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Single-Subject Constitutional Amendments

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SINGLE-SUBJECT CONSTITUTIONAL AMENDMENTS

RICHARD ALBERT[†]

Abstract

What makes a constitution difficult to amend? The answer varies across jurisdictions. In the United States, for example, the threshold problem is getting two-thirds of Congress to initiate an amendment—a virtually impossibility in our present day given that Congress has a hard enough time agreeing by a simple majority to pass a simple law. In Australia and Switzerland, it is largely the combination of subnational approval and referendal ratification that complicates matters. In Canada—the subject of this paper—constitutional amendment difficulty derives from similar challenges associated with initiation and ratification but perhaps even more from the use of omnibus amendment bills that combine the good with the bad and give political actors as much a reason to vote in favour as to vote against. In this paper prepared for a symposium on “Rewriting the Canadian Constitution,” I suggest that amending the Constitution of Canada could become easier under a new single-subject rule that prohibits omnibus amendment bills but permits multiple single-amendment bills only if voted on separately and differentiated by subject-matter. Imposing a single-subject rule for constitutional amendments in Canada is likely to make the Constitution much more flexible in some important ways but perhaps much more rigid in others.

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INTRODUCTION—THE MOST DIFFICULT CONSTITUTION TO AMEND?

In the leading study of constitutional rigidity, Donald Lutz deliberately excludes Canada from his 32-country sample.¹ In a footnote, he explains why: “the problem,” he writes, “lies in determining what has constitutional status.”² In other words, Lutz has trouble identifying what counts in Canada as *constitutional* as opposed to *ordinary* law. There are many reasons for Lutz uncertainty about the Constitution: its self-consciously partially codified and uncoded nature; the mid-stream entrenchment of the country’s first comprehensive amending formula in 1982, over a century after the creation of Confederation; and the question whether any unwritten constitutional norm has ever been altered by statute or amendment. Notwithstanding these conceptual challenges to measuring the precise quantum of formal amendment difficulty in Canada, modern history has taught us that amendments in the mold of the Meech Lake or Charlottetown Accords are doomed to fail, making the Canadian Constitution virtually unamendable for large-scale reforms.³

Stasis need not be the fate of the Constitution of Canada, and of course it remains in constant evolution through constitutional interpretation and political practice.⁴ And although major formal reforms have in the past failed but they might well succeed in the future if political actors use a new approach to how they propose constitutional amendments. From Patriation through the Meech Lake and Charlottetown Accords, political actors have taken to packaging their proposed alterations to the Canadian Constitution as an omnibus amendment bill that merges all manner of changes into one single constitutional amendment. There are advantages to this strategy: it makes possible enormous constitutional transformations that improve democratic procedures and strengthen rights; it allows many if not all constituencies to get something they demand; and it avoids the risk inherent in incrementalist sequencing that relies on the continuing good faith of political actors to make good on promises to address substantial problems in a piecemeal fashion. Yet there is great peril in this strategy: an omnibus amendment bill is a house of cards built on what may be a weak foundation. Pulling one card from its place destroys the entire edifice. The more there is to vote against in a package, the less likely it is to make it through the veto gates that line the way toward the successful ratification of a constitutional amendment in Canada.

In this paper, I suggest that the amending formula should be amended to limit future constitutional amendments to a single-subject rule. In contrast to an omnibus amendment bill that packages many amendments together as one amendment—especially where those changes are unrelated to each other except insofar as they all concern the Canadian Constitution—a single-subject rule would prevent the use of an omnibus bill for constitutional amendment and would instead require political actors to propose individual amendments that focus on one subject alone. Under this new rule, political actors would be compelled to propose amendments embracing only one subject and to consider every single amendment on its own merits, with a distinguishable vote on each proposed change. This new single-subject rule would be inserted into Part V of the *Constitution Act, 1982* and would require that “no amendment shall embrace more than one subject, which shall be

¹ Donald S. Lutz, *Principles of Constitutional Design* (Princeton: Princeton University Press, 2006) at 170.

² *Ibid* 179 n 16.

³ See Richard Albert, “The Conventions of Constitutional Amendment in Canada” (2016) 53 Osgoode Hall L J 399, at 438-39.

⁴ See Allan C. Hutchinson, “Constitutional Change and Constitutional Amendment: A Canadian Conundrum” in Xenophon Contiades, ed., *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abington, UK: Routledge 2013) 51 at 57.

expressed in its title.” This new rule would prohibit omnibus amendment bills but it would nonetheless permit amending actors to vote on multiple amendment bills at the same time on the condition that each amendment bill were differentiated by subject-matter and voted on separately.

This change to Part V of the *Constitution Act, 1982* would not be without collateral consequence. Although it could make the Constitution much more flexible in some important ways, it could perhaps make it much more rigid in others, namely in the inability to comprehensive constitutional reforms. But transformative constitutional change is not without its problems, especially in our constitutional culture of evolutionary rather than revolutionary change. On this front, then, the moderating effect that a single-subject rule would bring could be both positive and consistent with the way the Canadian Constitution has evolved by accretion rather than convulsion. The more important consequence of amending the amending formula to entrench a single-subject rule for constitutional amendment implicates the role of courts: the battleground in constitutional amendment would ever after be whether a proposed amendment concerns one or more subjects. Political actors would have to rely on courts to interpret whether an amendment indeed focuses on only one subject or whether it violates the single-subject prohibition. This new judicial role in policing the single-subject rule could be worth the cost of a more readily amendable constitution.

