

The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada

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It has become increasingly common for courts in constitutional democracies to invalidate constitutional amendments. Courts enforce both written and unwritten limits on how political actors may exercise the power of formal amendment. Although the Supreme Court of Canada has yet to invalidate a constitutional amendment, modern constitutional politics suggest that the Court possesses the residential authority to declare that a future constitutional amendment violates either the text or spirit of the Constitution of Canada. In this article, the author traces the origins and evolution of unconstitutional constitutional amendment across multiple jurisdictions and explains how the theory and doctrine may apply today in Canada. The author suggests a detailed framework for courts, litigators, political actors and scholars to evaluate when and how the Supreme Court of Canada may invalidate a constitutional amendment.

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Introduction

Modern constitutionalism has given rise to a question that has for some time now been the subject of significant scholarly attention: Can a constitutional amendment be unconstitutional?¹ As a normative matter, whether an amendment should ever be declared unconstitutional remains controversial. But in light of contemporary constitutional law and politics around the world, there is no doubt as a descriptive matter that an amendment can indeed be found unconstitutional. The phenomenon of an unconstitutional constitutional amendment traces its political foundations to France and the United States, its doctrinal origins to Germany, and it has migrated in some form to modern constitutional democracies in every corner of the world.²

But in Canada the question remains unanswered and indeed largely unexplored. Some of Canada's most formative constitutional controversies have touched the outer edges of the problem, but not squarely enough to generate a theory or doctrine for evaluating the constitutionality of a constitutional amendment. For example, in *Reference re Resolution to Amend the Constitution (Patriation Reference)*, the Supreme Court of Canada concluded that it would have been unconstitutional in the conventional sense for Parliament to pass the patriation resolution without securing substantial provincial consent.³ Later, in *Reference re Secession of Quebec*, the Court suggested that negotiations on a formal amendment in connection with provincial secession must respect certain unwritten principles.⁴ More recently, the Court advised Parliament that it could not unilaterally make amendments to the method for filling vacancies in the

1. For recent accounts, see e.g. Richard Albert, "Nonconstitutional Amendments" (2009) 22:1 *Can JL & Jur* 5; Aharon Barak, "Unconstitutional Constitutional Amendments" (2011) 44:3 *Israel LR* 321; Gábor Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?" (2012) 19:2 *Constellations* 182; Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4:3 *IJCL* 460.

2. Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea" (2013) 61:3 *Am J Comp L* 657 at 670–711; Arif Bulkan, "The Limits of Constitutional (Re)-making in the Commonwealth Caribbean: Towards the 'Perfect Nation'" (2013) 2:1 *Can J Hum Rts* 81 at 85–87.

3. [1981] 1 SCR 753 at 883, 904, 125 DLR (3d) 1 [*Patriation Reference*].

4. [1998] 2 SCR 217 at paras 88–105, 161 DLR (4th) 385 [*Secession Reference*].

Senate.⁵ These judicial opinions and others intimate that some informal concept of an unconstitutional constitutional amendment has begun to take root in Canada, whether or not it has yet been recognized.

In this article, I suggest a framework for evaluating the constitutional validity of amendments to the Constitution of Canada.⁶ It is important to stress that I do not inquire into the legitimacy of invalidating a constitutional amendment. I am concerned instead only with whether and how the Supreme Court of Canada *could* invalidate a constitutional amendment.⁷ I show that although the Court has yet to invalidate an amendment,⁸ modern constitutional politics suggest that the Court possesses residual constitutional authority to declare that a future amendment violates either the text or spirit of the Canadian Constitution. This *residual* authority derives both from the Court's power of judicial review and from contemporary changes to the Constitution "outside" of the Constitution.⁹

5. See *Reference re Senate Reform*, 2014 SCC 32 at para 3, [2014] 1 SCR 704 [*Senate Reform Reference*].

6. Unless otherwise specified, a constitutional amendment refers to a formal constitutional amendment, which alters the *text* of the constitution. References to informal amendment, which alters the *meaning* of the constitution, though without altering its text, will be made explicit.

7. I have elsewhere evaluated the normative dimensions of the question, specifically whether a court *should* have the power to invalidate a constitutional amendment. See e.g. Albert, "Nonconstitutional Amendments", *supra* note 1 at 9–10; Richard Albert, "Counterconstitutionalism" (2008) 31:1 Dal LJ 1 at 47–48; Richard Albert, "Constitutional Handcuffs" (2010) 42:3 Ariz St LJ 663 at 698.

8. Superior and appellate courts have dismissed challenges to the validity of two constitutional amendments dealing with denominational schools. These decisions sustained the validity of the *Constitution Amendment, 1998 (Newfoundland Act)*, (1998) C Gaz II, 1 and the *Constitution Amendment, 1997 (Quebec)* (1998) C Gaz II, 308 respectively. See *Hogan v Newfoundland (Attorney General)*, 2000 NFCA 12, 189 Nfld & PEIR 183, leave to appeal to SCC refused, [2000] SCCA No 191 [*Hogan*]; *Potter c Québec (Procureur Général)*, [2001] RJQ 2823, 2001 CarswellQue 2773 (WL Can) (CA), leave to appeal to SCC refused, [2002] SCR no 13 [*Potter*].

9. Here, I refer to constitution-level changes that have not been formalized into the master texts of the Constitution of Canada. Cf Ernest A Young, "The Constitution Outside the Constitution" (2007) 117:3 Yale LJ 408.

Drawing from the judicial review of constitutional amendments around the world, I propose a framework anchored in three major categories of possible unconstitutional constitutional amendment in Canada: procedural, substantive and procedural-substantive hybridity. Each of these three categories consists of at least three subsidiary forms of unconstitutionality. *Procedural unconstitutionality* includes subject-rule mismatch, temporal violations and processual irregularity. *Substantive unconstitutionality* includes unwritten unamendability, text-based unamendability and the amendment-revision distinction. Forms of *hybrid unconstitutionality* include statutory unconstitutionality, the recognition of convention and unconstitutionality by implication. My objective in this article is to offer the Court, litigators, political actors and scholars a road map to evaluate and apply the concept of an unconstitutional constitutional amendment in Canada.

I. Constitutional Amendment in Constitutional Democracies

Amendment rules serve an important cluster of functions that no other constitutional device can. They authorize a transparent process for correcting faults that may reveal themselves over time.¹⁰ Amendment rules moreover distinguish the constitution from ordinary law,¹¹ the former usually insulated from change by more exacting thresholds and procedures.¹² Amendment rules also offer a way to check the judicial interpretation,¹³ act as a vehicle to cultivate public discourse about constitutional meaning¹⁴ and offer means to foster institutional

10. See Brannon P Denning & John R Vile, "The Relevance of Constitutional Amendments: A Response to David Strauss" (2002) 77:1 Tul L Rev 247 at 275.

11. See Edward Schaefer, *Crafting Constitutional Democracies* (Lanham, Md: Rowman & Littlefield Publishers, 2006) at 222.

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

13. See Rosalind Dixon, "Constitutional Amendment Rules: A Comparative Perspective" in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011) 96 at 98.

14. See Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change" (1995) 64:2 Fordham L Rev 535 at 571.

dialogue among the branches of government.¹⁵ Amendment rules may also be designed to express a hierarchy of constitutional rules reflecting a constitutional democracy's self-understanding of its public values.¹⁶ Where they are especially onerous, amendment rules fill a pre-commitment function by making it difficult for political actors to change the entrenched preferences of the authoring generation.¹⁷ At their core, formal amendment rules reflect the democratic values of the rule of law, providing notice and predictability to political actors and the relevant publics about who may change the state's most important political commitments, how they must do so and under what conditions.¹⁸

A. The Amendment Power in Constitutional Design

There is great variety in the design of formal amendment rules in constitutional democracies.¹⁹ Formal amendment rules must necessarily differ according both to the particularized challenges confronting a constitutional state and to the stage of constitutional development in which the state finds itself, whether at its founding, on its way to democratic consolidation or as a mature democracy.²⁰ We may nevertheless observe, at a high level of abstraction, some important similarities among amendment rules in democratic constitutions.²¹ Amendment rules are anchored either explicitly or implicitly in the foundational distinction between constitutional amendment and revision. They operate according to one of six frameworks that combine either single or multiple tracks

15. See Mark Tushnet & Rosalind Dixon, "Weak-Form Review and its Constitutional Relatives: An Asian Perspective" in Rosalind Dixon & Tom Ginsburg, eds, *Comparative Constitutional Law in Asia* (Cheltenham, UK: Edward Elgar, 2014) 102 at 109.

16. Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225 at 244–57 [Albert, "Expressive Function"].

17. Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge, UK: Cambridge University Press, 2000) at 101–04.

18. See Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 McGill LJ 673 [Albert, "Amendment by Stealth"].

19. See e.g. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, Conn: Yale University Press, 1999) at 218–23.

20. Christopher L Eisgruber, *Constitutional Self-Government* (Cambridge, Mass: Harvard University Press, 2001) at 23–25.

21. See Richard Albert, "The Structure of Constitutional Amendment Rules" (2014) 49:4 Wake Forest L Rev 913 at 928–56 [Albert, "Structure of Constitutional Amendment"].

of amendment procedures with restricted, comprehensive or exceptional rules about their use. They also entrench a combination of specifications such as voting thresholds, temporal limitations, electoral preconditions and subject matter restrictions.

