January 2016

The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada

Richard Albert
Boston College Law School, richardalbert@gmail.com

Follow this and additional works at: http://lawdigitalcommons.bc.edu/lsfp
Part of the Comparative and Foreign Law Commons, Constitutional Law Commons, and the Jurisprudence Commons

Recommended Citation

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.szydlowski@bc.edu.
THE THEORY AND DOCTRINE OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT IN CANADA

RICHARD ALBERT†

It has become increasingly common for courts in constitutional democracies to invalidate constitutional amendments. Courts have enforced both written and unwritten limits on how political actors may exercise the formal amendment power. They have relied either on constitutional texts that expressly entrench provisions against formal amendment or on their own interpretation of these texts as implicitly establishing an unalterable constitutional core. Although the Supreme Court of Canada has not yet invalidated a constitutional amendment, modern case law provides the constitutional basis for the Court to declare that a future constitutional amendment violates either the text or spirit of the Constitution of Canada. In this Article, I trace the origins and evolution of the theory and doctrine of unconstitutional constitutional amendment, I explain how the theory and doctrine may apply today in Canada, and I suggest a detailed framework to evaluate when and how the Supreme Court of Canada may exercise the extraordinary residual constitutional authority to invalidate a constitutional amendment.

I. INTRODUCTION

II. CONSTITUTIONAL AMENDMENT IN CONSTITUTIONAL DEMOCRACIES

A. The Amendment Power in Constitutional Design
   1. Between Flexibility and Permanence
   2. Formal Amendment Rules and Modern Constitutional Democracy

B. Formal Prohibitions on Constitutional Amendment
   1. Designing Formal Unamendability
   2. Interpreting Formal Unamendability

C. Informal Restrictions on Constitutional Amendment
   1. The Unwritten Analogue to Formal Unamendability
   2. The Basic Structure Doctrine

III. CONSTITUTIONAL AMENDMENT IN CANADA

A. Formal Amendment in Canada
   1. The Escalating Structure of Formal Amendment
   2. The Federalist Structure of Formal Amendment
   3. The Consultative Structure of Formal Amendment

B. Judicial Restrictions on Constitutional Amendment
   1. Procedural Enforcement
   2. Unwritten Constitutional Principles
   3. Judicial Self-Entrenchment

C. Political Restrictions on Constitutional Amendment
   1. Parliamentary and Provincial Laws

† Associate Professor, Boston College Law School; Visiting Associate Professor of Law and Canadian Bicentennial Visiting Associate Professor of Political Science, Yale University (2015-16); Yale University (J.D., B.A.); Oxford University (B.C.L.); Harvard University (LL.M.); Email: richard.albert@bc.edu. [Complete list of thanks to come.]

I. INTRODUCTION

Modern constitutionalism has given rise to a question that has for some time now been the subject of significant scholarly attention: can a constitutional amendment be unconstitutional?¹ As a normative matter, whether an amendment should ever be declared unconstitutional remains in dispute.² But in light of contemporary constitutional law and politics around the world, there is no doubt as a descriptive matter that an amendment can indeed be found unconstitutional. The phenomenon of an unconstitutional constitutional amendment traces its political foundations to France and the United States, its doctrinal origins to Germany, and it has migrated in some form to several other constitutional democracies, including Argentina, Austria, Bangladesh, Brazil, Colombia, Greece, Hungary, India, Italy, Japan, Nepal, Peru, Portugal, Slovakia, South Africa, South Korea, Switzerland, Taiwan, Tanzania, Thailand, Turkey,³ and recently to Belize.⁴


But today the question remains unanswered and indeed largely unexplored in Canada. Some of Canada’s most formative constitutional controversies have been resolved with some reference to the subject, though not squarely enough to constitute a general theory or doctrine for evaluating the constitutionality of a constitutional amendment. For example, in the *Patriation Reference*, the Supreme Court of Canada concluded that a violation of the convention of substantial provincial consent for a major constitutional amendment to federal-provincial matters would be unconventional and indeed unconstitutional.\(^5\) Later, in the *Secession Reference*, the Court suggested that negotiations on a formal amendment in connection with provincial secession must respect unwritten principles, including federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.\(^6\) More recently, the Court has held that Parliament cannot unilaterally make amendments to the method for filling vacancies in the Senate of Canada and must instead comply with the Constitution’s multi-lateral amendment rules.\(^7\) Each of these judicial opinions and others, taken together, intimate that some informal concept of an unconstitutional constitutional amendment does indeed exist in Canada, whether or not it has yet been recognized.

In this Article, I suggest a framework for evaluating the constitutional validity of amendments to the Constitution of Canada.\(^8\) It is important to stress that I do not inquire in this Article into the legitimacy of the extraordinary action of invalidating a constitutional amendment. Here, I am concerned instead only with the descriptive inquiry: whether and how the Supreme Court of Canada could invalidate a constitutional amendment.\(^9\) I show that although the Court has yet to invalidate an amendment,\(^10\) modern case law provides the constitutional basis for recognizing that it possesses residual constitutional authority to declare that a future amendment violates either the text or spirit of the Constitution of Canada. This authority is residual insofar as it is nowhere expressly conferred upon the Court, nor indeed upon any other institution. The power to review the constitutionality of a duly-passed constitutional amendment belongs to the Court rather as a function of its power as the ultimate arbiter of constitutional meaning in Canada and also, as I will show, as a result of changes to the Constitution “outside” of the Constitution.\(^11\)

Drawing from the judicial review of constitutional amendments around the world, I propose a framework anchored in three major categories of possible unconstitutional constitutional amendment in Canada: procedural, substantive and exceptional, the last of which is a more

---

\(^5\) *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 883, 904 [*Patriation Reference*].


\(^7\) *Reference re Senate Reform*, [2014] SCC 32, at para. 4 [*Senate Reform Reference*].

\(^8\) Unless otherwise specified, a “constitutional amendment” refers to a formal constitutional amendment, which alters the text of the master-text or codified constitution. References to informal amendment, which alters the meaning of the constitution though without altering its text, will be made explicit.

\(^9\) I have elsewhere evaluated the normative dimension of the question, specifically whether a court *should* have the power to invalidate a constitutional amendment. See, e.g., Albert, *supra* note 1, at 9-10; Richard Albert, “Counterconstitutionalism” (2007) 33 Dal. L.J. 1 at 47-48; Richard Albert, “Constitutional Handcuffs” (2010) 42 Ariz. St. L. Rev. 663 at 698.


\(^11\) Here, I refer to constitution-level changes that have not been formalized into the master-texts of the Constitution of Canada. *Cf.* Ernest A. Young, “The Constitution Outside the Constitution” (2007) 117 Yale L.J. 408.
speculative form of unconstitutionality. As I explain in greater detail below, each of these three larger categories consists in turn of at least three subsidiary forms of unconstitutionality. The forms of procedural unconstitutionality include subject-rule mismatch, temporal violations and processual irregularity. The forms of subject-matter unconstitutionality include unwritten unamendability, text-based unamendability, and the amendment-revision distinction. And the forms of exceptional unconstitutionality include statutory unconstitutionality, the recognition of convention, and unconstitutionality by implication. I will illustrate each of these with examples.

First, however, I begin by explaining the theory and doctrine of unconstitutional constitutional amendment as it has developed in modern constitutional democracies. I then situate constitutional amendment in Canada in relation to this theory and doctrine, and I show how and why the Court may now possess the power to invalidate a constitutional amendment properly made using any one of Canada’s five intricate procedures of formal amendment. I subsequently explain and illustrate a suggested framework for identifying an unconstitutional constitutional amendment, and for understanding and applying the theory and doctrine of an unconstitutional constitutional amendment in Canada in both formal and informal forms, and on both procedural and substantive grounds. My objective in this Article is to offer the Court, scholars, litigators and political actors a roadmap to evaluate and enforce the concept of an unconstitutional constitutional amendment.

II. CONSTITUTIONAL AMENDMENT IN CONSTITUTIONAL DEMOCRACIES

Constitutional amendment rules are fundamental to codified constitutions in constitutional democracies. Constitutions generally create the “rules of the game in a society” but amendment rules create the “rules for changing the rules,” a function admitting of both promise and risk insofar as the very same rules that may advance democratic outcomes may also be used for non-democratic ends. Amendment rules serve an important cluster of functions that no other constitutional device can. For one, amendment rules authorize a transparent process for correcting faults that may reveal themselves in the constitutional text over time. Constitutional amendment rules moreover distinguish the constitution from ordinary law, the former usually requiring more exacting thresholds and procedures to amend than the latter. Where constitutional amendment rules are especially onerous, they also serve to precommit future political actors to the preferences of the authoring generation. Whatever their degree of difficulty, however, constitutional

---

amendment rules offer, at least in theory, a way to check the judicial interpretation, to cultivate public discourse about constitutional meaning, and to foster institutional dialogue among the branches of government. They may also be designed to entrench a hierarchy of constitutional rules and to thereby express a constitutional democracy’s self-understanding of its public values.

A. The Amendment Power in Constitutional Design

The concept of constitutional amendment originated in the United States. Early state charters and constitutions were the first to confront the possibility of their own imperfection. Amendment rules in the United States were created to give future political actors a predictable and transparent method to make changes to these foundational texts. America’s first national constitution, the Articles of Confederation, entrenched a particularly difficult amendment rule requiring the approval of the national legislature and the unanimous agreement of all thirteen states to alter its text. This unanimity rule was perceived as a significant barrier to constitutional amendment, and the veto it afforded each state in fact ultimately proved unworkable.

1. Between Flexibility and Permanence

The constitutions of a supermajority of the states represented at the Federal Convention of 1787 also entrenched constitutional amendment rules. It is no surprise, then, that the United States Constitution, which was drafted by representatives from those states, would contain a formal amendment rule of its own. Today, as it was then, the Constitution is amendable in two ways: first, in the traditional method, where two-thirds of each house of Congress proposes an amendment to then be ratified by three-quarters of the states in either state legislatures or state conventions, as directed by Congress; and second, in the convention-centric method, where two-thirds of the states petition Congress to call a constitutional convention whose proposed amendment is ratifiable by

---

24 Ibid.
25 Articles of Confederation, art. XIII (1781).
three-quarters of the states,\textsuperscript{29} again in either state legislatures or conventions as directed by Congress.\textsuperscript{30} The Constitution has been formally amended twenty-seven times using these rules, most recently in 1992.\textsuperscript{31} Yet in over two centuries since its entrenchment, the convention-centric method of amendment has not once been successfully used,\textsuperscript{32} and may have fallen into desuetude.\textsuperscript{33}

The authors of Article V had two major related objectives in mind: to create an amendment process consistent with the Constitution’s federalist design and to ensure the Constitution’s endurance. Article V was designed to be “neither wholly national, nor wholly federal,”\textsuperscript{34} and it therefore tried to strike a balance between nationalism and federalism.\textsuperscript{35} The second objective was related to the first insofar as a proposed amendment rule that gave either too much or too little to the national or state governments would have failed to win approval. The authors of Article V sought to promote constitutional durability by creating an amendment rule that was neither so easy as to make it as vulnerable to change as a statute nor so difficult as to freeze its text and content without knowing whether design flaws might later reveal themselves.\textsuperscript{36} Article V’s design has largely fulfilled its promise: it has allowed the Constitution to adapt to new economic, social and political realities, authorizing political actors to formally amend the Constitution when necessary instead of altogether replacing it,\textsuperscript{37} although it must be noted that many of the most important constitutional changes in the United States have occurred informally without a new writing.\textsuperscript{38}

2. Formal Amendment Rules and Modern Constitutional Democracy

Since the entrenchment of Article V in the United States Constitution, it has become common for national master-text constitutions to entrench formal amendment rules of their own.\textsuperscript{39}

\textsuperscript{29} The term “convention” here refers to an assembly whose task is to write or rewrite a constitution or parts of it, often for eventual approval by a national referendum or by separate subnational referenda. It is therefore different from the term “convention” as it is ordinarily used in Canada, where it refers to an unwritten constitutional norm. Nevertheless, the concept of a “convention” as an unwritten constitutional norm exists in the United States, though scholars using the term take care to distinguish it from the prevailing understanding of “convention.” See, e.g., Keith E. Whittington, “The Status of Unwritten Constitutional Conventions in the United States” (2013) U. Illinois L. Rev. 101 at 104; James G. Wilson, “American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior” (1992) 40 Buff. L. Rev. 646 at 647 n.8.

\textsuperscript{30} U.S. Const., art. V (1789).

\textsuperscript{31} U.S. Const., amend. XXVII.


\textsuperscript{34} James Madison, “The Federalist No. 39” in Jacob E. Cooke, ed., The Federalist (Hanover, NH: Wesleyan University Press, 1961) at 257.

\textsuperscript{35} Ibid.

\textsuperscript{36} James Madison, “The Federalist N. 43” in Cooke, supra note 34, at 296.

\textsuperscript{37} See Zachary Elkins et al., The Endurance of National Constitutions (Cambridge, UK: Cambridge University Press, 2009) at 99.

\textsuperscript{38} See generally Bruce Ackerman, We the People: Foundations (Cambridge, MA: Harvard University Press, 1991) (introducing theory of “constitutional moments”); Bruce Ackerman, We the People: Transformations (Cambridge, MA: Harvard University Press, 1998) (illustrating two major constitutional moments: Reconstruction and the New Deal); Bruce Ackerman, We the People: The Civil Rights Revolution (Cambridge, MA: Harvard University Press, 2014) (arguing that the Civil Rights movement created a constitutional moment).

There is great variety in the design of formal amendment rules in constitutional democracies.\(^{40}\)

Formal amendment rules must necessarily differ according both to the particularized challenges confronting a constitutional state and to the stage of constitutional development in which the state finds itself, whether at its founding, on its way to democratic consolidation, or as a mature democracy.\(^{41}\) We may nevertheless observe, at a high level of abstraction, some important similarities among amendment rules in democratic constitutions: their formal amendment rules are commonly structured around three tiers of constitutional change procedures, with variations within each. As I have explained elsewhere,\(^{42}\) amendment rules are anchored either explicitly or implicitly in the foundational distinction between constitutional amendment and revision, which I discuss below.\(^{43}\) This is the highest level of abstraction. At the intermediate level, amendment rules operate according to one of six frameworks that combine either single or multiple tracks of amendment procedures with restricted, comprehensive or exceptional rules about their use. And at the lowest level of abstraction, amendment rules entrench a combination of specifications, for instance voting thresholds, temporal limitations, electoral preconditions and subject-matter restrictions. There is, therefore, an internal coherence to amendment rules across national jurisdictions.