I. THE RIGIDITY OF THE LEGAL CONSTITUTION

Recent failures in major constitutional reform have created the impression that it is impossible to amend the Canadian Constitution.⁵ This is a false intuition, however, belied by the reality that the Canadian Constitution has been amended nearly one dozen times since Patriation.⁶ Yet there is a kernel of truth in the myth of the impossibility of constitutional amendment in Canada: it is virtually impossible to imagine political actors somehow reaching agreement today on a package of major constitutional reforms amounting in scope to the failed Meech Lake or Charlottetown Accords. The reason why concerns the difficulty of amending Canada’s legal and political constitutions. The difficulty of amending the legal constitution in Canada—the *legal constitution* referring to those formally enacted and judicially enforceable parts of the Constitution—derives from the codified rules of constitutional amendment and the uncodified limitations on their use.⁷

⁵ See Adam Dodek, “Amending the Constitution: The Real Question Before the Supreme Court” (March/April 2014) *Policy Magazine* 35 at 36, online: <http://policymagazine.ca/pdf/6/articles/PolicyMagazineMarch-April-Dodek.pdf> (observing that “no one has dared to try” to amend the constitution because “the failed attempts of Meech Lake and Charlottetown serve as a powerful deterrent to those who would ponder the possibility embarking on constitutional change”).

⁶ See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2014, release 1) vol 1 ch 1 at 1-7–1-8, n 32.

⁷ Jamie Cameron develops the novel argument that there exists an additional source of formal amendment difficulty in Canada: “the rigidities associated with unresolved legitimacy deficits” that have accumulated and gone unresolved since Confederation. See Jamie Cameron, “Legality, Legitimacy and Constitutional Amendment in Canada” in Richard Albert & David R. Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2017) 98 at 122.

A. Part V of the *Constitution Act, 1982*

There are five different paths to amend the legal constitution in Canada. Each amendment procedure is codified in the *Constitution Act, 1982* and applies to different provisions or principles of the Constitution in an escalating structure of constitutional amendment.⁸ This structure is *escalating* because each procedure is more onerous than the other, the degree of amendment difficulty rising according to the importance of the amendable matter. These five procedures are something of a window into the internal hierarchy of the Constitution; we can describe the more deeply entrenched provisions and principles as more fundamental to the operation of the Constitution or alternatively to its core identity than the more loosely entrenched ones.

For example, the least onerous amendment procedure authorizes a province to amend its own constitution by simple majority vote in its provincial assembly.⁹ A province can use this unilateral provincial procedure to amend any matter related to provincial government that is not otherwise entrenched under another amendment procedure.¹⁰ Parliament possesses an analogously limited power under the unilateral federal procedure, which authorizes narrow amendments to matters of federal executive and legislative government, subject to any overlap on matters of government that are themselves entrenched under a more onerous amendment procedure.¹¹ The regional amendment procedure is more difficult than either of these two: it requires the agreement of both houses of Parliament and each of the assemblies of one or more regionally-concentrated provinces affected by the change.¹² This third procedure applies to regional matters involving “one or more, but not all, provinces,” for instance a constitutional amendment involving provincial boundaries.¹³

The next two are the default multilateral and the unanimity procedures. These are the ones that have combined to thwart the Meech Lake and Charlottetown Accords. The default multilateral amendment procedure—what is known as the general amending procedure—requires the approval of both houses of Parliament and at least seven provinces representing at least half of the total provincial population.¹⁴ It is both a default procedure and a mandatory one: it is the default procedure for any provision or principle not otherwise entrenched under one of the other four procedures; and it is the mandatory procedure for a handful of specifically enumerated matters, including the creation of new provinces as well as Senate vacancies, powers and representation.¹⁵ This is a tough threshold to meet but it is not the hardest. The most onerous amendment procedure requires the unanimous agreement of both houses of Parliament and each provincial assembly.¹⁶ This unanimity procedure must be used for any amendment to Canada’s relationship with the monarchy, the entire design of the formal amendment rules, provincial representation in the House of Commons and Senate, the use of English and French and the composition of the Supreme

⁸ See *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, Part V [*Constitution Act, 1982*].

⁹ *Ibid*, s 45.

¹⁰ *Ibid*.

¹¹ *Ibid*, s 44.

¹² *Ibid*, s 43.

¹³ *Ibid*.

¹⁴ *Ibid*, s 38.

¹⁵ *Ibid*, s 42.

¹⁶ *Ibid*, s 41.

Court.¹⁷ Each of the four federal procedures reflects an ascending scale of difficulty whose main variable is the provincial consent required: from none, to some, to supermajority and to unanimity.

Despite the difficulties in measuring amendment difficulty,¹⁸ scholars have tried to measure the rigidity of the two most difficult amendment procedures in the Canadian Constitution. One study ranks Canada (7.0) behind only Belgium (9.5), Bolivia and the United States (9.0), the Netherlands (8.5) and Australia, Denmark and Japan (8.0).¹⁹ Another ranks Canada in a group of seven countries (Argentina, Australia, Canada, Germany, Japan, Korea, Switzerland and the United States) with the most rigid constitutions.²⁰ Still another has used the metrics of a study that excluded Canada from its sample and found that, when applied to Canada, those metrics suggest that Canada's Constitution may be second most difficult constitution to amend in the world.²¹ A clear pattern emerges: the Constitution of Canada is at or near the very top in terms of rigidity.