(i) Between Flexibility and Permanence

The concept of constitutional amendment originated in the United States.²² Early state charters and constitutions were the first to confront the possibility of their own imperfection. Amendment rules in the United States were created to give political actors a predictable and transparent method to make changes to these foundational texts.²³ America's first national constitution, the Articles of Confederation, entrenched a particularly difficult amendment rule requiring the approval of the national legislature and the unanimous agreement of all thirteen states.²⁴ This unanimity rule was perceived as a significant barrier to constitutional amendment,²⁵ and the veto it afforded each state in fact ultimately proved unworkable.²⁶

When the delegates to the Philadelphia Convention gathered in 1787 to revise the Articles of Confederation, they had two related objectives in mind for the new amendment rule: first, to strike a federalist balance between the centre and the states,²⁷ and second, to promote constitutional durability by making the Constitution neither too easy nor too difficult to amend.²⁸ The result was Article V of the United States Constitution,

22. See Lester B Orfield, *The Amending of the Federal Constitution* (Ann Arbor, MI: The University of Michigan Press, 1942) at 1.

23. *Ibid.*

24. Articles of Confederation, art XIII.

25. See Douglas G Smith, "An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution" (1997) 34:1 San Diego L Rev 249 at 299–300 n 159.

26. See Sanford Levinson, "'Veneration' and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment" (1990) 21:4 Tex Tech L Rev 2443 at 2448–449.

27. See James Madison, "The Federalist No 39" in Jacob Ernest Cooke, ed, *The Federalist* (Hanover, NH: Wesleyan University Press, 1961) 250 at 257.

28. See James Madison, "The Federalist No 43" in Cooke, *The Federalist*, *supra* note 27, 288 at 296.

which entrenches two major methods of formal amendment.²⁹ Under the traditional method, two-thirds of each house of Congress may propose an amendment that becomes valid when ratified by three-quarters of the states in either legislatures or conventions, as directed by Congress. Under the as-yet unused convention-centric method, two thirds of the states may petition Congress to call a constitutional convention in order to propose an amendment that becomes valid when ratified by three quarters of the states in either legislatures or conventions as directed by Congress.

(ii) Formal Amendment Rules and Modern Constitutional Democracy

Since the entrenchment of Article V in the United States Constitution, it has become common for national master-text constitutions to entrench formal amendment rules of their own.³⁰ Formal amendment rules influence constitutional politics even where political actors have no resort to them.³¹ Constitutional rigidity may shift constitutional change from formal to informal mechanisms, pushing constitutional change “off the books”.³² Heather Gerken understands the relationship between formal and informal change in terms of hydraulic pressure: A rigid constitutional text that is not formally amendable “effectively redirects those constitutional energies into different, potentially more productive channels”.³³ Those alternative channels include informal constitutional changes that result from quasi-constitutional statutes, treaties and constitutional conventions.³⁴ Amendment difficulty may

29. *US Const* art V.

30. See Francesco Giovannoni, “Amendment Rules in Constitutions” (2003) 115:1–2 *Public Choice* 37 at 37.

31. See Xenophon Contiades, “Constitutional Change Engineering” in Xenophon Contiades, ed, *Engineering Constitutional Change* (Abington, UK: Routledge, 2013) 1 at 1.

32. Stephen M Griffin, “The Nominee is . . . Article V” (1995) 12:2 *Const Commentary* 171 at 172.

33. Heather K Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution” (2007) 55:4 *Drake L Rev* 925 at 927. See also Michael Besso, “Constitutional Amendment Procedures and the Informal Political Construction of Constitutions” (2005) 67:1 *J Politics* 69 at 75 (noting that informal amendment occurs also where formal amendment is relatively easy).

34. See Richard Albert, “Constitutional Disuse or Desuetude: The Case of Article V” (2014) 94:3 *BUL Rev* 1029 at 1062–071.

also force constitutional courts to update or effectively “amend” the formally rigid constitution by interpretation, another species of informal constitutional change.

B. Formal Prohibitions on Constitutional Amendment

The power of formal amendment is rarely unlimited. Constitutional states commonly entrench prohibitions on the objects and subjects of the formal amendment power. For example, the French Constitution prohibits amendments to republicanism and to the integrity of the national territory.³⁵ Similarly, the Brazilian Constitution forbids amendments abolishing federalism.³⁶ The German *Basic Law* entrenches the best known example of a formal amendment prohibition, barring amendments that violate human dignity.³⁷

(i) Designing Formal Unamendability

There are many reasons why constitutional designers might choose to make a constitutional provision impervious to the textually entrenched rules for formal amendment, even where there is overwhelming support from political actors and the public to amend it. First, they may wish to impose a gag rule on a particularly contentious matter, freezing the terms of agreement so as to free the parties to negotiate other parts of the constitutional bargain.³⁸ One example is the temporarily unamendable slave trade clauses in the United States Constitution,³⁹ negotiated in 1787 as a temporary resolution to a divisive matter.⁴⁰ Second, making

35. *La constitution* 1958, “No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy. The republican form of government shall not be the object of any amendment.” *Ibid* art 89.

36. *Constituição Federal [Brazil Const]* (“[n]o proposal of amendment shall be considered which is aimed at abolishing . . . the federative form of State” art 60).

37. *Grundgesetz für die Bundesrepublik Deutschland*, May 23, 1949, BGBl. I, [*Basic Law*] (“Amendments to this Basic Law affecting [the inviolability of human dignity] shall be inadmissible” art 79(3)).

38. See Rosalind Dixon & Tom Ginsburg, “Deciding Not to Decide: Deferral in Constitutional Design” (2011) 9:3–4 *Intl J Const L* 636 at 644.

39. *US Const* art I, § 9, cls 1, 4.

40. See Douglas Linder, “What in the Constitution Cannot be Amended?” (1981) 23:2 *Ariz L Rev* 717 at 721.

something unamendable is a way for constitutional designers to entrench and thereby express to the world the constitutional values they believe do or should reflect the core identity of the constitutional state.⁴¹

Unamendability may serve three additional purposes: to preserve something distinctive about the state, to transform the state and to promote or accelerate reconciliation.⁴² Constitutional designers may use unamendability to preserve what they view as an integral feature of the state, for example Islamic republicanism in Afghanistan.⁴³ They may also use it to transform the state, for example to repudiate an old regime and entrench a new political commitment, as the Constitution of Bosnia and Herzegovina sought to do by making all human rights formally unamendable.⁴⁴ Constitutional designers may also grant unamendable protections of amnesty or immunity for prior conduct as a way of encouraging reconciliation. The former Nigerien Constitution, for example, gave unamendable grants of amnesty to perpetrators of previous coups.⁴⁵

Of course, no constitutional provision is really ever unamendable. Where the political will exists to alter an obdurate constitutional text, political actors can write a new constitution with the unamendable provision removed or loosened. This would break legal continuity in the regime, but it would nonetheless overcome the rigidity of the constitutional text. And where constitutional replacement is either impossible, improbable or suboptimal, the authoritative arbiter of constitutional meaning may stretch the interpretation of a constitutional law or amendment, finding as a result of creative interpretation that it respects the formal prohibitions set by the constitution, even if a plain reading would otherwise raise a tension with the formal prohibition.⁴⁶ This is precisely what occurred recently in Honduras: The Supreme Court

41. See Albert, “Expressive Function”, *supra* note 16 at 254.

42. See Albert, “Constitutional Handcuffs”, *supra* note 7 at 678–98.

43. *Constitution of Afghanistan* 2004, art 149.

44. *Constitution of Bosnia & Herzegovina* 1995, art X.

45. *Constitution du Niger de la République du Niger* 1999, arts 136, 141 (superseded in 2010).

46. See Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge, UK: Cambridge University Press, 2007) at 184.

interpreted as freely amendable a textually airtight formally unamendable clause prohibiting presidential re-election.⁴⁷

(ii) Interpreting Formal Unamendability

The power to evaluate the constitutionality of a constitutional amendment may in theory rest with any political institution, but it often belongs to courts, and less commonly to legislatures.⁴⁸ Some unamendable provisions are more definitive than others and, as a consequence, leave comparatively little room for interpretation. Consider, for example, the Algerian Constitution, which makes the national language unamendable,⁴⁹ a rule that is more straightforward to interpret than the Namibian Constitution's absolute prohibition on any amendment that "diminishes or detracts" from fundamental rights.⁵⁰

There are two major categories of violations of formal unamendability: procedural and substantive unconstitutionality. The Turkish Constitution, for example, entrenches secularism against formal amendment.⁵¹ It also authorizes the Constitutional Court to review the constitutionality of amendments, but it limits the Court's review to only matters of form, that is to whether the amendment was adopted using the correct procedures, with the proper majorities and in the right sequence without irregularity.⁵²

The Turkish Constitutional Court has been criticized for venturing beyond this pure procedural review of formal amendments, despite what appears to be a clear prohibition against a broader review of the substance

47. See Leiv Marsteintredet, "The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions" (2 May 2015), *Blog of the International Journal of Constitutional Law and ConstitutionMaking.org*, online: <www.iconnectblog.com/2015/05/Marsteintredet-on-Honduras> .

48. Norway is one of the cases where the power belongs to the legislature. See *Kongeriget Norges Grundlov* 1814, art 112.

49. *Constitution de la République Algérienne Démocratique et Populaire* 1989, art 178(4) (as amended in 2008).

50. *Constitution of the Republic of Namibia* 1990, art 131 [*Namibia Const.*].

51. *Türkiye Cumhuriyeti Anayasası* 1982, art 4.

52. *Ibid.*, art 148.

of secularism.⁵³ Yet the distinction between procedure and substance is less clear than it appears since procedural rules often reflect substantive restrictions, and indeed there may be substantive values underpinning the procedures themselves.⁵⁴ Moreover, the Constitutional Court's review of substantive constitutionality despite its textual command to review only procedural constitutionality may reflect the difficulty of interpreting an unamendable provision like Turkey's unamendable value of secularism. Although secularism may be constitutive of Turkish constitutional identity, its meaning may, over time, vary even as its text remains unchanged.

