

January 2015

# How Unwritten Constitutional Norms Change Written Constitutions

Richard Albert

*Boston College Law School*, richard.albert@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/lspf>



Part of the [Constitutional Law Commons](#), [Jurisprudence Commons](#), and the [Legal History Commons](#)

---

## Recommended Citation

Richard Albert. "How Unwritten Constitutional Norms Change Written Constitutions." *Dublin University Law Journal*, Forthcoming (2015).

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# HOW UNWRITTEN CONSTITUTIONAL NORMS CHANGE WRITTEN CONSTITUTIONS

RICHARD ALBERT<sup>†</sup>

*Written constitutions are susceptible to informal changes that do not manifest themselves in alterations to the text, for instance as a result of judicial interpretation, legislative enactment or executive action. This phenomenon is well developed in the scholarly literature on constitutional change and informal constitutional amendment. But what remains understudied and undertheorized in Canada and the United States is how written constitutions change informally as a result of the development of an unwritten constitutional norm, otherwise known as a constitutional convention. In this Article, I hypothesize with reference to the Canadian and United States Constitutions that there exist two major categories of informal constitutional change by constitutional convention: incorporation and repudiation. I suggest also that incorporation and repudiation may each occur in two ways: incorporation may occur by filling an existing void in the constitutional text or by refining one of its existing provisions, and repudiation may result from creating a void in the constitutional text or from substituting one of its existing provisions. I then evaluate whether these four forms informal constitutional change by constitutional convention entail costs to the rule of law where constitutional meaning is rooted in the present public meaning of the constitutional text. My larger purpose in this Article is to invite a dialogue with comparative public law scholars on how unwritten constitutional norms change written constitutions so that we may ultimately better understand the forms and implications of unwritten constitutional change.*

<b>I.</b>	<b>INTRODUCTION</b>	<b>2</b>
<b>II.</b>	<b>INFORMAL CONSTITUTIONAL CHANGE BY INCORPORATION</b>	<b>5</b>
	A. Incorporation by Void-Filling	7
	B. Incorporation by Refinement	8
<b>III.</b>	<b>INFORMAL CONSTITUTIONAL CHANGE BY REPUDIATION</b>	<b>11</b>
	A. Repudiation by Void-Creation	11
	B. Repudiation by Substitution	13
<b>IV.</b>	<b>INFORMAL CONSTITUTIONAL CHANGE AND THE RULE OF LAW</b>	<b>15</b>
	A. The Congruence Between Constitutional Text and Political Practice	15
	B. Informal Constitutional Change by Constitutional Convention	20
<b>V.</b>	<b>CONCLUSION</b>	<b>24</b>

---

<sup>†</sup> Associate Professor, Boston College Law School; Yale University (J.D., B.A.); Oxford University (B.C.L.); Harvard University (LL.M.). Email: [richard.albert@bc.edu](mailto:richard.albert@bc.edu). I am grateful for helpful comments from Or Bassok, Josh Braver, Oran Doyle, Cristina Fasone, Tania Groppi, Giovanni Piccirilli, David Prendergast and workshop participants at Boston College Law School, European University Institute, and the Fourth Annual YCC Global Conference. I have also benefitted from suggestions I received at the Symposium on Conventional Constitutionalism at Trinity College Dublin in November 2014 and also in the course of the peer-review process that led to the publication of this Article.

## I. INTRODUCTION

Codified constitutions, to which I will refer in this Article as written constitutions,<sup>1</sup> commonly entrench formal amendment rules that authorize political actors to change the constitutional text in conformity with special procedures.<sup>2</sup> Formal amendment rules may, for instance, require constitutional reformers to assemble supermajority approval from legislators,<sup>3</sup> majority approval from voters,<sup>4</sup> or they may require both of these in combination.<sup>5</sup> Written constitutions may also establish subject-matter restrictions that prohibit amendments to constitutional values,<sup>6</sup> they may impose temporal limitations that compel or constrain the timing and duration of the constitutional amendment process,<sup>7</sup> and they may also disable the procedures of formal amendment in times of emergency.<sup>8</sup> Formal amendment rules therefore provide a roadmap for how and when to amend the constitutional text, who may amend it, where the amendment must be initiated and ratified, and also what within the text is amendable.

Written constitutions may also change informally. An informal change occurs where the enforceable meaning of the constitution changes without altering the constitutional text.<sup>9</sup> For instance, where courts possess the power of judicial review,<sup>10</sup> and where that power is effective, the functionally binding quality of a national court of last resort interpreting the constitutional text approximates the formally binding quality of a written constitutional amendment.<sup>11</sup> The form of entrenchment may differ but their effects are largely indistinguishable.<sup>12</sup> This is the sense in which

---

<sup>1</sup> Writteness fails to distinguish the United States Constitution from the British Constitution, for instance, because all constitutions are in some ways written. *See generally* Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge 2013) (exploring the functions and limits of writteness). The real distinction is codification: the United States Constitution is codified in a master-text constitution whereas the British Constitution exists in written but disaggregated form.

<sup>2</sup> Bjørn Erik Rasch & Roger D. Congleton, 'Amendment Procedures and Constitutional Stability' in Roger D. Congleton & Birgitta Swedenborg (eds), *Democratic Constitutional Design and Public Policy* (MIT Press 2006) 325.

<sup>3</sup> *See, eg.*, Chile Const, ch XV, arts 127-29 (1980); Norway Const, pt E, art 112 (1814); US Const, art V (1789).

<sup>4</sup> *See, eg.*, Estonia Const, ch XV, sec 162 (1992); Ireland Const, art 46(2) (1937); Switzerland Const, tit VI, ch I, arts 192-95 (1999).

<sup>5</sup> *See, eg.*, Australia Const, ch VIII, art 128 (1900); Japan Const, ch IX, art 96 (1947); Mauritius Const, ch V, pt II, art 47(3) (1958).

<sup>6</sup> *See, eg.*, France Const, tit XVI, art 89 (1958) (prohibiting amendments to republicanism); Germany Const, pt VII, art 79(3) (1949) (prohibiting amendments to federalism); Portugal Const, pt IV, tit II, art 288(c) (1976) (prohibiting amendments to secularism).

<sup>7</sup> *See, e.g.*, Cape Verde Const, pt VI, tit III, art 309(1) (1980) (prohibiting amendment during a five-year period after the coming-into-force of the Constitution); Costa Rica Const, tit XVII, art 195(3) (1949) (establishing a maximum period for a Commission to deliberate on an amendment proposal); South Korea Const, ch X, art 129 (1948) (requiring a minimum time period for deliberating on an amendment proposal).

<sup>8</sup> *See, e.g.*, Belgium Const, tit VIII, art 196 (1994) (disabling amendment rules during emergency, martial law, siege or war); Luxembourg Const, ch XI, art 115 (1868) (prohibiting amendment during regency); Spain Const, pt V, art 116 (1978) (barring amendment during war, siege or emergency).

<sup>9</sup> Heather K. Gerken, 'The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution' (2007) 55 Drake L Rev 925, 929.

<sup>10</sup> This applies also in constitutional democracies with weak-form judicial review, where the legislative or popular mechanisms created to check courts are not used. *See* Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 61.

<sup>11</sup> *See* Tom Ginsburg & Eric A. Posner, 'Subconstitutionalism' (2010) 62 Stan L Rev 1583, 1600.

<sup>12</sup> Mark Tushnet, 'Progressive Constitutionalism: What is "it"?' (2011) 72 Ohio St LJ 1073, 1080.

a written constitution may be altered informally. Judicial interpretation is only one such method. There are others, including legislative enactment and executive action.<sup>13</sup>

It is not unusual for written constitutions to change informally. Even in the United States, the model of a codified master-text constitutional democracy, one should not read the Constitution as an exhaustive list of commands, duties, procedures, rights and allocations of power. Indeed much of what we understand as *the Constitution* exists outside of the four corners of its text. The late Felix Frankfurter, a former justice of the United States Supreme Court, was therefore imprecise in all but the most formal understanding of the Constitution to state that ‘nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process’<sup>14</sup>. The study of constitutional change simply cannot escape the reality that constitutions are never fully written, neither in one single place nor in their entirety.<sup>15</sup>

Despite the growing body of scholarship on informal constitutional change, what has so far received little scholarly treatment in Canada and the United States is how unwritten constitutional norms interact with and sometimes informally alter written constitutions.<sup>16</sup> Hans Kelsen alluded to the inevitability of these informal changes when he insisted that ‘there is no legal possibility of preventing a constitution from being modified by way of custom, even if the constitution has the character of statutory law, if it is a so-called ‘written’ constitution’<sup>17</sup>. What Kelsen referred to as custom is what we understand as a constitutional convention, a rule that creates an obligation, confers rights or powers, or otherwise governs the conduct of political actors.

A constitutional convention develops, as Ivor Jennings explained, where there are precedents, where political actors feel themselves bound by the precedent, and where there is a reason to respect the precedent.<sup>18</sup> The key to the Jennings test and in fact to the existence of a constitutional convention is what political actors think, feel and eventually do. A convention may be said to exist only where we perceive and identify more than ‘mere *practice*’<sup>19</sup>; it requires political actors to conform their conduct to that practice because they ‘believe that they ought to do so’<sup>20</sup>. Self-perception, then, is key to the formation of a convention. A practice, in order to become a convention, must also be rooted in normativity. It must ‘enable[] the machinery of State to run more smoothly’ and it must be ‘desirable in the circumstances of the constitution’<sup>21</sup>.

---

<sup>13</sup> See Bruce Ackerman, *We the People: Transformations* (Harvard University Press 1998) 15-26; S.N. Ray, *Modern Comparative Politics: Approaches, Methods and Issues* (Prentice-Hall 3d ed, 2004) 117-31; Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (McGill-Queen’s University Press 1994) 260-305; Richard Albert, ‘Constitutional Disuse or Desuetude: The Case of Article V’ (2014) 94 BU L Rev 1029, 1060-71.

