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The Conventions of Constitutional Amendment in Canada

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The Conventions of Constitutional Amendment in Canada

Abstract

Commentators have suggested that the unsuccessful national referendum to ratify the 1992 Charlottetown Accord created an expectation of popular participation requiring national referendal consultation in major reforms to the Constitution of Canada. In this article, I inquire whether federal political actors are bound by a constitutional convention of national referendal consultation for formal amendments to the basic structure of the Constitution of Canada. Drawing from the Supreme Court of Canada's Patriation Reference, I suggest that we cannot know whether federal political actors are bound by such a convention until they are confronted with the question whether or not to hold a national referendum in connection with a change to the Constitution's basic structure. I conclude by suggesting, perhaps counterintuitively, that layering a conventional requirement of national referendal consultation onto the existing requirements for formal amendments to the Constitution's basic structure could well undermine democracy, despite our common association of referenda with democratic legitimacy. I suggest instead that a national referendum should be an alternative path, not an additional step, in constitutional amendment.

Keywords

Constitutional Law

The Conventions of Constitutional Amendment in Canada

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Commentators have suggested that the unsuccessful national referendum to ratify the 1992 Charlottetown Accord created an expectation of popular participation requiring national referendal consultation in major reforms to the Constitution of Canada. In this article, I inquire whether federal political actors are bound by a constitutional convention of national referendal consultation for formal amendments to the basic structure of the Constitution of Canada. Drawing from the Supreme Court of Canada's *Patriation Reference*, I suggest that we cannot know whether federal political actors are bound by such a convention until they are confronted with the question whether or not to hold a national referendum in connection with a change to the Constitution's basic structure. I conclude by suggesting, perhaps counterintuitively, that layering a conventional requirement of national referendal consultation onto the existing requirements for formal amendments to the Constitution's basic structure could well undermine democracy, despite our common association of

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referenda with democratic legitimacy. I suggest instead that a national referendum should be an alternative path, not an additional step, in constitutional amendment.

Des observateurs ont suggéré que l'échec du référendum national proposé pour ratifier en 1992 l'Accord de Charlottetown a créé l'attente d'une participation populaire exigeant la tenue de consultations référendaires nationales pour chaque réforme majeure de la Constitution canadienne. Dans cet article, je me demande si les politiciens fédéraux sont liés par une convention constitutionnelle exigeant la tenue de consultations référendaires nationales pour amender formellement la structure fondamentale de la Constitution canadienne. M'inspirant du renvoi de la Cour suprême relatif au rapatriement de la Constitution canadienne, j'avance qu'il sera impossible de savoir si les politiciens fédéraux sont liés par une telle convention jusqu'au moment où ils seront confrontés à la question de savoir s'il sera nécessaire de tenir un référendum national pour amender la structure fondamentale de la Constitution. Je conclus en suggérant, peut-être contre-intuitivement que, malgré l'association que nous faisons communément entre référendums et légitimité démocratique, superposer l'exigence conventionnelle d'une consultation référendaire nationale aux exigences qui accompagnent déjà tout amendement formel de la structure fondamentale de la Constitution pourrait bien miner la démocratie. Je suggère au contraire qu'un référendum national devrait constituer une voie alternative plutôt qu'une étape additionnelle aux amendements constitutionnels.

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CODIFIED CONSTITUTIONS COMMONLY ENTRENCH formal amendment rules authorizing alterations to their text.¹ These rules, however, are susceptible to informal changes, as I have shown is the case in Canada, where the Constitution's escalating structure of formal amendment has been modified by judicial interpretation, federal and provincial law, and political practice.² Partly codified

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1. See Francesco Giovannoni, "Amendment Rules in Constitutions" (2003) 115:1-2 Pub Choice 37 at 37.
 2. Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 McGill LJ 673 at 689-92 [Albert, "Amendment by Stealth"].

and uncodified, the Constitution of Canada is peculiarly susceptible to informal changes that arise when new constitutional conventions fill or create a void in the constitutional text, or when they refine or substitute parts of the text.³ Two examples in Canada are the twin conventions that now exist against using the powers of reservation and disallowance—powers that nonetheless remain textually entrenched.⁴ The susceptibility of the Constitution of Canada to informal changes like these raises an important question: Could the Constitution's *formal* amendment rules be changed informally by a constitutional convention?

For much of Canadian history, with only a few exceptions,⁵ the power to formally amend the codified Constitution of Canada⁶ belonged to the Parliament of the United Kingdom.⁷ Canada finally acquired the power to formally amend its own constitution more than a century after Confederation, when the *Constitution Act, 1982* created an escalating structure of formal amendment that was fully and independently deployable by Canadian political actors.⁸ It took roughly fifteen unsuccessful attempts over the course of six decades to reach agreement on the intricate design of these rules.⁹

Soon after the coming into force of the *Constitution Act, 1982*, Canada's new formal amendment rules became the subject of major constitutional reform

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3. Richard Albert, "How Unwritten Constitutional Norms Change Written Constitutions" (2015) 38:2 *Dublin U LJ* 387 [Albert, "Unwritten Constitutional Norms"].
 4. See Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62:3 *Am J Comp L* 641 at 660-69 [Albert, "Constitutional Desuetude"].
 5. See Richard Albert, "Amending Constitutional Amendment Rules" (2015) 13:3 *Int'l J Const L* 655 at 673 [Albert, "Constitutional Amendment Rules"] (identifying exceptions to the general rule that only the Imperial Parliament could amend the Constitution).
 6. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].
 7. See Richard S Kay, "Constitutional Chronology" (2000) 13:1 *Ratio Juris* 31 at 42.
 8. See *Constitution Act, 1982*, pt V, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
 9. See James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communication Group, 1996) at 25-63. It is unclear, however, whether the rules were intended to be permanent. See Richard H Leach, "Implications for Federalism of the Reformed Constitution of Canada" (1982) 45:4 *Law & Contemp Probs* 149 at 156. The *Constitution Act, 1982* instructed Canada's first ministers to meet within fifteen years in an intergovernmental conference to review the Constitution's new amendment rules. See *Constitution Act, 1982*, *supra* note 8, s 49. Canada's first ministers met on 20-21 June 1996 to review the Constitution's formal amendment rules. It is reported that the discussion on this subject "was of very short duration and there was no decision on how further discussion might be pursued on this matter." See Canadian Intergovernmental Conference Secretariat, *First Ministers' Conferences: 1906-2004* (Ottawa: CICS, 2004) at 103, online: <www.scics.gc.ca/CMFiles/fmp_e.pdf>.

efforts in the 1987 Meech Lake Accord¹⁰ and 1992 Charlottetown Accord.¹¹ Both efforts failed, the former due in part to a time limitation for legislative ratification¹² and the latter as a result of outright public repudiation.¹³ In an interesting twist, however, these formal amendment failures may have set into motion an informal constitutional change to Canada's formal amendment rules.¹⁴ More specifically, political actors may have informally altered the textually entrenched rules of constitutional change by incorporating into the tradition of Canada's uncodified constitution a conventional requirement of national referendal consultation—an unwritten rule that is by definition altogether absent from the rules textually prescribed in the *Constitution Act, 1982* for formally amending the Constitution of Canada.¹⁵

Commentators have suggested that the unsuccessful national referendum held in connection with the Charlottetown Accord has created an expectation of popular participation requiring national referendal consultation in future major constitutional reforms.¹⁶ The argument seems compelling: In 1992, the federal government chose to require a national consultative referendum as part of the amendment process to ratify the Charlottetown Accord, and it must do so again in the future because the Charlottetown referendum has created a precedent that binds federal actors.¹⁷ But the argument, however compelling it may appear, must be tested. The question, then, is whether the federal government's decision to hold a referendum on the Charlottetown Accord has since matured into a constitutional convention.¹⁸ If indeed the Charlottetown referendum is today a binding precedent entrenched as a convention in the unwritten Constitution of Canada, this change should be understood as an informal amendment to the

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10. Meeting of the First Ministers on the Constitution, *The 1987 Constitutional Accord* (Ottawa: 3 June 1987) [Meech Lake Accord].
 11. Coordinating Committee, *Consensus Report of the Constitution: Final Text*, Doc CP22-45/1992E (Charlottetown: 27-28 August 1992) [Charlottetown Accord].
 12. See the text accompanying notes 38-41.
 13. See the text accompanying notes 54-64.
 14. See the text accompanying notes 93-100.
 15. See *Constitution Act, 1982*, *supra* note 8, ss 38-49.
 16. For further elaboration of this point, see *infra* note 93.
 17. See the text accompanying notes 93-98.
 18. In this article, I will follow the Canadian practice of using the term *referendum* to refer to both binding and non-binding direct popular votes, although the scholarly literature distinguishes between a referendum, which is binding, and a plebiscite, which is non-binding. I will refer variously to either binding or non-binding referenda. See Don Rowat, "Our Referendums are not Direct Democracy" (1998) 21:3 Can Parliamentary Rev 25 at 25.

written Constitution of Canada because Canada's formal amendment rules do not require direct popular participation to either propose or ratify an amendment.¹⁹ They require only federal or provincial legislative action, or both in tandem, to formally amend the constitution.²⁰

In this article, I draw from constitutional law, history, and theory to evaluate the suggestion that the use of the referendum in the Charlottetown Accord has matured into a constitutional convention. I inquire specifically whether a convention now exists that binds federal actors to hold a national referendum for any formal amendment to the basic structure of the Constitution of Canada. I explore whether the convention operates in the context of what Peter Russell defines as "mega constitutional politics."²¹ Russell coined the term to refer to amendments that "[address] the very nature of the political community on which the constitution is based"²² and that have a "tendency to touch citizens' sense of identity and self-worth."²³ As he explains, "Mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic."²⁴ Mega constitutional politics, then, seeks major reforms to the framework of government.

The Constitution of Canada's escalating structure of formal amendment identifies which matters trigger mega constitutional politics.²⁵ Amending the matters amendable pursuant to the default multilateral amendment procedure entrenched in section 38, as well as those amendable pursuant only to the unanimity amendment procedure entrenched in section 41, would result in a fundamental change to the polity, to Canadian identity, and to federal-provincial relations. In short, they would change the basic structure of the Constitution of Canada. These are the amendable matters for which I explore whether a federal convention of national referendal consultation has taken root. I conclude that we cannot know whether such a convention has developed until federal political actors are again confronted with the question whether or not to hold

19. See *Constitution Act, 1982*, *supra* note 8, ss 38-49.

20. *Ibid.*

21. See Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed (Toronto: University of Toronto Press, 1993) at 75.

22. *Ibid.*

23. *Ibid.*

24. *Ibid.*

25. See the text accompanying notes 80-87.

a national referendum in connection with a change to the basic structure of the Constitution of Canada.²⁶

I begin in Part I by returning to 1982. I trace briefly the constitutional and political context surrounding the Charlottetown Accord and I explain the impetus for political actors to initiate a referendum. In Part II, I examine the role and development of conventions in Canadian constitutional amendment in order then to evaluate, in Part III, whether the Charlottetown referendum has created a binding federal precedent amounting to a constitutional convention of national referendal consultation for major constitutional reforms. I also return again to 1982 to suggest that the pressure currently building behind some form of popular participation in major constitutional reform in Canada is a response to the failure to properly give voice to the people in the process of patriation in 1982. In Part IV, I close by suggesting, perhaps counterintuitively, that layering a requirement of national referendal consultation onto the existing requirements for formal amendments to the Constitution's basic structure could undermine democracy, despite our common association of referenda with democratic legitimacy. I suggest instead that a national referendum should be an alternative path, not an additional step, in constitutional amendment. I also reflect on the susceptibility of the Constitution of Canada to informal constitutional change.