At their core, formal amendment rules reflect the democratic values of the rule of law, providing notice and predictability to political actors and the relevant publics about who may change the state’s most important political commitments, how they must do so, and under what conditions.\(^{44}\) Formal amendment rules therefore pacify constitutional change in line with the expectations of modern constitutional democracy, reflecting “a domestication of the right to revolution.”\(^{45}\) On this reading, formal amendment rules satisfy the most important demand that constitutions make of their makers: “In any country the Constitution must prove susceptible of taking smoothly the mould of successive generations if violent outbreaks—coups d’état and revolutions—are to be avoided.”\(^{46}\) Change in all of its forms, from the mundane to the radical, is possible using the procedures entrenched in the constitutional text, although some constitutions expressly entrench the right to revolution, thereby distinguishing amendment from revolution.\(^{47}\)

Formal amendment rules influence constitutional politics even where political actors have no resort to them.\(^{48}\) The rigidity of a constitutional text entails at least two related outcomes. First, constitutional rigidity may shift constitutional change from formal to informal mechanisms, pushing constitutional change “off the books,”\(^{49}\) as it were. Heather Gerken explains the

---


\(^{43}\) See infra Section II.C.

\(^{44}\) See Richard Albert, “Constitutional Amendment by Stealth” (forthcoming 2015) 60 McGill L.J.

\(^{45}\) Walter Dellinger, “The Legitimacy of Constitutional Change: Rethinking the Amendment Process” (1983) 97 Harv. L. Rev. 386 at 431

\(^{46}\) Paul Gérin-Lajoie, Constitutional Amendment in Canada (Toronto, ON: University of Toronto Press, 1950) at 24.


relationship between formal and informal change with reference to hydraulics theory: a rigid constitutional text that is not formally amendable, either by design or evolved practice, “effectively redirects those constitutional energies into different, potentially more productive channels.”

Those alternative channels include informal constitutional changes that result from quasi-constitutional statutes, treaties and constitutional conventions. Second and relatedly, amendment difficulty may force constitutional courts to update the formally rigid constitution by interpretation, which is another species of informal constitutional change. Specifically, where formal amendment is not possible yet exigent circumstances demand it, courts may by interpretation effectively “amend” the constitution consistent with political norms—without altering its text. There may therefore exist, as Edward Schneier suggests, “some kind of reciprocal relationship between the existence of a strong constitutional court and the relative difficulty of amending the constitution.”

**B. Formal Prohibitions on Constitutional Amendment**

The power of formal amendment is rarely unlimited. Constitutional states commonly entrench prohibitions on the objects and subjects of the formal amendment power. For example, the French Constitution prohibits amendments to republicanism and to the integrity of the national territory: “No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy. The republican form of government shall not be the object of any amendment.”

Similarly, the Brazilian Constitution forbids amendments abolishing federalism: “No proposal of amendment shall be considered which is aimed at abolishing … the federative form of State…” The German Basic Law entrenches the best known example of a formal amendment prohibition, barring amendments that violate human dignity: “Amendments to this Basic Law affecting [the inviolability of human dignity] shall be inadmissible.”

**1. Designing Formal Unamendability**

These prohibitions on constitutional amendments create formally unamendable constitutional provisions, meaning that they are textually unalterable within that existing constitutional regime even where there is overwhelming support from political actors and the public to amend them. These provisions are therefore impervious to the textually entrenched rules for formal amendment. To illustrate, consider the Portuguese Constitution, which requires two-thirds supermajority approval in the national legislative assembly as well as the assent of the president in order to formally amend the Constitution. Even where political actors meet or exceed this threshold, they are not authorized to pass an amendment violating the separation of church and state, one of the several formal amendment prohibitions in the Portuguese Constitution.

---


51 See Albert, supra note 33, at 1062-71.


53 Schneier, supra note 16, at 223.

54 France Const., tit. XVI, art. 89 (1958).


56 German Basic Law, tit. VII, art. 79(3) (1949).

57 Portugal Const., pt. IV, tit. II, art. 288(c).
There are many reasons why constitutional designers might entrench a formally unamendable constitutional provision. First, they may wish impose a gag-rule on a particularly contentious matter, freezing the terms of agreement in an unamendable clause so as to free the parties to negotiate other parts of the constitutional bargain.\textsuperscript{58} One example is the temporarily unamendable slave trade clauses in the United States Constitution,\textsuperscript{59} negotiated in 1787 as a temporary resolution to a divisive matter to which the framers planned to return with dispassion when the temporary unamendability expired in 1808.\textsuperscript{60} Second, making something unamendable is a way for constitutional designers to entrench and thereby to express to the world the constitutional values they believe do or should reflect the core identity of the constitutional state.\textsuperscript{61}

Unamendability may serve three additional purposes: to preserve something distinctive about the state; to transform the state; and to promote or accelerate reconciliation.\textsuperscript{62} As to preservation, constitutional designers may use unamendability to preserve what they view as an integral feature of the state, for example Islamic republicanism in Afghanistan.\textsuperscript{63} As to transformation, they may use it to transform the state, for example to repudiate an old regime and to adopt a new political commitment, as the Constitution of Bosnia and Herzegovina sought to do by making all human rights formally unamendable.\textsuperscript{64} Constitutional designers may also use formal unamendability for reconciliation, by granting unamendable protections of amnesty or immunity for prior conduct in order to make peace between factions. An example is the former Nigerien Constitution, which gave unamendable grants of amnesty to perpetrators of previous coups.\textsuperscript{65}

Of course, no constitutional provision is really ever unamendable. For one, unamendable constitutional provisions cannot survive revolution.\textsuperscript{66} Where the political will exists to alter an obdurate constitutional text, political actors can write an altogether new constitution with the unamendable provision removed or loosened. This would break legal continuity in the regime but it would nonetheless overcome the rigidity of the constitutional text. Second, where constitutional replacement is either impossible, improbable or sub-optimal, the authoritative arbiter of constitutional meaning may stretch the interpretation of a constitutional amendment, finding that it respects the formal prohibitions set by the constitution even if a plain reading of the amendment would otherwise raise a tension with the formal prohibition.\textsuperscript{67} Third, formal unamendability may sometimes be more of an inauthentic expression of constitutional values than an authentic reflection of what matters most in that state, as is often true in the case of sham constitutions.\textsuperscript{68}

\textsuperscript{59} U.S. Const., art. I, § 9, cl. 1; U.S. Const., art. I, § 9, cl. 4.
\textsuperscript{61} See Albert, supra note 22, at 254.
\textsuperscript{62} See Albert, supra note 9, at 678-98.
\textsuperscript{63} Afghanistan Const., ch. 10, art. 149 (2004).
\textsuperscript{64} Bosnia & Herzegovina Const., art. X, § 2 (1995).
\textsuperscript{65} Niger Const., tit. XII, art. 136 (1999); Niger Const., tit. XII, art. 141 (1999) (superseded by Niger Const. (2010)).
\textsuperscript{66} Jeffrey Goldsworthy, Parliamentary Sovereignty (Cambridge, UK: Cambridge University Press, 2010) at 70.
\textsuperscript{67} See Andrew Friedman, “Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies” (2011) 4 Mex. L. Rev. 77 at 87.
\textsuperscript{68} See Albert, supra note 22, at 257-64
2. Interpreting Formal Unamendability

The task of interpreting formally unamendable constitutional provisions often, though not always, belongs to courts. Where political actors seek to amend the constitution, or to pass a simple law, or otherwise to engage in official conduct that is alleged to violate an unamendable provision, courts will evaluate the constitutionality of that impugned action against the interpretable standard set by the unamendable rule. Some unamendable provisions are more definitive than others, and as a consequence leave comparatively little room for interpretation. Consider, for example, the Algerian Constitution, which makes the national language unamendable, a rule that is more straightforward to interpret than the Namibian Constitution’s absolute prohibition on any amendment that “diminishes or detracts” from fundamental rights.

There are two major types of violations of a formally unamendable constitutional provision: action that is procedurally or substantively unconstitutional. It is useful to distinguish these two grounds, beginning with procedural unconstitutionality. The Turkish Constitution, for example, authorizes the Constitutional Court to review the constitutionality of amendments, but it limits the Court’s review to only matters of form, namely whether the amendment was adopted procedurally correctly with the proper majorities and in the right sequence without irregularity. The Constitution in turn entrenches secularism against formal amendment.

The Turkish Constitutional Court has been criticized for venturing beyond this pure procedural review of formal amendments despite what appears to be a clear prohibition against a broader review of the substance of secularism. The distinction between procedure and substance is less clear than it appears since procedural rules often reflect substantive restrictions and indeed there may be substantive values underpinning the procedures themselves. Moreover, the Constitutional Court’s review of substantive constitutionality despite its textual command to review only procedural constitutionality may reflect the difficulty of interpreting an unamendable provision like Turkey’s unamendable value of secularism. Although secularism may be constitutive of Turkish constitutional identity, its meaning may over time vary even as its text remains unchanged. As a consequence, one might plausibly argue that formal unamendability does not ever prevent amendment because the authoritative constitutional interpreter may always informally amend the meaning of the formally unamendable rule in its interpretation of that rule.

---

70 Namibia Const., ch. 19, art. 131 (1998).
72 Ibid., pt. I, art. 4.
75 See Melissa Schwartzberg, Democracy and Legal Change (Cambridge, UK: Cambridge University Press, 2007) at 184.
(This is precisely what occurred recently in Honduras: the Supreme Court interpreted as freely amendable a textually-airtight formally unamendable clause prohibiting presidential re-election.76)

In contrast to procedural review, a court may also review laws and constitutional amendments for substantive conformity with the constitution’s formally unamendable rules. Germany, for example, makes human dignity inviolable and thereby creates a standard against which all official conduct, including laws and constitutional amendments, must be judged.77 The German Constitutional Court has often invoked human dignity as a reason why a given law can or cannot stand. For instance, the Court has held that human dignity requires the state to protect pre-natal life over the mother’s autonomy interest.78 The Court has also held that the formally unamendable value of human dignity in the Basic Law requires the Court to invalidate a law authorizing the state to shoot down a commercial aircraft believed to have been hijacked to be used as a weapon against civilians,79 a law confining prisoners to life imprisonment without a good faith effort from the state to try to rehabilitate,80 and a federal census law requiring certain private information.81 In each of these instances, the Court relied on its interpretation of the formally unamendable substantive value of human dignity to judge the constitutionality of these laws.

A court may also interpret formal unamendability in connection with the adoption of a new constitution. The most well-known example comes from South Africa. In the transitional period after the end of apartheid, political actors adopted an interim constitution on the understanding that a new constitution would be adopted within two years of the first sitting of the national assembly.82 The interim constitution itself required that the eventual new constitution comply with a list of over thirty constitutional principles identified in an accompanying schedule—and that the Constitutional Court judge whether the new constitution respects those constitutional principles.83 The interim constitution made the Constitutional Court’s certification decision “final and binding”, and no other court had jurisdiction to review its judgment.84 When the Court ultimately reviewed the new constitution for compliance with the constitutional principles—including the protection of fundamental rights, the separation of powers, judicial independence, federalism and the rule of law—the Court held that nearly one dozen items had failed to meet the standard.85 The result was momentous: the new proposed constitution was unconstitutional, although the Court stressed that remedying the incidents of unconstitutionality so as to bring the proposed constitution into

77 German Basic Law, tit. I, art. 1(1) (1949).
79 Ibid. at 396 (translating and discussing the Aviation Security Act Case (2006), 115 BVerfGE 118).
80 Ibid. at 366 (translating and discussing the Microcensus Case (1969), 27 BVerfGE 1).
81 Ibid. at 357 (translating and discussing the Life Imprisonment Case (1977), 45 BVerfGE 187).
83 Ibid. at sec. 71(1)-(2).
84 Ibid. at sec. 71(3).
conformity with the governing constitutional principles would “present no significant obstacle to the formulation of a text which complies fully with those requirements.”

C. Informal Restrictions on Constitutional Amendment

Constitutional democracies sometimes recognize unamendability even where it is not entrenched in the constitutional text. In these cases, unamendability becomes informally entrenched as a result of a binding declaration by the authoritative interpreter of the constitution. Where the authoritative interpreter declares something to be informally unamendable, the interpreter acquires the power to invalidate later as unconstitutional any formal amendment deemed to violate the informally unamendable rule it has designated as such. These informal restrictions on constitutional amendment rest on the fusion of two roles that have traditionally been separated across time and institutions: constitutional author and constitutional interpreter.

1. The Unwritten Analogue to Formal Unamendability

The distinction between amendment and revision is critical for understanding how informal unamendability arises. Before we make the connection to informal unamendability, we must define revision in relation to amendment. A revision, to borrow the metaphor used by Jason Mazzone, may be understood with reference to the course on which a ship sets sail: where the ship departs from its course and changes direction in midstream, this alteration in trajectory will take it to a new destination unforeseen by those who commissioned the ship to set sail to begin with. Contrast this to a change to the ship itself that, while substantial, nonetheless keeps the ship on its course. The former would be a revision and the latter an amendment. Moving from analogy to theory brings us to Carl Schmitt, who explained that an amendment occurs “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”

Defining an amendment as such is not to constrain its scope because an amendment may be either ordinary or extraordinary, provided that in either case it remains continuous with the existing constitution and does not “offend the spirit or the principles” of the constitution. An amendment, then, may expand, retract, specify or generalize as long as it “preserve[s] the constitution itself.”

Where a constitutional change alters the identity of the constitution, or runs counter to its spirit or principles such that the change may be said to transform the existing constitution, that change is properly defined as a revision. A revision breaks with the fundamental presuppositions of the constitution and fails to cohere with its operational framework. To illustrate, as John Rawls has argued, it would be a revision to the United States Constitution, not an amendment, to repeal the First Amendment using the formal procedures of constitutional amendment. The First Amendment, he suggested, should be understood as implicitly unamendable because it forms the core of the democratic presuppositions of the Constitution.

---

86 Ibid. at para. 483.
89 Ibid. at 153.
90 Ibid. at 150.
prevents political actors from using its procedures to pass a hypothetical Twenty-Eighth Amendment doing away with the First. But the theory of revision regards the normal procedures of amendment as insufficient to authorize the eradication of a right as central to the American constitutionalism as presently understood as democratic expression, though formal amendments may nonetheless be extraordinarily significant in both nature and scope.  

Where the constitutional text does not expressly distinguish between procedures for amendment and revision, a judgment has to be made whether a proposed change qualifies as an authorized amendment or whether it amounts to a revision. If it is determined to be an amendment, and it is duly authorized by the constitution and adopted with no procedural irregularity, it is likely to become entrenched in the constitution without sustainable objection to its validity. But if it is determined that the change amounts to a revision and that political actors tried to achieve a revision to the constitution using the procedures designed for an amendment, that revision is not likely to stand. The basis for this informal restriction on the amendment power is the theory that a provision can be unamendable even where an amendment to it is not expressly prohibited in the codified constitution. This effectively creates an unwritten analogue to formal unamendability.

2. The Basic Structure Doctrine

The power to police the boundary separating amendment from revision may in theory rest with any political institution, but it often belongs to courts and less commonly to legislatures. In either case, this power entails the dual authority to interpret the constitution as permitting or prohibiting a constitutional amendment and, in the case of an amendment that exceeds the power of the amending actor, to identify the implicit limits on the actor’s amendment power. Where the power to invalidate a constitutional amendment rests with court, the act of reversing a popular or legislative judgment to amend the constitution raises a foundational question: on what democratic basis may a court rule that a duly-passed constitutional amendment is unconstitutional?  