B. Uncodified Amendment Rules

As difficult as these codified procedures make it to amend the most important features of the Canadian Constitution, there are uncodified restrictions on their use that make the Constitution even more difficult to amend than a plain reading of its formal amendment rules suggests. These uncodified restrictions have their origins in judicial interpretation as well as statutes passed by Parliament and provincial assemblies. They are uncodified because they are found outside the four corners of the codified constitution. Yet they are nonetheless legal because political actors could seek to enforce them in court—unlike the political restrictions I discuss in the next Part.

Begin with the provinces and territories.²² Many of them have passed laws that require the jurisdiction to hold either a binding or advisory referendum before the assembly votes on an amendment on which its assent is needed. Both Alberta and British Columbia have adopted laws requiring a binding provincial referendum before their respective assemblies vote to ratify or reject an amendment.²³ Some provinces—and territories as well—have adopted laws that authorize but do not require binding referendums before a vote on whether to ratify an amendment.²⁴ Provinces and territories have also adopted laws that authorize but do not require advisory referendums

¹⁷ *Ibid.* The last three matters amendable using the unanimity procedure must be distinguished from related but lesser matters amendable by another one of the five procedures. *Ibid.*

¹⁸ See Tom Ginsburg & James Melton, “Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty” (2015) 13 Int'l J Constitutional L 686.

¹⁹ See Astrid Lorenz, “How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives” (2005) 17 J Theoretical Politics 339 at 358-59.

²⁰ See Arend Lijphart, *Patterns of Democracy* (New Haven: Yale University Press, 2012) at 208.

²¹ See Richard Albert, “The Difficulty of Constitutional Amendment in Canada” (2015) 53 Alberta L Rev 85 at 93-100.

²² Note that the territories have no formal role in the two most onerous amendment procedures yet, as I will discuss below, they may have a conventional claim to future participation in major constitutional amendments. See *infra* Section II.A.

²³ See *Constitutional Referendum Act*, RSA 2000, c C-25, ss 2(1), 4; *Constitutional Amendment Approval Act*, RSBC 1996, c 67, s 1; *Referendum Act*, RSBC 1996, c 400, s 4.

²⁴ See *Referendum Act*, SNB 2011, c 23, ss 12–13 (establishing quorum requirement for vote to bind government); *The Referendum and Plebiscite Act*, SS 1990-91, c R-8.01, s 4 (establishing quorum and threshold requirements for vote to bind government); *Public Government Act*, SY 1992, c-10, s 7 (authorizing provincial assembly to decide ex ante whether referendum vote will bind government).

before voting to ratify or to reject a constitutional amendment.²⁵ These laws make it harder to amend the Constitution because they add additional actors whose consent is required for a change.

Parliament has likewise passed a major statute that complicates any future constitutional amendment attempted under the default multilateral amendment procedure. The *Regional Veto Law*, passed in 1996, prohibits federal cabinet ministers from proposing an amendment under that procedure without first securing the consent of a majority of provinces, where that majority must include British Columbia, Ontario, Quebec, and at least two provinces each from the Atlantic and Prairie regions whose population amounts to at least half of the regional population.²⁶ This law operates as a prior restraint on an amendment proposal; rather than proposing an amendment that might over time gather the necessary support after public debate, now the federal government must front-load the process by getting the consent of provinces before even proposing an amendment.

The Supreme Court of Canada has also exacerbated Canada's constitutional rigidity. The Constitution's formal amendment rules are clear in their plain text: amendments to "the composition of the Supreme Court of Canada" may be made only using the unanimity procedure.²⁷ Other major amendments to the Supreme Court may be made using the default multilateral amendment procedure.²⁸ But the Court basically amended the Constitution when it added its own "essential features" to the list of items that are amendable only with recourse to the unanimity procedure. In the *Supreme Court Act Reference*, the Court held that "the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence"²⁹ may be amended only using the unanimity procedure.³⁰

The *Secession Reference* is another example: the Court held that any amendment to formalize the separation of a province from Canada must respect the duty to negotiate and five "underlying constitutional principles," namely federalism, democracy, constitutionalism, the rule of law, and respect for minority rights.³¹ The two references are similar insofar as the Court imposed new restrictions on constitutional amendment—restrictions that are nowhere identified in the codified Constitution—and more importantly the Court cast the new restrictions in broad, open-textured terms that will require elaboration by the Court itself in the event of a constitutional challenge. The point is not that the Court was right or wrong in how it interpreted the Constitution; it is much less provocatively that the Court made difficult amendment rules even more difficult in these two cases.

²⁵ See e.g. *Consolidation of Plebiscite Act*, RSNWT 19888, c P-8, s 5; *Elections and Plebiscites Act*, SNWT 2006, c 15, s 48; *La Loi sur la consultation populaire*, LRQ 2000, c C-64.1, s 7; *Plebiscites Act*, RSPEI 1988, c P-10, s 1. See also *Elections Act*, SNL 1992, c E-3.1, s 218 (authorizing non-binding plebiscite on federal amendment).

²⁶ *An Act Respecting Constitutional Amendments*, SC 1996, c 1 [*Regional Veto Law*].

²⁷ *Constitution Act, 1982*, *supra* note 8, s 41(d).

²⁸ *Ibid*, s 42(d).

²⁹ *Reference re Supreme Court Act, ss 5 and 6*, [2014] 1 SCR 433 at para 94 [*Supreme Court Act Reference*]. Warren Newman explored the Court's constitutional status—and the possibility that the Supreme Court Act might not be amendable by a simple statute—five years prior to the *Supreme Court Act Reference*. See Warren J Newman, "The Constitutional Status of the Supreme Court of Canada" (2009) 47 Sup Ct L Rev (2d) 429.