<sup>14</sup> *Ullmann v United States*, 350 US 422, 428 (1955).

<sup>15</sup> Anthony King, *The British Constitution* (Oxford University Press 2007) 5.

<sup>16</sup> Some useful scholarship on this point includes Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2012) xii; James Ross Hurley, *Amending Canada’s Constitution: History, Processes, Problems and Prospects* (Ministry of Supply and Services Canada, 1996) 14-16; Keith E. Whittington, ‘The Status of Unwritten Constitutional Conventions in the United States’ (2013) U Ill L Rev 101, 102.

<sup>17</sup> Hans Kelsen, *General Theory of Law and State* (Harvard University Press, Anders Wedberg transl 1945) 259.

<sup>18</sup> Ivor Jennings, *The Law and The Constitution* (University of London Press, 5th ed 1967) 136.

<sup>19</sup> *Ibid* 134.

<sup>20</sup> *Ibid* 135.

<sup>21</sup> *Ibid* 136.

In master-text constitutional democracies, conventions create a rule that compels political actors to act in a way that is not mandated by the constitutional text. We must as a result look outside the constitutional text to identify constitutional conventions. They are knowable by the conduct of others insofar as they ‘ultimately reflect what people do’.<sup>22</sup> Conventions therefore often if not always create discontinuities of varying gravity between text and practice. The most grave occurs where a convention creates a rule obliging political actors to act ‘in a way other than what the formal law prescribes or allows.’<sup>23</sup> In these cases of serious disjuncture between the constitutional text and official conduct, the consequence is problematic for the very purpose of writtenness because the convention appears nowhere in the text and the conflict between the text as written and the convention as practiced seems to subordinate the text to the convention.

Constitutional conventions can modify the meaning, though not the formal text, of written constitutions. I hypothesize two major methods. First, a convention may incorporate something new into the text of the constitution without resulting in a new writing. Second, a convention can do the opposite: it can informally repudiate, though not formally repeal, something that is currently written in the text. Each of these two major methods manifests itself in two ways. Incorporation may occur by filling an existing void in the constitutional text, where the subject-matter of the convention that fills the void is *not presently* addressed in the text. Incorporation may also occur by refinement where the subject-matter of the convention that refines the existing constitutional text is in some way *already* addressed in the text. Repudiation, on the other hand, may occur in two ways. Repudiation may occur where a convention creates a void in the constitutional text by effectively disabling a provision entrenched in the constitutional text. Repudiation may also occur by substitution where a convention plainly contradicts the written constitution. Each of these four types of informal change entails its own costs for the democratic rule of law values served by a written constitution, namely predictability, transparency and accountability.

It is important to state at the outset that these pairs of distinctions—void-filling and refinement, void-creation and substitution—are intended to be exploratory not definitive. I present them as a hypothesis about how constitutional conventions change written constitutions. One could plausibly claim that there are only two large categories of informal change by constitutional convention—incorporation and repudiation—because any distinction more specific than that is too fine to withstand scrutiny. One could alternatively argue there is only one all-encompassing form of informal change by constitutional convention—change itself—and that any further distinctions are forced at best. For instance, one could claim that the incorporation of a new constitutional convention into a constitution entails the repudiation of the existing convention to the extent it conflicts with the new one, just as one could claim that the repudiation of an existing constitutional convention results from the incorporation of a new convention into the constitution.

The categories I have chosen are therefore contestable. Yet it is in contesting these categories and their outer limits that we will clarify the relevant comparators, continuities and discontinuities that might make these or other categories analytically useful. My approach here is reductionist: to examine informal change by constitutional convention at its lowest levels of

---

<sup>22</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 217.

<sup>23</sup> Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Oxford University Press, 2d ed 2013) 5.

abstraction. My immediate purpose is to then evaluate the costs of informal change by convention for the rule of law. Although I offer illustrations for each of the four forms of informal change by constitutional convention, I am less interested in persuading readers that each particular example I have chosen is illustrative of the category of informal change into which it has been classified than in hypothesizing that each of the four categories exists, and entails different consequences for the democratic values of the rule of law. The costs to the rule of law will vary according to whether the written constitution has been informally changed as a result of void-filling, refinement, void-creation or substitution. My larger purpose in this Article is to better understand the interrelation between writtenness and conventions, a subject underexplored in Canada and the United States, and to engage comparative public law scholars in dialogue about the forms and implications of informal constitutional change in constitutional democracies where the text matters.

I take a modest approach in this inquiry into the relationship between writtenness and conventions, and I also recognize the limits inherent in the comparative enterprise. It would be difficult to sustain, and indeed it would be inadvisable to make, the claim that all democratic constitutions interact with constitutional conventions in only four ways. For one, conventions are treated differently across jurisdictions and indeed exert different legal effects from one constitutional tradition to another. In one jurisdiction, they may be judicially recognizable but non-justiciable, and in another they may be treated as sources of law that require judicial interpretation and application.<sup>24</sup> In addition, there may be definitional and linguistic challenges to pinpointing precisely what we mean by a ‘convention’ when the term is used across jurisdictions: some constitutional traditions use the term ‘custom’ and ‘convention’ interchangeably, others use the term ‘custom’ and do not use ‘convention’, and others distinguish between the two.<sup>25</sup> The point is that comparative claims, to the extent possible, should not purport to be comprehensive where the ground covered is less than that, either as a result of language barriers, cultural differences and indeed an inability to account for all jurisdictional specificities. That is why, in this Article, my approach is to present a hypothesis that comparative public law scholars can help verify, improve, challenge or reject as we seek collectively to deepen our understanding of constitutional change.

I begin, in Parts II and III, by explaining and illustrating with reference to the Canadian and United States Constitutions how constitutional conventions modify written constitutions. Part II explores the two subsidiary methods of incorporation while Part III explores the two subsidiary methods of repudiation. In Part IV, I suggest that all but one of the four categories of informal change by constitutional convention are problematic for the democratic rule of law values in codified master-text constitutional regimes. I close in Part V with reflections on the relationship between writtenness and constitutional change in master-text constitutional democracies.

## II. INFORMAL CONSTITUTIONAL CHANGE BY INCORPORATION

In democratic regimes *without* a master-text constitution, constitutional change occurs commonly though not exclusively through the adoption, adaptation and erosion of constitutional conventions.<sup>26</sup> These unwritten constitutions change by evolution in the tacit understandings of

---

<sup>24</sup> This important point emerged from a productive and stimulating colloquy with Tania Groppi.

<sup>25</sup> *Ibid.*

<sup>26</sup> See Marshall, *supra* note 22, 8.

law and politics held by the governors and accepted by the governed.<sup>27</sup> Informal change by convention therefore departs from the strictly legalistic rules we associate with constitutional change in master-text regimes,<sup>28</sup> where political actors may alter the constitutional text by deploying formal procedures requiring special rules of agreement.<sup>29</sup>

Constitutional conventions may also change *written* constitutions, though only informally, by creating, retarding or accelerating constitutional change, all without altering the text. In a master-text regime, what results from the informal entrenchment of a constitutional convention is a new constitutional meaning without a new constitutional writing. There are two major ways in which constitutional conventions can change written constitutions: by incorporating something new into the text and by repudiating something old in it. In this Part, I explore two subtly distinct ways in which a convention can change a constitution by incorporation. In the next Part, I will show two similarly subtle ways in which conventions can change a constitution by repudiation. It is worth making such close distinctions among these four forms of constitutional change because each entails different consequences for the rule of law, as I will discuss below in Part IV.

Written constitutions can be quite specific in their content. For example, the Dutch Constitution requires Parliament to regulate public access to meetings of the local water board.<sup>30</sup> The Venezuelan Constitution states that municipalities may keep the proceeds from the fines and penalties they impose within their jurisdictional authority as well as from administrative charges for matters like licensing.<sup>31</sup> The Mexican Constitution specifies that the Federal Electoral Institute must be given 48 minutes of radio and television broadcast time each day during an election.<sup>32</sup> This *operations manual* model of constitutional specificity contrasts with the United States Constitution, which is written in broad strokes as a *framework* model of constitutional generality,<sup>33</sup> though of course it also entrenches some important matters of detail.<sup>34</sup>

But even the most specific codified constitutions are incomplete. They do not, nor could they, fully reflect all of the constitution-level laws. There are many reasons why: some statutes may become so important that they achieve quasi-constitutional status;<sup>35</sup> extracanonical rules and norms, like administrative regulations and practices, although not entrenched, may come to form part of the ‘constitution outside the constitution’<sup>36</sup>; and of course constitutional conventions arising from political practice may grow to exert as much constraining or compelling force on political actors as to effectively constitute a formal constitutional rule. This third reason is the one that forms the focus of this Article. I begin from the proposition that ‘once a constitution has been set up, then almost inevitably conventions will arise to supplement and put into practical effect the

---

<sup>27</sup> See S.E. Finer et al, *Comparing Constitutions* (Clarendon Press 1995) 100.

<sup>28</sup> See Marshall, *supra* note 22, 216-17.

<sup>29</sup> See Francesco Giovannoni, ‘Amendment Rules in Constitutions’ (2003) 115 *Pub Choice* 37, 37.

<sup>30</sup> Netherlands Const, ch VII, art 133 (1983).

<sup>31</sup> Venezuela Const, tit IV, ch IV, art 179 (1999).

<sup>32</sup> Mexico Const, tit II, ch I, art 41(III) (1917).

<sup>33</sup> See Jack M. Balkin, ‘The Framework Model and Constitutional Interpretation’ (April 14, 2015) at 3 <<http://ssrn.com/abstract=2607105>> accessed 1 June 2015 (distinguishing the skyscraper from the framework model of written constitutions).

<sup>34</sup> The generality of this framework model may have helped the United States Constitution endure over two centuries. See Zachary Elkins et al, *The Endurance of National Constitutions* (Cambridge University Press 2009) 84.