The Supreme Court of India wrestled with this question in a series of important judgments from 1967 to 1981. Faced with the threat of the legislature abusing its textually unlimited power of formal amendment, the Court was compelled to consider whether the amendment power was indeed unlimited. The Court ultimately ruled that the amendment power was limited, and created the “basic structure doctrine” to invalidate amendments that, in its view, are not consistent with the Constitution’s framework. At the time and with a handful of exceptions, the Indian Constitution authorized the national legislature to pass amendments with a bare majority vote in each house, provided two-thirds of all members are present. By comparison to other constitutional democracies, this is a relatively low threshold for constitutional amendments. And since the Indian Constitution did not then, nor does it today, formally entrench anything against amendment, all constitutional provisions are susceptible to legislative change, often by simple legislative vote.

---

94 See, e.g., Constitutional Amendment Proclamation, 1983 (entrenching protections for the interests of the aboriginal peoples of Canada); U.S. Const., amend. XII (changing the procedures for presidential election) (1804).
95 Norway is one of the cases where the power belongs to the legislature. See Norway Const., pt. E, art. 112 (1814).
97 India Const., pt. XX, art. 368(2) (1950).
98 See Donald S. Lutz, Principles of Constitutional Design (New York: Cambridge University Press, 2006) at 170 (ranking the Indian Constitution as one of the least rigid in a study sample of 36 democratic constitutions).
This constitutional design raises the risk that political actors will treat the Constitution like a statute, making it as easily amendable as a law and indeed indistinguishable from one.\(^9\)

The Court’s first major pronouncement on the national legislature’s implicitly limited powers of formal amendment was in fact a reversal of its prior holding nearly twenty years before that the amendment power was unlimited.\(^1\) The Court laid the foundation for invalidating a constitutional amendment at some point in the future, holding that the amendment power could not be used to abolish or violate fundamental constitutional rights.\(^2\) Surely sensing, however, that actually invalidating a constitutional amendment could be too bold a move too soon, the Court held that the rule applied only prospectively, not retrospectively, and that only henceforth would the national legislature’s textually plenary but now actually limited power of amendment be subject to judicial review. This case was a prelude to unveiling the basic structure doctrine.

In *Kesavananda Bharati Sripadagalvaru v. Kerala*, the Court held that the amendment power could be used only as long as it did not do violence to the Constitution’s basic structure.\(^3\) The concept of the basic structure was said to include the supremacy of the constitution, the republican and democratic forms of government, the secular character of the state, the separation of powers and federalism.\(^4\) In asserting these elements of the basic structure doctrine, the Chief Justice wrote that “every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.”\(^5\) It is important to stress here that the Constitution’s text itself did not then, nor does it now, identify expressly what is “basic,” as in foundational, to its own structure.\(^6\) That judgment of constitutional priority finds its origin in judicial interpretation, not in popular consent-driven constitutional design.

Over ten years later in *Minerva Mills Ltd. v. Union of India*, the Court invoked the basic structure doctrine to invalidate amendments to India’s formal amendment rules.\(^7\) The amendments had proposed to limit the Court’s power to review constitutional amendments. The amendments declared that “no amendment of this Constitution … shall be called in question in any court on any ground”\(^8\) and that “for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.”\(^9\) These amendments were evidently a direct response to the Court’s assertion of supremacy and just the latest move in the battle for constitutional primacy between the national legislature and the Court.

---


\(^{13}\) *Ibid.* at para. 316.

\(^{14}\) *Ibid.*

\(^{15}\) One could interpret India’s escalating formal amendment rules as creating a hierarchy of constitutional importance. See Albert, *supra* note 22.


\(^{17}\) *Constitution (Forty-second Amendment) Act*, 1976, s. 55.

The question for the Court was not whether the legislature’s amendment power was subject to implicit limits. That question had been resolved in Kesavananda. The question was instead whether the legislature could overrule the Court using its amendment power. The Chief Justice began from the proposition that although “Parliament is given the power to amend the Constitution,” it is clear for the Court that this “power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure.”

This cornerstone of the basic structure doctrine—that the amendment power is constrained by implication of its limited nature even where the constitutional text does not entrench any limitation on its use—has since migrated beyond India to many other countries since its articulation around half a century ago.

The basic structure doctrine recently made a prominent appearance in two cases in Belize, a Commonwealth Caribbean country with a written constitution that entrenches no formal limitations to the amendment power. In Belize, the power to amend rests exclusively with the national legislature and the Governor General, who must assent to a constitutional bill. Yet the Court short-circuited an amendment that had been approved by the national legislature but not yet given assent by the Governor General. The amendment would have denied land owners certain oil-related property rights. The Chief Justice, writing for the Court, held that the national legislature was not authorized to make laws contrary not only to the entrenched fundamental rights but also to broader values of the constitution including those expressed in the preamble. The second Belizean case resembled the controversy in Minerva Mills: may the national legislature amend the Constitution to insulate its amendment power from judicial review? The Belizean national legislature had passed an amendment granting plenary power to the legislature to amend the Constitution. The Court rejected the amendment out of concern that it would authorize the legislature to destroy the Constitution’s core commitments. Both of these Belizean cases highlight unwritten limits on the amendment power, and the Court’s authority to enforce them.

III. CONSTITUTIONAL AMENDMENT IN CANADA

Canada’s formal amendment rules are among the most complex in the democratic world. Their escalating thresholds, quorum requirements, opt-out exemptions, and special protections for certain rights, institutions, structures and principles create a unique framework for amendment. Yet Canada’s formal amendment rules stand out as much for what they entrench as what they do not: unlike over half of the world’s new recent constitutions, Canada does not entrench any form

---

109 Minerva Mills, supra note 106.
110 See Roznai, supra note 3.
111 See Belize Const., pt. VI, art. 69 (1981).
113 Ibid. at para. 10.
114 Ibid. at para. 45.
of formal unamendability.\textsuperscript{117} Formally amending the Constitution of Canada is nevertheless no small feat,\textsuperscript{118} and indeed it may be the most difficult democratic constitution to formally amend,\textsuperscript{119} harder even than the United States Constitution, widely thought to be the world’s most rigid.\textsuperscript{120}

A. Formal Amendment in Canada

By its textual imprint alone, Canada’s formal amendment rules are unique. The Constitution Act, 1982 contains 61 sections divided into seven parts. The fifth part, covering 12 sections and representing one-fifth of the entire text, is devoted exclusively to the rules for formal amendment.\textsuperscript{121} It is unusual for democratic constitutions to entrench formal amendment rules in such length. The world’s longest-enduring democratic constitutions entrench much shorter formal amendment rules, often in one or two sections.\textsuperscript{122} This pattern generally holds in more recently adopted constitutions in democratic states.\textsuperscript{123} Yet what distinguishes the Constitution of Canada’s formal amendment rules from others in the modern democratic world is its combination of tiered voting thresholds, strict quorum requirements, opt-out exemptions, and special protections for certain rights, institutions, structures and principles. These unique features are reflected in the escalating, federalist and consultative structure of formal amendment in Canada.

1. The Escalating Structure of Formal Amendment

Escalation is the defining feature of Canada’s formal amendment rules. The text formalizes five amendment procedures, each one expressly restricted for amendments to specific constitutional provisions and principles. This is an important feature of Canada’s amendment rules: they do not have comprehensive application in the way we would describe the application of the amendment procedures in the Italian Constitution, for example, whose multiple formal amendment procedures may each be used to amend any formally amendable constitutional provision in the entire constitutional text.\textsuperscript{124} Of the five formal amendment procedures in Canada, one applies exclusively to provincial constitutions: the legislature of each province is authorized to formally amend its own constitution in relation only to purely provincial subjects.\textsuperscript{125} Each of the other four

\begin{itemize}
\item \textsuperscript{117} See Yaniv Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, Chapter 2 at 28 (unpublished dissertation on file with author).
\item \textsuperscript{118} See Albert, supra note 74, at 194-96.
\item \textsuperscript{119} See Richard Albert, “Formal Amendment Difficulty in Canada” (forthcoming 2015) 53 Alberta L. Rev. Canada has five amendment procedures; the two most difficult are virtually impossible to use but the other three are useable.
\item \textsuperscript{120} See Lutz, supra note 98 (ranking the United States Constitution as the most rigid).
\item \textsuperscript{122} See, e.g., Austria Const., ch. II, arts. 34-35, 44 (1920); Australia Const., ch. VIII, art. 128 (1900); Luxembourg Const., ch. XI, art. 114 (1868); Norway Const., pt. E, art. 112 (1814); U.S. Const., art. V (1789).
\item \textsuperscript{124} See also, Italy Const., tit. VI, s. 2, art. 138 (1947).
\item \textsuperscript{125} Constitution Act, 1982, pt. V, s. 45.
\end{itemize}
amendment procedures is more onerous than the other, and each is by and large cumulative in that it incorporates the requirements of the lesser one. This is what I mean by escalation.

The lowest amendment threshold is the unilateral provincial amendment procedure in Section 45. The next-lowest amendment threshold is the unilateral federal amendment procedure in Section 44. Under this procedure, the Parliament of Canada is authorized to formally amend the Constitution of Canada by ordinary legislation “in relation to the executive government of Canada or the Senate and House of Commons.” Only the House of Commons or the Senate may initiate an amendment under this procedure, and both houses must approve the amendment before it receives Royal Assent. Ian Greene has interpreted this procedure correctly, in my view: Parliament may deploy this amendment procedure to formally amend matters within its own internal constitution, for instance parliamentary privilege, legislative procedure and the number of Members of Parliament. It is therefore an exceptionally narrow power, a limited delegation of power to Parliament because it requires relatively little breadth of political support in order to be used successfully. Further evidence of its thinness is evident in its own words, which makes its use “subject to sections 41 and 42,” both reserved for more substantial formal amendments.

The next amendment procedure in terms of amendment difficulty is the regional amendment procedure in Section 43, which incorporates the major elements of the unilateral federal amendment procedure. This parliamentary-provincial procedure requires the House of Commons, the Senate and the legislative assemblies of the affected provinces to approve all amendments that apply to “one or more, but not all, provinces.” This procedure is more onerous than the unilateral federal procedure because it requires something more—provincial consent—than simply approval by both houses of Parliament. It must be used for amendments in relation to provisions of the Constitution that apply to one or more, but not to all, provinces. Thus it applies to matters that have, at a minimum, a provincial-federal interest even if it is in respect of a single province and, at most, to matters that have a regional, though not national scope. This procedure has been used more frequently and successfully than any of the four other procedures since 1982.

The next-most difficult amendment procedure is Canada’s default amendment procedure. It applies to all subjects not otherwise assigned to a specific amendment procedure, and it also

---

126 The amendment procedures are not strictly cumulative. For example, one could not use Section 38, which I discuss below, to pass an amendment reserved to Section 43, which I also discuss below, because that could potentially bypass Section 43’s requirement for the authorization of the legislative assembly to which the amendment applies. The idea of cumulativeness, however, reflects the generally escalating framework of Canada’s formal amendment rules.
128 Ibid, s. 44.
129 Ibid.
131 It is important to stress here that Section 44 requires the approval of both houses of Parliament. The Senate has an absolute veto over amendments under Section 44, unlike amendments under Sections 38, 41, 42 or 43, which may be made without a resolution of the Senate. See Constitution Act, 1982, pt. V, s. 47(1).
132 Constitution Act, 1982, pt. V, s. 44.
133 Ibid, s. 43.
applies exclusively to a specially designated class of subjects, including proportional representation in the House of Commons, the powers and membership of the Senate as well as the method of senatorial selection, the Supreme Court of Canada for all items except its composition, the creation of new provinces and the boundaries between provinces and territories. This default procedure in Section 38 requires multilateral approval from both federal and provincial institutions: authorizing resolutions from the House of Commons and the Senate as well as resolutions from the provincial legislative assemblies of at least two-thirds of the provinces whose aggregate population amounts to at least half of the total. This default amendment procedure incorporates the regional amendment procedure—though it does not give a veto to all provinces to which the amendment would apply, unlike Section 43—and it adds the requirement of supermajority provincial ratification as well as the majority population quorum requirement.

Unanimity is the most difficult formal amendment threshold. Entrenched in Section 41, it requires authorizing resolutions from both houses of the federal Parliament and from each of the provincial legislative assemblies. There are five specifically designated subjects for which use of this unanimity amendment rule is required: the monarchy, the right to provincial representation in the House of Commons not less than that in the Senate, Canada’s official languages beyond their provincial or regional use, the composition of the Supreme Court of Canada, and Canada’s formal amendment rules themselves. This unanimity threshold is even more demanding than the default multilateral amendment procedure in Section 38 insofar as it requires the approval of both houses of the federal Parliament and all ten provincial legislative assemblies. (The Senate’s approval is not an absolute requirement here.) We can therefore appropriately describe Canada’s structure of formal amendment as escalating: each of the four federal procedures requires more than the former on the theory that the more important or politically salient a subject, the greater should be the degree of publicly aggregated political support for making changes to it.

2. The Federalist Structure of Formal Amendment

Canada’s commitment to federalism is reflected in its escalating structure of formal amendment. What makes formal amendment more difficult as the subject or object of amendment rises in importance is the degree of provincial consent required to ratify an amendment proposal. After the unilateral provincial amendment procedure, the lowest of the other four thresholds—the unilateral federal amendment procedure—requires no direct provincial consent, though provincial interests are represented indirectly through the parliamentarians who vote on the amendment. The regional amendment procedure introduces the requirement of provincial consent but only for the affected province(s), that is, the province(s) to which the amendment applies. The quantum of provincial consent rises for the default multilateral amendment procedure, and of course rises to its highest point in the unanimity amendment procedure. Yet the escalating structure of formal amendment is only one of many federalist features of Canada’s formal amendment rules. Others include the right to register provincial dissent, the power to opt-out from successful amendments

---

135 Ibid. s. 42.
136 Ibid. s. 38(1).
137 Ibid.
138 Ibid. s. 41.
139 Ibid.
140 Ibid. s. 47(1).
141 See Albert, supra note 22, at 247-51.
in certain circumstances and in some cases to receive compensation for opting-out, and the right to revoke both provincial dissent and assent. A word on each federalist feature is useful.

First, Canada’s formal amendment rules authorize a province to register its dissent from an amendment made under the default multilateral amendment procedure. There are three important qualifications to the right to dissent: (1) a province may only dissent from an amendment that weakens provincial powers or prerogatives, specifically an amendment that “derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province…”; (2) the dissenting province must pass a resolution by majority vote in its legislative assembly approving the province’s dissent prior to the proclamation of the amendment; and (3) the right of dissent is ineffective against formal amendments to proportional provincial representation in the House of Commons, Senate powers and provincial representation, Senator selection and eligibility, the Supreme Court of Canada, provincial-territorial boundary modification, and the creation of new provinces. The effect of a provincial dissent is to grant the dissenting province an exemption from the application of the amendment: an amendment from which a province dissents “shall not have effect” in the dissenting province.