³⁰ *Ibid*, paras 90-105.

³¹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*].

II. THE RIGIDITY OF THE POLITICAL CONSTITUTION

As difficult as it is to satisfy the legal requirements to amend the Constitution of Canada, there are also political requirements for constitutional amendment. These are not formally enacted nor are they ordinarily enforced by courts. Political requirements in constitutional amendment are instead the judicially unenforceable practices and conventions that inform and sometimes govern the conduct of political actors. They are not codified in the Constitution but they may perhaps have constitution-level effect, namely in the case of political practices that have matured into judicially recognizable constitutional conventions of constitutional amendment.

A. The Charlottetown Precedent

There are two significant political precedents that complicate amendments to Canada's legal Constitution. Both emerged from the failed Charlottetown Accord in 1992. The first is the use of a national referendum—formally advisory but in reality functionally binding—in the course of the process of ratifying a major constitutional amendment. And the second is the involvement of territories in the ratification process, even though Part V makes no mention of their participation. If either of these is treated as precedential the next time a major constitutional amendment is proposed, this will raise the degree of difficulty for amending the Constitution of Canada.

The formal rules of constitutional amendment in Canada do not require any form of direct popular participation in any part of initiating, proposing or ratifying an amendment.³² And yet political actors made the choice to put the Charlottetown Accord to a referendum. They felt compelled to use the referendum in light of justified complaints about the close-door process of elite executive federalism that had been used to design and negotiate the Meech Lake Accord, which had failed just a couple of years before the Charlottetown Accord was put to a vote.³³ The referendum was authorized by a new *Referendum Act*, passed by Parliament to allow a referendum “on any question relating to the Constitution of Canada”.³⁴ The law was clear that any outcome would be advisory, not legally binding. But the political reality at the time and likely still today is such that political actors would treat the result as an instruction on how to proceed: a convincing yes vote would make political actors follow suit the same way that a convincing no vote would preclude any further action on the amendment. Canadians rejected the Charlottetown Accord by almost 10 percentage points, 54.3 to 45.7 percent, putting an end to the amendment effort.³⁵

Not only do the rules of formal amendment make no mention of a referendum but they do not give territories a role in constitutional amendment. And yet both territories at the time—the Northwest Territories and Yukon—voted in the national referendum. As it happens, one territory voted to approve the Accord and the other to reject.³⁶ But both occupied a role equal to that of the provinces despite there being no constitutional requirement to count the territories in the process.

³² See Procedure for Amending Constitution of Canada, Part V of the *Constitution Act, 1982*.

³³ There were of course also serious criticisms about the content of the Meech Lake Accord. See Peter J Meekison, “The Meech Lake Accord: The End of the Beginning—or the Beginning of the End” (1990) 1 *Const Forum* 13 at 14.

³⁴ Referendum Act, s 3(1), SC 1992, c 30.

³⁵ See *The 1992 Federal Referendum—A Challenge Met: Report of the Chief Electoral Officer of Canada*, Part 2, at 58, January 17, 1994, online: <http://www.elections.ca/res/rep/off/1992/1992_Referendum_Part_2_E.pdf>.

³⁶ *Ibid.*

Like the choice to put the Charlottetown Accord to a referendum, the choice to give the territories a vote was driven not by legal obligation but by what were seen as justifiable political imperatives.

It is unclear whether one or the other amounts to a constitutional convention. Were the question to reach the Court, the justices would likely again use the Jennings test to identify whether or not a convention exists—a test the Supreme Court used in the *Patriation Reference*.³⁷ The test consists of three requirements for taking judicial notice of the existence of a convention:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.³⁸

We could well construct an argument in defense of either or both precedents having matured into a constitutional convention. Yet the right answer seems to be that we quite simply will not know whether a convention exists until political actors in the future face a decision on whether to hold a referendum in connection with a major constitutional amendment. The Court can of course evaluate the question for itself as it did in the *Patriation Reference* but its opinion will be advisory not binding, and it will be unable to enforce its judgment since for now conventions in Canada are enforceable only in the political arena not in the courts of law. But the larger point for our purposes is that if political actors were to treat these two Charlottetown precedents as conventionally binding, this would make amending the Constitution even harder than it is today—and these aggravating conditions would derive from Canada's political constitution, not its legal constitution.

B. Omnibus Amendment Packages

The political practice that perhaps most complicates constitutional amendment in Canada is the choice to propose major constitutional reforms as an omnibus package of amendments. The 1987 Meech Lake and 1992 Charlottetown Accords each proposed multiple alterations to the Constitution, and in both cases the proposals were bundled together in one enormous constitutional amendment. The inspiration for these omnibus amendment packages was the 1981 Patriation package, which introduced the *Charter of Rights and Freedoms*, entrenched a fully domestic set of formal amendment rules, consolidated the many parts of the Constitution, and ended the United Kingdom's legal authority in Canada, though it did keep the ceremonial trappings of the monarchy.

The Meech Lake and Charlottetown Accords sought to make momentous changes of their own. The principal purpose of the Meech Lake Accord was to reconcile Quebec with the rest of Canada after Patriation left many in Quebec with misgivings about both the agreement and the way it had been negotiated and ultimately finalized. The Accord was designed to address Quebec's five conditions for accepting the *Constitution Act, 1982*.³⁹ These changes would have been formalized as amendments to both the *Constitution Act, 1867* and the *Constitution Act, 1982*. The

³⁷ *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753, 888 [*Patriation Reference*].