<sup>35</sup> See William N. Eskridge, Jr., & John Ferejohn, ‘Super-Statutes’ (2001) 50 *Duke LJ* 1215, 1216-17.

<sup>36</sup> See Ernest A. Young, ‘The Constitution Outside the Constitution’ (2007) 117 *Yale LJ* 408, 415.

express provisions of the written constitutions.<sup>37</sup> The absence of these uncodified conventions from the master-text constitution therefore conceals how the constitution actually functions.

### A. Incorporation by Void-Filling

The task, then, is to show how a constitutional convention ‘will arise to supplement’<sup>38</sup> the written constitution. Here, I posit two methods in which a convention can arise to supplement the written constitution in a way that ‘put[s] into practical effect [its] express provisions’.<sup>39</sup> One way is by outright addition: a convention can supplement the written constitution where the subject-matter of the convention is *not* already addressed in the constitutional text, thereby filling a void in the existing constitutional text.

A helpful example of incorporation by void-filling is the two-term presidential convention in the United States. When the United States Constitution came into force in 1789, it was silent on the question of presidential reeligibility and reelection, and did not signal either in its text or through its broader architecture whether a president should or should not serve more than one term in office. The Constitution established only that the president ‘shall hold his Office during the Term of four Years’<sup>40</sup>, without stating more. Presidential incumbents could therefore serve an indefinite number of terms, if duly elected, provided they satisfied the Constitution’s other conditions for presidential eligibility, including citizenship, age and residency requirements.<sup>41</sup>

The silence of the Constitution on presidential reeligibility and reelection did not go unnoticed, nor was it uncontroversial, as legislators introduced nearly 300 resolutions between 1789 and 1947 to establish presidential term limits.<sup>42</sup> Eventually in 1951, political actors amended the Constitution to formally entrench the two-term limit in the Twenty-Second Amendment.<sup>43</sup>

We can trace origins of the Twenty-Second Amendment to the first president, George Washington, who retired in 1796 after serving only two consecutive terms despite the probability that he could have won a third presidential election.<sup>44</sup> Washington’s refusal to run for a third term did not by itself establish the two-term tradition,<sup>45</sup> although at the time of his retirement his choice to serve only two terms established what one scholar has referred to as ‘an almost unwritten law, virtually as sacred as any provision of the Constitution’<sup>46</sup>. As Washington’s successors followed

---

<sup>37</sup> G. Maher, ‘Custom and Constitutions’ (1981) 1 Oxford J Leg Stud 167, 171.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> US Const, art II, s 1(1).

<sup>41</sup> *Ibid* art II, s 1(5).

<sup>42</sup> See Paul G. Willis & George L. Willis, ‘The Politics of the Twenty-Second Amendment’ (1952) 5 W Pol Q 469, 469.

<sup>43</sup> US Const, amend XXII.

<sup>44</sup> See Richard Albert, ‘The Evolving Vice Presidency’ (2005) 78 Temple L Rev 811, 853-854.

<sup>45</sup> Indeed, Washington did not intend to bind his successors to follow his example of serving no more than two terms. See Bruce G. Peabody & Scott E. Gant, ‘The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment’ (1999) 83 Minn L Rev 565, 577.

<sup>46</sup> See Stephen W. Stathis, ‘The Twenty Second Amendment: A Practical Remedy or Partisan Maneuver’ (1990) 7 Const Comment 61, 63.



his example,<sup>47</sup> they so strongly entrenched his two two-term model that, in 1875, the House of Representatives passed a resolution recognizing that the ‘precedent established by Washington and other presidents of the United States, in retiring from the presidential office after their second term, has become, by universal concurrence, a part of our republican system of government’.<sup>48</sup>

The two-term convention helps illustrate void-filling. The Constitution’s silence on presidential reeligibility and reelection created space for the convention to take root. There was no peremptory constitutional obligation requiring presidents to contest or decline a second reelection. This afforded political actors, in this case Washington and his immediate successors, the discretion to choose whether or not to contest a third consecutive presidential election. Subsequent political actors had the option of repeating, modifying or altogether discontinuing the two-term tradition. But over time, as successive presidents began to follow the Washingtonian model, the two-term tradition matured into a convention whose effect grew to resemble what we would expect of a textually-entrenched constitutional rule. The two-term limit may therefore be said to have arisen as a matter of convention well before it became entrenched in the constitutional text.

## B. Incorporation by Refinement

In addition to incorporation by void-filling, there is a second way that a constitutional convention ‘will arise to supplement’ the written constitution to ‘put into practical effect [its] express provisions’.<sup>49</sup> A constitutional convention may also be incorporated into the constitution by refinement. In contrast to void-filling—where the subject-matter of the conventional change is *not* presently addressed in the constitutional text—refinement occurs where the subject-matter of the conventional change *is already* addressed in it. In refining the text, the convention adds to it or specifies something new about our understanding of its existing wording, though in neither case does the refinement create an inconsistency with a plain reading of the text.

Consider an example that contrasts with void-filling. In Canada, the norm of provincial consent on major constitutional amendments is an example of a convention taking root where the subject-matter was already addressed in the constitutional text. Prior to adopting its escalating structure of formal amendment rules in the *Constitution Act, 1982*,<sup>50</sup> the Constitution could be formally amended only by the Parliament of the United Kingdom<sup>51</sup>. Canada’s first written constitution, the *Constitution Act, 1867*,<sup>52</sup> was a colonial statute, and the enacting Parliament of the United Kingdom retained exclusive authority to formally amend it. The *Constitution Act, 1867* did not contain a comprehensive amendment rule. It did, however, expressly confer upon

---

<sup>47</sup> It is important to stress here that the convention was not just that a president would not run for a third term. It was that a president would not seek a third or subsequent *consecutive elected* term unless there were an emergency requiring continuity in the presidency. See Joseph Jaconelli, ‘The Nature of Constitutional Convention’ (1999) 19 *Leg Stud* 24, 33.

<sup>48</sup> Stathis, *supra* note 46, 64.

<sup>49</sup> Maher, *supra* note 37, 171.

<sup>50</sup> See Procedure for Amending Constitution of Canada, Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c 11 (UK) (hereinafter ‘*Constitution Act, 1982*’).

<sup>51</sup> Peter W. Hogg, ‘A Comment on the Canadian Constitutional Crisis’ (1980) 6 *Yale Stud World Pub Ord* 285, 287-88.

<sup>52</sup> The *Constitution Act, 1867*, 30 & 31 *Victoria*, c 3 (UK) (hereinafter ‘*Constitution Act, 1867*’).

individual provinces the authority to formally amend their respective provincial constitutions,<sup>53</sup> though there was no equivalent grant of formal authority to the Parliament of Canada to formally amend the federal constitution. There were therefore two amendment rules, one explicit and the other implicit: a province could amend its own constitution, and only the Parliament of the United Kingdom could amend the Constitution of Canada on matters affecting exclusively the federal government or on those implicating both provincial and federal interests.

The United Kingdom later formally amended the Constitution of Canada to introduce symmetry between federal and provincial amendment powers. The amendment granted the Parliament of Canada the analogous amendment power as to the purely federal matters in the federal constitution as provinces had been granted by the *Constitution Act, 1867* as to the purely provincial matters in their own constitutions.<sup>54</sup> This symmetry was salutary as a matter of form but the amendment left an open question in the constitutional text: there was no clear formal rule in the codified constitution on how to formally amend a matter of joint federal-provincial concern.

A convention developed over time to refine the formal rule that the authority to amend Canadian federal-provincial matters belonged exclusively to the United Kingdom. Under the convention, the Parliament of the United Kingdom would formally amend the Constitution of Canada at the request of the Government of Canada where the Parliament of Canada and a substantial number of provinces gave their consent to a proposed amendment. The convention had emerged from prior political practice: every time the Government of Canada requested a formal amendment affecting federal-provincial relations, the Government had first consulted with the affected provinces and indeed had almost always secured their unanimous consent.<sup>55</sup> In a landmark judgment in 1981 on the patriation of the Constitution of Canada, the Supreme Court of Canada expressly recognized the existence of this convention requiring substantial provincial consent for major formal amendments affecting provincial and federal interests.<sup>56</sup>

The convention of substantial provincial consent supplemented the existing rule on how to formally amend matters of federal-provincial concern. In their dialogic interactions over a number of decades, political actors created a practice that ultimately matured into a convention. That convention refined an existing rule that had, until then, admitted of no ambiguity: the Parliament of the United Kingdom possessed the authority to formally amend the Constitution of Canada on federal-provincial relations. Yet as the Court recognized, the convention became entrenched in Canadian political culture without being entrenched in the constitutional text. The new conventional rule refined the process for amendments to federal-provincial matters.

It is worth inquiring whether, in the United States, the filibuster is an example of a convention taking root where the subject-matter is already addressed in the constitutional text. The filibuster requires a given measure, motion or other legislative vote in the Senate to be supported by a supermajority of three-fifths, or 60 Senators, in order to survive. This legislative device is authorized by the Senate's procedural rules, and requires in relevant part that Senate debate 'shall be brought to a close' on an affirmative vote 'by three-fifths of the Senators duly chosen and

---

<sup>53</sup> *Constitution Act, 1867*, pt VI, s 92.

<sup>54</sup> British North America (No 2) Act, ch 81, 12, 13 & 14 Geo 6 (1949).

<sup>55</sup> Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer 1965) 12-16.