The right to register provincial dissent amounts to a provincial power to opt-out from an amendment that will otherwise apply to the entire country. For some matters, where a province registers its dissent to an amendment passed pursuant to the default multilateral amendment procedure and therefore opts-out of the effect of the amendment, a province may be entitled to compensatory funding from the federal government. The Constitution authorizes the disbursement of “reasonable compensation” for a dissenting province where the amendment transfers from provincial control to federal control certain powers concerning education or culture. To illustrate with an example, were political actors to agree by amendment pursuant to the default multilateral amendment procedure to transfer jurisdictional authority over education from provincial legislatures to Parliament, and were the province of Ontario to register its dissent to that amendment, Ontario would be entitled to public funding to continue operating its provincial school system while education in the rest of the country would be overseen by Parliament.

The right of revocation is an additional federalist feature of Canada’s formal amendment rules. The Constitution preserves provincial autonomy by conferring upon a province the right to revoke either its assent or dissent to a formal amendment. Where a province exercises its right to dissent, it may later revoke its dissent and simultaneously or subsequently consent to the amendment with a resolution supported by a majority of its legislative assembly. There is no time limitation on the right of revocation; a province may revoke its dissent either before or after

---

143 Ibid. s. 38(2).
144 Ibid. s. 38(2). An amendment is complete only when the Governor General issues a proclamation under the Great Seal of Canada. See Ibid. ss. 38(1), 41, 43. The Queen’s Privy Council advises the Governor General to issue a proclamation when the required resolutions have been adopted. See Ibid. s. 48.
145 Ibid. s. 42(2).
146 Ibid. 38(3).
the proclamation of an amendment.149 Provinces are not alone in possessing the right of revocation. Either the House of Commons, the Senate or a provincial legislative assembly may revoke a prior resolution assenting to an amendment as long as the revocation occurs before the amendment becomes official when the Governor General proclaims it under the Great Seal of Canada.150

But the Constitution disables the twin provincial rights of revocation and dissent as to the specially designated provisions for which only the default multilateral amendment procedure applies.151 For example, the default multilateral amendment procedure must be used to amend the provincial distribution of Senators.152 A province cannot dissent, and therefore opt-out, of a formal amendment to the number of Senators to which it or another province is entitled. To allow a province to dissent from the distribution of Senate seats would disrupt the structure and operation of Parliament.153 The same problem arises with respect to the principle of proportionate provincial representation in the House of Commons, which may be amended only with the default multilateral amendment procedure.154 For the same reasons a province cannot dissent or opt-out from Senate seat distributions, a province cannot dissent or opt-out from an amendment to the scheme of proportionate provincial representation in the lower house.155 The Constitution prudently anticipates problem arising out of this power to dissent.

3. The Consultative Structure of Formal Amendment

Formal amendment in Canada is also consultative by design, inviting and indeed requiring political actors to consult deliberatively and cooperatively on major constitutional change. The first consultative dimension of formal amendment applies exclusively to the default multilateral amendment procedure and the second applies to all amendment procedures except the unilateral federal amendment procedure. The first notable consultative dimension is a temporal limitation. For formal amendments made pursuant to the default multilateral amendment procedure, the Governor General may not issue a proclamation before one year has elapsed from the adoption of the resolution initiating the formal amendment procedure.156 The Governor General is also prohibited from issuing a proclamation after three years has elapsed from the adoption of the initial authorizing resolution.157 This creates a one-year floor and a three-year ceiling for deliberation, the consequence being that all amendments proposed under the default multilateral amendment procedure expire after three years. This temporal limitation encourages purposeful debate within a defined period of time: political actors can neither rush nor delay an amendment.

---

149 Ibid. s. 38(4).
150 Ibid. s. 46(2).
151 Ibid. s. 42(2).
152 Ibid. s. 42(1)(c).
153 Note that the Constitution Act, 1867 speaks only a “place” not a “seat” in the Senate. See Constitution Act, 1867, pt. IV.
154 Constitution Act, 1982, s. 42(1)(a).
155 Using its amendment power under Section 44, Parliament has amended the rules and provisions of the Constitution Act, 1867 as to seat distribution in the House of Commons, and it has done so in a manner mindful of the principle of proportionate representation. See Constitution Act, 1867, s. 51 as amended.
156 Ibid. s. 39(1). The Constitution creates an exception allowing the Governor General to proclaim the amendment sooner where “the legislative assembly of each province has previously adopted a resolution of assent or dissent.” Ibid. s. 39(1).
157 Ibid. s. 39(2).
The second notable consultative feature authorizes amendment without Senate approval. Where the Senate has not adopted an approval resolution for a formal amendment within 180 days after the House of Commons has done so and the House of Commons once again adopts the same approval resolution sometime after 180 days, the amendment process may proceed without Senate approval.\(^{158}\) Senate approval is normally required in all federal amendment procedures. This exception applies to all formal amendments made pursuant to either the unanimity amendment procedure, the default multilateral amendment procedure, or the regional amendment procedure.\(^{159}\) It wisely does not apply to the unilateral federal amendment procedure because allowing a formal amendment to pass without Senate approval would confer an unchecked power of formal amendment by legislation upon the House of Commons.\(^{160}\) The 180-day override power possessed by the House of Commons is therefore a mechanism to overcome political obstruction or delay by the Senate. Though it may appear contrary to the function of consultation, it more accurately furthers it by ensuring that political actors actually do consult, and ultimately decide, within a reasonable period of time. It is a constitutionalized protection against deliberate or passive delay.

Two additional features reflect the consultative dimension of formal amendment in Canada, yet they are not entrenched in the formal amendment rules themselves. First, the Constitution Act, 1982 required the prime minister to convene a constitutional conference with first ministers within fifteen years of its coming-into-force in order to review the formal amendment rules.\(^{161}\) The authors of the Constitution Act, 1982 therefore contemplated multilateral consultation on whether, after almost a generation in use, the new formal amendment rules were serving Canada well.\(^{162}\) Second, the Constitution Act, 1982 commits the prime minister to convene a constitutional conference consisting of first ministers and “representatives of the aboriginal peoples of Canada” before any amendment is made to matters affecting aboriginal rights.\(^{163}\)

B. Judicial Restrictions on Constitutional Amendment

The text of the Constitution of Canada is not the only source of rules governing constitutional amendment. The Supreme Court of Canada has suggested that it could evaluate the process of constitutional amendment to ensure that the correct procedure is being used for amendments to the appropriate principle or provision. The Court has also created its own rules that both supplement and refine the formal amendment rules entrenched in the constitutional text. In the course of its interpretation of the Constitution, the Court has declared that certain unwritten constitutional principles are fundamental and suggested that they must be addressed in any negotiations leading to constitutional amendment. And in a recent advisory opinion, the Court has entrenched itself against amendment by all but the most onerous procedure of amendment. In this Section, I review each of these to show how amendment is now constrained beyond the text.

---

\(^{158}\) Ibid. s. 47(1). In computing the 180-day time period after the House of Commons’ adoption of the approval resolution, the Constitution exempts any period of time when Parliament is prorogued or dissolved. Ibid. s. 47(2).

\(^{159}\) Ibid. s. 47(1).

\(^{160}\) Ibid.

\(^{161}\) Ibid. s. 49.

\(^{162}\) Whether the conference that was ultimately held in 1996 met the spirit of the requirement is a matter of some debate. See John D. Whyte, “‘A Constitutional Conference … Shall be Convened …’ Living with Constitutional Promises” (1996) 8 Const. Forum 15.

1. Procedural Enforcement

We know from the recent Senate Reform Reference that the Court believes itself authorized to declare which constitutional amendment procedure must be used to amend a given principle or provision. The Court of course did not arrogate this power to itself; it was the Government of Canada that invited the Court to address the issue to begin with. But here we must nonetheless separate two questions: whether the Government may seek the Court’s counsel on a matter of constitutional law (it may, and indeed often has) and whether the Court may in turn specify that one amendment procedure must be used over another in a given instance. The answer to the second question is yes, but the Constitution does not expressly delegate this authority to the Court. It has arisen partly as a consequence of the Court’s reference jurisdiction, its supremacy in constitutional interpretation, and the latent ambiguities in Canada’s formal amendment rules.

The central question in the Senate Reform Reference was whether one or another amendment procedure should be used to affect a series of separate changes to the Senate of Canada. The content of the question differed as to each envisioned senatorial reform but at bottom the Court was asked to answer which of the Constitution’s five amendment procedures political actors were required to use in a given scenario. In each instance, the Court answered clearly which amendment rule the circumstances dictated. This was the first major constitutional controversy since the enactment of the Constitution Act, 1982, in which the Court wrestled with the details of the entrenched formal amendment rules.

For example, in the Senate Reform Reference the Government of Canada asked the Court for its advice specifically on whether the Constitution could be formally amended to establish fixed senatorial terms, for instance terms of eight, nine or ten years, using the unilateral federal amendment procedure in Section 44. The Court answered no, explaining that the unilateral federal procedure is “limited” and that it “is not a broad procedure that encompasses all constitutional changes to the Senate which are not expressly included within another procedure in Part V,” a direct response to the unsuccessful argument that Parliament could amend senatorial term limits unilaterally since there is no express mention of term limits in the rules of multilateral formal amendment pertaining to the Senate. Term limits are amendable, explained the Court, but only using the default multilateral amendment rule in Section 38. There is good reason for not allowing Parliament to use its limited power of formal amendment to change senatorial tenure: the change touches on a matter of federal-provincial interest, and therefore any process to alter it must engage both levels of government, not only Parliament.

---

164 Senate Reform Reference, supra note 7.
165 The Court relied on its reference jurisdiction to issue an advisory opinion. See Supreme Court Act, R.S.C. 1985, c. S-26, at s. 53.
166 See generally James L. Huffman & Mardi Lyn Saathoff, “Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction” (1990) 74 Minn. L. Rev. 1251 (reviewing the history of the Court’s reference jurisdiction).
167 Senate Reform Reference, supra note 7, at para. 5.
168 Ibid. at para. 75.
169 Ibid.
170 Ibid.
The Court gave a similar answer to the question whether Parliament could effectively change the method of choosing Senators. The government asked the Court whether Parliament could use the unilateral federal procedure to create a framework for consultative senatorial elections that would authorize the populations of the provinces and territories to express their preferences for senatorial nominees. In answering no, the Court took a functionalist view of constitutional change, reasoning that a constitutional amendment need not necessarily alter the constitutional text in order to alter the constitution. It would privilege form over substance, wrote the Court, to define an amendment so narrowly, even where the Governor General would continue to appoint (in the language of the Constitution, to “summon”) Senators on the recommendation of the prime minister. The Court held that introducing these changes to the method of senatorial selection would so fundamentally alter the federal architecture of the Constitution that Parliament could not alone make this change. The provinces, the Court explained, must be involved in this amendment process pursuant to the default multilateral amendment procedure in Section 38. Indeed, the Court added, the text of the amendment rules requires that changes to the “method of selecting Senators” be made in consultation with the provinces, not unilaterally.

The other reference questions likewise asked the Court which amendment procedure was proper for a given reform to the Senate, namely repealing the property qualifications for Senators and abolishing the Senate altogether. On the former, the Court decided that the Constitution allowed Parliament to use its unilateral amendment power, although for political actors to fully repeal the Senate they would need also to use the regional amendment procedure to secure the consent of Quebec, which has a special arrangement in respect of the Senate. And on the latter, the Court explained that abolishing the Senate would require conformity with the onerous rules of the unanimity amendment procedure, namely the consent of the houses of Parliament and all of the provinces precisely because of the importance of the Senate to the structure of the Constitution, to federalism in Canada and to the design of Canada’s formal amendment rules themselves.

2. Unwritten Constitutional Principles

The Supreme Court has also identified certain unwritten constitutional principles that constitutional amendments must respect. This extraordinary move has incorporated unwritten rules into the written constitution, and arguably subordinated the text to them. The result has been to create a hierarchy of constitutional precedence placing unwritten rules above written rules, raising concerns for the rule of law—itself a constitutional principle—which Lon Fuller argued requires the publication of clear rules so the governed have notice of their obligations and entitlements. Where unwritten principles are given priority over written rules, there is a risk of a disjunction

---

171 Ibid. at para. 69.
172 Ibid. at para. 5.
173 Ibid. at para. 52.
174 Ibid. at para. 54.
175 Ibid. at para. 65.
176 Ibid. at para. 5.
177 Ibid. at para. 86.
178 Ibid. at paras. 95-111.
between law and enforcement—a disjunction that can undermine the rule of law. Whether this risk has materialized in Canada as to constitutional amendment remains an open question. What is less uncertain, however, is that unwritten rules are often uncovered from “amendment-like” interpretations of the Constitution.

For example, in the Secession Reference, the Court identified four unwritten constitutional principles that must govern negotiations leading to a constitutional amendment to formalize secession. By the Court’s own admission, these constitutional principles—federalism, democracy, constitutionalism and the rule of law, and the protection of minorities—appear nowhere in the express provisions of the constitutional text. As the Court wrote, these principles “are not explicitly made part of the Constitution by any written provision” but it “would be impossible to conceive of our constitutional structure without them” because they “dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.” When interpreted in light of the evolution of Canadian constitutional history, these principles give rise to a reciprocal obligation on all parties to negotiate a provincial secession where a clear majority of a province chooses secession on a clear referendal question.

These four unwritten principles, the Court wrote, are not merely descriptive. They are so important that they may constitute a legitimate basis for invalidating the conduct of political actors:

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations, which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.

The Court here recognized the existence of these unwritten constitutional norms, and also kept open the possibility of recognizing others, and in doing so has preserved for itself wide latitude to police all forms of state action. As the Court itself stressed in the Secession Reference, the Court is authorized to invoke these and other unwritten principles in all matters that arise before it.

This was not the first time the Court had invoked unwritten principles as a decision rule. The year prior, in the Provincial Judges Reference, the Court seemed to suggest that a law could...

---

180 For the strongest critique of the Court’s recourse to unwritten constitutional principles as a basis for judicial review, see Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 22 Queen’s L.J. 389.
182 Secession Reference, supra note 6.
183 Ibid. at paras. 55-82.
184 Federal union and the rule of law are mentioned in the preambles to the Constitution Act, 1867 and the Constitution Act, 1982, respectively. These, however, are recitals not justiciable provisions. See Constitution Act, 1867, prmb; Constitution Act, 1982, prmb.
185 Secession Reference, supra note 6, at para. 51.
186 Ibid. at para. 32.
187 Ibid. at para. 88.
188 Ibid. at para. 54.
189 Ibid.
be invalidated for violating an unwritten constitutional principle, in this case judicial independence.\textsuperscript{190} The Court insisted that although the Charter and the Constitution Act, 1867 both give a limited guarantee of an “independent and impartial tribunal,”\textsuperscript{191} judicial independence “is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts.”\textsuperscript{192} Drawing from precedent and the nature of Canadian constitutionalism, the Court concluded that it is obvious that the Constitution includes more than its entrenched texts. The Court thus cautioned against presupposing that “the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence.”\textsuperscript{193} The preamble of the Constitution Act, 1867, whose purpose is partly “to fill out gaps in the express terms of the constitutional scheme,”\textsuperscript{194} also reinforces judicial independence as an important norm.