In contrast to procedural review, a court may also review laws and constitutional amendments for *substantive* conformity with the constitution's formally unamendable rules. Germany, for example, makes human dignity inviolable and thereby creates a standard against which all official conduct, including laws and constitutional amendments, must be judged.⁵⁵ The German Constitutional Court has held that human dignity requires the state to protect pre-natal life over the mother's autonomy interest⁵⁶ and has relied on this constitutional value of human dignity to invalidate several other laws.⁵⁷

A court may also interpret formal unamendability in connection with the adoption of a new constitution. The most well-known example comes from South Africa. In the transitional period after the end of apartheid, political actors adopted an interim constitution on the understanding that a new constitution would be adopted within two years of the first sitting

53. See e.g. Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa, Turkey: Ekin Press, 2008) at 40–49; Yaniv Roznai & Serkan Yolcu, “An Unconstitutional Constitutional Amendment: The Turkish Perspective—A Comment on the Turkish Constitutional Court's Headscarf Decision” (2012) 10:1 Intl J Const L 175 at 195–202.

54. See Richard Albert, “Constructive Unamendability in Canada and the United States” (2014) 67:1 SCLR (2d) 181 at 193–94 [Albert, “Constructive Unamendability”].

55. *Basic Law*, *supra* note 37, art 1(1).

56. See Donald P Kommers & Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed (Durham, NC: Duke University Press, 2012) at 377.

57. See *ibid* at 357, 366, 396 (translating and discussing the Aviation Security Act Case, the Microcensus Case and the Life Imprisonment Case).

of the National Assembly.⁵⁸ The interim constitution itself required the Constitutional Court to ensure that the eventual new constitution comply with a list of over thirty constitutional principles identified in an accompanying schedule.⁵⁹ The interim constitution made the Constitutional Court's certification decision "final and binding".⁶⁰ When the Court ultimately reviewed the new constitution for compliance with these constitutional principles—including the protection of fundamental rights, the separation of powers, judicial independence, federalism and the rule of law—the Court held that roughly ten items had failed to meet the standard.⁶¹ The result was momentous: The new proposed constitution was unconstitutional.⁶²

C. Informal Restrictions on Constitutional Amendment

Constitutional democracies sometimes recognize unamendability even where it is not entrenched in the constitutional text. In these cases, unamendability becomes informally entrenched as a result of a binding declaration by the authoritative interpreter of the constitution that something in the constitution is inviolable. The interpreter thereafter acquires the power to invalidate any contrary action, law or formal amendment. These informal restrictions rest on the fusion of two roles that have traditionally been separated across time and institutions: constitutional author and constitutional interpreter.

(i) Amendment and Revision

The distinction between amendment and revision is critical for understanding how informal unamendability arises. Carl Schmitt explained that an amendment occurs "only under the presupposition that the identity and continuity of the constitution as an entirety is

58. *Constitution of the Republic of South Africa Act, 1993*, s 73(1) [*South Africa Const, 1993*], as repealed by *Constitution of the Republic of South Africa Act, 1996* [*South Africa Const, 1996*].

59. *South Africa Const, 1993*, *supra* note 58, ss 71(1)–(2).

60. *Ibid*, s 71(3).

61. See *Certification of the Constitution of the Republic of South Africa*, [1996] ZACC 26 at para 482.

62. *Ibid* at para 483.

preserved”.⁶³ An amendment may be either ordinary or extraordinary in its effect, provided that in either case it remains continuous with the existing constitution and does not offend “the spirit or the principles” of the constitution.⁶⁴ An amendment, then, may expand, retract, specify or generalize as long as it “preserve[s] the constitution itself”.⁶⁵

Where a constitutional change alters the identity of the constitution, or runs counter to its spirit or principles such that the change transforms the existing constitution, that change is properly defined as a revision. A revision breaks with the fundamental presuppositions of the constitution and fails to cohere with its operational framework.⁶⁶ To illustrate, as John Rawls argued, it would be a revision to the United States Constitution, not an amendment, to repeal the First Amendment using the formal procedures of constitutional amendment.⁶⁷ The First Amendment, he suggested, should be understood as implicitly unamendable because it forms the core of the democratic presuppositions of the Constitution.⁶⁸ Of course, nothing in Article V prevents political actors from using its procedures to pass a hypothetical Twenty-Eighth Amendment doing away with the First. But the theory of revision regards the normal procedures of amendment as insufficient to authorize the eradication of a right so central to American constitutionalism.

Where the constitutional text does not expressly distinguish between procedures for amendment and revision, a judgment must be made whether a proposed change qualifies as an authorized amendment or whether it amounts to a revision. If it is determined to be an amendment, it is likely to become entrenched in the constitution without sustainable objection. But if it is determined that the change amounts to a revision, and that political actors attempted to revise the constitution using the procedures designed for amendment, the revision is likely to be contested.

63. Carl Schmitt, *Constitutional Theory*, translated by Jeffrey Seitzer (Durham, NC: Duke University Press, 2008) at 150.

64. *Ibid* at 153.

65. *Ibid* at 150.

66. See Thomas M Cooley, “The Power to Amend the Federal Constitution” (1893) 2:4 Mich LJ 109 at 118.

67. See John Rawls, *Political Liberalism*, 2nd ed (New York: Columbia University Press, 2005) at 238–39.

68. 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) [forthcoming in 2015].

The basis for this informal restriction on the amendment power is the theory that a provision can be unamendable even where an amendment to it is not expressly prohibited in the codified constitution. This effectively creates an unwritten analogue to formal unamendability.

(ii) The Basic Structure Doctrine

The Supreme Court of India is best associated with the concept of informal unamendability. The Court refined the idea in a series of important judgments from 1951 to 1981.⁶⁹ Faced with the threat of the legislature abusing its textually unlimited power of formal amendment, the Court ultimately ruled that the amendment power was limited. The Court created the “basic structure doctrine” to invalidate amendments that, in its view, are inconsistent with the Constitution’s framework. The Chief Justice wrote that “every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same”.⁷⁰ What is most important to note is that the Constitution’s text did not then, nor does it now, identify what is “basic”, as in foundational, to its own structure.⁷¹ That judgment of constitutional priority finds its origin and expression in judicial interpretation, not in popular consent-driven constitutional design.

69. The leading cases are *Sri Sankari Prasad Singh Deo v Union of India*, 1951 AIR 458; *Golaknath v State of Punjab*, 1967 AIR 1643; and *Kesavananda Bharati v State of Kerala*, 1973 SCC (4) 225 [*Kesavananda*]. The culmination of these cases was the rule that the amendment power may be used only as long as it does not do violence to the Constitution’s basic structure. The concept of the basic structure is said to include the supremacy of the Constitution, the republican and democratic forms of government, the secular character of the state, the separation of powers and federalism. In *Minerva Mills Ltd v Union of India*, 1980 AIR 1789, [*Minerva Mills*], the Court invoked the basic structure doctrine to invalidate amendments to India’s formal amendment rules. The amendments had proposed to limit the Court’s power to review constitutional amendments.

70. *Kesavananda*, *supra* note 69.

71. One could interpret India’s escalating formal amendment rules as creating a hierarchy of constitutional importance. See Albert, “Structure of Constitutional Amendment”, *supra* note 21.

II. Constitutional Amendment in Canada

Canada's formal amendment rules are among the most complex in the democratic world.⁷² Their escalating thresholds, quorum requirements, opt-out exemptions and special protections for certain rights, institutions, structures and principles create a unique framework for amendment. Yet Canada's formal amendment rules stand out as much for what they entrench as what they do not: Unlike over half of the world's new recent constitutions, Canada does not entrench any form of formal unamendability.⁷³ Formally amending the Constitution of Canada is nevertheless no small feat,⁷⁴ and indeed it may be the most difficult democratic constitution to formally amend,⁷⁵ harder even than the United States Constitution, widely thought to be the world's most rigid.⁷⁶

A. Formal Amendment in Canada

By its textual imprint alone, Canada's formal amendment rules are unique. The *Constitution Act, 1982* contains sixty-one sections divided into seven parts. The fifth part, covering twelve sections and representing one-fifth of the entire text, is devoted exclusively to the rules for formal amendment.⁷⁷ It is unusual for democratic constitutions to entrench formal amendment rules in such length. The world's longest-enduring democratic constitutions entrench much shorter formal amendment

72. See Richard Albert, "Formal Amendment Difficulty in Canada" (2015) 53:1 *Alberta L Rev* 85 [Albert, "Amendment Difficulty"] (arguing that two of Canada's five formal amendment procedures are virtually impossible to use).

73. See Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (DPhil Thesis, London School of Economics and Political Science, 2014) c 2 at 28 [unpublished].

74. See generally Albert, "Constructive Unamendability", *supra* note 54 at 194–96.

75. See Albert, "Amendment Difficulty", *supra* note 72.

76. See Donald S Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006) at 170 (ranking the United States Constitution as the most rigid).

77. Part V of the *Constitution Act, 1982*, ss 38–49, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

rules, often in one or two sections.⁷⁸ This pattern generally holds in more recently adopted constitutions in democratic states.⁷⁹ Yet what distinguishes the Constitution of Canada's formal amendment rules from others in the modern democratic world is its combination of tiered voting thresholds, strict quorum requirements, opt-out exemptions and special protections for certain rights, institutions, structures and principles. These unique features are reflected in the escalating, federalist and consultative structure of formal amendment in Canada.