<sup>56</sup> *Reference re: Resolution to Amend the Constitution*, [1981] 1 SCR 753, 904.

sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting’ failing which the ‘matter pending before the Senate, or the unfinished business, shall be the unfinished business to exclusion of all other business until disposed of’<sup>57</sup>. Senators have used the filibuster with increasing frequency since the adoption of the cloture rule in 1917.<sup>58</sup>

Yet the filibuster, a significant feature of the legislative process, appears nowhere in the text of the United States Constitution. The Constitution of course outlines with some specificity the process by which the House of Representatives and the Senate are to conduct their lawmaking functions. For instance, the Constitution requires that ‘every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States’<sup>59</sup>. The Constitution proceeds to detail how the President may veto bill, how the Congress may override the President’s veto, as well as further specifications for lawmaking.<sup>60</sup>

The master-text United States Constitution, then, explains in intricate particulars the legislative process, yet without explicit reference to the filibuster. Scholars are divided on whether the filibuster is constitutional: some argue that it violates the Constitution’s majoritarian premises<sup>61</sup> while others argue that it is consistent the Constitution’s requirements.<sup>62</sup> (My own view on the question of constitutionality is that the filibuster is consistent with the Senate’s power to create its own internal rules of procedure, which the Constitution plainly authorizes.<sup>63</sup>) Constitutionality aside, it is not disputed that the filibuster is, as a descriptive matter, informally entrenched within the operative framework of the senatorial legislative process. We may therefore understand the filibuster as adding something new to the textually-prescribed process of lawmaking. But this new item is not a formal amendment, since it did not arise by recourse to Article V’s procedures for constitutional change<sup>64</sup>; nor is it a mere practice, since political actors see the rule as binding.

Is the filibuster a constitutional convention that has arisen over time by refining the existing text of the United States Constitution? I think the answer is no. The filibuster is written but not codified in the constitutional text, and it may well be a subconstitutional norm that has achieved quasi-constitutional status. But we should not to treat all non-formal law as convention. Where

---

<sup>57</sup> See Standing Rules of the Senate, Rule XII.

<sup>58</sup> Sarah A. Binder et al, ‘Tracking the Filibuster, 1917 to 1996’ (2002) 30 Am Pol Res 406, 407.

<sup>59</sup> US Const, art I, s 7, cl 2.

<sup>60</sup> *Ibid.*

<sup>61</sup> See, eg, Aaron-Andrew P. Bruhl, ‘The Senate: Out of Order?’ (2011) 43 Conn L Rev 1041, 1043; Josh Chafetz, ‘The Unconstitutionality of the Filibuster’ (2011) 43 Conn L Rev 1003, 1006; Gerard N. Magliocca, ‘Reforming the Filibuster’ (2011) 105 Nw U L Rev 303, 303-04.

<sup>62</sup> See, eg, Catherine Fisk & Erwin Chemerinsky, ‘The Filibuster’ (1997) 49 Stan L Rev 181, 245; Michael J. Gerhardt, ‘The Constitutionality of the Filibuster’ (2004) 21 Const Comment 445, 482.

<sup>63</sup> US Const, art I, s 5, cl 2.

<sup>64</sup> US Const, art V:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

there is a rule that does not appear in the constitutional text, and political actors see that rule as binding, it may be that the rule is a constitutional convention, or it may be, as in the case of the filibuster, that the rule is binding because its binding quality derives from its authorizing source. Here, the filibuster was authorized by the text of the Constitution itself, and so to the extent political actors feel bound by its rule, it is due less to its normative quality and more to its constitutional *bona fides* as a duly-passed senatorial rule of legislative procedure.

The vast body of established parliamentary practices, including the rules of parliamentary procedure, do not necessarily have the status of convention. In order to distinguish political practice from constitutional convention, we must return to the Jennings test, which counsels not only that a convention exists where there is precedent and where political actors feel bound to the precedent but also where there is a reason for the rule established by the precedent. Both the normativity underlying the rule and the self-perception of political actors in adhering to the rule help distinguish the vast body of legislative practice from the more narrow sphere of legislative convention. The filibuster, despite its endurance over decades, its significance in the legislative process and its polycentricity, is a merely written rule of senatorial procedure that may be changed—and indeed has been changed very recently<sup>65</sup>—by political actors. A constitutional convention would resist the kind of easy change that the filibuster has recently undergone.

### III. INFORMAL CONSTITUTIONAL CHANGE BY REPUDIATION

Having hypothesized that a written constitution may be informally changed by two forms of incorporation—void-filling and refinement—I turn now to how a written constitution may be informally changed by two forms of repudiation. Informal change by repudiation occurs where a textually entrenched provision is undermined or replaced by a new political practice that has matured into a constitutional convention. The effect of this convention approximates a formal amendment insofar as political actors perceive it as binding and conform their conduct to it. Below, I posit two forms of informal change by repudiation: void-creation and substitution.

#### A. Repudiation by Void-Creation

A constitutional convention can functionally, though not formally, remove something from a written constitution and leave a void in its place. Where a textually entrenched provision loses its binding quality as a result of its non-use and sustained public repudiation by political actors, this provision may be understood as having been informally removed from the text. Elsewhere, I have developed the idea of ‘constitutional desuetude’ with respect to the powers of disallowance and reservation in the Canadian Constitution.<sup>66</sup> Constitutional desuetude, which occurs in respect of only written constitutions, differs from the phenomenon of constitutional atrophy, which Adrian Vermeule has developed in connection with both written and unwritten constitutions to explain

---

<sup>65</sup> In November 2013, the Senate modified the filibuster rule to apply to all non-Supreme Court executive appointments. See Richard S. Beth & Anthony J. Madonna, ‘The Senate’s “Nuclear” Precedent: Implications for Efforts to Control the Filibuster’ (22 August 2014), at 2 <<http://ssrn.com/abstract=2455027>> accessed 1 June 2015. It is therefore worth monitoring how the filibuster will evolve. For now, though, its procedures remain the same despite the narrower range of circumstances in which it may be deployed.

<sup>66</sup> See Richard Albert, ‘Constitutional Amendment by Constitutional Desuetude’ (2014) 62 Am J Comp L 641, 656-69.

how constitutional powers have ‘passed from the domain of powers that are in fact exercised, to those that might be exercised but are not, to those that may not be exercised at all’<sup>67</sup>. Two of Vermeule’s examples are the Royal prerogative in the United Kingdom and the court-packing power in the United States, neither of which is textually entrenched in a codified constitution.<sup>68</sup>

Informal constitutional change by void-creation occurs where, as with constitutional desuetude, a ‘constitutional reordering occurs informally as a result of the sustained nonuse of an entrenched constitutional provision’ and that provision is ‘expressly repudiated by political actors’ after which ‘a new constitutional rule replaces the repudiated rule and thereafter sets the standard for future conduct by political actors’<sup>69</sup>. This new standard ‘exercises a binding effect that approximates a formal constitutional rule’ because ‘political actors self-consciously follow the new standard, believing themselves bound by it’<sup>70</sup>. Subsequently, this new constitutional rule ‘permeates the elite conventional understanding of the constitution’ even though, importantly, ‘the repudiated rule remains textually entrenched’<sup>71</sup>.

Here, I note that repudiation by void-creation requires that the ‘new standard’ be an outright negation of the entrenched provision. What therefore results from repudiation by void-creation is the unwritten deletion of a textual provision. Repudiation by void-creation need not always concern the exercise of a power or duty but where a textually-delegated power is repudiated in this way, it is effectively removed from the arsenal of a constitutional actor. The repudiated power remains entrenched in the text but is unusable. A new duty or power may subsequently emerge by convention or formal enactment to fill the void created by this repudiation. As a definitional matter under this form of informal constitutional change by constitutional convention, no new power or duty may be conferred, otherwise the emergence of a new standard to informally replace an entrenched rule would be better classified as an example of incorporation by refinement or, as I will explain below, as an example of repudiation by substitution.<sup>72</sup>

Consider an example of repudiation by void-creation. In Canada, the *Constitution Act, 1867* grants the federal government the power to ‘reserve’ or ‘disallow’ provincial legislation.<sup>73</sup> Under the reservation power, the Lieutenant Governor of a province may reserve a bill that has been duly passed by a provincial legislature for further instructions from the federal government.<sup>74</sup> Where the Lieutenant Governor does not expressly assent to the bill, it expires after one year.<sup>75</sup> Under the disallowance power, the federal government may repeal a provincial law within one year of its adoption by a provincial legislature.<sup>76</sup> Neither power has been used for at least 50 years, both have been expressly repudiated by political actors as well as academic commentators, yet both powers remain today entrenched in the constitutional text, concealing their contemporary illegitimacy and

---

<sup>67</sup> See Adrian Vermeule, ‘The Atrophy of Constitutional Powers’ (2012) 32 Oxford J Leg Stud 421, 426.

<sup>68</sup> *Ibid* 424-25.

<sup>69</sup> Albert, *supra* note 66, at 674-75.

<sup>70</sup> *Ibid* 675.

<sup>71</sup> *Ibid*.

<sup>72</sup> Compare *supra* Section II.B. with *infra* Section III.B.

<sup>73</sup> *Constitution Act, 1867*, pt IV, s 90.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*.

their political toxicity.<sup>77</sup> It is unlikely that any political actor would invoke either power because, as Andrew Heard explains, ‘clear and broadly accepted conventions have arisen to nullify the powers of disallowance and reservation’.<sup>78</sup> There now exists a functional though not formal void in the text: these powers are no longer politically deployable delegations of authority and no new textually-entrenched federal powers have emerged in their place to fill the functional void.

We may understand this phenomenon in terms of a constitutional convention. A convention has emerged to prohibit political actors from using the powers of reservation and disallowance. The nature of this convention is nullificatory and disabling: first, it nullifies part of the constitutional text, rendering the words of both powers of no present force or effect, though the words do continue to reflect the expressive intent of the constitutional authors; and second, the convention disables the once-operative text, serving as a bar to deploying either of the two powers.

But this phenomenon is distinguishable from repudiation by substitution, which I will discuss below. Repudiation by void-creation compels a political actor to refrain from acting in a way the constitutional text authorizes, but repudiation by substitution authorizes a political actor to act in a way the constitutional text prohibits. Repudiation by void-creation creates a void in the text where none existed: political actors once validly possessed the power to choose to act in a way the text authorized but now, as a result of a convention prohibiting the use of that power, political actors may no longer choose that course. In contrast, repudiation by substitution now authorizes political actors to choose to do something that will be in direct contradiction of the constitutional text. In both cases, the key is discretion. In the case of repudiation by void-creation, political actors no longer enjoy the discretion to invoke an entrenched provision, but in the case of repudiation by substitution political actors come to enjoy the discretion to do the opposite of what the constitutional text requires. I discuss repudiation by substitution in the following Section.