I. THE CHARLOTTETOWN ACCORD REFERENDUM

The *Constitution Act, 1982* left unresolved many questions that needed answers before constitutional peace could ever be possible in Canada, including whether and how to recognize the special status of Quebec, how to reform national institutions to assuage provincial alienation, and how to justly operationalize the right of self-government for First Nations.²⁷ The Meech Lake Accord, negotiated in 1987 only a few years after the patriation of the Constitution, sought to answer some of these questions.²⁸ But its principal purpose, to be sure, was reconciling Quebec with the rest of Canada in the aftermath of the adoption

26. In a related article, I explain more fully the concept of “the basic structure” of a constitution with reference to the basic structure doctrine articulated by the Supreme Court of India. See Richard Albert, “The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada,” (2016) 41 *Queen's LJ* 143 at 157.

27. See generally Ronald L Watts, “Canada: Three Decades of Periodic Federal Crises” (1996) 17:4 *Int'l Pol Sci Rev* 353 at 357.

28. See Richard Simeon, “Meech Lake and Shifting Conceptions of Canadian Federalism” (1988) 14 (supp) *Can Pub Pol'y* S7 at S13-21.

of the *Constitution Act, 1982* over the province's objections.²⁹ The Accord was designed to address Quebec's five conditions for finally accepting the *Constitution Act, 1982*: (1) recognition of Quebec's distinctiveness, (2) a larger provincial role in immigration, (3) a provincial role in Supreme Court appointments, (4) limits on the federal spending power, and (5) a veto for Quebec on constitutional amendments.³⁰ In retrospect, one might fairly suggest that the Accord sought to end the "moral exclusion" of Quebec in constitutional politics.³¹

A. MEECH LAKE AND ITS CONSEQUENCES

The Meech Lake Accord proposed to amend both the *Constitution Act, 1867* and the *Constitution Act, 1982*. As to the former, it would have inserted "the recognition that Quebec constitutes within Canada a distinct society,"³² changed the method of senatorial selection to require Senate vacancies to be filled from a list of nominees proposed by provincial governments,³³ and granted provinces some power over immigration.³⁴ Among other items, the Accord would also have constitutionalized the Supreme Court and required the prime minister to convene an annual conference of first ministers.³⁵ As to the *Constitution Act, 1982*, the Accord proposed to amend the rules of formal amendment, notably by granting a veto to all provinces in connection with amendments to matters of provincial interest such as the Supreme Court, proportional representation in the House of Commons, as well as senatorial powers, selection, and representation.³⁶ The Accord also mandated additional constitutional conferences.³⁷

29. See Samuel V LaSelle, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996) at 192.

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

31. Pierre Fournier, *A Meech Lake Post-Mortem: Is Quebec Sovereignty Inevitable?*, translated by Sheila Fischman (Montreal: McGill-Queen's University Press, 1991) at 15.

32. Meech Lake Accord, *supra* note 10, Schedule, s 1.

33. *Ibid*, Schedule, s 2.

34. *Ibid*, Schedule, s 3.

35. *Ibid*, Schedule, ss 6, 8.

36. *Ibid*, Schedule, s 9.

37. *Ibid*, Schedule, s 13.

The Meech Lake Accord ultimately collapsed in 1990 when political actors failed to ratify it by the three-year deadline arguably required for ratification.³⁸ Under Canada's formal amendment rules, some amendment proposals expire if they are not ratified within three years.³⁹ This temporal restriction applies to a specified class of amendments concerning proportional representation in the House of Commons, certain features of the Supreme Court, new provinces and provincial boundaries, and senatorial powers, selection, and representation.⁴⁰ The Accord had proposed to amend some of these matters as well as other important subjects not subject to any temporal restrictions. The point is that political actors eventually ran out of time, though one might plausibly wonder whether ratification would have been possible even with more time.⁴¹

The 1992 Charlottetown Accord was an effort to make up for both the substantive and procedural shortcomings that had felled the Meech Lake Accord.⁴² This new Accord proposed a large-scale overhaul of the Constitution of Canada even more transformative than the Meech Lake Accord would have been. The Charlottetown Accord proposed once again to recognize that Quebec is a "distinct society,"⁴³ but it also proposed to entrench a "Canada Clause" that would express Canadian values so as to guide judges in their interpretation of the

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38. See Christopher P Manfredi, "Institutional Design and the Politics of Constitutional Modification: Understanding Amendment Failure in the United States and Canada" (1997) 31:1 *Law & Soc'y Rev* 111 at 123. I qualify it as "arguably" required by the Constitution because it is not clear that the three-year deadline applied to the entire package of amendments. See FL Morton, "How Not to Amend the Constitution" (1989) 12:4 *Can Parliamentary Rev* 9 at 9-10. As I explain elsewhere, parts of the Accord triggered the three-year deadline and others did not, but political actors nevertheless chose to subject the entire Accord to the three-year deadline since the Accord had been proposed as an omnibus bill of amendments. See Richard Albert, "Temporal Limitations in Constitutional Amendment" (2016) 21 *Rev Const Stud* [forthcoming], online: <ssrn.com/abstract=2749288>.
39. See *Constitution Act, 1982*, *supra* note 8, s 39(2).
40. *Ibid*, s 42(1).
41. Elijah Harper, a member of the Manitoba provincial legislature, was a holdout in granting unanimous consent to introduce the ratifying motion onto the floor. See Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16:1 *Rev Const Stud* 1 at 10.
42. See *e.g.* David R Cameron & Jacqueline D Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process" (2008) 58:4 *UTLJ* 389 at 393; Harold D Clarke & Allan Kornberg, "The Politics and Economics of Constitutional Choice: Voting in Canada's 1992 National Referendum" (1994) 56:4 *J Pol* 940 at 942-44; Jeffrey J Cole, "Canadian Discord Over the Charlottetown Accord: The Constitutional War to Win Quebec" (1993) 11:3 *Dick J Int'l L* 627 at 642-44.
43. Charlottetown Accord, *supra* note 11, s 1(A)(1).

Constitution.⁴⁴ In addition, the Charlottetown Accord would have more robustly recognized Aboriginal rights;⁴⁵ defined, and in some cases redefined, the terms of the federal distribution of powers;⁴⁶ reformed the Senate, House of Commons, and the Supreme Court;⁴⁷ and amended the rules of formal amendment themselves.⁴⁸ The Charlottetown Accord also sought to reinforce linguistic rights⁴⁹ and, as with the Meech Lake Accord, to entrench the requirement of an annual first ministers' conference.⁵⁰

B. THE CHARLOTTETOWN INNOVATION

Canadian political actors took an unusual path to ratify the Charlottetown Accord. They submitted the entire Accord to the Canadian electorate in a national referendum. This form of referendal consultation was a constitutional innovation because the formal amendment rules entrenched in the Constitution of Canada did not then, nor do they now, require a national referendum to ratify an amendment.⁵¹ The *Referendum Act*, passed roughly four months before the referendum, had authorized the Governor General “to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada.”⁵² By its terms, the referendum was not legally binding and did not constitute a mandatory part of the amendment process. As a legal matter, then, the referendum was purely consultative. It was intended only as a discretionary, supplementary step in the formal process to adopt the amendment package, which required as a matter of constitutional law approval resolutions from the Parliament of Canada and each of the provincial assemblies pursuant to the unanimity procedure in section 41 of the *Constitution Act, 1982*.⁵³

The referendum question asked voters whether they agreed that “the Constitution of Canada should be renewed on the basis of the

44. *Ibid.*

45. *Ibid.*, ss I(A)(2), IV.

46. *Ibid.*, ss I(B), III.

47. *Ibid.*, ss II(A)-(C).

48. *Ibid.*, s V.

49. *Ibid.*, s I(A)(3).

50. *Ibid.*, s II(D).

51. *Constitution Act, 1982*, *supra* note 8, ss 38-49.

52. SC 1992, c 30, s 3(1) [*Referendum Act*].

53. Peter W Hogg, “The Difficulty of Amending the Constitution of Canada” (1993) 31:1 Osgoode Hall LJ 41 at 42-43.

[Charlottetown Accord].⁵⁴ The proclamation directing the referendum made clear that the referendum question had been approved by the House of Commons and the Senate, that it was “in the public interest” to “[direct] that the opinion of electors be obtained” on the question, and that both provincial and territorial electors were called to participate.⁵⁵ Although the result of the referendum was intended by law to be advisory rather than binding on political actors,⁵⁶ the political salience of a majority vote in favour of the Charlottetown Accord would have legitimated the amendment package and generated momentum to push it through ultimate ratification by the provincial assemblies.⁵⁷ It would have been unimaginable for provincial political actors to oppose the considered judgment of their constituents.⁵⁸ Indeed, the group of first ministers had agreed not to seek formal ratification of the Charlottetown Accord unless it had first won majority approval in each province in the consultative referendum.⁵⁹

Canadians ultimately rejected the Charlottetown Accord by a margin of 54.3 per cent to 45.7 per cent, with voters in only five of Canada’s ten provinces and (at the time) two territories approving the amendment package.⁶⁰ Political actors thereafter chose not to proceed with the textually prescribed procedures for formally ratifying the Accord in light of these results.

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54. *Proclamation Directing a Referendum Relating to the Constitution of Canada*, Proclamation, 7 October 1992, SI/92-180, online: <laws.justice.gc.ca/eng/regulations/SI-92-180/page-1.html>.
55. *Ibid.* Quebec administered its own separate referendum on the matter. See Lawrence LeDuc, “Canada’s Constitutional Referendum of 1992: A ‘Great Big No’” (1993) 12:3 *Electoral Stud* 257 at 259.
56. By provincial law, the referendum results in Alberta and British Columbia were binding upon their respective legislatures. See *Constitutional Referendum Act*, RSA 2000, c C-25, s 12(c) [Alberta, *Referendum Act*]; *Constitutional Amendment Approval Act*, RSBC 1996, c 67, s 1; *Referendum Act*, RSBC 1996, c 400, s 4 [BC, *Referendum Act*].
57. See Peter H Russell, “The End of Mega Constitutional Politics in Canada?” (1993) 26:1 *Pol Sci & Politics* 33 at 33.
58. Indeed, then Prime Minister Brian Mulroney said it would be “morally unacceptable” for governments to proceed with the amendment package if voters had rejected it in even one province. See Jeffrey Ulbrich, “Campaign Winds Up for Monday’s Referendum,” *Associated Press* (25 October 1992), online: <www.apnewsarchive.com/1992/Campaign-Winds-Up-For-Monday-s-Referendum/id-75ee5f5bc23c3e3685808917462accb>.
59. Ian Greene, “Constitutional Amendment in Canada and the United States” in Stephen L Newman, ed, *Constitutional Politics in Canada and the United States* (Albany: State University of New York Press, 2004) 249 at 257.
60. See Chief Electoral Officer of Canada, *The 1992 Federal Referendum: A Challenge Met: Report of the Chief Electoral Officer of Canada* (Ottawa: Elections Canada, 1994) at 58-59, online: <http://www.elections.ca/res/rep/off/1992/1992_Referendum_Part_2_E.pdf>.