³⁸ Ivor Jennings, *The Law and the Constitution* (London, UK: University of London Press, 5th ed. 1959) at 136.

³⁹ See Peter W Hogg, *Meech Lake Constitutional Accord Annotated* (Carswell, 1988) at 3-4.

Accord proposed, for instance, to constitutionalize a declaration that “Quebec constitutes within Canada a distinct society,”⁴⁰ to change the method of senatorial selection to give provinces an important role in the choice,⁴¹ to give provinces some control over immigration,⁴² to constitutionalize the Supreme Court,⁴³ and to require the prime minister to convene a conference of first ministers at least once per year.⁴⁴ The Meech Lake Accord also proposed to amend the formal amendment rules themselves.⁴⁵ These were some of the major features of the Accord.

The Charlottetown Accord was just as extensive in the changes it sought to make. The Accord proposed once again to recognize the distinctiveness of Quebec,⁴⁶ yet it also proposed to entrench a “Canada Clause” that would recognize the values that bind Canadians across country.⁴⁷ The Accord would have also recognized Aboriginal rights,⁴⁸ clarified and in some ways reorganized the federal distribution of powers,⁴⁹ made significant changes to the Senate and the House of Commons as well as to the Supreme Court,⁵⁰ brought additional protections for linguistic rights,⁵¹ and it too would have amended the rules of formal amendment.⁵² The Accord moreover would have entrenched a requirement of an annual conference of first ministers.⁵³ Just like the Meech Lake Accord, then, the Charlottetown Accord proposed a series of substantial amendments.

Both packages were patterned after Patriation—many changes were built into one amendment—but there is an important difference between Patriation on the one hand and the Meech Lake and Charlottetown Accords on the other: the method of ratification. Patriation was an agreement among elites with no direct involvement from voters, nor was the agreement agreed to by parliamentarians. It was instead an agreement among the Government of Canada and the governments of nine of the ten provinces, Quebec being the only province to refuse its assent.⁵⁴ The packages involved in Meech Lake and Charlottetown were to be ratified with the involvement of voters and parliamentarians; the Meech Lake Accord was to be ratified in votes of the provincial assemblies and the Charlottetown Accord also in provincial votes after the advisory referendum.

The method of ratification is the predicate for why the Meech Lake and Charlottetown Accords were doomed almost as soon as they were bundled as omnibus amendment packages. The method of ratification raised three problems: the problem of veto gates, the problem of incommensurability and the problem of comprehensiveness. Unlike at Patriation where there were only a small number of 11 major decisionmakers to convince—and even still the assent of all 11

⁴⁰ *Meech Lake Accord*, at Schedule s 1.

⁴¹ *Ibid* at Schedule s 2.

⁴² *Ibid* at Schedule s 3.

⁴³ *Ibid* at Schedule s 6.

⁴⁴ *Ibid* at Schedule s 8.

⁴⁵ *Ibid* at Schedule s 9.

⁴⁶ *Charlottetown Accord*, at IA1.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at IA2, IV.

⁴⁹ *Ibid* at IB, III.

⁵⁰ *Ibid* at IIA-C.

⁵¹ *Ibid* at IA3.

⁵² *Ibid* at IV.

⁵³ *Ibid* at IID.

⁵⁴ The agreement was formalized as a statute of the Parliament of the United Kingdom. See *Canada Act 1982*, 1982 c 11.

was not required—here in Meech and Charlottetown the decisionmakers were multiplied many times over and presented many more veto opportunities to kill the reform efforts. The bigger problem, though, was that some of various proposals within the same amendment package were in tension with each other in the sense that some groups certainly were pleased with the gains promised to them but they opposed some of the concessions offered to others.⁵⁵ As Louis Massicotte has explained, there was a logic behind the omnibus strategy in constitutional reform:

Documents like the Victoria Charter, the final patriation deal, the Meech Lake and Charlottetown Accords were all based on the assumption that nobody would be satisfied by each facet of the deal if considered in isolation, but that we should try to include in the package a little something for everybody, so as to generate a minimal consensus, if not genuine enthusiasm for the whole package.⁵⁶

Voting in favour of the reforms therefore meant taking the bitter with the sweet, which is not out of the ordinary in the normal course of legislative logrolling. The difference here was that a concession given to one group undermined the victory sought by another group. A third problem was a function of the comprehensiveness of the reform packages. Almost every important part of the Constitution was in some way touched by the reform proposals. The sheer volume of proposed changes itself was a significant problem—and the cause of the defeat of both reform packages—because it was not hard to find something to oppose. With few if any groups fully satisfied with what Canada would look like after the implementation of an Accord, most saw better reason to oppose the reforms than to depart from the known but nonetheless imperfect status quo.

III. A SINGLE-SUBJECT RULE FOR CONSTITUTIONAL AMENDMENT

There may be a way out of our constitutional amendment gridlock. A single-subject rule for constitutional amendment would prevent the use of omnibus bills for amendments and would instead require political actors to propose individual amendments that focus on one subject alone. This new single-subject rule would compel amending actors to consider every single amendment on its own merits, with a distinguishable vote on each proposed change. No longer would amendments be bundled together in a package of changes unrelated to each other except insofar as they all concern the Canadian Constitution. We would know clearly where each amending actor stands on the amendment proposal. Although omnibus amendment bills would be prohibited, amending actors could still vote on multiple amendment bills at the same time on the condition that each amendment bill were differentiated by subject-matter and voted on separately. This new single-subject rule would be inserted into Part V of the *Constitution Act, 1982* and would require that “no amendment shall embrace more than one subject, which shall be expressed in its title.”