## **B. Repudiation by Substitution**

A constitutional convention can also contradict the written constitution. In contrast to repudiation by void-creation—where an entrenched constitutional provision loses its binding quality and effectively expires from the text though it remains textually present—repudiation by substitution goes further than negating the entrenched constitutional text: it creates a conflicting duty, power, obligation or other rule. Repudiation by substitution occurs where a convention emerges as a result of a political practice that conflicts with a rule entrenched in the constitutional text. This informal constitutional change effectively substitutes a written constitutional provision with an unwritten political practice that defies the plain meaning of the constitutional text.

*Defying* the constitutional text could itself entail several meanings. It could mean that an evolved political practice is inconsistent with the intended meaning of the constitutional text, or its conventional meaning, or even with its original meaning. Unless we specify which of these meanings does or must govern our understanding of the constitutional text, we are left to disagree about whether a given political practice may be inconsistent with the text in light of a particular interpretation of that text. Of course, as United States Supreme Court Chief Justice John Marshall suggested in an early case of constitutional interpretation, a major battleground in master-text

---

<sup>77</sup> Albert, *supra* note 66, 664-65.

<sup>78</sup> Heard, *supra* note 23, 159.

regimes is how to interpret the text and which interpretative methodology interpreters should use. A constitution, he suggested, must of necessity be interpreted in order to be of any functional use.<sup>79</sup>

Yet treating an authoritative judicial constitutional interpretation as a defiance of the text risks collapsing each of the four forms of informal change by convention into one all-embracing category. Any authoritative judicial decision by a national court of last resort could be interpreted as an informal change by convention. For example, a decision by the Supreme Court of the United States that the First Amendment prevents Congress from imposing electoral spending restrictions on corporations could be classified as an example of incorporation by refinement.<sup>80</sup> Or the very first judgment of the Supreme Court of Canada to interpret the *Charter of Rights and Freedoms*, which involved citizenship and mobility rights, could itself be classified as an example of incorporation by void-filling insofar as it was the very first authoritative definition of an entrenched right that had until then been juridically void.<sup>81</sup> It is useful for our purposes, then, to distinguish judicial interpretation from binding political practice *authorized by* judicial interpretation.<sup>82</sup> Judicial interpretation alone does not create a convention. It requires political actors to regularize a practice that is supported by good reason and that over time becomes seen as obligatory. Acceptance may occur by either active approval or passive acquiescence. In either case, where political actors engage in sustained practice pursuant to an authoritative judicial interpretation—a practice that is in tension with the plain meaning of the constitutional text—this can give rise to a convention that informally changes a written constitution by repudiation.

For example, in the United States, the Contract Clause and the Treaty Clause have been contradicted by political practices that now authorize the opposite of what the constitutional text requires in its plain meaning. The Contract Clause, whose text admits of no exceptions when it strictly prohibits states from ‘impairing the obligation of contracts,’<sup>83</sup> now permits state intrusions into contracts.<sup>84</sup> Since the depression era, when the Supreme Court first approved this practice as a narrow emergency measure, states have continued to act in direct conflict with the text.<sup>85</sup> An additional example: the treaty-making power confers upon the president the ‘power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...’<sup>86</sup> Yet in the modern era it has become common practice for the president to bypass Senate confirmation by entering into sole-executive agreements that achieve the same functional ends as treaties.<sup>87</sup> The Supreme Court has effectively approved this practice, refusing to rule that sole-executive agreements circumvent the constitutional requirement of Senate consent.<sup>88</sup> These

---

<sup>79</sup> *McCulloch v Maryland*, (1819) 17 US (4 Wheat) 316, 407.

<sup>80</sup> See *Citizens United v Federal Elections Comm’n*, (2010) 130 S Ct 876.

<sup>81</sup> See *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.

<sup>82</sup> See Mark Tushnet, ‘Constitutional Workarounds’ (2009) 87 Tex L Rev 1499, 1510.

<sup>83</sup> US Const, art I, s 10, cl 1 (1789).

<sup>84</sup> See *Home Building & Loan Association v Blaisdell*, 290 US 398 (1934) (authorizing Minnesota law restricting mortgage holders to foreclose on property).

<sup>85</sup> Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* (Harvard University Press 2005) 67-68.

<sup>86</sup> US Const., art II, s 2.

<sup>87</sup> See Joseph P. Tomain, ‘Executive Agreements and the Bypassing of Congress’ (1973) 8 J Int’l L & Econ 129, 129-32.

<sup>88</sup> See *Am Ins Ass’n v Garamendi*, 539 US 396, 415 (2003); *Dames & Moore v Reagan*, 453 US 654, 682-87 (1981); *US v Pink*, 315 US 203, 229-30 (1942); *US v Belmont*, 301 US 324, 330-31 (1937).

are examples of informal change as a result of repudiation by substitution where an unwritten political practice matures into a constitutional convention that is inconsistent with the text.

#### IV. INFORMAL CONSTITUTIONAL CHANGE AND THE RULE OF LAW

The phenomenon of informal change by constitutional convention raises important questions about the nature of written constitutions, the meaning of constitutional change, and whether and how to distinguish among the forms of informal change by convention. Equally important is the interrelation between written constitutions and constitutional conventions, specifically whether a disjunction between the constitutional text and unwritten constitutional norms undermines the democratic values of the rule of law—namely predictability, accountability and transparency—values that follow from writtenness. In this Part, I offer preliminary thoughts on these questions and suggest why it is important for constitutionalism that we try to answer them.

To speak of a constitution without more raises at least two important questions: what counts as the ‘constitution’ and how do we interpret it when we identify it?<sup>89</sup> It is of course incorrect to answer that the constitution in a master-text regime is simply what appears in the constitutional text. The United States Constitution, for example, includes an unwritten component consisting of customs and practices as well as their underlying values and principles.<sup>90</sup> The Supreme Court has accordingly often acknowledged, most notably in relation to foreign policy, that the Constitution’s allocation of powers can be modified where, over time, an institution of government engages in a practice with approval, without objection, or in the face of acquiescence from another institution of government that could conceivably have raised a legitimate claim that the practice conflicts with its own delegated authority.<sup>91</sup> These unwritten constitutional developments are, as John Gardner explains, neither expressly nor intentionally made but they instead arise out of the confluence of actions by multiple actors over time.<sup>92</sup> They are constitutional yet they do not appear in the text.

##### A. The Congruence between Constitutional Text and Political Practice

The codified text is important for both formal and functional reasons but what may matter most is how that text is understood by its subjects. Tom Ginsburg develops this point with a useful example: ‘a constitutional rule saying that voting must take place on the weekend might, over time, come to represent an intersubjective understanding that voting must always take place on Sunday, or even Tuesday’<sup>93</sup>. He continues, ‘so long as the subjects think the text marks their constitutional understanding, it need not bear any relation to reality’<sup>94</sup>. The point is not that ‘the text is unimportant’ but rather that ‘over time, the text of the constitution is likely to matter less and less as a formal matter’<sup>95</sup>. Here, the comparative illustration offered by Joseph Raz is instructive:

---

<sup>89</sup> Sanford Levinson, ‘“The Constitution” in American Civil Religion’ (1979) *Sup Ct Rev* 123, 136.

<sup>90</sup> Thomas C. Grey, ‘The Uses of an Unwritten Constitution’ (1988) *64 Chi-Kent L Rev* 211, 211.

<sup>91</sup> David J. Bederman, *Custom as a Source of Law* (Cambridge University Press 2010) 110-12.

<sup>92</sup> John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 65-74.

<sup>93</sup> Tom Ginsburg, ‘Constitutional Specificity, Unwritten Understandings and Constitutional Agreement’ in A. Sajó & R. Uitz (eds.), *Constitutional Topography: Values and Constitutions* (Eleven International Publishing 2010) 69, 77.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*



[A constitution that has been adapted by ‘innovative interpretations’] is still the constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century house lives in a house built two hundred years ago. His house has been repaired, added to, and changed many times since. But it is still the same house and so is the constitution.

A person may, of course, object to redecorating the house or to changing its windows, saying that it would not be the same. In that sense it is true that an old constitution is not the same as a new constitution just as an old person is not the same as the same person when young. Sameness in that sense is not the sameness of identity (the old person is identical with the young person she once was). It is the sameness of all the intrinsic properties of the object.<sup>96</sup>

Political actors often make changes to the furnishings of the constitutional framework, by establishing new authoritative interpretations of the text or by formally adding or removing part of the text in formal amendment, but these are changes *to* the constitution not *of* the constitution itself. The question whether a change involves a mere furnishing or something more basic to the constitution such that a change to it would fundamentally rework its entire framework is a matter of both interpretation and design. Some constitutional states expressly distinguish between small-scale changes and larger-scale ones, the former referred to as amendment and the latter as revision, while other states leave the matter unaddressed in the constitutional text, and therefore to be resolved in the judicial or political process.<sup>97</sup> Others either make clear or suggest the constitutional values that constitute the constitution’s identity by designating them unamendable,<sup>98</sup> and consequently seek to remove them altogether from the vagaries of the judicial and political process.

Yet try as they might, drafters of democratic constitutions cannot freeze their preferred meaning of constitutional law across time,<sup>99</sup> neither with formal unamendability<sup>100</sup> nor with constructive unamendability<sup>101</sup> nor even with constitutional specificity.<sup>102</sup> Indeed, the effort to freeze time betrays a pathology that is sometimes evident in constitutional design: the self-assurance that constitutional authors have in themselves and the distrust they harbor for future generations.<sup>103</sup> The effort to freeze time raises the ‘dead hand’ problem in constitutional law, which in turn creates a democratic deficit as to the successor generations.<sup>104</sup> This democratic deficit is

---

<sup>96</sup> Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 370.