Scholars have attributed the failure of the Charlottetown Accord to many factors, from specific ones concerning the details of the package such as displeasure with the Canada Clause, confusion about how Aboriginal self-government would work alongside federalism in Canada, and unease with the constitutional veto power,⁶¹ to more general theories of its failure, including amendment overload⁶² and the challenge that large-scale constitutional bargaining presents for successful amendment.⁶³ Richard Johnston offers the following explanation for the Charlottetown Accord's collapse:

The package Canadians rejected was formidably complex. It became so by a decade's accretion of elements, each calculated to appeal to, or to offset concessions to, groups excluded at an earlier stage—Quebec, the western provinces, and aboriginal peoples. Negotiators hoped that by 1992 they had finally found an equilibrium, a logroll sufficiently inclusive to survive referral to the people. Instead they seem to have gotten the logic of the logroll upside down: they may have overestimated both how much each group wanted what it got and how intensely some groups opposed key concessions to others.⁶⁴

C. THE IMPETUS FOR REFERENDAL CONSULTATION

The fatal flaw of the Meech Lake Accord was the process by which it had been drafted. Federal and provincial elites negotiated the accord in closed meetings that would later call into question elite-driven executive federalism as a democratically legitimate process for constitutional change in Canada.⁶⁵ The chief constitutional advisor to the Government of Canada at the time, Mary Dawson, has acknowledged complaints “that the deal had been cooked up

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61. Joseph A Ghiz, “An Insider’s Perspective of Meech Lake & Charlottetown” (The Dick, Ruth and Judy Bell Lecture delivered at Carleton University, Ottawa, 20 October 1993). John Whyte also suggests that “popular sentiment recognized the element of political risk in minority community rights which, although essential to stabilizing the nation, can also be nation-fracturing.” See John D Whyte, “Rejection of Charlottetown Accord Ended Era of Constitutional Reform,” *Toronto Star* (26 October 2012), online: <www.thestar.com/opinion/editorialopinion/2012/10/26/rejection_of_charlottetown_accord_ended_era_of_constitutional_reform.html>.
 62. See Christopher P Manfredi & Michael Lusztig, “Why do Formal Amendments Fail? An Institutional Design Analysis” (1998) 50:3 *World Pol* 377 at 380.
 63. See Michael Lusztig, “Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail” (1994) 27:4 *Can J Pol Sci* 747 at 748.
 64. Richard Johnston, “An Inverted Logroll: The Charlottetown Accord and the Referendum” (1993) 26:1 *Pol Sci & Politics* 43 at 43.
 65. See Peter H Russell, “Can the Canadians Be a Sovereign People?” (1991) 24:4 *Can J Pol Sci* 691 at 705-06.

behind closed doors by a group of men in suits.”⁶⁶ As Dawson observes, “The *Charter* had given Canadians a sense of empowerment, and they were resisting what they characterized as secret deals.”⁶⁷ As a consequence, the political actors who negotiated the details of the Charlottetown Accord rejected the secrecy of the Meech Lake Accord and instead embraced transparency.

It is important to highlight how. Throughout the Charlottetown process, federal actors facilitated opportunities for public dialogue with citizens and civic groups. They also undertook consultations with First Nations and territorial governments. Provincial actors followed suit.⁶⁸ The federal government created a Cabinet Committee on Canadian Unity and Constitutional Affairs that held roving meetings across the country in order to underscore its intention to take regional concerns into account.⁶⁹ The federal government also issued publications throughout the process to keep Canadians abreast of the questions and proposals along the way.⁷⁰ The process, at least on the federal government’s end, culminated with a series of televised conferences intended to inform Canadians about different parts of the constitutional reform package.⁷¹ And when federal political actors met with their provincial, territorial, and Aboriginal counterparts to draft the Charlottetown Accord, they conducted their proceedings in private but then held public press briefings at the close of each day.⁷² All of this raised a sharp contrast to the closed proceedings that had produced the Meech Lake Accord.

Other factors prompted the federal government to initiate a national referendum. For one, Quebec had committed to holding a referendum on its future in Canada by October 1992; Canada’s national referendum on the Charlottetown Accord would satisfy that commitment in Quebec.⁷³ Second, some provinces had passed their own laws requiring consultative provincial referenda prior to their legislatures ratifying a constitutional amendment.⁷⁴ These provincial referenda

66. “From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown” (2012) 57:4 McGill LJ 955 at 983.

67. *Ibid.*

68. *Ibid.* at 991-92.

69. *Ibid.* at 993.

70. *Ibid.*

71. *Ibid.* at 994.

72. *Ibid.*

73. See also Laurence Morel, “The Rise of ‘Politically Obligatory’ Referendums: The 2005 French Referendum in Comparative Perspective” (2007) 30:5 W Eur Pol 1041 at 1048.

74. Ronald L Watts, “Processes of Constitutional Restructuring: The Canadian Experience in Comparative Context” (1999) Institute of Intergovernmental Relations Working Paper No 1999/1 at 7, online: <www.queensu.ca/iigr/working-papers/archive/1999>.

highlight a third factor: The federal government had calculated that holding its own nationwide referendum would allow it to exercise greater control over the administration of the referendum rather than leaving a matter of such high stakes to the vagaries of separate provincial political processes.⁷⁵ Fourth, a successful national referendum approving the Charlottetown Accord would have prevented the agreement from unraveling slowly between its drafting and its ratification by the provinces, which is precisely what had happened to the Meech Lake Accord.⁷⁶

Each of these reasons suggests that holding a referendum was a politically expedient choice. One might well wonder whether the federal government's decision to insert a consultative referendum into the process of constitutional amendment was driven instrumentally by political facts or by the government's perception of, or belief in, the intrinsic value of popular participation.⁷⁷ Indeed, Matthew Mendelsohn and Fred Cutler have observed that "Canadian political leaders had been coerced into holding a referendum and many observers felt that the political class was looking to orchestrate a response and seek legitimation, rather than engage in genuine consultation."⁷⁸

Federal political actors were not constitutionally obliged to submit the Charlottetown amendment package to a national referendum. After all, there is no mention of referendal consultation or ratification in the Constitution's formal amendment rules.⁷⁹ The *Constitution Act, 1982* creates five formal amendment thresholds, each requiring an escalating measure of federal or provincial legislative action, sometimes in tandem, with the applicable threshold rising in difficulty according to the functional or symbolic importance of the entrenched provision to be amended.⁸⁰ For example, the Constitution requires a lower quantum of political agreement to amend a matter that is of interest only to the House of Commons than it does to amend a matter that concerns Canada's federal institutions, including the monarchy, the Supreme Court, and

75. Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 141.

76. Lawrence LeDuc & Jon H Pammett, "Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum" (1995) 28:1 *Can J Pol Sci* 3 at 8.

77. On the former view, see Michael B Stein, "Improving the Process of Constitutional Reform in Canada: Lessons from the Meech Lake and Charlottetown Constitutional Rounds" 30:2 *Can J Pol Sci* 307 at 327.

78. "The Effect of Referendums on Democratic Citizens: Information, Politicization, Efficacy and Tolerance" (2000) 30:4 *Brit J Pol Sci* 685 at 698.

79. See *Constitution Act, 1982*, *supra* note 8, ss 38-49.

80. See Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 *McGill LJ* 225 at 247-51 [Albert, "Expressive Function"].

the Senate.⁸¹ This reflects a hierarchy of constitutional importance: The quantum of political agreement rises according to the importance assigned to the matter to be amended.⁸²

These five formal amendment thresholds thus increase in difficulty. Under the unilateral provincial amendment power, a provincial assembly may amend its own provincial constitution simply by passing a law.⁸³ The unilateral federal amendment power confers an analogous power upon Parliament in respect of purely federal matters.⁸⁴ Under the regional amendment power, both houses of Parliament and the assemblies of the affected province(s) must agree to an amendment that will affect some, but not all, provinces.⁸⁵ The general multilateral amendment power requires both houses of Parliament and two-thirds of provincial assemblies representing half of the total provincial population to agree to an amendment on various matters of national scope.⁸⁶ And the unanimous amendment power requires the agreement of both houses of Parliament and each of the provincial assemblies to amend Canada's most important institutions, principles, and constitutional provisions.⁸⁷ None of these five rules requires or even mentions a referendum.

Nor did the federal *Referendum Act* make a consultative referendum on the Charlottetown Accord compulsory.⁸⁸ Political actors made a strategic choice to hold a referendum. History at the time was similarly conclusive that the use of a referendum was neither a necessary nor a prudent step, as there had been no established practice of national referenda.⁸⁹ Yet the referendum became virtually politically imperative as a tool of legitimation after the failure of the elite-led and closed-door negotiations for the Meech Lake Accord.

81. See *Constitution Act, 1982*, *supra* note 8, s 44 (authorizing Parliament to amend its internal constitution). Compare *ibid*, ss 38, 41-43 (authorizing Parliament and provincial assemblies to agree to amendments to matters affecting provinces and the federal government).

82. Richard Albert, "The Structure of Constitutional Amendment Rules" (2014) 49:4 *Wake Forest L Rev* 913 at 962-63.

83. *Constitution Act, 1982*, *supra* note 8, s 45.

84. *Ibid*, s 44.

85. *Ibid*, s 43.

86. *Ibid*, s 38(1).

87. *Ibid*, s 41.

88. See *Referendum Act*, *supra* note 52.

89. Prior to the 1992 consultative referendum on the Charlottetown Accord, there had been only two national referenda, one in 1898 on alcohol prohibition and the other in 1942 on war conscription. See Benoit Dostie & Ruth Dupré, "The People's Will: Canadians and the 1898 Referendum on Alcohol Prohibition" (2012) 49:4 *Explorations Econ Hist* 498 at 499.

II. PRECEDENT AND CONVENTION IN CONSTITUTIONAL AMENDMENT

The Charlottetown referendum was therefore thought to be a necessary innovation to supplement the codified rules of formal amendment. Of course, it is not unusual for political practice to depart from the constitutional text, particularly in Canada, where the written constitution does not always reflect the living constitution.⁹⁰ Indeed, it is accepted in Canada that a disjunction can emerge between the written and unwritten parts of the Constitution, the former entrenching a provision that the latter no longer recognizes as valid.⁹¹ This disjunction is only one way that written constitutions commonly change informally over time as political actors alter their behaviour and in turn also the social facts underlying the constitution. Accordingly, it does not pose a problem for constitutional theory to recognize that the written constitution must be interpreted in light of unwritten principles.⁹² Yet the susceptibility of the Constitution of Canada to informal changes like these raises a question worth asking: Has the Charlottetown innovation matured into a constitutional convention that today binds federal political actors, even though holding a referendum appears to defy the formal amendment rules entrenched in the text of the Constitution of Canada?

A. THE CHARLOTTETOWN INNOVATION: PRECEDENT OR CONVENTION?

Commentators have suggested that the Charlottetown innovation has created an expectation of direct popular participation requiring national referendal

90. This point is particularly relevant to provincial secession. See Donna Greschner, “The Quebec Secession Reference: Goodbye to Part V?” (1998) 10:1 *Const Forum Const* 19 at 23.

91. See e.g. David E Smith, *The Invisible Crown: The First Principle of Canadian Government*, revised ed (Toronto: University of Toronto Press, 2013) at 43; 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* (New York: Routledge, 2013) 51 at 61-62; Albert, “Constitutional Desuetude,” *supra* note 4 at 650-73; Richard Albert, “Constitutional Disuse or Desuetude: The Case of Article V” (2014) 94:3 *BU L Rev* 1029 at 1072-79; Martha A Field, “The Differing Federalisms of Canada and the United States” (1992) 55:1 *L & Contemp Probs* 107 at 118.

92. See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49-54, 161 DLR (4th) 385 [*Secession Reference*].

consultation for future major constitutional reforms.⁹³ One observer states the point directly in terms of precedent: “The [Charlottetown] referendum created a precedent: Canadians must be consulted directly before political leaders attempt to alter the country’s basic document.”⁹⁴ The Charlottetown referendum, it is said, “marks the end of the era of élite accommodation in matters constitutional and the beginning of a new era of public consultation and ratification.”⁹⁵ Therefore, any process that fails to consult the public through a referendum “is likely to be perceived as illegitimate.”⁹⁶

On this majority view, the lesson of the failed Charlottetown Accord is that Canadians now perceive the Charlottetown innovation as a binding precedent and that it is no longer possible for political actors to approve major constitutional reforms through provincial legislatures alone.⁹⁷ The referendum is “a fact of constitutional reform in Canada now,” the majority view continues, and although minor constitutional amendments would not require a referendum, major constitutional reforms “will most likely require public ratification.”⁹⁸ Commentators therefore regard the Charlottetown referendum as a precedent that future political actors must follow.