(i) The Escalating Structure of Formal Amendment

Escalation is the defining feature of Canada's formal amendment rules. The text formalizes five amendment procedures, each one expressly restricted for amendments to specific constitutional provisions and principles. This is an important feature of Canada's amendment rules: They do not have comprehensive application in the way we would describe the application of the amendment procedures in the Italian Constitution, for example, whose multiple formal amendment procedures may each be used to amend any formally amendable constitutional provision in the entire constitutional text.⁸⁰ Of the five formal amendment procedures in Canada, one applies exclusively to provincial constitutions: The legislature of each province is authorized to formally amend its own constitution in relation only to purely provincial subjects.⁸¹ Each of the other four amendment procedures is more onerous than the other, and each is by

78. See e.g. *Bundes-Verfassungsgesetz* BGBl No 1/1930, as last amended by *Bundesverfassungsgesetz* BGBl I arts 34–35, 44 (Austria); *Australian Constitution* s 128; *Constitution du Grand-Duché de Luxembourg* 1868, art 114; see *Norges Grundslov*, *supra* note 48 art 112; *US Const* art V.

79. See e.g. *La Constitution* 1994, art 195 (Belg); *Constituição da República de Cabo Verde* 1992, arts 309–15 (Cape Verde); *Constitución Política de la República de Chile*, arts 127–29; *Eesti Vabariigi Põhiseadus* 1992, ss 161–67 (Est); *Suomen perustuslaki* 2000, s 73 (Fin); *Stjórnarskrá lýðveldisins Íslands* 1999, art 79 (Ice); *Ustawa Republike Slovenije* 1991, arts 168–71 (Slovn); *South Africa Const*, 1996, *supra* note 58, s 74; *Bundesverfassung* Apr 18 1999, SR 101, arts 192–95 (Switz).

80. *Constituzione*, art 138 (It).

81. *Constitution Act*, 1982, *supra* note 77, s 45.

and large cumulative in that it incorporates the requirements of the lesser one.⁸² This is what I mean by escalation.

The lowest amendment threshold is the unilateral provincial amendment procedure in section 45.⁸³ The next-lowest amendment threshold is the unilateral federal amendment procedure in section 44. Under this procedure, Parliament is authorized to formally amend the Constitution by ordinary legislation “in relation to the executive government of Canada or the Senate and House of Commons”.⁸⁴ Only the House of Commons or the Senate may initiate an amendment under this procedure, and both houses must approve the amendment before it receives Royal Assent.⁸⁵ In my view, Ian Greene has interpreted this procedure correctly: Parliament may deploy this amendment procedure to formally amend matters within its internal constitution, for instance Parliamentary privilege, legislative procedure and the number of members of parliament.⁸⁶ It is therefore an exceptionally narrow power—a limited delegation of power to Parliament—because it requires relatively little breadth of political support in order to be used successfully.⁸⁷ Further evidence of its thinness is evident in the Constitution’s text, which makes its use “subject to sections 41 and 42”, both reserved for more substantial formal amendments.⁸⁸

The next amendment procedure in terms of difficulty is the regional amendment procedure in section 43, which incorporates

82. The amendment procedures are not strictly cumulative. For example, one could not use section 38 to pass an amendment reserved to section 43 because that could potentially bypass section 43’s requirement for the authorization of the legislative assembly to which the amendment applies. The idea of cumulateness, however, reflects the generally escalating framework of Canada’s formal amendment rules. See *Constitution Act, 1982*, *supra* note 77, ss 38, 43.

83. *Ibid.*, s 45.

84. *Ibid.*, s 44.

85. *Ibid.*

86. 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 251.

87. It is important to stress here that section 44 requires the approval of both houses of Parliament. The Senate has an absolute veto over amendments under section 44, unlike amendments under sections 38, 41, 42 or 43, which may be made without a resolution of the Senate. See *Constitution Act, 1982*, *supra* note 77, s 47(1).

88. *Ibid.*, s 44.

the major elements of the unilateral federal amendment procedure. This Parliamentary-provincial procedure requires the House of Commons, Senate and legislative assemblies of the affected provinces to approve all amendments that apply to “one or more, but not all, provinces”.⁸⁹ This procedure is more onerous than the unilateral federal procedure because it requires provincial consent, not just simple approval by both houses of Parliament. It must be used for amendments in relation to provisions of the Constitution that apply to one or more, but not all, provinces. Thus, it applies to matters that have, at a minimum, a provincial-federal interest even if it is in respect of a single province and, at most, to matters that have a regional, though not national scope. This procedure has been used more frequently and successfully than any of the four other procedures since 1982.⁹⁰

The next most difficult amendment procedure is Canada’s default amendment procedure. It applies to all subjects not otherwise assigned to a specific amendment procedure. It also applies exclusively to a specially designated class of subjects, including proportional representation in the House of Commons, the powers and membership of the Senate (as well as the method of senatorial selection), the Supreme Court of Canada for all items except its composition, the creation of new provinces and the boundaries between provinces and territories.⁹¹ This default procedure in section 38 requires multilateral approval from both federal and provincial institutions: authorizing resolutions from the House of Commons and the Senate as well as resolutions from the provincial legislative assemblies of at least two-thirds of the provinces whose aggregate population amounts to at least half of the total.⁹² This default amendment procedure incorporates the regional amendment procedure—though it does not give a veto to all provinces to which the amendment would apply, unlike section 43. It also requires supermajority provincial ratification as well as the majority population quorum requirement.⁹³

Unanimity is the most difficult formal amendment threshold. Entrenched in section 41, it requires authorizing resolutions from both

89. *Ibid.*, s 43.

90. See Peter W Hogg, *Constitutional Law of Canada*, 5th ed, (Toronto: Carswell, 2007) vol 1 (loose-leaf updated 2012, release 1) at 1-7-1-8, n 32.

91. *Constitution Act, 1982*, *supra* note 77, s 42.

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

93. *Ibid.*

houses of the federal Parliament and from each of the provincial legislative assemblies.⁹⁴ There are five specifically designated subjects for which use of this unanimity amendment rule is required: the monarchy, the right to provincial representation in the House of Commons not less than that in the Senate, Canada's official languages beyond their provincial or regional use, the composition of the Supreme Court of Canada and Canada's formal amendment rules themselves.⁹⁵ This unanimity threshold is even more demanding than the default multilateral amendment procedure in section 38 insofar as it requires the approval of both houses of the federal Parliament and all ten provincial legislative assemblies. The Senate's approval is not an absolute requirement here.⁹⁶ We can therefore appropriately describe Canada's structure of formal amendment as escalating: Each of the four federal procedures requires more than the former, on the theory that the more important or politically salient a subject, the greater the degree of publicly aggregated political support required for making changes to it.⁹⁷

(ii) The Federalist Structure of Formal Amendment

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

94. *Ibid.*, s 41.

95. *Ibid.*

96. *Ibid.*, s 47(1).

97. See Albert, "Expressive Function", *supra* note 16 at 247-51.

provincial dissent, the power to opt out from successful amendments in certain circumstances and in some cases to receive compensation for opting out, and the right to revoke both provincial dissent and assent. A word on each federalist feature is useful.

First, Canada's formal amendment rules authorize a province to register its dissent from an amendment made under the default multilateral amendment procedure.⁹⁸ There are three important qualifications to the right to dissent: (1) a province may only dissent from an amendment that weakens provincial powers or prerogatives, specifically one that "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province",⁹⁹ (2) the dissenting province must pass a resolution by majority vote in its legislative assembly approving the province's dissent prior to the proclamation of the amendment,¹⁰⁰ and (3) the right of dissent is ineffective against formal amendments to proportional provincial representation in the House of Commons, Senate powers and provincial representation, senator selection and eligibility, the Supreme Court of Canada, provincial-territorial boundary modification and the creation of new provinces.¹⁰¹ The effect of a provincial dissent is to grant the dissenting province an exemption from the application of the amendment: An amendment from which a province dissents "shall not have effect" in the dissenting province.¹⁰²

The right to register provincial dissent amounts to a provincial power to opt out from an amendment that will otherwise apply to the entire country. For some matters, where a province registers its dissent to an amendment passed pursuant to the default multilateral amendment procedure and therefore opts out of the effect of the amendment, a province may be entitled to compensatory funding from the federal government. The Constitution authorizes the disbursement of "reasonable compensation" for a dissenting province where the amendment transfers from provincial control to federal control certain powers concerning

98. *Constitution Act, 1982*, *supra* note 77, s 38(3).

99. *Ibid*, s 38(2).

100. *Ibid*. An amendment is complete only when the governor general issues a proclamation under the Great Seal of Canada. See *ibid*, ss 38(1), 41, 43. The Queen's Privy Council advises the governor general to issue a proclamation when the required resolutions have been adopted. See *ibid*, s 48.

101. *Ibid*, s 42(2).

102. *Ibid*, s 38(3).

education or culture.¹⁰³ For example, political actors might agree, by amendment pursuant to the default multilateral amendment procedure, to transfer jurisdictional authority over education from provincial legislatures to Parliament. Were the province of Ontario to register its dissent to that amendment, Ontario would be entitled to public funding to continue operating its provincial school system while education in the rest of the country would be overseen by Parliament.

The right of revocation is an additional federalist feature of Canada's formal amendment rules. The Constitution preserves provincial autonomy by conferring upon a province the right to revoke either its assent or dissent to a formal amendment. Where a province exercises its right to dissent, it may later revoke its dissent and simultaneously or subsequently consent to the amendment with a resolution supported by a majority of its legislative assembly.¹⁰⁴ There is no time limitation on the right of revocation; a province may revoke its dissent either before or after the proclamation of an amendment.¹⁰⁵ Provinces are not alone in possessing the right of revocation. Either the House of Commons, the Senate or a provincial legislative assembly may revoke a prior resolution assenting to an amendment as long as the revocation occurs before the official proclamation of the amendment.¹⁰⁶

But the Constitution disables the twin provincial rights of revocation and dissent for specially designated provisions requiring the default multilateral amendment procedure.¹⁰⁷ For example, the default multilateral amendment procedure must be used to amend the provincial distribution of senators.¹⁰⁸ A province cannot dissent to, and therefore opt out of, a formal amendment to the number of senators to which it or another province is entitled.¹⁰⁹ To allow a province to dissent from the

103. *Ibid*, s 40. Canada's Constitution grants provinces exclusive jurisdiction over education and certain cultural matters, for instance charities, shopping and alcohol licensing, and the solemnization of marriage. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92–93, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

104. *Constitution Act, 1982*, *supra* note 77, s 38(3).