<sup>97</sup> See Richard Albert, ‘The Structure of Constitutional Amendment Rules’ (2014) 49 Wake Forest L Rev 913, 929-35.

<sup>98</sup> See Richard Albert, ‘Amending Constitutional Amendment Rules’ (forthcoming 2015) 13 Int’l J Const L.

<sup>99</sup> Sanford Levinson, ‘Law as Literature’ (1982) 60 Tex L Rev 373, 376-77.

<sup>100</sup> Formal unamendability is defenseless before revolutionary movements. See John R. Vile, ‘Limitations on the Constitutional Amending Process’ (1985) 2 Const Comment 373, 375.

<sup>101</sup> Yet political actors may innovate new methods to alter the constitution even where the text is constructive unamendable. See Richard Albert, ‘Constructive Unamendability in Canada and the United States’ (2014) 67 Sup Ct L Rev (2d) 181, 210-15.

<sup>102</sup> Ginsburg, *supra* note 93.

<sup>103</sup> See Sanford Levinson, ‘The Political Implications of Amending Clauses’ (1996) 13 Const Comment 107, 112-13.

<sup>104</sup> See Andrew Friedman, ‘Dead Han Constitutionalism: Honduras and the Danger of Eternity Clauses in New Democracies’ (2011) 4 Mexican L Rev 77.

most problematic in the case of formal unamendability,<sup>105</sup> but any intentionally rigid constitutional text risks losing the democratic legitimacy of continuing popular consent.<sup>106</sup> The same aspiration to freeze time is evident in originalist constitutional interpretation, though I resist describing it as a pathology because originalism is one of several reasonable ways to give meaning to a text whose meaning may admit of a multiplicity of morally, legally and sociologically legitimate meanings.<sup>107</sup>

For present purposes, my point of departure is the meaning of the text in the period in which it is read by a reasonable reader who is subject to its constraints and compulsions. Reasonable readers of the constitutional text should not perceive a dissonance between what the text says and how political actors conduct themselves, or how the authoritative interpreter of the text understands the text to bind the governed and their governors, or in how the readers themselves perceive their rights and duties. On this view, Ginsburg's example of a peremptory textual rule requiring voting on a weekend, but which comes to be interpreted by practice to mean Tuesday, would be problematic where a reasonable reader perceives the constitutional text as inaccurately reflecting the actual voting rule.<sup>108</sup> Such dissonance risks undermining the rule of law and the democratic values it is intended to serve. But I suspect that a reasonable reader is less likely to perceive a disjunction between text and practice as to Congress's textually delegated power 'to coin money, regulate the value thereof'<sup>109</sup> and the prevailing practice of printing paper money since today the idea of 'coining' money is not understood to refer exclusively to coins.

Reading the text as would a reasonable reader who is subject to it therefore privileges its present public meaning.<sup>110</sup> The payoff is the core promise of the rule of law: fair notice to those governed by the text such that there exists symmetry between the expectations the text creates and the outcomes it generates.<sup>111</sup> There is a threat to the rule of law where a text meant to be authoritative is no longer relevant or recognizable to those it governs.<sup>112</sup> The threat is twofold, both to the rule of law and also to the codified constitution itself. Where, for example, the bill of rights promises a living wage but people find themselves underemployed or without work, people will conclude that the constitution does not mean what it says, and this may over time cause a loss of faith in public institutions.<sup>113</sup> As Ginsburg suggests, the disjunction between text and reality may become less problematic over time in a mature constitutional democracy.<sup>114</sup> But it remains exceptionally problematic in nations trying to create a new culture of constitutionalism.<sup>115</sup>

---

<sup>105</sup> See Richard Albert, 'Constitutional Handcuffs' (2010) 42 Ariz St LJ 663, 667.

<sup>106</sup> Walter Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process' (1983) 97 Harv L Rev 386, 386-87.

<sup>107</sup> For a strong contemporary explication and defense of originalism, see Lawrence B. Solum, 'The Fixation Thesis: The Role of Historical Fact in Original Meaning' (February 3, 2015), at 18-29 <<http://ssrn.com/abstract=2559701>> accessed 1 June 2015.

<sup>108</sup> Ginsburg, *supra* note 93.

<sup>109</sup> US Const, art I, s 8, cl 5.

<sup>110</sup> Several scholars have adopted this view, which Larry Solum describes as 'Contemporary Readers' Meaning Theory'. See Solum, *supra* note 107, at 62-65.

<sup>111</sup> See Caleb Nelson, 'What is Textualism?' (2005) 91 Va L Rev 347, 352.

<sup>112</sup> 'Textualism as Fair Notice' (2009) 123 Harv L Rev 542, 563.

<sup>113</sup> Richard Albert, 'Counterconstitutionalism' (2008) 31 Dalhousie LJ 1, 35.

<sup>114</sup> Ginsburg, *supra* note 93.

<sup>115</sup> Cass Sunstein, 'Against Positive Rights' (1993) 2 E Eur Const Rev 35, 37

Although the constitutional text cannot on its own be a guarantor for the rule of law, it can be an agent of the rule of law insofar as a codified constitution can be both democracy-enhancing and -protecting.<sup>116</sup> To take the text seriously is to appreciate that people read and refer to it in order to ‘define a basic vocabulary of liberty for ordinary citizens’<sup>117</sup>. This kind of ‘popular textualism’, to borrow from Mark Tushnet, is the ‘first interpretive principle’ for nonlawyers who seek to understand their rights and duties under the constitutional texts that govern them.<sup>118</sup> Beyond the democracy-building function of written constitutions, they also have a nation-building function: the writtenness of the constitution makes it a force for constituting into a single nation a people whose origins, beliefs and aspirations may differ in the starkest ways.<sup>119</sup> Akhil Amar captures this essential point about constitutionalism, connecting writtenness to democracy in the United States:

Emphasis on the Constitution’s writtenness—its general textuality and its specific textual provisions—has certain democratic virtues. The Constitution is a compact document that most Americans can read. With modest effort, even layfolk can become familiar with its words and basic layout. . . . The text of the document itself constitutes a democratic focal point—and open meeting hall, a common language—that can structure the conversation of ordinary Americans as they ponder the most fundamental and sometimes divisive issues in our republic of equal citizens. Certain forms of nontextual constitutional interpretation are often inherently exclusionary, requiring intimate familiarity with vast amounts of case law and the subtle arts of doctrinal analysis, or mastery of history writ large and writ small, or fluency in abstruse political philosophy.<sup>120</sup>

These were some of the forces that drove the textualization of the United States Constitution. The document, treated as scripture in the culture of ‘American constitution-worship’, is both a legal instrument and a ‘sacred symbol’ not unlike the flag.<sup>121</sup> In the modern American tradition of textuality, texts are revered as tools of social order, be it religious or political, or indeed what for Thomas Paine was the union of these two orders in the Constitution, which he saw as a ‘political bible’<sup>122</sup>. At the American founding, the text carried moral force as an accessible and tangible act of self-definition.<sup>123</sup> Its formulation, ‘singularly brief and expressive’<sup>124</sup>, invited

---

<sup>116</sup> Codified constitutions serve other important functions, including coordinating behavior and creating a framework for common law elaboration. See Andrew B. Coan, ‘The Irrelevance of Writtenness in Constitutional Interpretation’ (2010) 158 U Pa L Rev 1025, 1047-71. Codified constitutions also serve expressive functions. See Cass R. Sunstein, ‘On the Expressive Function of Law’ (1996) 5 E Eur Const Rev 66, 67.

<sup>117</sup> Akhil Reed Amar, ‘Textualism and the Bill of Rights’ (1998) 66 Geo Wash L Rev 1143, 1144.

<sup>118</sup> Mark Tushnet, ‘Citizen as Lawyer, Lawyer as Citizen’ (2009) 50 Wm & Mary L Rev 1379, 1381.

<sup>119</sup> Akhil Reed Amar, ‘A Few Thoughts on Constitutionalism, Textualism, and Populism’ (1997) 65 Fordham L Rev 1657, 1658.

<sup>120</sup> Akhil Reed Amar, ‘Intratextualism’ (1999) 112 Harv L Rev 747, 796.

<sup>121</sup> Thomas C. Grey, ‘The Constitution as Scripture’ (1984) 37 Stan L Rev 1, 17.

<sup>122</sup> Thomas Paine, ‘Rights of Man, Part II. Combining Principles and Practice’ in *The Political Writings of Thomas Paine*, Vol. 2 (J.P. Mendum, Boston 1856) 145, 180-81.

<sup>123</sup> See Gordon S. Wood, *The Creation of the American Republic 1776-1787* (University of North Carolina Press 1998) 260.

<sup>124</sup> Joseph Story, ‘The Science of Government’ in William W. Story (ed), *The Miscellaneous Writings of Joseph Story* (C.C. Little and Brown 1852) 622.

Americans to discover the document and internalize its rules,<sup>125</sup> both to govern their individual conduct and to monitor the carefully bounded limits of permissible governmental action.<sup>126</sup>

The principal function of a codified constitution, then, wrote Chief Justice Marshall in *Marbury v Madison*, decided in the early years of the new American republic, is to ‘establish certain limits not to be transcended’ by the institutions of government.<sup>127</sup> All institutions of government, including courts, ‘are bound by that instrument’<sup>128</sup> whose ‘very foundation’<sup>129</sup> and ‘essential’<sup>130</sup> core is that the constitution itself is ‘superior, paramount law, unchangeable by ordinary means’<sup>131</sup>. Where a written constitution prescribes limits only to then have those limits transgressed without sanction, the transgression of the constitutional text ‘reduces to nothing what we have deemed the greatest improvement on political institutions’<sup>132</sup>, namely its very writtleness. This suggests a basic norm of democratic government that doubles as a bests practice for master-text constitutional regimes: text and practice should be consistent absent extraordinary reasons.