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93. See e.g. Dawson, *supra* note 66 at 997; Peter Leslie, “Canada: The Supreme Court Sets Rules for the Secession of Quebec” (1999) 29:2 *Publius* 135 at 142; Kenneth McRoberts, “After the Referendum: Canada With or Without Quebec” in Kenneth McRoberts, ed, *Beyond Quebec: Taking Stock of Canada* (Montreal: McGill-Queen’s University Press, 1995) 403 at 413; Matthew Mendelsohn, “Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics” (2000) 33:2 *Can J Pol Sci* 245 at 251-52; Christa Scholtz, “Aboriginal Communities and the Charlottetown Accord: A Preliminary Analysis of Voting Returns” (Paper delivered at the Canadian Political Science Association 80th Annual Conference, University of British Columbia, 4 June 2008) at 14, online: <www.cpsa-acsp.ca/papers-2008/Scholtz.pdf>; Robert C Vipond, “Seeing Canada Through the Referendum: Still a House Divided” (1993) 23:3 *Publius* 39 at 54; José Woehrling, “La modification par convention constitutionnelle du mode de désignation des sénateurs canadiens” (2008-09) 39 *RDUS* 115 at 125.
94. Jeffrey Simpson, “The Referendum and Its Aftermath” in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 193 at 193.
95. Michael Adams, “The October 1992 Canadian Constitutional Referendum: The Socio-Political Context” in McRoberts & Monahan, *supra* note 94, 185 at 192.
96. R Kent Weaver, “Political Institutions and Conflict Management in Canada” (1995) 538 *Annals Am Ac Pol & Soc Sci* 54 at 65.
97. Roger Gibbins & David Thomas, “Ten Lessons from the Referendum” (1992) 15:4 *Can Parliamentary Rev* 3 at 3.
98. Kathy L Brock, “Learning from Failure: Lessons from Charlottetown” (1993) 4:2 *Const Forum Const* 29 at 32.

The minority view, in contrast, suggests that the Charlottetown referendum is not binding. For example, Benoît Pelletier speaks of “the 1992 precedent of the Charlottetown agreement, that suggests that a Canada-wide referendum be held for constitutional reform, a precedent which, for the time being, cannot, strictly speaking, be considered a constitutional convention.”⁹⁹ And, in a short paragraph, Peter Meekison also seems to reject the majority view. Meekison argues that the Charlottetown experience was less about the centrality of referendal consultation *itself* than about the importance of facilitating some measure of popular involvement in future constitutional negotiations, though not necessarily in the form of a referendum.¹⁰⁰

Neither the majority nor the minority view has been developed in any extensive detail, and the minority view is the least developed of the two. More importantly, as I will explain, neither view is correct because we cannot yet know whether the Charlottetown referendum is binding and moreover whether it has matured into a convention. We can, however, explore the question and project the circumstances that would tell us when and how to recognize that a convention has taken root. The first step in determining whether the Charlottetown referendum is binding on federal political actors requires us to distinguish between precedent and convention—because the difference between the two concepts holds the answer to whether political actors must once again hold a national consultative referendum in the next round of constitutional reform.

Whether the Charlottetown referendum has created either a precedent or a convention is difficult to know without a standard against which to judge how a practice matures into a convention. Fortunately, we can turn to an important illustration from Canadian constitutional history to understand how a practice becomes a convention. Prior to the *Constitution Act, 1982*, there was a convention of provincial consent to major constitutional reforms. The practice of provincial consultation eventually matured into a convention of provincial consent and, although the convention later became entrenched in the constitutional text, we may draw from this example in comparative perspective to explore whether the Charlottetown innovation has created a federal convention requiring national referendal consultation in major constitutional reforms in Canada.

99. “Reinventing Canada: The Challenges that Canada Faces in the Twenty-First Century” (2010) 4:2 J Parliamentary & Pol L 133 at 142.

100. “Canada’s Quest for Constitutional Perfection” (1993) 4:2 Const Forum Const 55 at 56.

B. FORMAL AMENDMENT AT CONFEDERATION

Canada's first codified constitution did not entrench a formal federal amendment rule.¹⁰¹ The formal amendment power belonged to the Parliament of the United Kingdom, which retained the exclusive authority to amend the *Constitution Act, 1867*, a colonial law that reflected its colonial qualities.¹⁰² The only exception concerned provincial constitutions: The *Constitution Act, 1867* conferred upon provinces the unilateral power to amend their provincial constitution.¹⁰³ Over time, Canadian political actors came to expect the United Kingdom to pass an amendment only if it could claim broad support across Canada.¹⁰⁴ As a matter of law, any formal amendment would begin and end in the United Kingdom, but as a matter of political reality, the process began in Canada with a joint resolution of the House of Commons and the Senate requesting an amendment.¹⁰⁵ Before long, the United Kingdom would routinely agree to formally amend the Constitution of Canada in the manner requested by the joint resolution issued from Canada.¹⁰⁶

The problem arose in 1949 when the United Kingdom amended the Constitution, at Canada's request, to confer upon the Canadian Parliament a similar unilateral amendment authority over purely federal subjects—a power the provinces already possessed over provincial subjects in their own provincial constitutions.¹⁰⁷ The provinces worried this new amendment would embolden the Canadian Parliament to exploit its unilateral amendment power on federal subjects to amend federal institutions of provincial concern without provincial consent.¹⁰⁸ This was an understandable concern. The textual silence left it unclear whether the federal government was obligated even to consult with, let alone obtain the consent of, the provinces (and if yes, of how many) before requesting from the Parliament of the United Kingdom a major constitutional

101. *Constitution Act, 1867*, *supra* note 6.

102. Peter W Hogg, "Constitutional Reform in Canada: A Comment on the Canadian Constitutional Crisis" (1980) 6:2 *Yale Stud World Pub Ord* 285 at 287-88.

103. *Constitution Act, 1867*, *supra* note 6, s 92.

104. William Renwick Riddell, "Constitutional Amendments in Canada" (1919) 28:4 *Yale LJ* 314 at 317.

105. William R Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32:2 *Am J Comp L* 339 at 340.

106. *Ibid*; HB Mayo, "Majority Rule and the Constitution in Canada and the United States" (1957) 10:1 *West Pol Q* 49 at 59.

107. *British North America (No 2) Act, 1949* (UK), 12, 13 & 14 *Geo VI*, c 81.

108. WR Lederman, "Notes on Recent Canadian Constitutional Developments" (1950) 32:3-4 *J Comp Legis & Int'l L* (3d) 74 at 75-76.

amendment affecting the basic federal structure of the Constitution of Canada.¹⁰⁹ The constitutional text did not entrench any formal amendment rule that answered this question.

Political practice, however, evolved over time to suggest that the Canadian Parliament would not seek an amendment affecting federal-provincial relations without the federal government first consulting with and obtaining the approval of the provinces. Of the sixteen instances of formal amendment between Confederation and 1964, ten amendments had concerned matters that were exclusively federal in nature according to the federal government and therefore did not require provincial consultation.¹¹⁰ As to the six amendments affecting federal-provincial relations, the federal government consulted with the affected provinces in each instance: One amendment involved consultation only with the provinces affected by it, and in all but one of the remaining five cases the federal government secured unanimous provincial consent.¹¹¹ This federal practice of seeking provincial approval for an amendment affecting federal-provincial relations appeared to evolve over time into something more than a practice. Indeed, in each of the unsuccessful intergovernmental negotiations from 1964 to 1980 on a new or revised constitution for Canada, the proposed rule for formally amending matters affecting federal-provincial relations reflected this practice of securing the consent of both federal and provincial governments to any major constitutional change.¹¹²

C. THE CONVENTION OF PROVINCIAL CONSENT

These historical precedents raised the all-important question: Is securing provincial consent to amendments affecting federal-provincial relations a practice or a convention? The Supreme Court of Canada answered this question in the 1981 *Patriation Reference* in connection with a constitutional challenge to the federal government's intention to proceed without provincial consent and only with a joint resolution of both houses of the Parliament of Canada requesting from the United Kingdom a package of major constitutional reforms altering the basic federal structure of the Constitution of Canada.¹¹³ The specific question

109. William S Livingston, "The Amending Power of the Canadian Parliament" (1951) 45:2 Am Pol Sci Rev 437 at 437-38.

110. Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Information of Canada, 1965) at 16.

111. *Ibid* at 12-16.

112. See Hurley, *supra* note 9 at 34-54.

113. *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 11 Man R (2d) 1 [*Patriation Reference* cited to SCR].

before the Court was whether a convention exists that the House of Commons and the Senate will not proceed unilaterally to affect major constitutional reform without first securing provincial agreement.¹¹⁴

The Court answered that there is indeed a convention of substantial provincial consent.¹¹⁵ Looking to history, the Court noted that federal and provincial governments had tried for decades to reach agreement on formal amendment rules for the Constitution of Canada, and although they had failed each time, the quantification of provincial consent had invariably remained a central question in their deliberations.¹¹⁶ This, for the Court, indicated “a clear recognition by all the governments concerned of the principle that a substantial degree of provincial consent is required.”¹¹⁷ But the Court left open the precise quantum of provincial consent required to respect the conventional requirement of provincial agreement. The Court declared only that “a substantial measure of provincial consent is required,” something more than the agreement of two provinces and something less than unanimous agreement.¹¹⁸ Anticipating the objection that a convention on provincial consent must reflect some specificity in order for political actors to operationalize it, the Court explained that major constitutional reform must be governed by flexible conventions until political actors finally manage to agree on the details of the formal amendment rules:

Nor can it be said that this lack of precision is such as to prevent the principle from acquiring the constitutional *status* of a conventional rule. If a consensus had emerged on the measure of provincial agreement, an amending formula would quickly have been enacted and we would no longer be in the realm of conventions. To demand as much precision as if this were the case and as if the rule were a legal one is tantamount to denying that this area of the Canadian constitution is capable of being governed by conventional rules.¹¹⁹

The Court’s answer prompted the federal government to reconsider its unilateralism and instead to convene multilateral discussions to negotiate the package of amendments that would later become the *Constitution Act, 1982*. Canada’s new constitutional text would entrench complex formal amendment rules that retained both federal and provincial unilateral powers of formal

114. *Ibid* at 875.

115. *Ibid* at 904-05.

116. *Ibid* at 904.

117. *Ibid* at 904-05.

118. *Ibid*.

119. *Ibid* at 904 [emphasis in original].

amendment over matters under their respective exclusive jurisdiction.¹²⁰ Canada's new formal amendment rules would also entrench the convention of provincial consent for major constitutional reform within a larger structure of escalating thresholds requiring a different quantum of provincial agreement depending on the importance of the matter of federal-provincial concern to be amended.¹²¹ Amendments affecting one or more, but not all, provinces would require the consent of both houses of Parliament and of the affected province(s).¹²² Another class of amendments affecting all provinces would require the consent of both houses of Parliament as well as of at least seven provinces representing at least half of the population of all provinces.¹²³ And yet another class of amendments affecting all provinces would require the consent of both houses of Parliament and of all provinces.¹²⁴ These rules remain in force today, though not without some controversy.¹²⁵

III. REFERENDAL CONSULTATION IN CONSTITUTIONAL AMENDMENT

The Court's analysis in the *Patriation Reference*—specifically relating to how the federal government's practice of consulting with provinces eventually matured into a convention—is instructive for evaluating whether a convention now exists that binds federal political actors to hold a national referendal consultation for major constitutional reforms in Canada. I pause here to stress the parameters of our inquiry into the existence of the convention: The question is whether a convention now exists that governs the conduct of federal political actors, not of provincial or territorial political actors, to hold a referendum to consult Canadians across the country on a proposed amendment or package of amendments to the basic structure of the Constitution. If such a convention exists, it would

120. See *Constitution Act, 1982*, *supra* note 8, s 44 (authorizing the Parliament of Canada to amend matters relating to purely federal subjects). See also *ibid*, s 45 (authorizing provincial legislatures to amend matters relating to their own provincial constitution).

121. See Albert, "Expressive Function," *supra* note 80 at 250.

122. *Constitution Act, 1982*, *supra* note 8, s 43.

123. *Ibid*, s 38.

124. *Ibid*, s 41.