Rooted in history, entrenched in the text and anchored in the preamble of the Constitution Act, 1867, judicial independence was not the only unwritten constitutional principle the Court identified in this case. The preamble also identifies other organizing principles that have similar normative validity, according to the Court. For instance, the doctrine of full faith and credit, obliging provincial courts to recognize the judgments of others, must be inferred from the Constitution and its preamble since it is fundamental to federalism in Canada yet it is not expressly entrenched in the constitutional text.\textsuperscript{195} Likewise, paramountcy—which holds that a valid federal law prevails over a valid provincial law to the extent of any inconsistency—appears nowhere as a general proposition in the text but is a necessary feature of Canada’s federalist constitutional design.\textsuperscript{196} The Court followed similar reasoning to support its recognition of other unwritten constitutional norms, including the rule of law’s remedial innovation of suspended declarations of invalidity, the constitutional status of the privileges of provincial legislatures, the federal power to regulate political speech, and implicit limits on legislative sovereignty with respect to political speech.\textsuperscript{197} There are of course others still to be uncovered and applied, though without the same knowability that only a text can offer.\textsuperscript{198}

### 3. Judicial Self-Entrenchment

Quite apart from entrenching unwritten constitutional principles, the Court has also entrenched itself. Yet in self-entrenching, the Court has not made itself formally unamendable: the Court remains amendable by political actors, specifically by the default multilateral amendment procedure, and by the unanimity procedure as to its composition.\textsuperscript{199} Nonetheless, in the recent

\textsuperscript{190} Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3, at para. 83 [Provincial Judges Reference]. Ultimately, the Court anchored its judgment in s. 11(d) of the Charter.

\textsuperscript{191} Constitution Act, 1867, pt. VII, ss. 96-100; Constitution Act, 1982, pt. I, s. 11(d).

\textsuperscript{192} Provincial Judges Reference, supra note 190, at paras. 82-83 (emphasis in original).

\textsuperscript{193} Ibid. at para. 85.

\textsuperscript{194} Ibid. at para. 95.

\textsuperscript{195} Ibid. at para. 97.

\textsuperscript{196} Ibid. at para. 98. For a specific example of federal paramountcy as to agriculture and immigration, see Constitution Act, 1867, pt. VI, s. 95.

\textsuperscript{197} Provincial Judges Reference, supra note 190, at para. 104.

\textsuperscript{198} See Leclair, supra note 180, at 392-93 n.13. The Court recent consideration of judicial independence, the separation of powers and the rule of law suggests that it has pulled back somewhat from its approach in the Provincial Judges Reference. See British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473.

\textsuperscript{199} Constitution Act, 1982, at ss. 41-42.
Supreme Court Act Reference, the Court made it much more difficult than the text of the Constitution suggests it should be to make amendments to the Court itself. By its interpretation of formal amendment rules, the Court has in this way entrenched itself against ordinary amendment.

The Supreme Court Act Reference concerned two inquiries related to eligibility for a seat on the Supreme Court. The first was whether a person who was currently a judge on the Federal Court of Appeal but had previously been, though was not currently, a qualified Quebec attorney for at least ten years could qualify as a Quebec judge under the Supreme Court Act, which reserves three seats for judges appointed “from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from the advocates of that Province.” The Court answered no, concluding that the law’s requirement that the appointee be a qualified Quebec attorney means that the appointee has to be a current member of the Quebec bar, at the time of the appointment, with at least ten years standing. The second question, though, is more relevant for our purposes. The Court was asked to advise the government whether, in light of the answer to the first question, Parliament may pass a law remedying that ineligibility thereby authorizing the appointment of a former member of the Quebec bar to the Court.

In detailing why Parliament cannot authorize by simple law an appointment not otherwise permitted by the Supreme Court Act, the Court may had its Canadian Marbury moment, a reference to Marbury v. Madison, the famous case in which the United States Supreme Court declared itself not only the authoritative interpreter of the constitution but also the ultimate arbiter of its own jurisdiction. Just as Marbury illustrates an example of self-entrenchment, so does the Supreme Court Act Reference. The Canadian Supreme Court positioned itself as the only body that can constitutionally interpret the constitution as to others and as to itself, a position that could conceivably raise a conflict but that one could justify under Section 52 of the Constitution Act, 1982, which makes the Constitution of Canada supreme, and by implication the Court’s interpretation of it as well. What the Court ruled in the Supreme Court Act Reference can be stated quite plainly as follows: Parliament cannot by itself repeal or even amend the Supreme Court Act, except for routine amendments that do not affect the essential characteristics of the Court.

That Parliament cannot alone amend its own law would once have been controversial and indeed thought to uproot the very foundations of parliamentary sovereignty that Canada inherited from the United Kingdom. But parliamentary sovereignty in Canada has never implied parliamentary supremacy given the jurisdictional limitations imposed on Parliament and the provincial legislatures by the Constitution Act, 1867. And since 1982, Canada has been a constitutional supremacy, with the consequence that Parliament and the provincial legislatures must now conform their conduct to the Charter, which has imposed new obligations on parliamentarians. One of those obligations is to abide by the Court’s interpretation of the

---

200 Reference re Supreme Court Act, 2014 SCC 21 [Supreme Court Act Reference].
201 Ibid. at paras. 1, 7.
202 Ibid. at paras. 4, 107.
203 Ibid. at paras. 5, 7.
204 Ibid. at paras. 5, 107.
205 5 U.S. (1 Cranch) 137.
206 Constitution Act, 1982, s. 52.

[26]
Constitution, which has of course long included more than its text. Since the *Supreme Court Act Reference*, however, the “Constitution of Canada” arguably now includes the *Supreme Court Act* itself. That is the operational result of the Court’s opinion in the *Supreme Court Act Reference*: it elevates most aspects of the *Supreme Court Act* beyond ordinary parliamentary action by informally entrenching the key characteristics of the Court. Therefore, today, amending the Court’s essential features now requires a multilateral constitutional amendment.

The composition of the Supreme Court, wrote the majority, cannot be subject to simple parliamentary legislative amendment. Any change to the Court’s composition, which for the Court includes a change to rules for the three Quebec appointments, must be made using the unanimity amendment procedure in Section 41. Otherwise Parliament could unilaterally amend the essential features of the Court, and thereby risk undermining the Court’s independence, its function in the separation of powers, and its power as the authoritative interpreter of the Constitution. As the Court explained, “essential features of the Court are constitutional protected” and any changes to the Court’s composition requires “the unanimous consent of Parliament and the provincial legislatures.”

The practical consequence of the Court’s opinion is significant. The Court has effectively transformed a parliamentary law into a constitutional statute that now forms part of the Constitution of Canada, causing the “essential features of the Court” to “migrate” into the Constitution, where it is now immune from anything less than multilateral constitutional change. The Court has recognized that the evolution of Canadian federalism and of the Court’s role within it as the national court of last resort now require that its composition and its fundamental components be protected from ordinary parliamentary law-making. Parliament, the Court ruled, cannot have the power to make transformative changes unilaterally, either to the Court as an institution of central importance to Canadian federalism or to Quebec’s historically guaranteed representation. Conferring this power upon Parliament, concluded the Court, would ignore the Court’s constitutional status, it would ignore Canada’s modern constitutional history, and it would moreover deny the Court the capacity to exercise its function under the Constitution of Canada.

**C. Political Restrictions on Constitutional Amendment**

Nor do the constitutional text and its interpretation exhaust the repository of rules on constitutional amendment. Statutes may also impose restrictions on political actors in respect of how and when the constitution is amended. In addition, in Canada and indeed in other democracies,
political practices may evolve to ultimately exert constitutional-level constraints that approximate the binding quality of a constitutional amendment such that political actors feel themselves bound to conform their conduct to them. In this Section, I detail these not-strictly textual nor judicial restrictions on constitutional amendment—restrictions rooted partly in political practice, constitutional law and the legislative process—that further limit the amendment power in Canada.

1. Parliamentary and Provincial Laws

Parliament’s regional veto law, passed in 1996,[217] makes formal amendment in Canada even more complicated than the constitutional text already does. Enacted in the aftermath of the 1995 Quebec referendum, the law fulfilled the federal government’s pledge to give Quebec a veto over future major constitutional reforms.[218] Although it affords veto power to Quebec, the law allocates the same power to each of Canada’s other major regions, some of which the law defines in terms of provinces: the Atlantic provinces, Ontario, Quebec, the Prairie provinces and British Columbia. The law prevents any minister from proposing a constitutional amendment under the default multilateral amendment procedure in Section 38 unless the proposal first secures the consent of a majority of provinces, including Ontario, Quebec, British Columbia and at least two each of the Atlantic and Prairie provinces representing at least half of the regional population.[219]

The regional veto law does not apply to amendments proposed under the following rules: (1) Sections 41 or 43, since each already confers a veto to affected provinces; (2) Section 44 because it allows only amendments that do not affect provinces; (3) Section 45, which authorizes provinces to amend their own constitutions; and (4) Section 38(3) which authorizes provinces to dissent from amendments of national application. The regional veto law is not without its critics: Andrew Heard and Tim Schwartz suggest that it may be unconstitutional as it undermines the legal equality of the provinces guaranteed by the textually entrenched amendment rules in Section 38.[220]

In addition to this federal veto law, provinces and territories have passed their own laws on amendments to the Constitution of Canada. Their laws in some instances impose obligations upon themselves to hold referenda—an additional step in the already onerous formal amendment rules. These provincial and territorial laws require either binding or advisory referenda. For instance, Alberta and British Columbia require their legislatures to hold a binding provincial referendum before either of them votes on an amendment proposal requiring provincial agreement,[221] whereas New Brunswick, Saskatchewan and Yukon authorize but do not require binding referenda before a legislative vote.[222] Similarly, the Northwest Territories, Nunavut, Quebec, Prince Edward Island

---

219 Regional Veto Law, supra note 217, at s. 1(1).
222 See Referendum Act, S.N.B. 2011, c. 23, ss. 12-13 (New Brunswick) (establishing quorum requirement for binding government); The Referendum and Plebiscite Act, Stat. Sask. 1990-91, c R-8.01, s. 4 (Saskatchewan) (establishing quorum and threshold requirements for binding government); Public Government Act, Stat. Yuk. 1992, c-10, s. 7 (Yukon) (authoring legislature to decide ex ante whether referendum will bind government).
and Newfoundland & Labrador do not require an advisory referendum or plebiscite before a legislative vote to ratify or not an amendment but they do permit political actors to hold one.\textsuperscript{223} The constitutional status of these provincial laws on referenda and plebiscites is debatable: on one hand, they have been duly authorized by legislative vote; on the other, they undermine the force of the textually-entrenched amendment rules as a complete code for formal amendment. Perhaps this is purely an academic matter because no major amendment is likely to happen today.\textsuperscript{224}

2. Convention and Public Expectations

Constitutional amendment in Canada may also be governed by constitutional conventions. The Court has in the past recognized that constitutional amendment is constrained by conventional rules that guide the conduct of political actors. In the 1981 \textit{Patriation Reference}, the Court acknowledged a convention preventing the Government of Canada from proceeding unilaterally to request from the Parliament of the United Kingdom a major constitutional reform affecting federal-provincial matters and requiring instead it to secure substantial provincial consent.\textsuperscript{225} Drawing from historical political practice, the Court suggested that earlier efforts, both successful and not, to make changes to the basic federal structure of the Constitution of Canada had matured into a constitutional convention whose violation would be illegitimate though not illegal.\textsuperscript{226}

Today, there is a question whether the national referendum held in connection with the 1992 Charlottetown Accord has established a precedent that has matured into a constitutional convention requiring all future large-scale reform efforts to incorporate a similar public consultation.\textsuperscript{227} Observers have argued that the Charlottetown referendum has created a new public expectation not unlike a constitutional convention of increased popular participation in matters of significant constitutional change.\textsuperscript{228} I am not yet ready to conclude that the Charlottetown


\textsuperscript{225} \textit{Patriation Reference}, supra note 5, at 904.

\textsuperscript{226} \textit{Ibid}. at 880-85. There is some debate, though, whether the Court identified the right convention. See John Finnis, “Patriation and Patrimony: The Path to the Charter” (2015) 28 Can. J. L. & Juris. 51 at 73 (arguing that the convention was unanimous, not substantial, consent).


referendum has created a constitutional convention binding on political actors undertaking large-scale constitutional amendment efforts today but it is a common view in the academy.\(^{229}\)

### 3. Restrictions by Implication

In addition to amendment rules interpreted by the Court as existing above and beyond those entrenched in the text, those enacted by parliamentary or provincial statute and those evolved by political practice, there may also exist amendment principles that we can infer by implication of the design of the *Constitution Act, 1982*. However, these amendment principles are not explicit rules about how to amend the Constitution, or about who may initiate or ratify the amendment and when, or what may be amended. They are instead restrictions that arise as an implication of an existing rule that does not concern constitutional amendment. Identifying principles that may be interpreted as restricting the amendment power therefore requires us to look outside the formal amendment rules but still within the text of the Constitution.

For example, one might argue that the design of the legislative override power implies that the scope of certain rights cannot be diminished by a constitutional amendment. The legislative override power, entrenched outside the formal amendment rules in Section 33,\(^{230}\) authorizes Parliament or a provincial legislature to “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.”\(^{231}\) What this means, in practice, is that the legislature is authorized to override the judicial interpretation of the rights entrenched sections 2 and 7 to 15. Parliament or a provincial legislature may operationalize this power by passing a law in breach, or in anticipatory breach, of the Court’s interpretation of the *Charter* and inserting within it a declaration that the law will operate “notwithstanding” its conflict with the Court’s judgment.\(^{232}\) This declaration may last no longer than five years, and it is renewable indefinitely every five years.\(^{233}\)

By its own terms, the legislative override power is applicable to those rights entrenched in section 2, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the *Charter*. Those rights include the freedom of conscience, religion, thought, belief, peaceful assembly and association;\(^ {234}\) the right against unreasonable search and seizure;\(^ {235}\) the right against arbitrary detention;\(^ {236}\) the right to retain counsel;\(^ {237}\) and among others, the right to the equal protection of the law.\(^ {238}\) The other provisions of the *Charter*, which spans 34 sections in its entirety, are accordingly immune from the legislative


\(^{231}\) *Ibid.* at s. 33(1).


\(^{233}\) *Constitution Act, 1982*, pt. I, s. 33(3)-(5).

\(^{234}\) *Ibid.* at s. 2.

\(^{235}\) *Ibid.* at s. 8.

\(^{236}\) *Ibid.* at s. 9.

\(^{237}\) *Ibid.* at s. 10(b).