The possibility of judging practice against the text is what made a codified constitution so appealing to Marshall as a tool for democratic governance. Lon Fuller likewise saw virtue in what he called the ‘congruence between the rules as announced and their actual administration’.<sup>133</sup> But congruence for Fuller was not, as it had been for Marshall before him, something that only a written constitution could help ensure but was rather an essential element of the rule of law, whether or not in a master-text constitutional democracy. Congruence was one of the eight elements Fuller identified as requirements for the rule of law, including creating clear rules with clear expectations and publicizing those rules in order to constrain the governors and to give notice to the governed.<sup>134</sup>

Fuller and Marshall were not alone, of course, in associating the rule of law with this aspiration to congruence between law and action. Friedrich Hayek and A.V. Dicey in particular both defended similar propositions, namely that ‘stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge’<sup>135</sup> and that ‘the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint’<sup>136</sup>. Joseph Raz, too, situates the rule of law in terms of its expectation that lawmaking will ‘be guided by open, stable, clear and general rules’<sup>137</sup> that allow the governed to hold their governors accountable. The centrality of congruence to the rule of law therefore makes it uncontroversial to state that a defining

---

<sup>125</sup> Akhil Reed Amar, *America’s Constitution: A Biography* (Random House 2005) xi.

<sup>126</sup> See Richard Albert, ‘The Cult of Constitutionalism’ (2012) 39 Fla St L Rev 373, 410-12.

<sup>127</sup> *Marbury v Madison*, 5 US (1 Cranch) 137, 176 (1803).

<sup>128</sup> *Ibid* 180.

<sup>129</sup> *Ibid* 178.

<sup>130</sup> *Ibid* 180.

<sup>131</sup> *Ibid* 179.

<sup>132</sup> *Ibid* 178.

<sup>133</sup> Lon L. Fuller, *The Morality of the Law* (Yale University Press 1964) 39.

<sup>134</sup> *Ibid* 39.

<sup>135</sup> F.A. Hayek, *The Road to Serfdom* (Routledge 1944) 75-76.

<sup>136</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982, reprinting 8th ed 1915) 110.

<sup>137</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009) 214.

principle of the rule of law is that ‘political power may not be exercised except according to procedures and constraints prescribed by laws which are publicly known’<sup>138</sup>

The rule of law of course does not require writtenness. The rule of law exists and indeed often thrives in jurisdictions without a codified constitution. But a codified constitution, as Marshall well understood, can help promote the rule of law’s democratic values of transparency, accountability and predictability.<sup>139</sup> Writtenness appealed to Marshall because it facilitated the judicial task of evaluating the constitutionality of conduct against the standard set by the constitutional text. But whether conduct satisfies the strictures of the text is only one part of the interrelationship between text and practice. The converse is also important: whether the text correctly reflects the accepted norms that inform, shape, compel or constrain political practices.

### **B. Informal Constitutional Change by Constitutional Convention**

Unwritten constitutional norms can and do co-exist with writtenness in a master-text regime. But the relationship becomes problematic for the rule of law where an unwritten constitution norm neither supports nor supplements the written constitution but instead supplants it.<sup>140</sup> The four forms of informal change by constitutional convention highlight incongruities between constitutional text and practice that pose threats of different degrees to the rule of law. Each of the four forms of informal constitutional change by constitutional convention can be plotted along a linear scale of congruence between text and practice, where perfect congruence represents optimal conformity with the rule of law and perfect non-congruence reflects its outright violation. On this scale, from highest to lowest congruence between the constitutional text and political practice, the four forms may be ordered as follows: incorporation by void-filling at the highest level of congruence, though far from the perfect congruence of a clear text and consistent practice; repudiation by substitution at the lowest level of congruence; and incorporation by refinement and repudiation by void-creation usually somewhere in between, though determining which is more or less congruent with the rule of law depends on the nature of the actual convention.

It is fair to ask what standard is to be used to assess conformity with the rule of law values of transparency, predictability and accountability. The Supreme Court of the United States isolated the nub of the matter in *New York v United States*, a case concerning the Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>141</sup> The congressional law required states to dispose of radioactive waste generated within their borders and created three kinds of strategies to secure their cooperation: giving a state money if it complied with the law; denying access to certain disposal facilities if a state missed important deadlines for disposing of the waste; and requiring a state to take title of the waste, and to be liable for damages incurred as a result, if the state failed to arrange for waste disposal by a certain date.<sup>142</sup> The State of New York successfully challenged the third of these on the federalist presuppositions of the Tenth Amendment, arguing that Congress

---

<sup>138</sup> Fred D. Miller, Jr., ‘The Rule of Law in Ancient Greek Thought’ in Mortimer Sellers & Tadeusz Tomaszewski, (eds), *The Rule of Law in Comparative Perspective* (Springer 2010) 11, 11.

<sup>139</sup> Elsewhere, I have explained how the rule of law serves these democratic values. See Richard Albert, ‘Constitutional Amendment by Stealth’ (forthcoming 2015) 60 McGill LJ.

<sup>140</sup> Cf Amar, *supra* note 16, xi.

<sup>141</sup> *New York v United States*, 505 US 144 (1992).

<sup>142</sup> *Ibid* 152-54.

had impermissibly directed New York to regulate in this particular way in this field<sup>143</sup>, and in doing so had ‘commandeered’ its legislative process.<sup>144</sup>

In finding the ownership disincentive unconstitutional, the majority highlighted the conditions that undermine transparency, predictability and accountability, the same conditions that may guide us in evaluating whether the disjunction between text and practice is problematic for a reasonable reader of a constitutional text. As the Court explained, where the federal government forces states to regulate, as it had sought to do with this law, ‘the accountability of both and federal officials is diminished’<sup>145</sup>. The Court continued:

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.<sup>146</sup>

The Court here was concerned about how, in the face of unclear lines of responsibility, citizens could identify the political actors—New York or federal officials—whose action had affected them and in turn how citizens could effectively express their satisfaction or dissatisfaction where they had difficulty identifying the right political actors to begin with. The risk in the federal government commandeering a state was that, as the Court acknowledged, citizens might mistakenly hold accountable the state for the action of the federal government. The Court stressed that its intent was not to protect states specifically but rather to respect both the structure of American federalism and the capacity of citizens to know which level of government was responsible for a particular action. The Court recognized that neither level of government would want to be associated with the unpopular decision to create radioactive waste disposal sites. Each might seek to shift the blame for the decision to other, and in doing so leaving citizens ill-informed about which political actors had actually made the decision and also without actionable recourse.<sup>147</sup>

In the same way, the interests of citizens as subjects of the constitution are not well served where there exists an inconsistency between what the text says and what it means in practice. This inconsistency complicates the task of a reasonable reader of the text to hold accountable those whom the text is supposed to bind. Consequently where the text admits of this disjunction, it reveals itself to be non-transparent and of little use in predicting official conduct. Drawing from this understanding of the democratic values of the rule of law, we can evaluate how well each of the four forms of informal change by convention conforms to our expectations of the text.

Consider first incorporation by void-filling. Here, the meaning of the codified constitution changes as a result of the informal entrenchment of a constitutional convention that fills a gap in the text. I suggested as an example the two-term presidential convention, which was an unwritten

---

<sup>143</sup> *Ibid* 160.

<sup>144</sup> *Ibid* 176.

<sup>145</sup> *Ibid* 168.

<sup>146</sup> *Ibid* 168-69.

<sup>147</sup> *Ibid* 182-83.

constitutional norm obliging a president not to run for a third consecutive term unless a national emergency suggested the need for continuity in the presidency. The two-term convention was ultimately proposed and ratified as a formal amendment in 1951 but it had become as functionally binding well before its textual entrenchment. The reason why, it has been suggested, is that a convention developed after George Washington set the precedent that his successors followed.

Where, as with this presidential two-term convention, the text establishes no relevant requirement or standard, there is little ground to argue that the rule of law is compromised by the emergence of a constitutional convention requiring or precluding certain conduct. There was no disruption to the public expectations set by the text, which had been written either expressly, implicitly or even by negligence to accommodate any political practice of presidential reeligibility and reelection that had taken hold among political actors. Had the Washingtonian convention been different—for instance *requiring* two-term presidents to run for a third term—the void in the text could have just as well accommodated this alternative informal constitutional change. It would not have given rise to a disjuncture between text and practice, and therefore would not have undermined the rule of law values of predictability, transparency and accountability. This is the nature of informal constitutional change as a result of incorporation by void-filling: there is no textual contradiction nor even any change to the text because the text is silent on the matter.

In contrast, informal change as a result of repudiation by substitution is an outright violation of the rule of law values of transparency, accountability and predictability. Substitution creates a direct conflict between text and practice. The governed, in this case, have no textual referent for the standard to which their governors will hold them, nor the standard to which they may hold their governors. Consider the context in repudiation by substitution: the text entrenches a right, commands an action or forbids some particular conduct but political actors nonetheless deny the right, to refuse their duty or to engage in expressly prohibited conduct. This substitution of an unwritten rule for a written one undermines the very purpose of the text where we understand its function as setting rules of conduct and expectations that should reflect reality, or aspire to it.

It is not clear as an abstract matter which of either incorporation by refinement or repudiation by void-creation is less consonant with the democratic values of the rule of law. Under incorporation by refinement, the constitutional convention refines a textually entrenched standard of conduct for which there is no new notice in the master-text constitution. In the case of the substantial provincial consent convention for formally amending federal-provincial matters in Canada, the political actors bound by the refined standard were aware of the change. But many seeking to understand the amendment process did not find the convention in the constitutional text. As compared to incorporation by void-filling, incorporation by refinement conforms less closely to the rule of law values of transparency, accountability and predictability with which we associate master-text constitutions. The political practice that refines the textual rule is not announced in the text, and this complicates the task of holding political actors to its standard.