125. Despite this intricate escalating structure of formal amendment, there remain unresolved questions about which particular amendment rule governs specific kinds of amendment. See *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reform Reference*]. Moreover, Quebec was not a signatory to the new constitution and has yet to ratify it. See Michel Seymour, "Quebec and Canada at the Crossroads: A Nation Within a Nation" (2000) 6:2 *Nations & Nationalism* 227 at 248.

presumably have consequences for the conduct of provincial and territorial political actors. Their conduct would be driven by the conduct of federal political actors, whose own conduct would be governed by this convention.

The Court is a critical actor for identifying the existence of a constitutional convention. As H.L.A. Hart explained, the most relevant community for recognizing the binding quality of a rule is the legal elite, by which he meant judges.¹²⁶ Of course, judges take action both in support of and in response to popular will, but it falls to political actors to choose what to recognize as valid and what conduct to credit. Hart understood a convention as a “shared acceptance,”¹²⁷ a guiding norm that need not be stated but that is perceived by political actors as valid.¹²⁸ A convention, therefore, exercises a regulatory function on political actors: It regulates their conduct and expectations by creating a body of common understandings, habits, and practices.¹²⁹

A. CONVENTIONS IN CANADIAN COURTS

Canadian Courts will not enforce conventions, but they will recognize them as the Supreme Court did in the *Patriation Reference*.¹³⁰ The Court gave four reasons why it would not enforce them: (1) conventions are not statutory rules that courts ordinarily interpret and apply; (2) conventions are rooted in precedents established by political actors, not in judicial precedents like common law rules; (3) the legal system does not contemplate any formal sanction for breaching conventions because sanctions, if any are to follow, would be political, not legal; and (4) conventions are by nature often in conflict with legal rules that courts are bound to enforce.¹³¹ This tension between convention and law “prevents the courts from enforcing conventions [and] also prevents conventions from crystallizing into laws, unless it be by statutory adoption.”¹³²

Courts will nonetheless recognize conventions. Given that the main purpose of a convention is “to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles

126. *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 256.

127. *Ibid* at 102.

128. *Ibid* at 101.

129. AV Dicey, *Introduction to the Study of the Law of the Constitution*, revised ed (Indianapolis: Liberty Classics, 1982) at cxli.

130. Whether Canadian courts *should* recognize conventions is, of course, a controversial question. See Eugene A Forsey, “The Courts and the Conventions of the Constitution” (1984) 33 UNBLJ 11 at 38-42.

131. *Patriation Reference*, *supra* note 113 at 880-81.

132. *Ibid* at 882.

of the period,”¹³³ a convention forms an integral if unwritten part of a regime’s constitution and may sometimes be even more important than its laws.¹³⁴ The Court observed in the *Patriation Reference* that this is uncontroversially true in Canada insofar as the preamble of the *Constitution Act, 1867* highlights the centrality of conventions to the constitutional system.¹³⁵ The Court was right to note that conventions operate against the backdrop of the prevailing constitutional values *of the period* because conventions are not fixed points. They are neither eternal nor unconditional. They may be overridden by sustained contrary practice or, short of reversal, they may evolve either predictably or unpredictably as political actors alter their own practices.¹³⁶ Yet despite their unwritten character and their non-enforceability in courts, conventions reflect a certain empirical simplicity because they “ultimately reflect what people do.”¹³⁷

Identifying a convention requires more than counting occurrences of a practice, however. In the *Patriation Reference*, the Court relied on Ivor Jennings’s three-part test to evaluate whether the federal government was bound by a convention of securing substantial provincial consent for fundamental constitutional change where federal-provincial interests are engaged.¹³⁸ To establish that a convention exists, Jennings explained, “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?”¹³⁹ The Court determined that political actors had established a precedent of securing provincial consent, and thereafter had continued to follow the precedent for decades.¹⁴⁰ But the Court noted that political actors followed the rule for a reason, not out of

133. *Ibid* at 880.

134. *Ibid* at 883.

135. *Ibid* at 883-84.

136. Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, revised ed (New York: Oxford University Press, 1986) at 217.

137. *Ibid*. In this respect, conventions are stable insofar as they are rooted in the predictable practices of political actors. Yet conventions are also changeable by the very political actors whose conduct determines whether or not a convention has matured.

138. *Patriation Reference*, *supra* note 113 at 888.

139. Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1961) at 136. An important critique of the Jennings test argues that conventions may arise variously from precedential practice, by agreement without prior precedent, from an authoritative unilateral declaration by important political actors, and from constitutional principle. See Andrew Heard, “Constitutional Conventions: The Heart of the Living Constitution” (2012) 6:2 J Parliamentary & Pol L 319 at 332-37. While I acknowledge the critique, I nonetheless apply the Jennings test because it remains, at least for now, the conventional method to evaluate whether a practice has matured into a convention.

140. *Patriation Reference*, *supra* note 113 at 888-94.

convenience or habit: Securing provincial consent was consistent with and indeed necessitated by Canada's federal character.¹⁴¹ The Court also observed that, for any constitutional change affecting federal-provincial relations, "[t]he federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities."¹⁴²

B. THE LAW AND POLITICS OF REFERENDA IN CONSTITUTIONAL AMENDMENT

The three-part Jennings test provides a framework to evaluate whether there is a convention that binds federal actors to hold a national referendum on future reforms to the basic structure of the Constitution of Canada. The answer to Jennings's first question—whether there are precedents—risks being obscured by insufficient specificity as to the precise practice for which we must identify precedents. Whether there are *any* precedents in Canada on holding referenda is not the right question to ask, nor is whether there are precedents of the federal government holding referenda. Examining the history of referenda in Canada yields the perception that referenda are common occurrences.¹⁴³ The federal government has administered three referenda over the years,¹⁴⁴ and provinces and territories have held dozens of referenda of their own on subjects as varied as women's suffrage, public health insurance, balanced budget legislation, daylight savings time, and electoral recall.¹⁴⁵ Yet this long record of referenda in Canada is not relevant to the essential focus of the first question in the Jennings test. That question can be answered only by asking whether there are precedents on holding national referenda on constitutional amendment. On this point, Canadian

141. *Ibid* at 905-09.

142. *Ibid* at 905-06.

143. The question of Quebec sovereignty, which has been tested in two referenda since 1980, further strengthens the perception of frequent referenda in Canada. See Le Directeur général des élections du Québec, "Référendums au Québec," online: <www.electionsquebec.qc.ca/francais/tableaux/referendums-quebec-8484.php>.

144. See Elizabeth Goodyear-Grant & Cameron Anderson, "Public Support for Direct Democracy in Canada: The 'Post-Charlottetown' Era and Beyond" (Paper delivered at the Canadian Political Science Association 76th Annual Meeting, University of Manitoba, 4 June 2004) at 2-3, online: <www.cpsa-acsp.ca/papers-2004/Goodyear-Grant-Anderson.pdf>.

145. See Patrick Boyer, *Direct Democracy: The History and Future of Referendums* (Toronto: Dundurn Press, 1996) at 190-222, 259-60.

history is clear: The Charlottetown innovation is the only instance of national referendal consultation relating to a constitutional amendment.¹⁴⁶

1. THE RELEVANT PRECEDENTS

That there is only one prior instance of national referendal consultation would seem to foreclose the possibility of a convention. Jennings, after all, insisted that political actors are not bound to act in a certain way simply because they may have once in the past behaved in a particular way.¹⁴⁷ The search for precedent to support the existence of a convention generally requires more than one instance of a particular conduct, although Jennings did concede that “[a] single precedent with a good reason may be enough to establish the rule.”¹⁴⁸ This is not to suggest that a string of precedents on its own is enough to create a convention that will govern the conduct of political actors. For Jennings, one occurrence is not enough, but neither is a series of identical occurrences. Mere practice, as Jennings writes, is insufficient on its own to establish a convention: “The fact that an authority has always behaved in a certain way is no warrant for saying that it ought to behave in that way.”¹⁴⁹ Creating a convention turns on something more than the frequency of occurrences.

Yet the Charlottetown innovation is not the only relevant precedent. As Andrew Heard observes, the first part of the Jennings test leaves unanswered whether one should consider both positive and negative precedents.¹⁵⁰ This is an important question, according to Heard, because “[s]ometimes, what did not happen and why can be just as revealing, or even more so, than what has happened.”¹⁵¹ We should therefore also look for negative precedents on the use of referenda in constitutional amendment, specifically for occasions where political actors have rejected the use of referenda in constitutional amendment. There is indeed one such important negative precedent.

The negative precedent dates to 1980, when the federal government prepared a joint resolution for both houses of Parliament to unilaterally patriate

146. See Daniel Turp, “Solutions to the Future of Canada and Québec after the October 26th Referendum: Genuine Sovereignties within a Novel Union” (1993) 4:2 Const Forum Const 47 at 47.

147. Jennings, *supra* note 139 at 135.

148. *Ibid* at 136.

149. *Ibid* at 134-35.

150. *Canadian Constitutional Conventions: The Marriage of Law & Politics*, 2nd ed (Don Mills, ON: Oxford University Press Canada, 2014) at 14 [Heard, “Constitutional Conventions”].

151. *Ibid*.

the Constitution of Canada.¹⁵² The joint resolution proposed a package of amendments on a multiplicity of matters, but none was more controversial than the proposed formal amendment rules. The joint resolution created two general amendment procedures. The first authorized an amendment by resolutions from both houses of Parliament as well as a majority of provincial legislatures meeting specific quorum requirements by population and geography.¹⁵³ The second general amendment procedure authorized an amendment by a referendum proposed by both houses of Parliament and ratified by a majority of participating voters, including a majority of voters in a specific geographical distribution of provinces across western, central, and eastern Canada.¹⁵⁴ The joint resolution therefore proposed to give the Parliament of Canada the option of pursuing a general amendment to the Constitution of Canada either via provincial legislative ratification or referendal ratification. These were alternative paths to achieve major constitutional change.

Despite the federal government's initial insistence that it would stand firm behind preserving the referendum option,¹⁵⁵ the proposal to entrench an option of referendal ratification in the formal amendment process did not survive the patriation negotiations,¹⁵⁶ and ultimately led to the *Patriation Reference*.¹⁵⁷ The proposal for referendal ratification in constitutional amendment was unusual given that it had never been discussed at a federal-provincial conference or more generally in the country.¹⁵⁸ It was a "radically new"¹⁵⁹ device in constitutional amendment. The Official Opposition denounced the referendum option as contrary to Canada's structure of government, which it viewed as anchored in the separation of powers between federal and provincial governments.¹⁶⁰ The Opposition argued that the federal government was "trying to change that division by having constitutional amendments approved by referendum, rather

152. See Government of Canada, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" Document 25005-2-10-80 (2 October 1980).

153. *Ibid.*, s 45.

154. *Ibid.*, s 46.

155. See John Ferguson, "PM Won't Budge on BNA Proposal to End Deadlocks with Referendum," *The Globe and Mail* (17 October 1980) 1.

156. See generally David Close, "Politics and Constitutional Reform in Canada: A Study in Political Opposition" (1985) 15:1 *Publius* 161 at 167-68.

157. See *Patriation Reference*, *supra* note 113 at 765-67.

158. Richard Simeon, "An Overview of the Trudeau Constitutional Proposals" (1981) 19:3 *Alta L Rev* 391 at 392-93.

159. Jake Epp, "It's Not Just Another Flag Debate, Tory MP Says in Rejecting Proposal," *The Globe and Mail* (18 February 1981) 10.