\(^{238}\) *Ibid.* at s. 15(1).
override. These other provisions protect the right to vote, \footnote{Ibid. at s. 3.} the right of citizens to enter and leave Canada\footnote{Ibid. at s. 6(1).} and, among other linguistic rights, the right to receive federal services in either of Canada’s two official languages. \footnote{Ibid. at s. 20.} The text of this legislative override power does not expressly state that any Charter sections are more important, but that is the message conveyed by its design: where the rights in sections 2 and 7-15 may be limited using the legislative override but those entrenched elsewhere in the Charter are otherwise immune to it, what results is a constitutional hierarchy pursuant to which the overridable sections sit below the non-overridable ones.

Drawing from this architectural interpretation of the Charter, the Court could treat differently those constitutional amendments diminishing the rights or protections in the non-overridable sections from those amending the overridable sections. On the theory that the authors of the Constitution must have intended to signal some message about the relative importance of these two categories of rights and freedoms in the Charter, the Court could conceivably subject a constitutional amendment concerning the matters in the non-overridable sections to greater scrutiny than it applies to review one implicating the overridable sections.

IV. A FRAMEWORK FOR JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENT

The extraordinary complexity of the rules and practices for altering the text of the Constitution of Canada has made it arguably the world’s most difficult to amend. \footnote{See Albert, supra note 119.} The escalating, federalist and consultative structures of constitutional amendment entrenched in the Constitution Act, 1982 create intricate rules that reveal constraints rooted in both specificity and generality to which political actors must conform when they propose and execute formal constitutional change. Specific rules involve matters like the quantum of provincial agreement required for ratifying a constitutional amendment or the time limit within which ratification must occur, whereas the more general rules concern definitional matters about the “composition” of the Supreme Court or of “the method of selecting Senators,” both of which are matters of recent controversy. \footnote{See, e.g., Supreme Court Act Reference, supra note 200; Senate Reform Reference, supra note 7.} In the case of both specificity and generality in the rules of formal amendment, the Court has in some instances positioned itself to evaluate the constitutionality of a future constitutional amendment, and in others the constitutional text and political practice may leave the Court no other choice.

In this Part, I endeavor to create a framework for judicial review of future constitutional amendments. Drawing from the judicial review of constitutional amendments around the world, I propose a framework anchored in three major categories of possible unconstitutional constitutional amendment in Canada: procedural, substantive and exceptional\footnote{I have learned a great deal from Kemal Gözler’s study of unamendability, in which he divides judicial review of constitutional amendments into procedural and substantive categories. He does not, however, offer further differentiation between the two categories, nor does he consider the third category I suggest here. See Gözler, supra note 73, at 28-97.} the last of which is a more speculative form of unconstitutionality. As I explain in greater detail below, each of these three larger categories consists in turn of at least three subsidiary forms of unconstitutionality. The forms of procedural unconstitutionality include subject-rule mismatch, temporal violations and
processual irregularity. The forms of subject-matter unconstitutionality include unwritten unamendability, text-based unamendability, and the amendment-revision distinction. And the forms of exceptional unconstitutionality include statutory unconstitutionality, the recognition of convention, and unconstitutionality by implication. I will illustrate each of these with examples.

I wish to make three points before proceeding. First, these three major categories and nine subsidiary categories are intended to be illustrative, not exhaustive, of the bases upon which the Supreme Court of Canada might invalidate a constitutional amendment. Second, the distinction between process and substance is not as clear as we might wish or perceive it to be. Substantive restrictions of amendment are often entrenched in procedural terms, and vice-versa. 245 We should therefore be attentive to the difficulty of clearly distinguishing between the two. Third, the forms of exceptional unconstitutionality include examples that straddle the boundary separating procedural and substantive unconstitutionality, and indeed could fit under the category of substantive unconstitutionality. But their exceptional character—exceptional even in the context of the judgment to invalidate a constitutional amendment—compels me to highlight them in their own category, precisely to signal their speculative and exceptional character. Nonetheless, the framework I develop below may be useful to Canadian courts to evaluate how and when to engage in the extraordinary act of invalidating a constitutional amendment. The framework I propose is rooted in three sources: the Court’s existing case law, the evolved and evolving political context surrounding formal and informal amendment, and the text of the Constitution Act, 1982.

A. Procedural Unconstitutionality

A duly-passed constitutional amendment may be found lacking in the procedure by which it was adopted. It may, for instance, have failed to conform to the detailed sequence, thresholds, time-limits or values of procedural fairness reflected in the formal amendment rules in the Constitution Act, 1982. These kinds of unconstitutionality are procedural insofar as they derive from how an amendment comes to pass, not necessarily or exclusively what has been amended. In this Section, I illustrate three forms of procedural unconstitutionality that the Supreme Court might invoke to invalidate a successful constitutional amendment when it has been properly challenged.

1. Subject-Rule Mismatch

As is apparent from the escalating, federalist and consultative structure of formal amendment in Canada, which creates five formal amendment rules for use in relation only to specific constitutional subjects, these various procedures create a complex arrangement of rules, and their complexity raises the risk of incorrect application. Even the general procedure in Section 38 is subject to restrictions inasmuch as it must be used for six designated constitutional subjects over and above serving as the default multilateral amendment procedure for all those constitutional subjects that are not otherwise expressly assigned to another procedure. 246 The assignment of amendment rules to constitutional subjects is specific but not clear. Political actors are therefore susceptible to misapplication, either mistaken or intentional, of these five formal amendment rules. To the extent a misapplication results in successfully amending the Constitution, the amendment...

245 See Albert, supra note 74, at 193-94.
246 See Constitution Act, 1982, s. 42.
may be invalidated as procedurally unconstitutional as a result of a mismatch between the amendment rule deployed in the amendment, and the specific constitutional subject amended.

The Senate Reform Reference helps us understand the idea of procedural unconstitutionality as a result of subject-rule mismatch. Let us assume that, instead of referring its questions to the Supreme Court for an advisory opinion, the government of Canada had proceeded to pass through Parliament either the Senate Appointment Consultations Act or the Senate Reform Act, the two bills that were the subject of the second and third reference questions, respectively.247 The controversy concerned whether Parliament could enact either of these two bills using its general and residuary power under section 91 of the Constitution Act, 1867 to make laws for the peace, order and good government of Canada, or the federal unilateral amendment power in Section 44 of the Constitution Act, 1982, and thereby affect a constitutional amendment, or whether, as the Court ultimately concluded, the changes introduced by these two bills were of such significance that they required political actors to use the multilateral amendment power in Section 38, in which case the government would need to collaborate with the provinces.248 Had the government proceeded to engage the Section 44 power, it is likely that this would have been challenged as an unconstitutional use of this narrow amendment rule. The Court, in this case, could have invalidated the amendment as improperly authorized by the wrong amendment rule. The wrong rule would have been deployed to amend a subject for which the process was not suited.

Judicial review of an amendment on the basis of the procedures entrenched in the constitutional text is consistent with the separation of powers. Legislative and executive actors should not themselves determine whether they have used the correct amendment rule to amend the Constitution of Canada. This would effectively authorize them to check themselves, a self-policing power that is particularly problematic in the Canadian parliamentary system where a majority government faces no real barrier to its legislative program. Apart from the Senate—which today poses no real threat of impeding a majority government—and public opinion—which is admittedly a limit on political actors though not one whose resistance can be operationalized in Parliament—the judiciary is the only body that can effectively review legislative and executive action.

2. Temporal Violations

The same self-dealing concerns that support the Court reviewing an amendment for subject-rule agreement in the face of a constitutional challenge also support the Court reviewing an amendment for conformity with the temporal restrictions on constitutional amendment in the Constitution Act, 1982. There are four relevant temporal restrictions for our consideration. First, no amendment in connection with the default multilateral amendment procedure in Section 38 can become official before one year has elapsed, or after three years have expired, from the time of its initial proposal by resolution.249 Second, the one-year rule under Section 38 is subject to an exception: it does not apply where the legislative assembly of each province has at a previous time adopted a resolution assenting to or dissenting from the resolution.250 Third, an amendment under

---

247 See Senate Reform Reference, supra note 7, at para. 5.
248 Ibid. at paras. 68-70. The Court interpreted the contemplated change as covered by the discrete list in Section 42, for which the rule in Section 38 must be used. Ibid.
249 Constitution Act, 1982, s. 39(1)-(2).
250 Ibid. at s. 39(1).
Sections 38, 41, 42 or 43 need not have the support of the Senate if it fails to adopt an approval resolution within 180 days of its approval in the House of Commons. Fourth, the 180-day period for Senate ratification does not run when Parliament is prorogued or dissolved.

Where there is disagreement among political actors on whether a full year has elapsed, or three years have expired, or whether a previous provincial ratification is effective to reduce the full-year period, the Court could answer the question prior to or after an amendment’s ratification if raised properly in the context of a reference. The Court’s reference jurisdiction authorizes judicial consideration of the exercise of all parliamentary or provincial legislative powers, whether or not in the context of a particular bill. The Court could also resolve the question if raised as a constitutional challenge to a duly-passed constitutional amendment. If there is some question whether political actors have respected the temporal restrictions in any of the four cases, the Court could examine and evaluate the facts to make a determination as to, for instance, the time having elapsed since ratification, the previous adoption of a provincial resolution, the period of Senate inaction on a duly-passed amendment proposal or the proper way to count or not the tolling period in connection with prorogation or dissolution. The Court’s inquiry might in this narrow circumstance also involve whether Parliament had been properly prorogued or dissolved, though only to establish the condition precedent for this particular step in the constitutionally-prescribed sequence for making a constitutional amendment. Inactivating an amendment here would result from the Court’s enforcement of temporal limitations on constitutional amendment.

3. Processual Irregularity

Less concretely, though still conceivably, the Court could be asked to evaluate the constitutional adequacy of the actual process of voting to initiate, ratify or promulgate an amendment. Here, an amendment could be ruled procedurally unconstitutional as a result of a processual irregularity. Consider, for example, a claim that the initiating vote has been in some way coerced, or that the ratifying vote has occurred without fair advance notice to legislators such that, in the former case, the legislator voting to initiate has been compelled to vote contrary to his or her independent position and that, in the latter, the legislator eligible to vote has missed the ratifying vote. In either case, a constitutional challenge to an already-passed amendment on grounds of processual irregularity would require the Court to judge whether the vote had been so compromised as to justify invalidating the amendment altogether.

These and other claims of processual irregularity are much less text-bound than the subject-rule mismatch or temporal violations that could give the Court cause to invalidate an amendment. Determining the point at which persuasion becomes coercion for a legislator in the context of a

\[251\] _Ibid_. at s. 47(1).
\[252\] _Ibid_. at s. 47(2).
\[253\] See _Supreme Court Act_, R.S.C. 1985, c. S-26, at s. 53(1)(d) (conferring reference jurisdiction on matters relating to “the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised”).
\[254\] On this point, the Court’s inquiry should be limited to whether Parliament had been prorogued or dissolved legally as a matter of fact. The Court should not, nor indeed could it I believe, inquire into whether it was legitimate for the Governor General to dissolve or prorogue Parliament. This is not a matter for judicial oversight.
\[255\] In _Hogan_, the courts of Newfoundland rejected all of the arguments based on procedural irregularity. See _Hogan_, _supra_ note 10. This would not preclude the Supreme Court of Canada, however, from taking a different view.
constitutional amendment would be difficult for a judge, particularly given that logrolling is common in legislative practice and also in major constitutional reform. But judges commonly engage in difficult line-drawing exercises, and this would be no different. Moreover, where legal doctrine in other jurisdictions might prohibit the Court from reviewing a matter thought to raise a “political question,” the political question doctrine has been rejected in Canada, and therefore poses no bar to judicial review of controversies arising out of the political process. Similarly, it would be difficult to evaluate what constitutes fair notice to a legislator but judges could identify reasonable standards against which to measure a notice period alleged to be insufficient.

Other types of processual irregularity could arise where the voting itself involves non-legislators, which is not currently the case under Canada’s formal amendment rules. But where the vote were a sanctioned referendum, for example, the Court could also evaluate constitutional challenges as to voter suppression, exclusion or intimidation, as to the sufficiency of the duration of the voting period, as to the accessibility of voting locations and as to the availability of a ballot in both official languages, among other measures. In these and other instances of processual irregularity, the Court could invoke the values of procedural fairness to invalidate a constitutional amendment that had failed to meet the expectations of constitutional democracy. These matters are different from those the Court identified in the Secession Reference as within the exclusive purview of legislative and executive political actors, namely those “various legitimate constitutional interests” that may be reconciled only “through the give and take of political negotiations.” Processual irregularities are not negotiable in the sense that they can be affirmatively authorized, though it is possible to imagine a court retroactively excusing them as insignificant. They are instead properly seen as violations of the constitutional amendment process.

A more timely constitutional challenge to a processual irregularity could arise in connection with the recent moratorium on appointments to the Senate. On July 24, 2015, Prime Minister Stephen Harper declared that he would stop filling vacancies in the Senate, which at the time had 22 open seats in the 105-seat chamber. These vacancies have accumulated since the prime minister last made an appointment long ago in 2013. Notwithstanding the prime minister’s interest in insulating himself and his party from the legal controversies surrounding the

257 The strongest statement rejecting the political question in Canada appears in a concurrence. See Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441 at para. 104 (Wilson, J.).
258 Nonetheless, one should note that there is an emerging separation of powers principle in Canada based partly on parliamentary privilege and on the concern that courts should respect the autonomy of Parliament. See Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667, at para. 21.
259 In the Secession Reference, the Court stressed that “the results of a referendum have no direct role or legal effect in our constitutional scheme” but noted that “a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.” See Secession Reference, supra note 6, at para. 87. It therefore seems plausible that the Court might wish to ensure the integrity of the administration of a referendum even if the result of the vote did not have a legal effect.
260 Ibid. at para. 101.
Senate ahead of the federal election, he calculated that a moratorium would “force the provinces, over time, who as you know have been resistant to any reforms in most cases, to either come up with a plan of comprehensive reform or to conclude that the only way to deal with the status quo is abolition.”263 His strategy is to pressure the provinces to agree on a package of Senate reforms whether linked or not to broader constitutional reforms, or to eliminate the Senate by attrition.

We have in the past seen instances of constitutionally delegated powers falling into desuetude. Constitutional desuetude occurs where a textually entrenched provision loses its binding quality on political actors as a result of its conscious and sustained nonuse over time and its public repudiation by political actors.264 The desuetudinal provision remains in the constitutional text but a constitutional convention emerges against its use.265 In Canada, the powers of disallowance and reservation, both as to federal and provincial law, have arguably been informally repealed from the Constitution of Canada. None of the powers have been used for generations: the British powers of disallowance and reservation as to federal law were last used in 1873 and 1878, respectively; and the Canadian powers as to provincial law were last used in 1943 and 1961, respectively.266 The evolution of Canadian federalism has made it unthinkable to use any of them today.267 Yet all four powers remain entrenched in the constitutional text.