Yet refinement might also be viewed as far less problematic to the rule of law. Under refinement, the convention adds new associated content to an already-entrenched and known rule. With respect to the substantial provincial consent convention, it was known from the master-text that the amendment process required agreement either of provincial actors for provincial amendments or federal actors for federal amendment. But the convention of substantial provincial

consent introduced a change to the amendment process as to federal-provincial matters and therefore to the rules governing the interaction of federal and provincial actors. The process was wholly internal to political actors, although its effect of course extended beyond them. Still, the theory underlying the fundamental structure and sequence of the process of amendments to federal-provincial matters was both intuitive and constitutionally appropriate: if an amendment will affect the entire country namely both the federal and provincial levels of government, it makes sense that the political actors involved in sanctioning the amendment represent both levels of government.

The case of repudiation by void-creation can likewise be either tolerable or not depending on the nature of the affected constitutional text—and indeed it could in some cases be as intolerable for the rule of law as repudiation by substitution. In all cases of repudiation by void-creation, the textual referent remains but it becomes ineffective as a matter of convention. But one kind of void is more serious than the other: the existence of a void in the text is more problematic where the affected text confers upon a political actor an official power that has effectively lapsed as a result of its non-use *and* where no viable functional alternative subsequently emerges to fill its role *than* where a convention has disabled an official power whose purpose has been functionally replaced by another power that is now commonly used in the ordinary course of political practice. The latter creates a void in the text but also produces a remedy to fill the functional hole in the text.

For example, the national convention procedure to formally amend the United States Constitution under Article V has never once been successfully used since the adoption of the Constitution.<sup>148</sup> The procedure authorizes two-thirds of states to petition Congress to call a convention and three-quarters of states to ratify the amendment proposals arising out of the convention.<sup>149</sup> One could plausibly suggest that the provision had expired as a result of its non-use.<sup>150</sup> Still, the historical prevalence of the congressionally-initiated procedure to formally amend the Constitution—which has been used 27 times thus far—would suggest that the functional purpose of the national convention procedure remained achievable in other ways.<sup>151</sup> The existence of a functional analogue would not obviate the formal and expressive values of formally amending the Constitution through the arguably more popularly legitimate conventional process but the point would remain that an alternative procedure had replaced the national convention procedure.

The void created in the national convention procedure in the United States would be less problematic than the void that has been arguably created in the power of legislative override in Canada.<sup>152</sup> The legislative override, entrenched in the *Charter of Rights and Freedoms*, authorizes Parliament or a provincial legislature to suspend the judicial interpretation of certain constitutional rights for unlimited renewable terms of up to five years each<sup>153</sup>:

---

<sup>148</sup> See William B. Fisch, 'Constitutional Referendum in the United States of America' (2006) 54 Am J Comp L 485, 490.

<sup>149</sup> US Const, art V.

<sup>150</sup> See Akhil Reed Amar, 'The Consent of the Governed: Constitutional Amendment Outside Article V' (1994) 94 Colum L Rev 457, 499 n 164.

<sup>151</sup> One might also argue that formal amendment more generally had been functionally replaced by informal amendment. See Stephen M. Griffin, 'The Nominee is ... Article V' (1995) 12 Const Comment 171, 172.

<sup>152</sup> See Richard Albert, 'Advisory Review: The Reincarnation of the Notwithstanding Clause' (2008) 45 Alberta L Rev 1037, 1041-43.

<sup>153</sup> *Canadian Charter of Freedoms*, s 33(3)-(4), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982, 1982*, c 11 (UK).



Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.<sup>154</sup>

Scholars have suggested that this legislative override has become obsolete, and political actors at the highest levels have repudiated it.<sup>155</sup> The obsolescence of the legislative override coupled with the absence of any functional analogue would prove more problematic for the rule of law than had the legislative override become obsolete yet had also found another way to fulfill its function. If indeed the legislative override has expired and lost its political viability, it should be repealed because its continuing textual entrenchment distorts the true content of the actual constitution.

## V. CONCLUSION

Having posited and evaluated four forms of informal constitutional change by constitutional convention, there may remain doubt whether there is a meaningful distinction among them. Perhaps, one might say, it is better to conceive of only two forms of informal constitutional change by convention: additions and subtractions. Or perhaps we should speak of one only form of such change: change by convention, whether conceptually it adds or subtracts from the text.

The argument that there is only one all-encompassing category of informal constitutional change by convention—conventional change itself—would proceed as follows. Where a practice matures into a constitutional convention and becomes binding on political actors, the new convention must necessarily displace the existing understanding of the thing about which the displaced understanding existed. For example, as to our example of incorporation by void-filling, the argument would be that the presidential two-term convention replaced the contemporaneous understanding that there existed no limit to reeligibility or reelection. On this view, it would be incorrect to claim that there had existed a void in the text on reeligibility or reelection. The claim would instead be that the drafters of the master-text constitution had chosen intentionally to leave out of the text any mention of limits because they intended there to be none.

Likewise, the substantial provincial consent convention, which I have posited as an example of incorporation by refinement, could instead be construed as an example of a new understanding replacing an old one, not of refining it. On this view, the amendment process in Canada would have been transformed *from* a three-rule process—one for provincial constitutions, one for the federal constitution, and one for federal-provincial matters that only the Parliament of the United Kingdom could operationalize—to an altogether new three-rule process. The new three-rule amendment process would be understood not only to shift the power of amendment on federal-provincial matters from the Parliament of the United Kingdom to Canadian federal and provincial actors, but also to change the scope of the provincial and federal unilateral amendment powers,

---

<sup>154</sup> *Ibid* s 33(1).

<sup>155</sup> See, eg James Allan, ‘Critical Notice: An Unashamed Majoritarian’ (2004) 27 Dalhousie LJ 537, 547; Jeffrey Goldsworthy, ‘Judicial Review, Legislative Override, and Democracy’ (2003) 38 Wake Forest L Rev 451, 466-70; House of Commons, Debates, Apr 6, 1989, at 153 (Brian Mulroney); ‘Martin Wraps Campaign in Constitutional Pledge’, *CBC News* (10 January 2006) <<http://www.cbc.ca/news/canada/martin-wraps-campaign-in-constitutional-pledge-1.609744>> accessed 1 June 2015.

narrowing it some ways and expanding it in others but in any case changing the entire structure of amendment. One might therefore understand this transformation as resulting in an all-embracing change to the amendment process rather than as a narrow refinement to it.

The same claim can be made with respect to repudiation by void-creation: the change may be understood as replacing an existing understanding of the master-text constitution with a new one. In repudiation by void-creation, specifically with respect to the examples of disallowance and reservation in Canada, the claim would be that the desuetude of both powers has not created a void in the text but has rather created a new convention of non-use. There would be, on this view, no resulting silence on the rule of disallowance or reservation, but rather an altogether new convention that neither power is to be used under the current understanding of the federal distribution of powers. One could therefore argue that although the prevailing interpretation of the existing constitutional provision had been repudiated, a new interpretation of the existing text had taken root to give a new meaning to the constitutional text whose old meaning had been abandoned.

This perspective would lead us to one conclusion: all cases of informal change by constitutional convention are illustrations of repudiation by substitution. On this view, in every case—whether the presidential two-term convention, the informal entrenchment of the convention on substantial provincial consent, the desuetude of the disallowance and reservation powers, or the new meaning of the Contracts or Treaty Clauses—the prevailing understanding of the constitution has been displaced by a new, now dominant interpretation of the constitution, and it now governs the conduct of political actors and public expectations until that understanding is itself replaced by a new one. There would be no distinction among the four forms of informal constitutional change because, at their core, they would each be understood to reflect the creation of a new convention.

This alternative perspective brings both advantages and disadvantages. Consider two of its salutary benefits for understanding constitutional change. First, the view that there is only one category of informal constitutional change—repudiation by substitution—could be understood to reflect what is really happening when a new constitutional convention becomes informally entrenched in the constitutional culture: the creation of a new convention necessarily entails the rejection of an old one. Second, it simplifies our taxonomy—a taxonomy which, as I have suggested, is subject to criticism that its lines of division may not be as clear as they first seem.

However, treating informal constitutional change as one catchall category elides over the important distinctions among the four forms in relation to their conformity with the expectations of the democratic values of the rule of law. In this regard, the four forms of informal constitutional change are not the same. Some are less objectionable than others, and this is usefully demonstrated by isolating the differences among them. Conceptualizing these distinctions is possible only if we reduce the large all-embracing category—informal constitutional change—into its four subsidiary forms. It is then that we may contrast the four forms of informal constitutional change by constitutional convention for conformity with the democratic values of the rule of law. Of course, we may disagree about whether one particular example best illustrates this or that form of informal constitutional change. But then the challenge becomes identifying illustrative examples for each category. Using these four forms of informal constitutional change by constitutional convention as our point of departure may lead to more than four, or indeed fewer than four, forms. They are

nonetheless useful in and of themselves as a point of departure to theorize how to evaluate the various ways in which unwritten constitutional norms can change a master-text constitution.

But questions nonetheless remain. Should we ascribe as much importance as I have to the democratic values of the rule of law? Perhaps it is less important that a constitutional order respect the values of transparency, accountability and predictability than that it achieve social and political stability. And where a constitutional order is stable, as it is in Canada and the United States, should it matter that the text does not always align with political practice? We must also consider whether the reasonable reader is the right standard against which to judge how clearly constitutional meaning is conveyed. On the one hand, the sacrality of a master-text constitution is rooted in the idea of the consent of the governed, and this counsels some attention to the connection between citizens and the constitutional text. On the other hand, we might well wonder whether constitutions outside of the United States are generally perceived as a ‘political bible’ or whether they exist instead more as functional instruments, and less as symbols of nationhood, that help achieve the mechanistic objectives of governance. The relationship between constitutional endurance and constitutional conventions also deserves attention: are disjunctions between text and practice the price to pay for constitutional longevity? These and other questions follow from this inquiry into the interrelationship between writtenness and constitutional conventions, and the study of comparative public law would benefit from more perspectives from Canada and the United States.