105. *Ibid*, s 38(4).

106. *Ibid*, s 46(2).

107. *Ibid*, s 42(2).

108. *Ibid*, s 42(1)(c).

109. See *Constitution Act, 1867*, *supra* note 103, ss 17–57 (speaks of only a “place” not a “seat” in the Senate).

distribution of Senate seats would disrupt the structure and operation of Parliament. The same problem arises with respect to the principle of proportionate provincial representation in the House of Commons, which may be amended only with the default multilateral amendment procedure.¹¹⁰ For the same reasons a province cannot dissent or opt out from Senate seat distributions, a province cannot dissent or opt out from an amendment to the scheme of proportionate provincial representation in the lower house.¹¹¹ The Constitution prudently anticipates problems arising out of this power to dissent.

(iii) The Consultative Structure of Formal Amendment

Formal amendment in Canada is also consultative by design, requiring political actors to consult deliberatively and cooperatively on major constitutional change. The first consultative dimension of formal amendment applies exclusively to the default multilateral amendment procedure as a temporal limitation. For formal amendments made pursuant to the default multilateral amendment procedure, the governor general may not issue a proclamation before one year has elapsed from the adoption of the resolution initiating the formal amendment procedure.¹¹² The governor general is also prohibited from issuing a proclamation after three years have elapsed from the adoption of the initial authorizing resolution.¹¹³ This creates a one-year floor and a three-year ceiling for deliberation, the consequence being that all amendments proposed under the default multilateral amendment procedure expire after three years. This temporal limitation encourages purposeful debate within a defined period of time—political actors can neither rush nor delay an amendment.

The second notable consultative feature authorizes amendment without Senate approval. Where the Senate has not adopted an approval

110. *Constitution Act, 1982*, *supra* note 77, s 42(1)(a).

111. *Constitution Act, 1867*, *supra* note 103, s 51 (using its amendment power under section 44 of the *Constitution Act, 1982*, *supra* note 77, Parliament has amended the rules and provisions of the *Constitution Act, 1867* as to seat distribution in the House of Commons in a manner mindful of the principle of proportionate representation).

112. See *Constitution Act, 1982*, *supra* note 77, s 39(1). (The Constitution creates an exception allowing the governor general to proclaim the amendment sooner where “the legislative assembly of each province has previously adopted a resolution of assent or dissent” *ibid*).

113. See *ibid*, s 39(2).

resolution for a formal amendment within 180 days after the House of Commons has done so, and the House of Commons once again adopts the same approval resolution sometime after 180 days, the amendment process may proceed without Senate approval.¹¹⁴ Senate approval is normally required in all federal amendment procedures. This exception applies to all formal amendments made pursuant to either the unanimity amendment procedure, the default multilateral amendment procedure, or the regional amendment procedure.¹¹⁵ It wisely does not apply to the unilateral federal amendment procedure¹¹⁶ because allowing a formal amendment to pass without Senate approval would confer an unchecked power of formal amendment by legislation upon the House of Commons. The 180-day override power possessed by the House of Commons is therefore a mechanism to overcome political obstruction or delay by the Senate. Though it may appear contrary to the function of consultation, it furthers it by ensuring that political actors actually do consult, and ultimately decide, within a reasonable period of time. It is a constitutionalized protection against deliberate or passive delay.

Two additional features reflect the consultative dimension of formal amendment in Canada, yet they are not entrenched in the formal amendment rules themselves. First, the *Constitution Act, 1982* required the prime minister to convene a constitutional conference with first ministers within fifteen years of its coming into force in order to review the formal amendment rules.¹¹⁷ The authors of the *Constitution Act, 1982* therefore contemplated multilateral consultation on whether, after almost a generation in use, the new formal amendment rules were serving Canada well.¹¹⁸ Second, the *Constitution Act, 1982* commits the prime minister to convene a constitutional conference consisting of first

114. See *ibid*, s 47(1). In computing the 180-day time period after the House of Commons' adoption of the approval resolution, the Constitution exempts any period of time when Parliament is prorogued or dissolved. See *ibid*, s 47(2).

115. *Ibid*, s 47(1).

116. *Ibid*.

117. *Ibid*, s 49.

118. Whether the conference that was ultimately held in 1996 met the spirit of the requirement is a matter of some debate. See John D Whyte, "A Constitutional Conference . . . Shall be Convened . . .": Living with Constitutional Promises" (1996) 8:1 Const Forum Const 15.

ministers and “representatives of the Aboriginal peoples of Canada” before any amendment is made to matters affecting Aboriginal rights.¹¹⁹

B. Judicial Restrictions on Constitutional Amendment

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

(i) Procedural Enforcement

The Court asserted its authority to declare which constitutional amendment procedure must be used to amend a given principle or provision in the *Senate Reform Reference* when invited by Parliament to address the issue.¹²⁰ This raises two separate questions: whether the Government may seek the Court’s counsel on a matter of constitutional law (it may and often has)¹²¹ and whether the Court may specify that one amendment procedure must be used over another in a given instance. The answer to the second question is yes, but the Constitution does not expressly delegate this authority to the Court. It has arisen partly as a consequence of the Court’s reference jurisdiction, its supremacy

119. *Constitution Act, 1982*, *supra* note 77, s 35.1.

120. *Senate Reform Reference*, *supra* note 5 at para 5.

121. See generally James L Huffman & MardiLyn Saathoff, “Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction” (1990) 74:6 *Minn L Rev* 1251 (reviewing the history of the Court’s reference jurisdiction).

in constitutional interpretation and the latent ambiguities in Canada's formal amendment rules.

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

For example, in the *Senate Reform Reference*, the Government of Canada asked the Court for its advice specifically on whether the Constitution could be formally amended to establish fixed senatorial terms, for instance terms of eight, nine or ten years—using the unilateral federal amendment procedure in section 44.¹²² The Court answered no,¹²³ explaining that the unilateral federal procedure is “limited”, and that it “is not a broad procedure that encompasses all constitutional changes to the Senate which are not expressly included within another procedure in Part V”.¹²⁴ This was a direct response to the unsuccessful argument that Parliament could amend senatorial term limits unilaterally since there is no express mention of term limits in the rules of multilateral formal amendment pertaining to the Senate. Term limits are amendable, explained the Court, but only using the default multilateral amendment rule in section 38.¹²⁵ There is good reason for not allowing Parliament to use its limited power of formal amendment to change senatorial tenure: The change touches on a matter of federal-provincial interest, and therefore any process to alter it must engage both levels of government, not only Parliament.

The Court gave a similar answer to the question of whether Parliament could effectively change the method of choosing senators.¹²⁶ The government asked the Court whether Parliament could use the unilateral

122. *Senate Reform Reference*, *supra* note 5 at para 5.

123. *Ibid* at para 75.

124. *Ibid*.

125. *Ibid*.

126. *Ibid* at para 69.

federal procedure to create a framework for consultative senatorial elections that would authorize the populations of the provinces and territories to express their preferences for senatorial nominees.¹²⁷ In answering no, the Court took a functionalist view of constitutional change, reasoning that a constitutional amendment need not necessarily alter the constitutional text in order to alter the constitution. It would “privilege form over substance”, wrote the Court, to define an amendment so narrowly, even where the governor general would continue to appoint—in the language of the Constitution, to “summon”—senators on the recommendation of the prime minister.¹²⁸ The Court held that introducing these changes to the method of senatorial selection would so fundamentally alter the federal architecture of the Constitution that Parliament could not alone make this change.¹²⁹ The provinces, the Court explained, must be involved in this amendment process pursuant to the default multilateral amendment procedure in section 38. Indeed, the Court added, the text of the amendment rules requires that changes to the “method of selecting Senators” be made in consultation with the provinces, not unilaterally.¹³⁰

The other reference questions likewise asked the Court which amendment procedure was proper for a given reform to the Senate, namely repealing the property qualifications for senators and abolishing the Senate altogether.¹³¹ On the former, the Court decided that the Constitution allowed Parliament to use its unilateral amendment power, although for political actors to fully repeal the Senate they would need also to use the regional amendment procedure to secure the consent of Quebec, which has a special arrangement in respect of the Senate.¹³² On the latter, the Court explained that abolishing the Senate would require conformity with the onerous rules of the unanimity amendment procedure, namely the consent of the houses of Parliament and all of the provinces. This is precisely because of the importance of the Senate to the

127. *Ibid* at para 5.

128. *Ibid* at paras 51–52.

129. *Ibid* at para 54.

130. *Ibid* at para 65.

131. *Ibid* at para 5.

132. *Ibid* at para 86.

structure of the Constitution, to federalism in Canada and to the design of Canada's formal amendment rules themselves.¹³³

(ii) Unwritten Constitutional Principles

The Supreme Court has also identified certain unwritten constitutional principles that constitutional amendments must respect. This extraordinary move has incorporated unwritten rules into the written constitution, and arguably subordinated the text to them. The result has been to create a hierarchy of constitutional precedence placing unwritten rules above written rules, raising concerns for the rule of law—itsself a constitutional principle. As Lon Fuller argued, the rule of law requires the publication of clear rules so the governed have notice of their obligations and entitlements.¹³⁴ Where unwritten principles are given priority over written rules, there is a risk of a disjunction between law and enforcement¹³⁵—a disjunction that can undermine the rule of law. Whether this risk has materialized in Canada in the context of constitutional amendment remains an open question. What is less uncertain, however, is that unwritten rules are often uncovered from “amendment-like” interpretations of the Constitution.¹³⁶

For example, in the *Secession Reference*, the Court identified four unwritten constitutional principles that must govern negotiations leading to a constitutional amendment to formalize secession.¹³⁷ By the Court's own admission, these constitutional principles—federalism, democracy, constitutionalism and the rule of law, and the protection of minorities¹³⁸—

133. *Ibid* at paras 95–111.