160. Geoffrey Stevens, "A Rude Shock," *The Globe and Mail* (21 October 1980) 6.

than provincial legislatures.”¹⁶¹ Opponents worried that the referendum option could lead to “the tyranny of the 51 per cent majority”¹⁶² and were reluctant to support it because it “rais[ed] a constant threat that the federal Government will go it alone on future amendments.”¹⁶³

The provinces rejected the referendum proposal for several reasons. It would have given the federal government the option of seeking to ratify an amendment by national referendum even where the provincial governments had withheld their consent to the amendment.¹⁶⁴ No other proposal drew greater resistance from provinces.¹⁶⁵ Provinces worried that the federal government would use referenda to marginalize them.¹⁶⁶ In an editorial, a leading national newspaper observed that the referendum option would allow the federal government to “ride roughshod over the Legislatures.”¹⁶⁷ The referendum proposal was seen as an anti-provincial federal “weapon ... for use in overcoming provincial opposition to substantive constitutional amendments.”¹⁶⁸ There was one further reason to oppose the referendum option: Referenda, opponents argued at the time, could exacerbate the existing regional divisions in Canada by highlighting them in the results of the referendum. Saskatchewan Premier Allan Blakeney thus argued that “the whole idea of a referendum as a way to weld this country more closely together when the regional pulls are strong is ill-conceived.”¹⁶⁹ The failure of this proposal is an important negative precedent that weighs against seeing the referendum as a conventional requirement.

2. SELF-PERCEPTION AND BINDING RULES

The second inquiry in the three-part Jennings test informs the first: Do political actors feel bound by the precedents? Just as the first inquiry must be framed at the

161. *Ibid.*

162. John Gray, “Lawrence Volunteers to Advise the Queen on Patriation Plans,” *The Globe and Mail* (8 October 1980) 3 (quoting Jake Epp, then a Member of Parliament).

163. Robert Sheppard, “Referendums: Sticking Point at Centre of BNA Controversy,” *The Globe and Mail* (18 November 1980) 9.

164. See Jeff Sallot, “Blakeney Sees Hope for Scaled-Down Package,” *The Globe and Mail* (25 February 1981) 8.

165. Alan C Cairns, “Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake” (1988) 14 (supp) *Can Pub Pol’y* S121 at S143.

166. JR Mallory, “Conflict Management in the Canadian Federal System” (1981) 44:3 *Law & Contemp Probs* 231 at 242.

167. “What He Didn’t Mention,” Editorial, *The Globe and Mail* (30 December 1980) 6.

168. “Britain and Canada,” Editorial, *The Globe and Mail* (5 November 1980) 6.

169. “Saskatchewan Dashes Trudeau’s Last Chance for an Ally in the West,” *The Globe and Mail* (20 February 1981) 10.

lowest level of abstraction in order to isolate the nub of the matter—whether there is a federal convention of national referendal consultation in major constitutional reform—this second inquiry must similarly be framed with specificity so as not to elide important distinctions. It is important to recall that if a national consultation like the Charlottetown referendum were to occur in the future, it would be ordered, controlled and administered by the Parliament of Canada, the federal government and federal institutions.¹⁷⁰ Consequently, it matters less whether provincial or territorial political actors feel bound by the Charlottetown precedent than whether federal political actors feel bound by it. The point is not that provincial referenda are irrelevant to major constitutional reform. Indeed, as I suggest below, provincial referenda may ultimately be directly relevant to the formation of a convention on national referendal consultation. But we must focus first on whether *federal* actors feel bound by the Charlottetown innovation because our inquiry is concerned only with whether there is a federal convention of national referendal consultation.

Focusing on whether provincial or territorial political actors are bound by a convention of referendal consultation would distort the inquiry because many provinces and territories have enacted laws that require referendal consultation, with some requiring binding ratification before approving an amendment to the Constitution of Canada. For instance, Alberta's *Constitutional Referendum Act* requires a provincial referendum "before a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly."¹⁷¹ By provincial law, the result of the provincial referendum is binding on the government that initiated the referendum.¹⁷²

British Columbia's *Constitutional Amendment Approval Act* and its *Referendum Act* likewise stipulate, respectively, that "[t]he government must not introduce a motion for a resolution of the Legislative Assembly authorizing an amendment to the Constitution of Canada unless a referendum has first been conducted under the *Referendum Act* with respect to the subject matter of that resolution"¹⁷³ and that the referendum result "is binding on the government that initiated the referendum."¹⁷⁴ Other provinces and territories authorize but do not require their governments to hold referenda. Some of these referendal laws make the results of

170. See "A Charter of Loopholes," Editorial, *The Globe and Mail* (27 March 1981) 6.

171. *Alberta Referendum Act*, *supra* note 56, s 2(1).

172. *Ibid*, s 4.

173. *Constitutional Amendment Approval Act*, *supra* note 56, s 1.

174. *BC Referendum Act*, *supra* note 56, s 4.

referenda binding on the provincial or territorial government¹⁷⁵ whereas others make them simply advisory.¹⁷⁶ Some provincial and territorial political actors are therefore constrained by law.¹⁷⁷ These various provincial and territorial laws may by accumulation eventually force the creation of a national standard for referendal consultation, in which case federal actors would be acting in response to pressure coming from the provinces and territories. For their part, provincial and territorial actors would remain bound by their respective laws.

There are no similar laws requiring federal political actors to consult Canadians in a referendum before proposing a constitutional amendment to the basic structure of the Constitution of Canada. The federal *Referendum Act* authorizes the federal government to hold a referendum in connection with a constitutional amendment, but it does not make referendal consultation compulsory. The law instead confers broad discretionary authority upon the federal government to hold one should it be in the “public interest.”¹⁷⁸ In light of the limited scope of the *Referendum Act*, Canada’s formal amendment rules evidently reflect the entire codification of the binding rules of amendment. Yet the question remains whether there are any unwritten rules for formal amendment, namely a federal convention on national referendal consultation.¹⁷⁹ Were federal political actors to feel bound by the Charlottetown precedent, this would suggest that they had come to believe that adhering to the Constitution of Canada’s textually entrenched procedures for formal amendment was a necessary though insufficient

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

176. See *e.g. Consolidation of Plebiscite Act*, RSNWT 1988, c P-8, s 5; *Nunavut Act*, SC 1993, c 28, s 29; *Elections and Plebiscites Act*, SNWT 2006, c 15, s 48; *Loi sur la consultation populaire*, RLRQ, 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 a non-binding plebiscite on amendments to the Constitution of Canada).

177. There are two other noteworthy examples of provincial referendal legislation but neither requires a binding referendum in connection with an amendment to the Constitution of Canada. In Manitoba, certain proposed tax increases must first be approved by the electorate in a referendum. See *The Balanced Budget, Fiscal Management and Taxpayer Accountability Act*, SM 2008, c 44, CCSM c B5, s 10. In Nova Scotia, the province may not sell liquor unless the municipality in which the province proposes to sell liquor grants its approval. See *Liquor Control Act*, RSNS 1989, c 260, ss 43-46.

178. See *Referendum Act*, *supra* note 52, s 3(1).

179. Elsewhere, I have explored the unwritten rules of formal amendment in Canada. See Albert, “Unconstitutional Constitutional Amendment,” *supra* note 26 at 170-73.

condition for achieving major constitutional reform. The rule of recognition would have compelled them to recognize the legitimacy-conferring function of national referendal consultation as an unwritten though obligatory prerequisite for formally amending the basic structure of the Constitution of Canada.

In light of Hart's view that the most relevant community for recognizing the binding quality of a rule is the legal elite, it is worth inquiring into the Court's view. This is not a dispositive point, but it is important and useful to consider. Had the Charlottetown innovation matured into a constitutional convention, it is possible though not inevitable that the Court would have acknowledged it when it issued its recent advisory opinion on constitutional reforms to the Senate.¹⁸⁰ In the *Patriation Reference*, the Court, as discussed above,¹⁸¹ had recognized though not enforced the convention on substantial provincial agreement for amendments affecting federal-provincial relations.¹⁸² The Court's advisory opinion on Senate reform was prompted by the government's request for clarity on the amendment process required to, among other things, change the method of Senator selection, establish fixed terms of senatorial tenure, and abolish the Senate.¹⁸³

In the *Senate Reform Reference*, the Court invoked its earlier validation in the *Patriation Reference* of a convention requiring substantial provincial consent for amendments affecting federal-provincial relations,¹⁸⁴ but it did not discuss referendal consultation. The Court did, however, explain that the *Constitution Act, 1982* "provides the blueprint for how to amend the Constitution of Canada," and that "It tells us what changes Parliament and the provincial legislatures can make unilaterally, what changes require substantial federal and provincial consent, and what changes require unanimous agreement."¹⁸⁵ The Court stressed that where constitutional amendment touches upon Canada's federal structure, the *Constitution Act, 1982* requires approval from the Parliament of Canada and a significant representation of provinces.¹⁸⁶ The Court examined each of the five procedures for formally amending the Constitution of Canada under the *Constitution Act, 1982*'s escalating amendment framework, but in no case did it suggest that those procedures were insufficient for a formal amendment.¹⁸⁷

180. *Senate Reform Reference*, *supra* note 125.

181. See Section III(A), above, for more on this point.

182. See discussion accompanying notes 115-19.

183. *Senate Reform Reference*, *supra* note 125 at para 5.

184. *Ibid* at para 29.

185. *Ibid* at para 28.

186. *Ibid* at para 29.

187. *Ibid* at paras 33-48.

On the contrary, the Court interpreted those procedures as necessary and sufficient for their respective classes of formal amendments.¹⁸⁸ The Court identified the scope of political consent required for each proposed constitutional amendment concerning the Senate. It confirmed that changing the method of Senator selection would require conformity with sections 38 and 42 of the *Constitution Act, 1982*, specifically the agreement of both houses of the Parliament of Canada as well as at least seven of the provinces representing at least half of the total population.¹⁸⁹ The Court concluded that the same consent threshold in section 38 applies to formally amending Senate terms, for instance to impose fixed terms of service.¹⁹⁰ With respect to the proposal to abolish the Senate, the Court observed that it “would fundamentally alter our constitutional architecture—by removing the bicameral form of government that gives shape to the *Constitution Act, 1867*,”¹⁹¹ suggesting that the amendment would profoundly change the Constitution of Canada. Yet even this most fundamental of formal amendments to the Constitution of Canada would not, for the Court, require referendal consultation. The Court declared that section 41’s unanimity procedure would govern Senate abolition, requiring the agreement of both houses of Parliament and each of the provincial legislatures.¹⁹² Therefore, the Court did not recognize the importance of referendal consultation.¹⁹³ Again, I stress that this point is not dispositive, though it does raise a useful contrast to the *Patriation Reference*, where the Court recognized the existence of a convention.

The Court did, however, discuss the role of referenda in the *Secession Reference*. The Court acknowledged that referenda “appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government.”¹⁹⁴ Moreover, the Court noted that referenda are an important tool for governance in constitutional democracy, but made it clear that the Constitution neither provides for their use nor gives them legal force:

Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic

188. *Ibid.*

189. *Ibid.* at para 53.

190. *Ibid.* at para 82.

191. *Ibid.* at para 97.

192. *Ibid.* at para 110.

193. On Hart’s view, this would be one strike against the existence of the convention, since the Court had failed to recognize the convention. See Hart, *supra* note 126 at 256.

194. *Secession Reference*, *supra* note 92 at para 75.

method of ascertaining the views of the electorate on important political questions on a particular occasion.¹⁹⁵

The Court suggested that political actors could allow themselves to be guided by a referendum result but emphasized that institutions of representative government must make the final choice. Political actors, the Court wrote, “may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people.”¹⁹⁶ For the Court, then, the Constitution is clear today in not requiring referendal ratification for constitutional amendments, major or not.

3. THE REASON FOR THE RULE

There remains the third part of the inquiry into whether a convention exists: Is there a reason for the rule?¹⁹⁷ The answers to the first two parts of the inquiry may seem to obviate the need to answer the third, but Jennings cautioned care in applying his formula where only one precedent exists. “A single precedent with good reason,” stressed Jennings, “may be enough to establish the rule.”¹⁹⁸ The reason for the Charlottetown innovation may therefore be sufficiently compelling so as to transform its single occurrence into a conventional rule that binds federal actors to hold a national referendum. Jennings offered little guidance on how to evaluate the sufficiency of the reason supporting the convention. He stated only that the creation of a convention “must be normative”¹⁹⁹ and “must be due to the reason of the thing because it accords with the prevailing political philosophy.”²⁰⁰ Jennings added that the creation of a convention “helps to make the democratic system operate; it enables the machinery of State to run more smoothly; and if it were not there friction would result.”²⁰¹ Jennings appears to be privileging three factors in evaluating the sufficiency of the reason for the rule: normativity, consistency, and efficiency.