A. The Single-Subject Rule

The debate on the use and abuse of omnibus bills is not new in Canada. As early as 1923, Hansard recorded objections to the *Act respecting the Construction of the Canadian National*

⁵⁵ Richard Johnston, “An Inverted Logroll: The Charlottetown Accord and the Referendum” (1993) 26 Pol Sci & Pol 43 at 43.

⁵⁶ Louis Massicotte, “Omnibus Bills in Theory and Practice” (2013) 36 Can Parl Rev 13 at 15.

Railway Lines, which proposed to build 29 branch lines.⁵⁷ Parliamentarians suggested that the bill should be reintroduced as separate bills for each line; and indeed in the next session the government did just that.⁵⁸ More recently, the Chrétien government made use of omnibus budget bills that grew from 63 pages in 1994 to 380 in 2003; the Martin government's 2005 budget counted 450 pages.⁵⁹ By 2010, the Harper government had proposed an 880-page omnibus budget bill.⁶⁰ This practice of cramming disparate items into one bill has been decried as an “affront to parliamentary democracy”⁶¹ and as a device that “subvert and evade the normal principles of parliamentary review of legislation.”⁶² Omnibus bills may of course expedite voting and implementation but there is a strong case that they undermine our overarching values of democracy and accountability insofar as they do not allow parliamentarians to vote for or against specific items within them.

Taking a larger view of legislative practice, one can appreciate the purpose of the single-subject rule. It is partly intended to prevent log-rolling, which occurs when legislators occupying separate minority blocks combine their own proposals as different parts of one bill in order to consolidate their separate minority votes into a working majority to pass the mega-bill whose individual parts might not have otherwise attracted majority support if voted on separately.⁶³ The single-subject rule also prevents political actors from attaching “riders” to a popular bill in order to ensure the adoption of the rider without considered judgment on it alone but on the strength of the larger bill in which it is placed.⁶⁴ The rule also simplifies the complicated legislative process: it requires debate on individual legislative proposals on their own merits and this generates a more informed and direct debate on the stakes involved in approving the measure.⁶⁵ The rule therefore has a democratic pedigree insofar as it serves the public interests of accessibility to legislative business, information on what representatives do, and accountability for how representatives vote.

B. Design and Implementation Challenges

Discontinuing the use of omnibus bills is a topic of current debate, and it may well happen. In its 2015 electoral platform, the Liberal Party pledged to “bring an end to this undemocratic practice.”⁶⁶ If the practice is undemocratic in one case surely it must be in others. There is little

⁵⁷ Michel Bédard, *Omnibus Bills: Frequently Asked Questions*, Library of Parliament, Legal and Legislative Affairs Division, Publication No 2012-79-E, October 1, 2012, at 2.

⁵⁸ *Ibid.*

⁵⁹ Eugene Lang, “Omnibus Budget Legislation Hits a New Low”, Canada2020, October 29, 2012, online: <http://canada2020.ca/omnibus-budget-legislation-hits-a-new-low> (last accessed October 1, 2017).

⁶⁰ Editorial, “Another Budget, Another Contemptuous Tory Omnibus Bill”, *The Globe and Mail*, May 12, 2015, online: <https://beta.theglobeandmail.com/globe-debate/editorials/another-budget-another-contemptuous-tory-omnibus-bill/article24404300> (last accessed October 1, 2017).

⁶¹ Adam Dodek, “Can the Liberals Resist Omnibus Bills?”, *The Globe and Mail*, Apr 4, 2016, online: <https://beta.theglobeandmail.com/opinion/a-bold-brave-way-to-fix-omnibus-bills/article29498159/?ref=http://www.theglobeandmail.com&> (last accessed Oct 1, 2017).

⁶² C.E.S. Franks, “Omnibus Bills Subvert our Legislative Process”, *The Globe and Mail*, July 14, 2010, online: <https://www.theglobeandmail.com/opinion/omnibus-bills-subvert-our-legislative-process/article1387088/?arc404=true> (last accessed Oct 1, 2017).

⁶³ Millard H. Ruud, “No Law Shall Embrace More Than One Subject” (1958) 42 *Minn L Rev* 389 at 391.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Liberal Party of Canada, *Real Change: A New Plan for a Strong Middle Class* (2015) at 30. Of course, promises can be hard to keep, as the current Liberal Government has itself shown with a number of broken promises. See Lorrie Goldstein, “10 Key Promises Trudeau has Broken Since Becoming PM”, *Toronto Star*, Mar 25, 2017, online:

that distinguishes an omnibus legislative bill from an omnibus amendment bill. The principal point of distinction—that one targets ordinary law and the other constitutional law—makes the case even stronger in the case of constitutional amendment since these bills are intended to change the land’s highest law, and if anything should attract exacting scrutiny it is an alteration to the Constitution.

There is reason to believe that only omnibus amendment bills could ever lead to successful constitutional reform in Canada. For example, the idea of a “Triple E” Senate—making the Senate elected, equal and effective—was crucial to western Canada’s support for the Charlottetown package but this reform was not acceptable to either Ontario or Quebec without the west’s agreement to making other changes that Ontario and Quebec wanted but that the west might not.⁶⁷ And so this trade led to other trades, which in turn led to trades involving other parties and interests, and by the end of negotiations the Charlottetown package was full of compromises that could not stand on their own. Only when cobbled together in an unsteady state could the entire package have had any chance at approval. But even then the prospects for ratification were far from reassuring.

