how they are treated by constitutionally significant actors. This explains Albert's emphasis on durability through time in assessing whether (in his terminology) a quasi-constitutional amendment has been made. We cannot know straightaway whether the informal constitution has shifted the operation of norms in the master-text constitution—only time will tell whether constitutionally significant actors have accepted changes in the informal constitution. It is problematic to analogize these constitutional changes to amendment. This will cause us to misunderstand how the changes occur and how they can be undone in the future. The operation of norms in the master-text constitution always depends on the informal constitution; changes in the informal constitution can shift the operation of master-text constitution norms, without amendment (in any sense) of the master-text constitution.

I defined "informal constitution" in a way that excluded the content of the master-text constitution in order to preserve a linguistic distinction that would allow us to focus on how the master-text constitution can be influenced by laws and practices that exist outside of it. However, in conclusion it is appropriate to relax that stipulation and recall that the informal constitution includes much of the content of the master-text constitution. This emphasises the lack of hierarchical relationship between the two. This does not mean that it is always appropriate to alter the operation of norms in the master-text constitution rather than seek to amend it formally. Albert correctly identifies costs with such a practice: it obscures the ordinary hierarchy of authority in a constitutional state and undermines the very purpose of codification. Nevertheless, in some instances the difficulty of

formal amendment and the attractiveness of the legal change may outweigh those costs. The Regional Veto Law seems an improper interference with a difficult federal compromise. However, the convention that the Governor General is bound by the Prime Minister's advice in the appointment of Senators was an appropriate constitutional change. The court-identified convention of substantial provincial consent required for the patriation of the Canadian Constitution in 1982 is more contestable.³⁷ In other words, the appropriateness of all forms of constitutional change requires open-ended consideration. Analysis in terms of quasi-constitutional amendments suggests that some types of constitutional change are by their very nature suspicious. This is not the case. We should instead recognize that constitutional change can occur both through formal constitutional amendment and through informal constitutional change. The appropriate method of constitutional change depends on all the circumstances of the case, not a preconception that quasi-constitutional amendments are inherently problematic.

37. Oran Doyle, *Constitutional Transitions, Abusive Constitutionalism and Conventional Constraint*, 37 NAT'L J. CONST. L. 67, 76 (2017).