134. Lon L Fuller, *The Morality of Law* (New Haven, Conn: Yale University Press, 1964) at 39.

135. For the strongest critique of the Court's recourse to unwritten constitutional principles as a basis for judicial review, see generally Jean Leclair, “Canada's Unfathomable Unwritten Constitutional Principles” (2002) 27:2 *Queen's LJ* 389.

136. Sujit Choudhry, “Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?” (2008) 6:2 *Int J Constitutional L* 193 at 219.

137. *Supra* note 4.

138. *Ibid* at paras 55–82.

appear nowhere in the express provisions of the constitutional text.¹³⁹ As the Court wrote, these principles “are not explicitly made part of the Constitution by any written provision”, but it “would be impossible to conceive of our constitutional structure without them” because they “dictate major elements of the architecture of the Constitution itself and are as such its lifeblood”.¹⁴⁰ In light of the evolution of Canadian constitutional history,¹⁴¹ these principles give rise to a reciprocal obligation on all parties to negotiate a provincial secession when a clear majority of a province has chosen secession on a clear referential question.¹⁴² These four unwritten principles are not merely descriptive. They are so important that they may constitute a legitimate basis for invalidating the conduct of political actors.

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations, which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.¹⁴³ The Court here recognized the existence of these unwritten constitutional norms, and also kept open the possibility of recognizing others, and in doing so has preserved for itself wide latitude to police all forms of state action. As the Court itself stressed in the *Secession Reference*, the Court is authorized to invoke these and other unwritten principles in all matters that arise before it.¹⁴⁴

This was not the first time the Court had invoked unwritten principles as a decision rule. The year prior, in the *Provincial Judges Reference*, the Court seemed to suggest that a law could be invalidated for violating an unwritten constitutional principle, in this case judicial

139. Federal union and the rule of law are mentioned in the preambles to the *Constitution Act, 1867* and the *Constitution Act, 1982*, respectively. These, however, are recitals not justiciable provisions. See *Constitution Act, 1867*, *supra* note 103, Preamble; *Constitution Act, 1982*, *supra* note 77, Preamble.

140. *Secession Reference*, *supra* note 4 at para 51.

141. *Ibid* at para 32.

142. *Ibid* at para 88.

143. *Ibid* at para 54.

144. *Ibid*.

independence.¹⁴⁵ The Court insisted that although the *Canadian Charter of Rights and Freedoms*¹⁴⁶ and the *Constitution Act, 1867* both give a limited guarantee of an “independent and impartial tribunal”,¹⁴⁷ judicial independence “is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*”.¹⁴⁸ Drawing from precedent and the nature of Canadian constitutionalism, the Court concluded that the Constitution includes more than its entrenched texts. The Court thus cautioned against presupposing that “the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence”.¹⁴⁹ The preamble of the *Constitution Act, 1867*, whose purpose is partly “to fill out gaps in the express terms of the constitutional scheme”,¹⁵⁰ also reinforces judicial independence as an important norm.

Rooted in history, entrenched in the text and anchored in the preamble of the *Constitution Act, 1867*, judicial independence was not the only unwritten constitutional principle the Court identified in this case. The preamble also identifies other organizing principles that have similar normative validity, according to the Court. For instance, the doctrine of “full faith and credit”, obliging provincial courts to recognize the judgments of others, must be inferred from the Constitution and its preamble since it is fundamental to federalism in Canada though not expressly entrenched in the constitutional text.¹⁵¹ Likewise, paramountcy—which holds that a valid federal law prevails over a valid provincial law to the extent of any inconsistency—appears nowhere as a general proposition in the text,

145. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at para 83, (*sub nom Re Provincial Court Judges*) 150 DLR (4th) 577 [*Provincial Judges Reference*] (ultimately, the Court anchored its judgment in section 11(d) of the *Charter*).

146. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, *supra* note 77 [*Charter*].

147. *Constitution Act, 1867*, *supra* note 103, ss 96–100; *Constitution Act, 1982*, *supra* note 77, s 11(d).

148. *Provincial Judges Reference*, *supra* note 145 at para 83 [emphasis in original].

149. *Ibid* at para 85.

150. *Ibid* at para 95.

151. *Ibid* at para 97.

but it is a necessary feature of Canada's federalist constitutional design.¹⁵² The Court followed similar reasoning to support its recognition of other unwritten constitutional norms, including the rule of law's remedial innovation of suspended declarations of invalidity, the constitutional status of the privileges of provincial legislatures, the federal power to regulate political speech, and implicit limits on legislative sovereignty with respect to political speech.¹⁵³ There are others still to be uncovered and applied, though without the same clarity that only a text can offer.¹⁵⁴

(iii) Judicial Self-Entrenchment

In addition to, but quite apart from entrenching unwritten constitutional principles, the Court has also entrenched itself. Yet in self-entrenching, the Court has not made itself formally unamendable: The Court remains amendable by political actors, specifically by the default multilateral amendment procedure, and by the unanimity procedure as to its composition.¹⁵⁵ Nonetheless, in the recent *Supreme Court Act Reference*, the Court made it much more difficult than the text of the Constitution suggests it should be to make amendments to the Court itself. By its interpretation of formal amendment rules, the Court has in this way entrenched itself against ordinary amendment.¹⁵⁶

Reference re Supreme Court Act, ss 5 and 6 concerned two inquiries related to eligibility for a seat on the Supreme Court. The first was whether a person who was currently a judge on the Federal Court of Appeal but had previously been, though was not currently, a qualified Quebec attorney for at least ten years could qualify as a Quebec judge under the *Supreme Court Act*, which reserves three seats for judges appointed "from among the judges of the Court of Appeal or of the Superior Court of the

152. *Ibid* at para 98. For a specific example of federal paramountcy as to agriculture and immigration, see *Constitution Act, 1867*, *supra* note 103, s 95.

153. *Provincial Judges Reference*, *supra* note 145 at para 104.

154. The Court's recent consideration of judicial independence, the separation of powers and the rule of law suggests that it has pulled back somewhat from its approach in the *Provincial Judges Reference*. See Leclair, *supra* note 135 at 392–93, n 13; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473.

155. *Constitution Act, 1982*, *supra* note 77, ss 41–42.

156. *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Supreme Court Act Reference*].

Province of Quebec or from among the advocates of that Province".¹⁵⁷ The Court answered no, concluding that the law's requirement that the appointee be a qualified Quebec attorney means that the appointee has to be a current member of the Quebec bar, at the time of the appointment, with at least ten years standing.¹⁵⁸ The second question, though, is more relevant for our purposes. The Court was asked to advise the government whether in light of the answer to the first question, Parliament may pass a law remedying that ineligibility, thereby authorizing the appointment of a former member of the Quebec bar to the Court.¹⁵⁹ The Court again answered no.¹⁶⁰

In detailing why Parliament cannot authorize by simple law an appointment not otherwise permitted by the *Supreme Court Act*, the Court had its Canadian *Marbury* moment—a reference to *Marbury v Madison*,¹⁶¹ the famous case in which the United States Supreme Court declared itself not only the authoritative interpreter of the constitution, but also the ultimate arbiter of its own jurisdiction. Just as *Marbury* illustrates an example of self-entrenchment, so does the *Supreme Court Act Reference*. The Canadian Supreme Court positioned itself as the only body that can constitutionally interpret the Constitution as to others and as to itself, a position that could conceivably raise a conflict, but that one could justify under section 52 of the *Constitution Act, 1982*, which makes the Constitution of Canada supreme¹⁶² and by implication the Court's interpretation of it as well. What the Court ruled in the *Supreme Court Act Reference* can be stated quite plainly as follows: Parliament cannot by itself repeal or even amend the *Supreme Court Act*, except for routine amendments that do not affect the essential characteristics of the Court.

That Parliament cannot alone amend its own law would once have been controversial and thought to uproot the very foundations of Parliamentary sovereignty that Canada inherited from the United Kingdom. But Parliamentary sovereignty in Canada has never implied Parliamentary supremacy given the jurisdictional limitations imposed

157. *Supreme Court Act*, RSC 1985, c S-26, s 6; *Supreme Court Act Reference*, *supra* note 156 at paras 1, 7.

158. *Supreme Court Act Reference*, *supra* note 156 at paras 4, 107.

159. *Ibid* at paras 5, 7.

160. *Ibid* at paras 5, 107.

161. *Marbury v Madison*, 5 US 137 (1803).

162. *Constitution Act, 1982*, *supra* note 77, s 52.

on Parliament and the provincial legislatures by the *Constitution Act, 1867*. Since 1982, Canada has been a *constitutional* supremacy, with the consequence that Parliament and the provincial legislatures must now conform their conduct to the *Charter*, which has imposed new obligations on parliamentarians.¹⁶³ One of those obligations is to abide by the Court's interpretation of the Constitution, which has long included more than its text. Since the *Supreme Court Act Reference*, however, the Constitution arguably now includes the *Supreme Court Act* itself. That is the operational result of the Court's opinion in the *Supreme Court Act Reference*: It elevates most aspects of the *Supreme Court Act* beyond ordinary Parliamentary action by informally entrenching the key characteristics of the Court. Today, amending the Court's essential features requires a multilateral constitutional amendment.