The better view may be that comprehensive constitutional reform on this scale might for now and quite possibly forever be impossible in Canada. Michael Lusztiq has theorized that Canada’s various “mega-constitutional orientations” are inherently irreconcilable, the consequence being that major amendment efforts are doomed to failure.⁶⁸ He identifies four conflicting mega-constitutional orientations—pan-Canadian, Quebec, Western and minoritarian—that give a different answer to the question where sovereign lies.⁶⁹ Three pairs of answers are possible, according to Lusztiq: with individuals or collectivities; if with collectivities, with territorial ones or nonterritorial ones, and if with territorial collectivities, with symmetrical or asymmetrical arrangements?⁷⁰ In light of these competing visions of sovereignty in Canada, Lusztiq concludes that the modern political imperative for mass input and legitimization in major constitutional reforms like the Meech Lake and Charlottetown Accords does not bode well for the successful ratification of amendment packages in a deeply divided consociationalist system like ours.⁷¹

Rather than pursuing major constitutional reforms on the comprehensive scale of the Meech Lake or Charlottetown Accords, a more realistic objective is to seek incremental changes constrained by a single-subject rule. Amending actors could then tailor amendment bills to address specific problems one item at a time in a piecemeal fashion, and require votes on each. Amending actors would be expected to declare themselves on each proposed change on its own merits. To be sure, the single-subject rule would not solve the problem of irreconcilability that Lusztiq identifies; if Lusztiq is right, that problem will never disappear. The single-subject rule would instead contemplate an altogether different path that circumvents this problem. The new path of a single-subject rule for constitutional amendment would have the anticipated effect of moderating reforms from the comprehensive kind we saw in the Meech Lake and Charlottetown Accords to more

<http://www.torontosun.com/2017/03/25/10-key-promises-trudeau-has-broken-since-becoming-pm> (last accessed Oct 1, 2017).

⁶⁷ See Dominique Leydet, “Compromise and Public Debate in Processes of Constitutional Reform: The Canadian Case” (2004) 43 Soc Sci Info 233 at 246-47.

⁶⁸ Michael Lusztiq, “Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail” (1994) 27 Can J Pol Sci 747.

⁶⁹ *Ibid* at 752.

⁷⁰ *Ibid* at 753-54.

⁷¹ *Ibid* at 770.

targeted changes that do not involve the complex web of interconnected and unconnected changes that have failed in the past. Even if the single-subject rule did not in the end yield amendments with greater success than is possible today with omnibus amendment bills, the single-subject rule would have the benefit of requiring amending actors to vote yes or no on each discrete amendment.

The single-subject rule would moreover neutralize the familiar boogeyman that political actors often invoke to end discussions on constitutional reform before they even begin: the problem of “re-opening” the Constitution. It is an effective deterrent to threaten that constitutional talks would put everything on the negotiating table, with nothing assured of surviving negotiations on a package of constitutional reforms. Where the choice is either the status quo or a bundle of changes unknown in their content or consequence, the prudent decision is to opt for the familiar present arrangements, however imperfect. The single-subject rule would obviate the fear of wholesale constitutional overhaul by taking off the table as a possibility permissible under law.

Yet the almost-certain consequence of adopting a single-subject rule for constitutional amendment would involve the judiciary: the Supreme Court would take on an even bigger role in managing the process of constitutional reform.⁷² The Court is already integrally involved today in constitutional amendment when it evaluates whether a amendment would be constitutional even before it is proposed, as we saw in the *Senate Reform Reference*.⁷³ But with the single-subject rule, the Court would now be called upon using the reference procedure to determine whether a given amendment conforms to the requirement that it concern only a “single subject”. We have seen state courts in the United States exercise the judicial review power to determine what constitutes one subject for purposes of amendment, using standards like “germaneness” and “common purpose” to test whether a package of amendments relates to a single subject.⁷⁴ We have even seen courts apply the severability doctrine to excise parts of bills deemed unrelated to the central subject⁷⁵—a problematic choice that courts would do best to avoid if confronted with it.⁷⁶ Potentially, then, the single-subject rule would have implications far beyond the amending actors alone.

CONCLUSION—THE DEMOCRATIC VALUES OF CONSTITUTIONAL AMENDMENT

For a country without the present capacity to make major constitutional amendments, Canada is performing spectacularly well in a variety of quality of life rankings that are no doubt more important. Canada ranks among the world’s top ten countries on the United Nation’s Human Development Index, which aggregates outcomes for life expectancy, education and gross national

⁷² For a discussion of the Court’s current role in managing the process of constitutional amendment in Canada, see Richard Albert, “The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada” (2015) 41 *Queen’s LJ* 143 at 167-76.

⁷³ See *Reference re Senate Reform*, [2014] 1 *SCR* 704 [“Senate Reform Reference”].

⁷⁴ For a useful overview of how courts interpret the single-subject rule in state courts, see Rachael Downey et al, “A Survey of the Single Subject Rule as Applied to Statewide Initiatives” (2004) 13 *J Contemp Leg Issues* 579 at 628.

⁷⁵ See Stanley H. Friedelbaum, “Initiative and Referendum: The Trials of Direct Democracy” (2007) 70 *Alb L Rev* 1003 at 1021-22; Stephanie Hoffer & Travis McDade, “Of Disunity and Logrolling: Ohio’s One-Subject Rule and the Very Evils It Was Designed to Prevent” (2004) 51 *Clev St L Rev* 557 at 563-67; see generally Daniel H Lowenstein, “California Initiatives and the Single-Subject Rule” (1983) 30 *UCLA L Rev* 936 (examining single-subject rule in California courts and proposing a standard to bring coherence to its application).

