

Discretionary Referendums in Constitutional Amendment

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The unexpected results of recent referendums around the world have concealed an important similarity among many of them: the referendums were not constitutionally required. For example, the Constitution of the United Kingdom does not require a referendum to authorize Brexit nor does the Colombian Constitution require one to ratify the FARC peace pact. Yet in both cases incumbents felt compelled by political imperatives to forego the settled rules of constitutional change in order to bring their reform proposals directly to the people. This is not a rare practice: historically and recently, leaders have often had recourse to referendums by choice rather than constitutional obligation as part of a larger strategy to legitimate a major constitutional change. In this paper, I draw from various non-obligatory referendums held around the world to develop a typology of discretionary referendums in constitutional amendment. I also examine why constitutional actors use discretionary referendums to amend the constitution and I situate their use against the backdrop of an increasingly observable phenomenon in democracies: the circumvention of formal amendment rules. This occurs when constitutional actors deliberately bypass the formal rules of constitutional change to amend the constitution, with recourse not only to referendums but to other modalities of constitutional change.



Richard Albert is the William Stamps Farish Professor in Law and Professor of Government at the University of Texas at Austin. Professor Albert has published widely on constitutional amendment. His scholarship has been translated into Chinese, French, Hungarian, Portuguese, Russian and Spanish. He is the author of *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, a monograph published by Oxford University Press in August 2019. Professor Albert has co-edited several volumes on the study of constitutionalism, is the co-editor of the new Series in Comparative Constitutionalism at Oxford University Press, co-editor of the Series in Comparative Constitutional Change at Routledge, and he sits on the editorial boards of numerous journals including the *International Journal of Constitutional Law*. He sits on the Governing Council of the International Society of Public Law, holds an elected membership in the International Academy of Comparative Law, and has served on the Executive Committee of the American Society of Comparative Law.