What the prime minister proposes to do with respect to the Senate raises the possibility of desuetude, both as to the prime ministerial power to nominate senators and as to the Senate itself. As a formal matter, senators are appointed by the Governor General, whom the Constitution states “shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate”.268 In practice, however, it is the prime minister who must nominate candidates for appointment by the Governor General. The prime minister has therefore placed a moratorium not on senate appointments but on senate nominations, although this will as a consequence entail a moratorium on senate appointments by the Governor General. This prime ministerial power to nominate senators could conceivably fall into desuetude over time if another political actor or choice mechanism arises to fill the void, as might have occurred had the Supreme Court authorized consultative elections to fill senatorial vacancies.269 The moratorium also raises the possibility of the desuetude of the Senate itself as an institutional arm of the Parliament of Canada. As vacancies continue to increase, the Senate draws nearer to becoming an empty chamber. Were that to happen, the Senate would exist in name only, stripped of its function as a legislative body, and Parliament would effectively become unicameral chamber. The question in both scenarios is whether desuetude is the constitutionally valid way to effect these changes.

There is a strong argument that both of these changes—both to the prime ministerial power to nominate senators and to the depletion of the Senate itself—amount to procedurally


265 Ibid. at 644-45.

266 Ibid at 658, 662

267 656-69

268 See Constitution Act, 1867, pt. IV, s. 24.

269 See Albert, supra note 42.
unconstitutional constitutional amendments because they raise processual irregularities. The Supreme Court of Canada spoke obliquely to both of these in its recent Senate Reform Reference. As to the former, the Court indicated that the “the method of selecting senators” refers to more than the formal senatorial appointment by the Governor General. Any change to the “method” must respect the multilateral amendment procedure in Section 38 if the prime minister is to longer exercise the power of senatorial nomination. As to the latter, the Court advised that the Constitution does not authorize the “indirect abolition of the Senate”. Insofar as the moratorium on filling vacancies could eventually lead to a zero-member Senate, the declining number of senators would compromise the work of the chamber and it would gradually alter the balance of legislative and federal powers in Canada. This kind of change, the Court suggested, cannot validly result from the prime minister’s refusal to nominate senatorial candidates because it would authorize the prime minister to circumvent the onerous yet constitutionally required unanimity procedure for abolishing the Senate. Both of these changes are therefore susceptible to constitutional challenges as procedurally unconstitutional constitutional amendments.

B. Subject-Matter Unconstitutionality

While procedural unconstitutionality involves how an amendment is made, substantive unconstitutionality concerns the subject-matter of the amendment, which is to say what in the Constitution is amended. On the theory of substantive unconstitutionality, an amendment may be invalidated where the content of the amendment is inconsistent with non-procedural constitutional values. These values may derive from the constitutional text, they may be rooted in the fundamental though unwritten rules of constitutionalism, or they may rely on the distinction between amendment and revision. In all three cases, which I illustrate below, judicial review of constitutional amendments raises significant challenges for constitutional democracy.

1. Unwritten Fundamental Values

The Supreme Court has positioned itself to invalidate a constitutional amendment that violates an unwritten constitutional principle of Canadian constitutional law. Although the Court has not yet directly declared its power to invalidate an amendment on these grounds, its declaration that certain constitutional amendments must respect certain unwritten constitutional principles suggests that it may ultimately be prepared to exercise this extraordinary power. As discussed above, the Court has identified a handful of unwritten constitutional principles—federalism, democracy, constitutionalism and the rule of law, and the protection of minorities—which negotiations in connection any amendment on provincial secession must respect. The question that arises is whether these unwritten constitutional principles govern only negotiations in connection with an amendments concerning secession or whether they apply more broadly. The secession of a province is admittedly a momentous episode in the life of any federal state, particularly one like Canada where the seceding province would be one of Canada’s founding partners. If these unwritten principles are understood as unwritten constraints on all amendments,

---

270 See Senate Reform Reference, supra note 7, at para. 65.
271 Ibid.
272 Ibid. at para. 102.
273 Ibid. at para. 110.
274 See supra Section III.B.1.
the Court could judge the validity of any future amendment against the standards they set—and what satisfies the standards would be a matter for judicial determination.

It is true, however, that the Court stressed in the Secession Reference that it is the role of elected representatives to negotiate the process of a provincial secession and that it is “not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so.” But the Court appears to have left itself some room to intervene where the questions are legal, not political. The Court was careful to distinguish that its role was limited only “to the extent that the questions are political.” But where the issues implicate “a legal component” there could be “serious legal repercussions,” and here there appears to be in the Court’s opinion an implication that courts could play some role, either advisory or supervisory or indeed enforcing, in a constitutional amendment on provincial secession. The dividing line between legal and political is unclear at best, and it is the Court that would ultimately draw it.

It should come as no surprise that the Court identified these four principles as constraints on future constitutional change. They are among the most important to constitutional democracy. Indeed, constitutional designers around the world have judged them similarly fundamental: each of the four principles is textually entrenched as formally unamendable in other constitutional states. For example, the Brazilian Constitution and the German Basic Law formally entrench federalism against amendment. Democracy is protected against amendment in the Constitutions of Cameroon, the Dominican Republic, and Equatorial Guinea. The rule of law is made unamendable in the Angolan and Czech Republic Constitutions. And the protection of rights is an unamendable guarantee in the Constitutions of Ecuador, Namibia, Portugal and Ukraine. The Court’s judgment that these four unwritten constitutional principles reflect important values in Canada is therefore consistent with broader global constitutional values.

We can conceptualize the effect of the Court’s opinion to constrain future constitutional change in this way as informally entrenching these unwritten constitutional principles. Whether the Court understood what it was doing as recognizing long-standing principles or entrenching them, those principles are nowhere written alongside the rules of formal amendment such that political actors were at the time of the Court’s opinion on notice of their obligation to abide by them. But today political actors are bound by these principles as they are interpreted by the Court. There is therefore very little functional difference between how these informally entrenched

---

275 Secession Reference, supra note 6, at para. 101.
276 Ibid.
277 Ibid. at para. 102.
278 Federalism is not a necessary feature of constitutional democracy but it is hard to disagree that the other three are.
279 Brazil Const., tit. IV, sec. VIII, subsec. II, art. 60 (1988); German Basic Law, tit. VII, art. 79(3) (1949).
280 Cameroon Const., pt. XI, art. 64 (1972).
284 Czech Republic Const., ch. I, art. 9(2) (1993).
286 Namibia Const., ch. 19, art. 131 (1990).
principles now operate in the Constitution of Canada and how the same principles operate in constitutional democracies where they are formally entrenched in the constitutional text. Judges in Canada, like their counterparts abroad, must still interpret them and identify their outer boundaries.

2. Non-Negotiable Founding Values

The Court might, as I have suggested above, invalidate a constitutional amendment on the basis of an unwritten fundamental principle. The Court might also invalidate an amendment on the basis of what I wish to identify as a non-negotiable founding value. These principles and values are contestable insofar as their entrenchment against amendment springs from neither constitutional design nor consent-based decision-making but rather from judicial interpretation. The principal difference between the two concerns their formal writtenness. The unwritten fundamental principles the Court has identified in the course of constitutional interpretation are not codified in the master-text constitution but non-negotiable founding values indeed are.

These non-negotiable founding values are not formally entrenched against amendment. They are accordingly unlike the many formally unamendable constitutional provisions in constitutions around the world.289 Non-negotiable founding values, as defined here, are entrenched ordinarily like all other freely amendable constitutional provisions, with no express protections against amendment. But what makes a non-negotiable founding value special is the Court’s interpretation in the course of litigation that a given provision is worthy of heightened status relative to others. The result is to transform an ordinary textual provision into a non-negotiable founding value with the capacity to disable another constitutional provision or to invalidate governmental action that would otherwise be permissible notwithstanding that founding value.

Prior to Potter,290 one might have suggested that Section 93 of the Constitution Act, 1987, is an example of an ordinarily entrenched constitutional provision that over time had been conferred special status as what I am identifying as a non-negotiable founding value.291 After all, Section 93, which delegated to the provinces jurisdiction over education and preserves denominational education rights as they existed at Confederation,292 was critical to the compromise negotiated between Ontario and Quebec at the time, a compromise without which the creation of Canada as we know it would have been unlikely.293 Section 93 was called the “Grundnorm, the basic premise” of the Constitution of Canada.294 The Court moreover recognized the importance of Section 93 in litigation, namely in Adler, where the Court rejected the claim that Section 93’s preferential preservation of denominational education rights for Protestant schools in Quebec and Roman-Catholic schools in Ontario to the exclusion of other religious traditions violated the freedoms of conscience and religion as well as the right to equality in Sections 2 and 15, respectively, of the Charter.295 For the Court, Section 93 was “the product of an historical

---

289 See supra Section II.B.
290 Potter, supra note 10.
291 Constitution Act, 1867, pt. VI, s. 93.
293 Ibid. at 878-79.
294 See Edward McWhinney, Quebec and the Constitution, 1960-1978 (Toronto: University of Toronto Press, 1979) at 11.
compromise which was a crucial step along the road leading to Confederation.\textsuperscript{296} Without this “‘solemn pact’, this ‘cardinal term’ of Union, there would have been no Confederation,” reasoned the Court.\textsuperscript{297} As a result, concluded the Court, Section 93 is “a child born of historical exigency” and therefore “does not represent a guarantee of fundamental freedoms.”\textsuperscript{298}

But Potter precludes that view for now. Potter upheld the validity of the Constitution Amendment, 1997 (Quebec), which provides that the denominational schools provisions of Section 93 no longer apply to Quebec. On the other hand, the denominational schools protections still apply in Ontario and they are legally subject to amendment through Section 43, though they may have today become constructively unamendable.\textsuperscript{299} One might also suggest that Section 133 of the Constitution Act, 1867,\textsuperscript{300} which protects the core equality of status and use of English and French languages in federal institutions, reflects a non-negotiable founding value that has over time become informally unamendable as a political matter, whether or not the rules of formal amendment authorize its amendment. As we have seen in connection with the Indian basic structure doctrine,\textsuperscript{301} courts do not always respect the written rules of formal amendment, and here the Court could conceivably resist an amendment through Section 41 that proposed to change by formal amendment the equality of status and use of Canada’s two official languages. The Court might recognize that this is a non-negotiable founding value that political actors cannot amend even though Part V appears to authorize it.

The special status of a constitutional provision like Section 133, or indeed of other any provision not formally entrenched against amendment but treated as special, might be a basis for the Court to invalidate an amendment that comes into conflict with it. In this way, a formally ordinary provision can become imbued with special meaning over time, even though it may not have been intended as a matter of constitutional design to be unamendable when it was written. This evolution of a constitutional provision—from ordinarily entrenched in the text and therefore freely amendable to informally entrenched against amendment yet not designated as such in the constitutional text—may have happened to the Japanese Constitution with respect to its Pacifism Clause, which commits Japan to “forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.”\textsuperscript{302} The Pacifism Clause, like Section 133, is not formally unamendable, but it may have become a superconstitutional norm that can no longer be amended without political actors facing substantial resistance from the public.\textsuperscript{303} Courts might point to these and other provisions as embodying the unamendable constitutional identity of a regime—an identity that cannot be changed in the normal course of amendment.\textsuperscript{304}

\begin{itemize}
\item \textsuperscript{296} \textit{Ibid.} at para. 29.
\item \textsuperscript{297} \textit{Ibid.}
\item \textsuperscript{298} \textit{Ibid.} at para. 30.
\item \textsuperscript{299} For a discussion of constructive unamendability, \textit{see} Albert, \textit{supra} note 74, at 194-208.
\item \textsuperscript{300} \textit{Constitution Act, 1867}, pt. IX, s. 133.
\item \textsuperscript{301} \textit{See supra} Section II.C.
\item \textsuperscript{302} Japan Const., ch. II, art. 9(1).
\item \textsuperscript{303} \textit{See} Richard Albert, “Amending Constitutional Amendment Rules” (forthcoming 2015) 13 Int’l J. Const. L. In Japan, Article 9 has achieved its special status as a result of its history and high public salience.
\item \textsuperscript{304} \textit{See} Gary Jacobsohn, \textit{Constitutional Identity} (Cambridge, MA: Harvard University Press, 2010) at 125 (suggesting that the Indian Supreme Court invokes the basic structure doctrine to protect constitutional identity).
\end{itemize}
3. Amendment-Revision Unamendability

A third basis upon which the Court could invalidate an amendment is the distinction between amendment and revision, which I have explained above. The Court could determine that a constitutional amendment, either one that is proposed or one that has already been enacted, will so fundamentally alter the Constitution of Canada that it cannot lawfully be achieved by a simple constitutional amendment. On this view, the change would amount to a constitutional revision that transforms for core framework of the Constitution and results in the creation of a new constitutional order—a change, the Court might say, that cannot be achieved by an amendment process reserved for changes that occur within the existing framework of the rules entrenched in the Constitution Act, 1982, but that must instead by validated by a higher form of authority.

The Court has not often addressed the distinction between amendment and revision. Where it has, it has been only by direct reference. In the Secession Reference, the Court implicitly rejected the argument that provincial secession cannot be achieved by constitutional amendment and instead requires revision. The Court acknowledged that a change as significant as a secession would of course “be profound” but ultimately the Court was “not persuaded” that secession could be constitutional only if it were authorized by something more than a constitutional amendment:

The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

There are three takeaways from the Court’s discussion of amendment and revision in the Secession Reference. First, constitutional changes that are “radical and extensive” or “profound” can be achieved using the formal amendment rules entrenched in the Constitution Act, 1982. Formal amendment can therefore be used to transform some significant part or feature of the Constitution, presumably provided it conforms to the exacting thresholds entrenched in the Constitution’s default multilateral or unanimity procedures. Second, according to the Court, the Constitution Act, 1982 may appear by its text to be a complete code for formal amendment but it is not. The Court recognizes that the text is silent as to important matters of constitutional change, particularly those that would result in changes “inconsistent with our current constitutional arrangements.” Third, the Court recognized that formal amendment is appropriate for a provincial secession, but

---

305 See supra Section II.C.1.
306 See Secession Reference, supra note 6, at para. 84.
it did not state as a definite matter that all other “radical and extensive” or “profound” changes could likewise be achieved by formal amendment. The Court was careful to insist that provincial secession, though transformative, may be accomplished by amendment, but it did not foreclose the possibility that other kinds of transformative changes would be foreclosed by amendment and would indeed require more exacting procedures consistent with the theory of revision.

The third point is the most important for our discussion of amendment and revision: the Court insisted on amendment for provincial secession but did not state that all other transformative changes could be achieved by amendment alone. This was the right answer, and indeed the only one that could keep the Secession Reference internally consistent. Had the Court advised that there can be no revision under the Constitution of Canada, this would have conflicted with the Court’s recognition of the four unwritten constitutional principles governing constitutional change. These four unwritten principles must govern negotiations in connection with a formal amendment on provincial secession and must presumably be respected also where other amendments are concerned. Where one or more is violated by an amendment, the consequence is twofold: that amendment is susceptible to invalidation by the Court; and the change the amendment seeks to achieve may still be achievable, though only through the higher lawmaking procedures of revision. What counts as higher lawmaking varies across jurisdictions; in some jurisdictions the Court has imposed them, in others political actors have chosen them. The point is that revision is generally a more involved process of formal constitutional change than the formal amendment process.