⁷⁶ Michael D Gilbert, “Single Subject Rules and the Legislative Process” (2006) 67 *U Pitt L Rev* 803 at 867-69.

income.⁷⁷ The country ranks sixth on the globe in *The Economist's* Democracy Index, a measure of the integrity of governance, democratic outcomes, civil rights and political culture.⁷⁸ And Canada ranks also sixth in the World Happiness Report, a global ranking of happiness.⁷⁹ So perhaps it matters little or not at all that Canadians cannot today amend our Constitution.

Do we even need a formal amendment process? After all, we have a highly regarded, trusted and capable judiciary, led by the Supreme Court of Canada, that can change our Constitution by interpretation where needed in order to keep it reflective of the times.⁸⁰ The reality of informal amendment by judicial interpretation is ever more present since the 2014 *Senate Reform* and *Supreme Court Act References*, which, taken together lead us to the incontrovertible conclusion that the Court now possesses the immense power to determine whether, how and by whom the Constitution of Canada can be amended, even where the amendment concerns the Court itself.⁸¹

Yet there is something special about the collective act of formally amending a constitution, whether it is done directly by referendum, as is the case relatively frequently in Ireland and Switzerland, or indirectly through representative institutions, as our own constitution requires. However constitutional democracies design their formal amendment rules—and they exist in all but a handful of world's codified constitutions⁸²—formal amendment rules serve important functions. They provide a roadmap for amending actors to alter the constitutional text,⁸³ and they distinguish constitutional from ordinary law.⁸⁴ More importantly they serve fundamental democratic values of participation, deliberation and ownership. At their best they promote deliberation about constitutional meaning,⁸⁵ they channel popular will into institutional dialogue,⁸⁶ and they formalize an important right of citizens in a democracy—to amend their constitution.⁸⁷

⁷⁷ United Nations Development Program, *Human Development Report 2016: Human Development for Everyone* (New York, NY: United Nations Development Program, 2016) at 198.

⁷⁸ The Economist Intelligence Unit, *Democracy Index 2016: Revenge of the "Deplorables"* (2017) at 7.

⁷⁹ John F Helliwell et al, eds, *World Happiness Report 2016* (New York: Sustainable Development Solutions Network, 2016) at 20.

⁸⁰ The reality of informal amendment by judicial interpretation is not without its critics. See eg, Dennis Baker & Mark D Jarvis, "The End of Informal Constitutional Change in Canada?" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: Toronto University Press, 2016) at 185; Dale Gibson, "Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution" (1992) 55 L & Contemp Probs 261.

⁸¹ See Richard Albert, "The Most Powerful Court in the World? Constitutional Amendment in Canada After the Senate Reform and Supreme Court Act References", paper prepared for conference on the Sesquicentennial at the Asper Center, University of Toronto Faculty of Law; see also Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada" (2015) 60 McGill LJ 883 at 903 (suggesting that the *Senate Reform Reference* "may have the effect of chilling future attempts at constitutional change or, at the very least, increasing contestation and future legal challenges to reform efforts").

⁸² See Francesco Giovannoni, "Amendment Rules in Constitutions" (2003) 115 Pub. Choice 37 at 37.

⁸³ Rosalind Dixon & Richard Holden, "Constitutional Amendment Rules: The Denominator Problem" in Tom Ginsburg, ed., *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012) 195 at 195.

⁸⁴ András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999) at 39-40.

⁸⁵ Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change" (1995) 64 Fordham L Rev 535 at 571.

⁸⁶ Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process" (1983) 97 Harv L Rev 386 at 431.

⁸⁷ Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001) at 174.

It is not enough that the Constitution is freely amendable using only three of the five procedures entrenched in the *Constitution Act, 1982* because these procedures—the unilateral provincial procedure, the unilateral federal procedure and the regional procedure—are useable only to amend a small part of the Constitution of Canada in relation to what is amendable using the other two currently unuseable ones. The multilateral default procedure and the unanimity procedure are today blocked because they are virtually impossible to use. The reasons why derive of course from the legal rigidity of the Constitution—the initiation requirements, ratification thresholds and the time limits associated with them. But the larger reason why neither procedure is useable may well derive from non-legal sources of the Constitution’s rigidity, the most important being the choice made to package both the Meech Lake and Charlottetown Accords as omnibus amendment bills. When we speak today of major constitutional amendments, we look back to those spectacular amendment failures and assume that the same fate awaits us for future large-scale amendment efforts. But this need not necessarily continue to be the outcome.

I have suggested that major constitutional amendment may become possible if we adopt a single-subject rule for constitutional amendment. This new single-subject rule would be inserted into Part V of the *Constitution Act, 1982* and would require that “no amendment shall embrace more than one subject, which shall be expressed in its title.” This single-subject rule would prevent the use of omnibus bills for constitutional amendments. It would require amending actors to propose individual amendments that concern one subject alone. It would moreover demand that every single amendment be considered on its own merits. Amending actors could no longer bundle amendments in an enormous package of changes unrelated to each other except insofar as they all concern the Canadian Constitution. Importantly, the prohibition on omnibus amendment bills would not prevent amending actors from proposing and voting on multiple amendment bills at the same time—on the condition that each amendment bill were differentiated by subject-matter and voted on separately. This single-subject rule could well lead us to an affirmative answer to the question that we have answered in the negative for over a generation: will we ever find a way to finally make a much needed major constitutional amendment to the Constitution of Canada?