The composition of the Supreme Court, wrote the majority, cannot be subject to simple Parliamentary legislative amendment.¹⁶⁴ Any change to the Court's composition, which for the Court included a change to the rules for the three Quebec appointments, must be made using the unanimity amendment procedure in section 41.¹⁶⁵ Otherwise, Parliament could unilaterally amend the essential features of the Court and thereby risk undermining the Court's independence, its function in the separation of powers and its power as the authoritative interpreter of the Constitution. As the Court explained, "essential features of the Court are constitutionally protected" and any changes to the Court's composition require "the unanimous consent of Parliament and the provincial legislatures".¹⁶⁶

The practical consequence of the Court's opinion is significant. The Court has effectively transformed a Parliamentary law into a constitutional statute that now forms part of the Constitution of

163. See Richard Albert, "Advisory Review: The Reincarnation of the Notwithstanding Clause" (2008) 45:4 *Alta L Rev* 1037 at 1050.

164. *Supreme Court Act Reference*, *supra* note 156 at para 74.

165. *Ibid.*

166. *Ibid* at para 74.

Canada,¹⁶⁷ causing the “essential features of the Court” to “migrate” into the Constitution, where it is now immune from anything less than multilateral constitutional change.¹⁶⁸ The Court has recognized that the evolution of Canadian federalism and of the Court’s role within it as the national court of last resort now requires that its composition and its fundamental components be protected from ordinary Parliamentary law making.¹⁶⁹ Parliament, the Court ruled, cannot have the power to make transformative changes unilaterally, either to the Court as an institution of central importance to Canadian federalism or to Quebec’s historically guaranteed representation.¹⁷⁰ Conferring this power upon Parliament, the Court concluded, would ignore the Court’s constitutional status and modern constitutional politics. Moreover, it would deny the Court the capacity to exercise its function under the Constitution.¹⁷¹

C. Political Restrictions on Constitutional Amendment

The constitutional text and its interpretation do not exhaust the repository of rules on constitutional amendment. Statutes may also impose restrictions on political actors in respect of how and when a constitution is amended. In Canada, and other democracies, political practices may evolve to ultimately exert constitutional-level constraints on political actors.¹⁷² This section details these not-strictly textual nor judicial restrictions on constitutional amendment—restrictions rooted partly in political practice, constitutional law and the legislative process—that further limit the amendment power.

167. Here I distinguish between the technical and practical consequences of the Court’s advisory opinion in the *Supreme Court Act Reference*, *ibid*. As a technical matter, the Court did not entrench the *Supreme Court Act* in the Schedule of the *Constitution Act, 1982*. The Court instead informally entrenched the Supreme Court itself and its essential features as an institution in the Constitution. As a practical matter, however, the result was to effectively entrench the Act in the list. See generally Warren J Newman, “The Constitutional Status of the Supreme Court of Canada” (2009) 47 SCLR (2d) 429.

168. See Peter W Hogg, “Senate Reform and the Constitution” 68 SCLR (2d) at 12, n 41 [forthcoming in 2015].

169. *Supreme Court Act Reference*, *supra* note 156 at para 95.

170. *Ibid* at para 99.

171. *Supreme Court Act Reference*, *supra* note 156 at paras 95–101.

172. See Richard Albert, “How Unwritten Constitutional Norms Change Written Constitutions” 38 Dublin U LJ [forthcoming in 2016].

(i) Parliamentary and Provincial Laws

Parliament's Regional Veto Law, passed in 1996,¹⁷³ makes formal amendment in Canada even more complicated than the constitutional text already does. Enacted in the aftermath of the 1995 Quebec referendum, the Law fulfilled the federal government's pledge to give Quebec a veto over future major constitutional reforms.¹⁷⁴ Although it affords veto power to Quebec, the Law allocates the same power to each of Canada's other major regions, some of which the Law defines in terms of provinces: the Atlantic provinces, Ontario, Quebec, the Prairie provinces and British Columbia. The Law prevents any minister from proposing a constitutional amendment under the default multilateral amendment procedure in section 38 unless the proposal first secures the consent of a majority of provinces, including Ontario, Quebec, British Columbia and at least two each of the Atlantic and Prairie provinces representing at least half of the regional population.¹⁷⁵

The Regional Veto Law does not apply to amendments proposed under the following rules: (1) sections 41 or 43, since each already confers a veto to affected provinces; (2) section 44, because it allows only amendments that do not affect provinces; (3) section 45, which authorizes provinces to amend their own constitutions; and (4) section 38(3), which authorizes provinces to dissent from amendments of national application. The Regional Veto Law is not without its critics; Andrew Heard and Tim Schwartz suggest that it may be unconstitutional as it undermines the legal equality of the provinces guaranteed by the textually entrenched amendment rules in section 38.¹⁷⁶

In addition to this veto law, provinces and territories have passed their own laws on amendments to the Constitution. Their laws in some instances impose obligations upon themselves to hold either binding or advisory referenda—an additional step in the already onerous formal amendment rules. For instance, Alberta and British Columbia require their legislatures to hold a binding provincial referendum before they

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

174. See Robert A Young, "Jean Chrétien's Québec Legacy: Coasting Then Stickhandling Hard" (2004) 9:1 *Rev Const Stud* 31 at 38–39.

175. *Regional Veto Law*, *supra* note 173, s 1(1).

176. Andrew Heard & Tim Swartz, "The Regional Veto Formula and its Effects on Canada's Constitutional Amendment Process" (1997) 30:2 *Can J Pol Sc* 339 at 340–41.

vote on an amendment proposal requiring provincial agreement.¹⁷⁷ Conversely, New Brunswick, Saskatchewan and the Yukon authorize, but do not require, binding referenda before a legislative vote.¹⁷⁸ Similarly, the Northwest Territories, Nunavut, Quebec, Prince Edward Island and Newfoundland & Labrador do not require an advisory referendum or plebiscite before a legislative vote to ratify an amendment, but they do permit political actors to hold one.¹⁷⁹ The constitutional status of these provincial laws on referenda and plebiscites is debatable. On one hand, they have been duly authorized by legislative vote; on the other, they undermine the force of the textually entrenched amendment rules as a complete code for formal amendment. Perhaps this is purely an academic matter because no major amendment is likely to happen today.¹⁸⁰

(ii) Convention and Public Expectations

Constitutional amendment in Canada may also be governed by constitutional conventions. The Court has recognized that constitutional amendment is constrained by conventional rules that guide the conduct of political actors. In the 1981 *Patriation Reference*, the Court acknowledged a convention preventing the Government of Canada from proceeding unilaterally to request from the Parliament of the United Kingdom a major constitutional reform affecting federal-provincial matters, and requiring instead it to secure substantial provincial consent.¹⁸¹ Drawing from historical political practice, the Court suggested that earlier efforts to make changes to the basic federal structure of the Constitution had

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

178. 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 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 of government).

179. See e.g. *Consolidation of Plebiscite Act*, RSNWT 1998, c P-8, s 5; *Elections and Plebiscites Act*, SNWT 2006, c 15, s 48; CQLR, c C-64.1, s 7; *Plebiscites Act*, RSPEI 1991, c 32, s1; *Elections Act*, SNL 1992, c E-3.1, s 218 (authorizing non-binding plebiscite on federal amendment).

180. See Michael Lusztig, “Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail” (1994) 27:4 Can J Pol Sc 747 at 748.

181. *Patriation Reference*, *supra* note 3 at 904.

matured into a constitutional convention, whose violation would be illegitimate though not illegal.¹⁸²

Today, there is a question as to whether the national referendum held in connection with the 1992 Charlottetown Accord has established a precedent that has matured into a constitutional convention requiring future large-scale reform efforts to incorporate a similar public consultation.¹⁸³ Observers have argued that the Charlottetown referendum has created a new public expectation not unlike a constitutional convention of increased popular participation in matters of significant constitutional change.¹⁸⁴ I am not yet ready to conclude that the Charlottetown referendum has created a constitutional convention binding on political actors undertaking large-scale constitutional amendment efforts today, but it is a common view in the academy.¹⁸⁵

182. *Ibid* at 880–85. There is some debate, though, whether the Court identified the right convention. See John Finnis, “Patriation and Patrimony: The Path to the Charter” (2015) 28:1 *Can J L & Juris* 51 at 73 (arguing that the convention was unanimous, not substantial, consent).

183. See Government of Canada, *Consensus Report on the Constitution: Final Text*, (Charlottetown: 28 August 1992) [Charlottetown Accord].

184. See e.g. Kathy L Brock, “Learning from Failure: Lessons from Charlottetown” (1993) 4:2 *Const Forum Const* 29 at 32; Mary Dawson, “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 997; Roger Gibbons & David Thomas, “Ten Lessons From The Referendum” (1992) 15:4 *Can Parl Rev* 3 at 3; 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 & Kingston: 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 Sc* 245 at 251–52; Jeffrey Simpson, “The Referendum and its Aftermath” in Kenneth McRoberts and Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 193 at 193; R Kent Weaver, “Political Institutions and Conflict Management in Canada” (1995) 538:1 *Ann Am Acad Pol & Soc Sc* 54 at 65; José Woehrling, « La modification par convention constitutionnelle du mode de désignation des sénateurs canadiens » (2008) 39:1–2 *RDUS* 115 at 125.

185. See Richard Albert, “The Conventions of Constitutional Amendment in Canada: Is There a Convention of Federal Referendal Consultation?” (2015) [unpublished, on file with author].

(iii) Restrictions by Implication

There may also exist amendment principles that can be inferred by implication of the design of the *Constitution Act, 1982*. However, these amendment principles are not explicit rules about how to amend the Constitution, who may initiate or ratify the amendment, and when, or what may be amended. They are instead restrictions that arise as an implication of an existing rule that does not concern constitutional amendment. Identifying principles that may be interpreted as restricting the amendment power therefore requires us to look outside the formal amendment rules but still within the text of the Constitution.