Normativity relates to the principle underlying the practice. There must be a principled reason for following a political practice, which later matures into a convention. The leading scholar of Canadian constitutional conventions, Andrew Heard, observes that absent a reason for adhering to a political practice, “the

195. *Ibid* at para 87.

196. *Ibid* at para 88.

197. Jennings, *supra* note 139 at 136.

198. *Ibid* at 136.

199. *Ibid* at 135.

200. *Ibid* at 136.

201. *Ibid*.

obligation could simply be one of conformity to tradition, policy preference,” or “mere habit.”²⁰² These reasons for rule-following are insufficient to create a convention inasmuch as they are not supported by a governing principle that gives the reasons “any force as rules of constitutional morality.”²⁰³ Measuring the Charlottetown innovation against this factor does not yield a clear answer as to whether the normative justification for the practice is either satisfied or lacking. On one view, as discussed above,²⁰⁴ the Charlottetown precedent seems to have arisen for instrumental, not intrinsic, reasons. Political actors do not appear to have been motivated by a commitment to the intrinsic value of popular participation in major constitutional reform; they appear instead to have been motivated by political expediency.²⁰⁵ Yet, on another view, the instrumental motivation for holding the Charlottetown referendum could be understood to reflect a normative justification anchored in democratic legitimacy. Federal political actors, on this account, thought it necessary to respond to the call for more participatory forms of democracy in the aftermath of the failure of the Meech Lake Accord. Their solution, one of many possible options, was to hold a referendum, which they did of their own volition, not under duress.

Consistency and efficiency, however, appear lacking in our evaluation of the justification for the Charlottetown innovation. As discussed above,²⁰⁶ Canada has no history of national referendal consultation in constitutional amendment, nor is there an overwhelming record in the country of national referendal consultation more generally. Indeed, there is an important and recent negative precedent suggesting that national referenda are a point of contention for provincial premiers.²⁰⁷ It is therefore difficult to support the argument that the Charlottetown innovation “accords with the prevailing political philosophy.”²⁰⁸ With regard to efficiency—Jennings’s view that the practice must help the democratic system operate more smoothly²⁰⁹—if federal political actors were bound by a convention of national referendal consultation, this would only

202. Heard, “Constitutional Conventions,” *supra* note 150 at 17.

203. *Ibid.*

204. See Section II(C), above, for more on this point.

205. *Ibid.*

206. See the text accompanying notes 143-46.

207. See the text accompanying notes 150-69.

208. Jennings, *supra* note 139 at 136.

209. *Ibid.*

further complicate the already onerous multilateral amendment process for major constitutional reform.²¹⁰

For now, one cannot state that there is a federal convention of national referendal consultation in major constitutional reform in Canada. The Charlottetown innovation is the only instance of referendal consultation for a constitutional amendment, and it is one of only three national referenda in Canadian history.²¹¹ That provinces have a longer record of consultative referenda speaks to their local history and practices, not to the question whether a convention exists that binds federal political actors to hold a referendum on major constitutional reforms. The Court has not recognized the existence of such a convention, even when faced with a question directly related to the rules for major constitutional reform.²¹² The Court instead interpreted the formal amendment rules entrenched in the *Constitution Act, 1982* as necessary and sufficient conditions for effecting changes to the basic structure of the Constitution of Canada.²¹³ Moreover, the Charlottetown innovation seems, on one view, to be lacking in consistency and efficiency as well as in its normative foundation. The referendum appears to have been motivated by instrumental reasons in response to procedural deficiencies in connection with the Meech Lake Accord, not by intrinsic justifications related to the value of participatory democracy.²¹⁴ Applying the Jennings test suggests, on balance, that a convention of federal referendal consultation does not yet exist.

Nonetheless to conclude today in the absence of concrete political facts that a convention of federal referendal consultation exists or not would be to misunderstand the nature of conventions. We cannot know whether federal political actors feel bound to conform their conduct to a precedent until federal

210. Formal amendment in Canada is incredibly complex. See Katherine Swinton, "Amending the Canadian Constitution: Lessons From Meech Lake" (1992) 42:2 UTLJ 139 at 144. This is attributable partly to the federalization of constitutional politics. See Bettina Petersohn, "Constitutional Reform and Federal Dynamics: Causes and Effects" in Arthur Benz & Jörg Broschek, eds, *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford: Oxford University Press, 2013) 297 at 316. It is also due to the need for mass input and legitimation. See Lusztig, *supra* note 63 at 748. The difficulty of formal amendment in Canada is also exacerbated by the 1996 regional veto law, which effectively gives each of four provinces a veto in major constitutional reform under section 38 of the *Constitution Act, 1982*. See *Constitutional Amendments*, SC 1996, c 1. See also Andrew Heard & Tim Swartz, "The Regional Veto Formula and Its Effects on Canada's Constitutional Amendment Process" (1997) 30:2 Can J Pol Sci 339 at 351.

211. See Boyer, *supra* note 145 at 259.

212. See *Senate Reform Reference*, *supra* note 125 at paras 33-48.

213. See *ibid.*

214. See the text accompanying notes 65-89.

political actors reach a decision point compelling a choice. Only then can we know if a convention has taken root. Evaluating whether or not a convention exists therefore entails both a theoretical inquiry, which I have sought to develop with reference to the Jennings test, and an empirical inquiry that requires a set of facts confronting federal political actors. When political actors in the future engage in constitutional reform amounting to mega constitutional politics, we will know that a federal convention on national referendal consultation exists if federal actors elect to submit their amendment proposals to a referendum.

It is not difficult, however, to imagine that future political actors would feel bound by the Charlottetown innovation. Should more provinces and territories adopt the Albertan and British Columbian model requiring their governments by law to hold a referendum prior to any action on a proposed amendment to the Constitution of Canada, an expectation of subnational referenda across the country could eventually emerge. As provinces and territories conducted these referenda, binding or not, and it became a norm of subnational government in Canada to consult citizens formally on whether to ratify a proposed amendment to the Constitution of Canada, the federal government, provinces, and territories might well agree that these consultative referenda are best conducted as a single national referendum. The referendum would be administered by the independent federal election agency under federal law, paid for with federal funds, and subject to national standards. What would impede this scenario is the continuing infrequency of major constitutional reform. In order for a federal convention on national referendal consultation to take root, there must be new major efforts to amend the Constitution. So far there have been none since the failure of the Charlottetown Accord, largely due to the political impossibility, perceived or real, of major constitutional reform initiatives in Canada.²¹⁵

C. POPULAR CONSTITUTIONAL REDESIGN

We can interpret the impetus for referendal consultation in Canada in terms internal and altogether external to Canadian constitutional politics. On the internal account, the pressure currently building behind some form of popular participation in major constitutional reform in Canada is a response to the failure to give proper voice to the people in the process of patriation in 1981 and 1982. On the external account, the pressure aligns with the larger trend in the democratic world towards some measure of popular participation in the design

215. See David McLaughlin, *Poisoned Chalice: The Last Campaign of the Progressive Conservative Party?* (Toronto: Dundurn Press, 1994) at 5-36 (discussing the costs to political careers of the failed Charlottetown Accord).

and redesign of constitutions. Both are descriptive accounts, but they have deep normative foundations.

Consider the patriation of the Constitution. Rather than seeking to legitimate the new Constitution with the consent of Canadians in a national referendum, political actors ratified the Constitution among themselves in an act of executive federalism that left the people noticeably uninvolved in what should have been an act of popular, not elite, legitimation. Reflecting in 1984 on Canada's missed democratic moment, Bruce Ackerman and Robert Charney observed that Canada had "neither completely succeeded in adapting British parliamentary sovereignty nor fully domesticated American popular sovereignty to Canadian purposes," and thus stood at "the constitutional crossroads"²¹⁶ faced with many open questions crying out for resolution. None of those questions, noted Ackerman and Charney, was more important than whether Canadians would eventually give themselves their own constitution instead of accepting what elites had given them:

Perhaps a generation from now, after another exhausting series of referenda on the provincial and the federal level, both Anglophone and Francophone voters will approve a mutually satisfactory constitution, one that hands down the law to the parliaments of Canada in the name of We the People of Canada.²¹⁷

Part of what Ackerman and Charney had envisioned came true. There was indeed a series of referenda within the next generation in connection with the Charlottetown Accord, but approval did not follow, nor did Canadians ever speak in one voice to adopt a constitution that bore their imprint of legitimation. On the contrary, the subsequent efforts at constitutional renewal reinforced many of the old fault lines around which patriation had occurred, and the failed attempts to revise the Constitution also created new divisions. Today, then, we remain at much the same constitutional crossroads where Ackerman and Charney found Canada thirty years ago.

This crossroads is the same one that compelled Peter Russell to ask if Canadians could ever be a sovereign people.²¹⁸ The question remains unanswered today. When the Court wrote in the *Secession Reference* that "[t]he Constitution is the expression of the sovereignty of the people of Canada,"²¹⁹ it was speaking of the exercise of sovereignty in its mediated and metaphorical sense, not in its most meaningful sense of actual popular consent. The people of Canada have yet to

216. "Canada at the Constitutional Crossroads" (1984) 34:1 UTLJ 117 at 133.

217. *Ibid* at 134.

218. Russell, *supra* note 21.

219. *Secession Reference*, *supra* note 92 at para 85.

give their direct consent to the Constitution. This fact of Canadian constitutional life does not undermine the Constitution's legal force, nor does it make the *Charter of Rights and Freedoms* any less of a symbol of Canadian identity than it has become, nor does it detract from the extraordinary global influence of the Canadian Constitution. But the Constitution's missing democratic moment of popular consent does highlight its drought of sociological legitimacy.

The rise of provincial and territorial laws requiring some form of popular consultation prior to ratifying an amendment can therefore be understood as an effort to breathe into the Constitution the sociological legitimacy it has long lacked. A ratification referendum such as the one required by some provincial laws can serve a cluster of legitimacy-conferring functions: It makes citizens more likely to identify with the constitution, it makes the constitution-making process seem fair to the governed, and it helps instil a culture of citizenship oriented towards democratic norms of deliberation and participation.²²⁰ It will take more than a series of subnational referenda on major constitutional amendments to give the Constitution of Canada the popular legitimacy it requires in this modern era. Only an inclusive and informed national referendum on either a major constitutional amendment or a new constitution altogether can give Canada its needed democratic moment to finally legitimate the Constitution.

Around the world, constitutional democracies are living their own democratic moments, even in places where referenda are not the norm. In the United Kingdom, for example, the paradigmatic, if declining, model of parliamentary sovereignty has not traditionally recognized referenda as a necessary part or sufficient form of constitutional change. But the prime minister's decision to hold a referendum on the country's future in the European Union reflected the larger trend around the world towards popular decision making, if only as a matter of consultation and not necessarily of binding commitment. The historic referendum vote in favour of leaving the Union has produced a major, though unwritten, constitutional change in the United Kingdom. While in recent years referenda have not always been used to ratify new constitutions—for instance, neither Tunisia in 2014²²¹ nor Nepal in 2015²²² ratified their constitutions by

220. See Jeffrey A Lenowitz, "A Trust That Cannot Be Delegated": The Invention of Ratification Referenda" (2015) 109:4 *Am Pol Sci Rev* 803 at 814.

221. See Carlotta Gall, "Three Years After Uprising, Tunisia Approves Constitution," *The New York Times* (26 January 2014), online: <www.nytimes.com/2014/01/27/world/africa/three-years-after-uprising-tunisia-approves-constitution.html>.