It is worth pondering the Court’s insistence that provincial secession may be achieved by formal amendment. A provincial secession by any province, let alone by one of Canada’s original founding partners, would most assuredly alter the balance and framework of Canadian federalism, not to mention the territorial integrity of the country, incidentally something that many constitutional democracies make unamendable. Yet the Court concluded that we should treat a secession simply as an amendable matter, not a revisable one. This decision was almost certainly driven more by constitutional politics than constitutional law. Recognizing that provincial secession in Canada is a very real looming possibility, admittedly with oscillating degrees of likelihood, the Court was reluctant, and with good reason, to define secession as subject only to revision, because successful secession would have had to entail a new constitution. And for a country whose modern constitutional renewal efforts have met with momentous failure, the prospects are dim for successfully negotiating a new constitution after a successful secession vote.

C. Exceptional Forms of Unconstitutionality

Procedural and subject-matter unconstitutionality are the conventional forms of unconstitutional constitutional amendment where its theory and doctrine have taken root. Yet constitutional politics in Canada suggest that exceptional forms of unconstitutionality could emerge here in the future if and when the Court ever faces a problematic amendment and ultimately takes the extraordinary action of actually invalidating it. Three of these exceptional forms of
unconstitutionality derive respectively from statutory law, the recognition of constitutional conventions, and unamendability by textual implication. I introduce each of these below.

1. Statutory Unconstitutionality

The Court could interpret the Regional Veto Law, as well as the provincial and territorial referenda and plebiscite laws discussed above, as a source of constitutional constraint on future amendments, over and above the obvious political constraints they pose. As a political matter, these two sets of laws now impose significant obstructions to major formal amendment in Canada because they require political actors to do more than is already required of them—and Canada’s amendment process is known to be quite onerous to begin with. These additional hurdles certainly complicate the task of consolidating political agreement for certain kinds of amendment, but they may raise two separate constitutional concerns: first, they may compel the unconstitutionality of a constitutional amendment; and second, the additional hurdles may themselves be unconstitutional. The second is more probable, though it is difficult to know at this stage what the Court would do.

The first question raised by these parliamentary and provincial statutes is whether the Court would declare unconstitutional a constitutional amendment that had failed to conform to them. The question asks whether the Court would do it, not whether it could, since I take the position for the narrow purposes of this inquiry that the Court now possesses the power to invalidate an amendment. To evaluate the question, let us imagine a major constitutional amendment has been proposed under the default multilateral amendment procedure by a Cabinet minister who has not secured the consent of the various regions as required by the Regional Veto Law. Let us further imagine that the proposal secures the consent of both houses of Parliament, and then proceeds to ratification by the requisite seven provinces representing at least fifty percent of the total provincial population, as required by Section 38, though importantly without having been submitted to a provincial or territorial referendal exercise as required by law in or more of the ratifying provinces.

The Court could conceivably interpret these statutes as binding upon political actors in the amendment process. The Court might well conclude that the Regional Veto Law is a lawful statutory supplement to the formal process of constitutional amendment, and insofar as the law is internally applicable upon the Cabinet ministers in the course of their decision-making and negotiation on behalf of the Government of Canada, it remains enforceable as long as it is in force. The same would be true of the provincial and territorial laws on referenda and plebiscites: these are lawful statutory supplements that are internally applicable within the province or territory, and the larger constitutional amendment process provides the framework within which those laws are operationalized. On this view, the formal constitutional amendment process would include those parliamentary and provincial laws, and therefore any violation of their rules would be subject to the Court’s declaration of their incompatibility both with the statutory law itself and the larger framework of constitutional amendment, which would include both Constitution and these laws.

There is another option: assuming the amendment satisfied the requirements of Part V, the Court could issue a declaration that the amendment is valid notwithstanding the failure of political actors to comply with these statutory supplements. As a result, the amendment would survive the

---

311 See supra Section III.C.1.
constitutional challenge, and the Regional Veto Law as well as the provincial and territorial laws on referenda and plebiscites would likewise survive though they would be deemed inapplicable.

My own view is that the Court should invalidate these laws as unconstitutional. Although neither the Regional Veto Law nor the provincial or territorial statutes possesses constitutional status, each inappropriately seeks to approximate constitutional status by adding constraints to the process of formal constitutional amendment—constraints that these laws intend political actors to treat as equally authoritative as the textual constitutional constraints in the Constitution. The efficacy of these statutory constraints derives from their perception as binding on political actors engaged in the amendment process. The problem is that their regulation of the constitutional amendment process is an effort to incorporate them into the Constitution when in reality they are only simple statutory enactments. The binding quality of statutory law is of course secondary to constitutional law, whose supremacy is acknowledged in the Constitution Act, 1982:

\[\text{The Constitution of Canada is the supreme law of Canada, and any law that is} \]
\[\text{inconsistent with the provisions of the Constitution is, to the extent of the} \]
\[\text{inconsistency, of no force or effect.}^{312}\]

Here, the Regional Veto Law as well as the provincial and territorial referenda and plebiscite laws are inconsistent with the formal amendment rules insofar as they impose additional requirements for amendment. That inconsistency should be sufficient reason to invalidate them if they are challenged as unconstitutional. This reading, of course, requires us to interpret the Constitution Act, 1982, as creating a complete code for formal amendment, with an exception for unwritten constitutional principles, which by their very nature as \textit{unwritten} are not textually entrenched.

The unwritten constitutional principle of the rule of law also provides a justification for invalidating these statutory restrictions on constitutional amendment. The rule of law reflects democratic values of transparency, predictability and notice about the rules that govern official conduct.\(^ {313}\) As the repository for Canada’s supreme body of formal amendment rules, the Constitution Act, 1982 puts political actors on notice about what is expected for a formal amendment, and those requirements have been validated by the extraordinary procedure of constitutional adoption. The rule of law requires further requirements for constitutional amendment to be added only by similarly constitution-level procedures, not by simple statutory enactment. The Court conveyed a similar concern in the Senate Reform Reference when it underscored the improper constitution-changing effect of the statutorily-created consultative elections, which would have arguably circumvented the amendment process by a simple law.\(^ {314}\)

\section*{2. The Recognition of Convention}

The Court would unlikely rule an amendment unconstitutional where the amendment failed to respect a constitutional convention. But it is possible that the Court would recognize the existence of a constitutional convention in the amendment process, in which case the amendment would not be unconstitutional but political actors would likely feel a political if not legal duty to

---

\(^{312}\) Constitution Act, 1982, pt. VII, s. 52(1).

\(^{313}\) See Albert, \textit{supra} note 44.

\(^{314}\) See Senate Reform Reference, \textit{supra} note 7, at para. 62.
pass the amendment in conformity with that constitutional convention. This is consistent with the outcome in the 1981 *Patriation Reference*, where the Court found constitutional amendment proposals constitutional as a matter of law but improper as a matter of constitutional convention. The Court’s recognition of a convention on a particular process or subject of constitutional amendment would exert significant pressure on political actors to respect the convention.

Above, I discussed one example of a practice that may have matured into a constitutional convention: perhaps, I suggested, a convention has arisen requiring national referendal consultation for major constitutional amendment. Another example of a possible constitutional convention pursuant to which political actors could make a constitutional claim concerns the role of the territories in the formal amendment process.

Recall the Charlottetown referendum. It was authorized by a parliamentary law, and in turn executed by an official proclamation. The proclamation directed voters in both the Yukon Territory and the Northwest Territories, the only two territories at the time, to participate in the referendum. And indeed voters cast their ballots at high participation rates of 70.0 percent and 70.4 percent, respectively, in both territories. Yet the formal amendment rules in the *Constitution Act, 1982*, do not authorize the territories to participate in any of the multilateral amendment procedures. Nor do they even make mention of the territories. The multilateral amendment rule in Section 38 actually emphasizes the exclusion of the territories from the relevant population when it declares that ratifying an amendment proposal requires the approval of “legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty percent of the population of all the provinces.” The territories are similarly excluded from the unanimity procedures—they require only provincial ratification.

Were a future major constitutional amendment under Sections 38 or 41 to exclude the territories from the process, for instance in participating in a national referendal, the question could arise whether that amendment is constitutional. The argument in favour of constitutional validity and legality would rely on the definitiveness of the constitutional text, which makes no reference to the territories in the formal amendment process. But the argument for unconstitutionality from a conventional standpoint would be rooted in the precedent of territorial participation in the Charlottetown referendum. The argument, convincing or not, would be that the Yukon Territory and Northwestern Territories should be entitled to participate now in the ratification of the major constitutional amendment in light of their participation in the past. And Nunavut, the latest...

---

315 See *Patriation Reference*, supra note 5.
316 See supra Section III.C.2.
321 Ibid. at s. 41.
322 The governments of the Yukon and the Northwest Territories unsuccessfully challenged their exclusion from the process that lead to the Meech Lake Accord. See *Canada (Prime Minister) v. Penikett*, (1987) 45 D.L.R. (4th) 108 (B.C.C.A), leave to appeal to SCC refused, [1988] 1 S.C.R. xii); *Sibbeston v. Northwest Territories (Attorney General)*, [1988] 2 WWR 501 (N.W.T. C.A.). But both cases were heard before the Charlottetown referendum. Today,
territory admitted into Canada, would have a claim as strong as theirs in light of its equal status as a territory. The Court would have to evaluate whether the Charlottetown practice had matured into a constitutional convention. The Court would be unlikely to rule the amendment constitutionally invalid on the basis of this constitutional convention but it could draw from precedent and refer to the Jennings test as it did in the Patriation Reference to ultimately recognize the convention, which would in turn likely compel political actors to include the territories now as they had before.

3. Unconstitutionality by Implication

A third exceptional form of unconstitutional constitutional amendment may be described as unconstitutionality by implication. Where the architecture of the constitutional text suggests that certain constitutional principles or provisions demand greater constitutional protection, the Court could invalidate a constitutional amendment that violates one of these principles or provisions. Above, I suggested that the design of the legislative override could suggest that non-overridable rights and freedoms are higher in constitutional significance relative to others. The Court could perhaps subject to greater scrutiny a constitutional amendment concerning these specially protected non-overridable rights and freedoms, for instance the right to vote, which by constitutional design is not susceptible to the legislative override. This is an admittedly speculative form of unconstitutionality but the structure of the text raises it as an exceptional possibility.

V. Conclusion

We must separate two questions when considering the theory and doctrine of unconstitutional constitutional amendment in Canada. The first is descriptive and asks whether the Supreme Court has the authority as a matter of law to invalidate a constitutional amendment made using the formal amendment rules entrenched in the Constitution Act, 1982. The second is normative, and inquires more profoundly whether the Court should have this extraordinary power. In this Article, I have addressed the descriptive question by explaining and illustrating how the Court has in some instances positioned itself to evaluate the constitutionality of a future amendment and also how, in other instances, political practice and the constitutional text may have constrained the Court to be prepared to engage in judicial review of constitutional amendments.

The answer to the second question is contestable. If the evidence from other constitutional states is any indication, the debate on the legitimacy of judicial review of constitutional amendment in Canada will be similarly divided between those who argue for a majoritarian or countermajoritarian understanding of constitutional democracy, the former adopting a formal reading of the constitution and the latter preferring a more substantive view. As the question of an unconstitutional constitutional amendment gains interest in the legal academy and among political actors anticipating or eventually confronting a live challenge to a constitutional

---

323 See Patriation Reference, supra note 5, at 888.
324 See supra Section III.C.3.
325 See Charter, s. 3.
326 See Albert, supra note 62, at 664-66.
amendment, the broad strokes of the larger global debate are likely to reproduce themselves in Canada, though refashioned to reflect the peculiarities of Canadian constitutional law.

The key question on the theory and doctrine of unconstitutional constitutional amendment is whether Part V of the Constitution Act, 1982, is a complete code for formal amendment in Canada. My own view is that if political actors manage to satisfy the extraordinary hurdles in Part V, the Supreme Court should in all but the rarest circumstances recognize the amendment as constitutionally valid if a challenge is brought against it. I therefore agree with Warren Newman’s interpretation of Part V, specifically that “it is a triumph of constitutionalism and the rule of law that our Constitution sets out a series of written provisions that govern, in relatively precise terms, the set of circumstances in which the formal terms of the Constitution may be amended.” We cannot be certain, however, that the Court will in the future interpret Part V as a complete code; as I have shown, the Court has on occasion layered new unwritten requirements onto the already-onerous rules of formal amendment in the course of interpreting the Constitution. The foundation, it seems, has been lain for the Court to declare that a duly-passed formal amendment violates either a stated or as-yet unstated principle of Canadian constitutionalism.

I have suggested a modest framework for the Supreme Court of Canada to review the constitutionality of a constitutional amendment, a position in which the Court may find itself in the years ahead. There are three major categories of possible unconstitutional constitutional amendment under the Constitution of Canada, and each comprises at least three subsidiary categories. An amendment, I have shown, may be procedurally unconstitutional insofar as it reflects a subject-rule mismatch, a processual irregularity or a temporal violation. I have also shown that an amendment may be substantively unconstitutional as a result of unwritten unamendability, text-based unamendability or the enforcement of the amendment-revision distinction. Finally, I have also suggested that an amendment may be ruled unconstitutional under one of three exceptional forms of unconstitutionality, namely statutory unconstitutionality, the judicial recognition of a constitutional convention, and unamendability by implication. I have stressed that these three categories and nine total subsidiary forms are illustrative, not exhaustive, of the bases upon which the Court could rule a constitutional amendment unconstitutional.

When the time comes for the Supreme Court of Canada to rule on a live challenge to a constitutional amendment, the Court will have to weigh the relative importance of textually entrenched constitutional law, unwritten constitutional norms and the inherited traditions of constitutional principles as it determines whether or to invalidate a constitutional amendment, on what constitutional grounds, and how to justify it as a political matter. In this Article, I have sought to make two contributions to the study of constitutional amendment in Canada. First, I have suggested a way to understand one of the great ironies of constitutional law, namely how in certain

327 In a previous Article, I argued that there should be an inverse relationship between formal amendment difficulty and the judicial power to review the constitutionality of a constitutional amendment. I suggested that where formal amendment rules are difficult to satisfy, courts should be more hesitant to invalidate an amendment that has satisfied those extraordinary amendment thresholds than in cases where formal amendment rules are much easier to satisfy, in which case courts can serve as a useful check against simple majoritarian abuses of the constitution. See Albert, supra note 1, at 45-46. In Canada, the formal amendment rules for major constitutional amendments affecting federal and provincial interests are among the most difficult in the world and may therefore warrant judicial deference.


[47]
circumstances a constitutional amendment could be ruled unconstitutional. Second, I have
developed an outline for an analytical framework the Court could use to explain its reasoning for
invalidating a constitutional amendment, should that conclusion be compelled by the law, facts
and politics of the case, and should the Court deem it necessary to take this extraordinary action.
There remain refinements to make to this framework, but it is, I hope, a useful start to the project.