222. See Rishi Iyengar, "Nepal has Finally Passed a New Constitution After Years of Political Turmoil," *Time* (17 September 2015), online: <time.com/4037788/nepal-constitution-sushil-koirala-protests-madhesi-tharu>.

referendum—they have been used to adopt new constitutions in Iraq (2005),²²³ Bolivia (2009),²²⁴ Kenya (2010),²²⁵ Zimbabwe (2013),²²⁶ and Egypt (2014).²²⁷ These are only a few examples, but they reflect a powerful trend since World War II of multiplying forms and frequency of popular participation in constitutional design, whether before, during, or after the drafting of the constitutional text.²²⁸

This modern trend towards popular participation began in France and the United States, whose revolutionary traditions have made the will of the people central to constitutional meaning. Modern constitutional states such as India and Ireland have lived through their own democratic moments to legitimate their constitutions. Some of these moments have been easier than others, but all have resulted in the consolidation of a democracy in which most, if not all, members of the polity feel that the constitution is theirs. Some countries, perhaps most notably Germany, have tried to moderate the influence of direct popular participation. But they have nonetheless evolved methods to fill their constitution with sociological legitimacy, something that continues in many ways to escape the Constitution of Canada. The pressure building towards popular participation in Canada is therefore something to embrace, not suppress, because only through Canadians themselves can the Constitution ultimately be legitimated.

IV. CONCLUSION

No constitutional text is a comprehensive catalogue of the constitutional rules that political actors recognize as binding. This is especially true in Canada, whose founding constitution is a statute “expected to embody the principles of the British parliamentary system, which rest for the most part on convention

223. See “Iraqi constitution passes, officials say,” *CNN* (25 October 2005), online: <www.cnn.com/2005/WORLD/meast/10/25/iraq.constitution>.

224. See Simon Romero, “Bolivians Ratify New Constitution,” *The New York Times* (25 January 2009), online: <www.nytimes.com/2009/01/26/world/americas/26bolivia.html?_r=0>.

225. See “Kenya’s back change to constitution in referendum,” *BBC News* (5 August 2010), online: <www.bbc.com/news/world-africa-10876635>.

226. See “Zimbabwe approves new constitution,” *BBC News* (19 March 2013), online: <www.bbc.com/news/world-africa-21845444>.

227. See Reza Sayah & Mohammed Tawfeeq, “Egypt passes a new constitution,” *CNN* (18 January 2014), online: <www.cnn.com/2014/01/18/world/africa/egypt-constitution>.

228. Justin Blount, Zachary Elkins & Tom Ginsburg, “Does the Process of Constitution-Making Matter?” in Tom Ginsburg, ed, *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012) 31 at 38-39.

rather than law.²²⁹ These conventional understandings of the constitution exert a non-trivial constraint on political actors and indeed simulate the binding effect of a written constitutional rule.²³⁰ Conventions reflect the constitutional morality of the regime—a moral code that informally, though no less effectively, governs the conduct of political actors.²³¹ Conventions arise by sustained political practice and may change thereafter by subsequent practice.²³² There is then, as Hans Kelsen noted, “no legal possibility of preventing a constitution from being modified by way of custom, even if the constitution has the character of statutory law, if it is a so-called ‘written’ constitution,”²³³ as these unwritten alterations informally amend the written constitution by filling or creating voids in the text or by substituting or refining the text.²³⁴

The Constitution of Canada has long been recognized as susceptible to informal change as a result of a new convention.²³⁵ For example, I have demonstrated elsewhere that the Constitution of Canada has been changed by new conventions on the non-use of the British and Canadian powers of disallowance and reservation.²³⁶ I have also shown how a new conventional understanding, specific to Canada, has arisen that makes an ordinarily amendable constitutional provision unamendable.²³⁷ Canada is therefore an important site for the study of the interaction between unwritten constitutional norms and an entrenched constitutional text. But despite the extraordinary attention given to the use of referenda in Canada, the question whether the Charlottetown innovation has informally amended the Constitution of Canada to establish a new federal convention of national referential consultation on major constitutional reforms has remained underexplored. Some commentators have suggested that political actors are bound by the precedent of the Charlottetown referendum, and others have suggested the contrary.²³⁸

In this article, I have endeavoured to show that we cannot yet know whether such a convention has taken root in Canada. Although I have concluded that

229. William S Livingston, “The Amending Power of the Canadian Parliament” (1951) 45:2 Am Pol Sci Rev 437 at 438.

230. See Albert, “Unwritten Constitutional Norms,” *supra* note 3.

231. Dicey, *supra* note 129 at cxli.

232. Marshall, *supra* note 136 at 217.

233. *General Theory of Law and State*, translated by Anders Wedberg (Cambridge, Mass: Harvard University Press, 1945) at 260.

234. See Albert, “Unwritten Constitutional Norms,” *supra* note 3.

235. See Hurley, *supra* note 9 at 14-16.

236. See Albert, “Constitutional Desuetude,” *supra* note 4 at 650-73.

237. See Albert, “Constitutional Amendment Rules,” *supra* note 5 at 672-74.

238. See the text accompanying notes 93-100.

the Jennings test suggests that there is no convention of national referendal consultation—there has been only one instance of national referendal consultation, federal political actors are not bound by that single instance, and the Charlottetown innovation was not designed on a strong normative foundation—the Jennings test cannot by itself tell us how political actors *will* act. Until federal political actors are faced with a choice to hold such a referendum or not, it remains unclear whether a federal convention exists. Should political actors opt to hold a referendum in connection with a future major constitutional reform, it may well be because they feel they have no choice but to seek popular input and consent. In that case we will know that they feel bound by the Charlottetown innovation. For now, though, the Charlottetown referendum cannot yet be called a convention without more information that can come only through another large-scale effort to amend the Constitution of Canada.

Nonetheless, it is plausible to predict that national referendal consultation will become an unwritten requirement of the constitutional amendment process for major constitutional reforms to the basic structure of the Constitution of Canada. But this informal change is less likely to arise in the near term out of a concretized federal convention on referendal consultation than from the various laws and practices of provincial referendal consultation and ratification as they multiply across provinces to eventually normalize the use of referenda in each of the provinces and territories. Still, this new constitutional convention would be a subnational one rooted in provincial and territorial political practice, not a federal convention anchored in federal practice.

What is worrisome, in my view, is that a federal convention on referendal consultation could do more harm than good to democracy in Canada. The formal amendment rules entrenched in the *Constitution Act, 1982* already make the Constitution of Canada one of the world's most resistant to major reform, if not the most difficult to amend.²³⁹ To layer a federal conventional

239. See Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 *Alta L Rev* 85. At the adoption of the *Constitution Act, 1982*, Canada's new formal amendment rules were described as "unduly rigid." See Walter Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) 45:4 *Law & Contemp Probs* 283 at 300. In hindsight, it was justifiable to worry that the *Constitution Act, 1982* could "prove to be only a Pyrrhic victory, a largely symbolic success that will effectively bring the process to a halt." See Michael B Stein, "Canadian Constitutional Reform, 1927-1982: A Comparative Case Analysis Over Time" (1984) 14:1 *Publius* 121 at 139. Today, it is difficult to argue with Peter Oliver, one of Canada's leading comparativists, that Canada's formal amendment rules are "probably the most complex in the world." See Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49:4 *UTLJ* 519 at 520.

requirement of national referendal consultation onto the existing requirements for amendments to the basic structure of the Constitution of Canada would further complicate formal amendment, transforming a constitution that is at present freely amendable, though perhaps only in theory, into a constitution whose basic structure is in practice constructively unamendable.²⁴⁰

We commonly associate referenda with democratic legitimacy.²⁴¹ There are of course dangers with referenda—for instance, that they might undermine the institutions of representative democracy—but the greater risk is that a federal convention on national referendal consultation would undermine democracy itself by frustrating all future major constitutional reform efforts. The most fundamental of all democratic rights in a constitutional democracy is the right of self-definition, most directly reflected in the power of constitutional amendment.²⁴² The power to amend the constitution is more than a mere procedural right; it is the core democratic right that authorizes those subject to the constitution to redesign it where necessary to keep it in line with their shared values.²⁴³ When the constitutional text becomes unchangeable and its rules of change do more to prevent than to facilitate self-government, the first casualties are democracy and the rule of law.²⁴⁴ How to balance constitutional flexibility with stability is an important design choice, the risk being that the constitution will be either too difficult or too easy to amend.²⁴⁵ But, in my view, a more amendable constitution is a lesser evil than a frozen one.

The strongest counterview is that referendal consultation could work well in conjunction with the formal amendment rules in Part V of the *Constitution Act, 1982* to overcome what appears today to be a logjam in major formal amendment. Constitutional change would be easier than it currently is if political actors consulted the people in advance of ratifying votes in the legislative assemblies. On this view, the result of a federal referendum or of a series of subnational referenda would alert legislative actors to the preferences of the people, which would in turn allow them to make a better informed decision in choosing whether

240. See generally Richard Albert, “Constructive Unamendability in Canada and the United States” (2014) 67 *Sup Ct L Rev* (2d) 181 (theorizing the concept of “constructive unamendability,” which results from a political climate that makes it practically unimaginable, though always theoretically possible, to amend the constitution).

241. See Tierney, *supra* note 75 at 261-62.

242. See Richard Albert, “Counterconstitutionalism” (2008) 31:1 *Dal LJ* 1 at 49-51.

243. See Richard Albert, “Constitutional Handcuffs” (2010) 42:3 *Ariz St LJ* 663 at 698-99.

244. See Richard Albert, “Nonconstitutional Amendments” (2009) 22:1 *Can JL & Jur* 5 at 8-9.

245. See Emmet Macfarlane, “Unsteady Architecture: Ambiguity, the *Senate Reference*, and the Future of Constitutional Amendment in Canada” (2015) 60:4 *McGill LJ* 883 at 903.

to ratify the proposed amendment. The reality, however, is that these referenda would amount to an informal delegation of the ratifying power, effectively shifting the ratifying decision away from the legislative assemblies, to whom the Constitution expressly assigns this decision-making responsibility. From my perspective, there is little more important than giving greater voice to the people of Canada in matters of major constitutional change. But we should recognize that this informal delegation of the ratifying power would in turn informally amend the Constitution's formal amendment rules—a result that undermines the very purpose of codifying Canada's intricate structure of formal amendment rules to begin with.

Referenda are of course useful vehicles to foster a culture of participatory democracy when they are incorporated into a larger program to enhance citizen participation. But it makes little sense, as a matter of democratic constitutional design, to require political actors in Canada to satisfy all of the existing textually entrenched thresholds for an amendment to the basic structure of the Constitution while *also* making referendal consultation an additional necessary condition of amendment. This would risk making it actually impossible to successfully pass a major formal amendment to the basic structure of the Constitution of Canada. The better design is to create alternative paths to major constitutional reform: one that proceeds through the existing rules of formal amendment and another that authorizes political actors to make major constitutional reforms when authorized by a successful national referendum.

We therefore confront a paradox: In order to preserve the democratic right of constitutional amendment in Canada, major constitutional reform should not require national referendal consultation unless a national referendum becomes an alternative path, not an additional step, in constitutional amendment. The problem, of course, is that amending Canada's formal amendment rules requires the unanimous agreement of both houses of Parliament and of each province,²⁴⁶ a threshold that today seems virtually impossible to meet. Until the political climate becomes more amenable to the possibility of a grand federal bargain and political actors no longer feel themselves bound by the constitutional text, we will be constrained by the Constitution's formal amendment rules to live with the challenge of near-unamendability. The costs of unamendability are not

246. *Constitution Act, 1982*, *supra* note 8, s 41(e).

insignificant,²⁴⁷ and the consequence may well be that the power of constitutional change will shift as a matter of necessity, if it has not already done so,²⁴⁸ from formal amendment by legislative actors in Parliament and provincial assemblies to informal amendment largely by the judiciary.

247. See Richard Albert, “The Unamendable Core of the United States Constitution” in András Koltay, ed, *Comparative Perspectives on the Fundamental Freedom of Expression* (Budapest: Wolters Kluwer, 2015) 13 at 23-24. See also Albert, “Amendment by Stealth,” *supra* note 2 at 724-36.

248. See 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) [forthcoming].