For example, the design of the legislative override power implies that the scope of certain rights cannot be diminished by a constitutional amendment. The legislative override power, entrenched outside the formal amendment rules in section 33,¹⁸⁶ authorizes Parliament or a provincial legislature to “expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter”.¹⁸⁷ In practice, this means the legislature is authorized to override the judicial interpretation of the rights entrenched in section 2 and sections 7 to 15. Parliament or a provincial legislature may operationalize this power by passing a law in breach, or in anticipatory breach, of the Court’s interpretation of the *Charter*, inserting within it a declaration that the law will operate “notwithstanding” its conflict with the Court’s judgment.¹⁸⁸ This declaration may last no longer than five years, and it is renewable indefinitely every five years.¹⁸⁹

By its own terms, the legislative override power is applicable to those rights entrenched in sections 2, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the *Charter*. Those rights include the freedom of conscience, religion, thought, belief, peaceful assembly and association,¹⁹⁰

186. *Charter*, *supra* note 146, s 33.

187. *Ibid*, s 33(1).

188. See Janet L Hiebert, “Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding” in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 107 at 118.

189. *Charter*, *supra* note 146, s 33(3)–(5).

190. *Ibid*, s 2.

the right against unreasonable search and seizure,¹⁹¹ the right against arbitrary detention,¹⁹² the right to retain counsel,¹⁹³ and, among others, the right to the equal protection of the law.¹⁹⁴ The other provisions of the *Charter*, which spans 34 sections in its entirety, are accordingly immune from the legislative override. These other provisions protect the right to vote,¹⁹⁵ the right of citizens to enter and leave Canada¹⁹⁶ and, among other linguistic rights, the right to receive federal services in either of Canada's two official languages.¹⁹⁷ The text of this legislative override power does not expressly state that any *Charter* sections are more important, but that is the message conveyed by its design. Where the rights in sections 2 and 7 to 15 may be limited using the legislative override and those entrenched elsewhere in the *Charter* are otherwise immune to it, what results is a constitutional hierarchy pursuant to which the overridable sections sit below the non-overridable ones.

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

191. *Ibid*, s 8.

192. *Ibid*, s 9.

193. *Ibid*, s 10(b).

194. *Ibid*, s 15(1).

195. *Ibid*, s 3.

196. *Ibid*, s 6(1).

197. *Ibid*, s 20.

III. A Framework for Judicial Review of Constitutional Amendment

The extraordinary complexity of the rules and practices for altering the text of Canada's Constitution makes it arguably the world's most difficult to amend.¹⁹⁸ The escalating, federalist and consultative structures of constitutional amendment entrenched in the *Constitution Act, 1982* create intricate rules that reveal constraints rooted in both specificity and generality. Specific rules involve matters like the quantum of provincial agreement required to ratify a constitutional amendment, whereas general rules concern definitional matters about the "composition" of the Supreme Court or "the method of selecting Senators", both of which are matters of recent controversy.¹⁹⁹ In the case of both specificity and generality, the Court has, in some instances, positioned itself to evaluate the constitutionality of a future constitutional amendment. In others, the constitutional text and political practice may leave the Court no other choice.

In this Part, I draw from the judicial review of constitutional amendments around the world to propose a framework anchored in three major categories of possible unconstitutional constitutional amendment in Canada: procedural, substantive and "procedural-substantive hybridity",²⁰⁰ the last of which is a more speculative form of unconstitutionality. Each of these three larger categories consists of at least three subsidiary forms of unconstitutionality. The forms of procedural unconstitutionality include subject-rule mismatch, temporal violations and processual irregularity. The forms of substantive unconstitutionality include unwritten unamendability, text-based unamendability and the amendment-revision distinction. And the forms of hybrid unconstitutionality include statutory unconstitutionality, the recognition of convention, and unconstitutionality by implication.

198. See Albert, "Amendment Difficulty", *supra* note 72.

199. See e.g. *Supreme Court Act Reference*, *supra* note 156; *Senate Reform Reference*, *supra* note 5.

200. I have learned a great deal from Kemal Gözler's study of unamendability, in which he divides judicial review of constitutional amendments into procedural and substantive categories. He does not, however, offer further differentiation between the two categories, nor does he consider the third category I suggest here. See Gözler, *supra* note 53 at 28-97.

There are three points to make before proceeding. First, each of the three major forms of unconstitutionality and their nine total subsidiary categories are illustrative, not exhaustive, of the bases upon which the Supreme Court of Canada might invalidate a constitutional amendment. Second, the distinction between process and substance is not as clear as one might wish or perceive it to be. Substantive restrictions are often entrenched in procedural terms, and vice versa.²⁰¹ Third, the examples of hybrid unconstitutionality straddle the boundary separating procedural and substantive unconstitutionality, and could fit under the substantive category. But their exceptional character—exceptional even in the context of the judgment to invalidate a constitutional amendment—compels me to highlight them in their own category, precisely to signal their unique character.

A. Procedural Unconstitutionality

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

(i) Subject-Rule Mismatch

As is apparent from the escalating, federalist and consultative structure of formal amendment in Canada, the various amendment procedures create a complex arrangement of rules, which raises the risk of incorrect application. Even the general procedure in section 38 is subject to restrictions insofar as it must be used for six designated constitutional subjects over and above serving as the default multilateral amendment procedure.²⁰² The assignment of amendment rules to constitutional subjects is specific but not clear. Political actors are therefore susceptible to

201. See Albert, “Constructive Unamendability”, *supra* note 54 at 193–94.

202. See *Constitution Act, 1982*, *supra* note 77, s 42.

misapplication, either mistaken or intentional, of the formal amendment rules. To the extent a misapplication results in successfully amending the Constitution, the amendment may be invalidated as procedurally unconstitutional as a result of a mismatch between the amendment rule deployed and the specific constitutional subject.

The *Senate Reform Reference* helps illustrate the idea of procedural unconstitutionality as a result of subject-rule mismatch. Assume that, instead of referring its questions to the Supreme Court for an advisory opinion, Parliament had proceeded to pass either the *Senate Appointment Consultations Act* or the *Senate Reform Act*—the two bills that were the subject of the second and third reference questions, respectively.²⁰³ The controversy concerned whether Parliament could enact either of these two bills using its general and residuary power under section 91 of the *Constitution Act, 1867* or the federal unilateral amendment power in section 44 of the *Constitution Act, 1982*. The Court ultimately concluded that the changes introduced by these two bills were of such significance that they required political actors to use the multilateral amendment power in section 38. Had Parliament proceeded to engage its section 44 power, it is likely that this would have been challenged as an unconstitutional use of this narrow amendment rule.²⁰⁴ The Court, in this case, could have invalidated the amendment as improperly authorized by the wrong amendment rule.

Judicial review of an amendment on the basis of the procedures entrenched in the constitutional text is consistent with the separation of powers. Legislative and executive actors should not themselves determine whether they have used the correct amendment rule because this effectively grants them a self-policing power that is particularly problematic where a majority government faces no real barrier to its legislative program. The oversight of the judiciary is needed most in a context of majority government.

203. *Senate Reform Reference*, *supra* note 5 at para 5.

204. *Ibid* at paras 68–70 (the Court interpreted the contemplated change as covered by the discrete list in section 42, for which the rule in section 38 must be used).

The Senate could conceivably play a similar role, but this would require substantial changes to its structure and composition, as well as to its own self-understanding.

(ii) Temporal Violations

The same self-dealing concerns associated with subject-rule agreement also support the Court reviewing an amendment for conformity with the temporal restrictions on constitutional amendment in the *Constitution Act, 1982*. There are four relevant temporal restrictions for our consideration. First, no amendment in connection with the default multilateral amendment procedure in section 38 can become official before one year has elapsed, or after three years have expired, from the time of its initial proposal by resolution.²⁰⁵ Second, the one-year rule under section 38 is subject to an exception: It does not apply where the legislative assembly of each province has previously adopted a resolution assenting to or dissenting from the resolution.²⁰⁶ Third, an amendment under sections 38, 41, 42 or 43 need not have the support of the Senate if the Senate fails to adopt an approval resolution within 180 days of its approval in the House of Commons.²⁰⁷ Fourth, the 180-day period for Senate ratification does not run when Parliament is prorogued or dissolved.²⁰⁸

Where there is disagreement among political actors on these temporal restrictions, the Court could answer the question in a reference prior to or after an amendment's ratification. The Court's reference jurisdiction authorizes judicial consideration of all Parliamentary or provincial legislative powers, whether or not in the context of a particular bill.²⁰⁹ The Court could also resolve the question if raised as a constitutional challenge to a duly passed amendment.

205. See *Constitution Act, 1982*, *supra* note 77 at s 39(1)-(2).

206. *Ibid*, s 39(1).

207. *Ibid*, s 47(1).

208. *Ibid*, s 47(2).

209. See *Supreme Court Act*, *supra* note 157 (conferring reference jurisdiction on matters relating to "the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised", s 53(1)(d)).

If there is some question whether political actors have respected these temporal restrictions, the Court could examine and evaluate the facts to make a determination as to, for instance, the time having elapsed since ratification, the previous adoption of a provincial resolution, the period of Senate inaction on a duly passed amendment proposal or the proper way to count or not the tolling period in connection with prorogation or dissolution. The Court's inquiry might, in this narrow circumstance, also involve whether Parliament had been properly prorogued or dissolved, though only to establish the condition precedent for this particular step in the constitutionally prescribed sequence for making a constitutional amendment.²¹⁰ Invalidating an amendment here would result from the Court's enforcement of temporal limitations on constitutional amendment.

(iii) Processual Irregularity

Less concretely, though still conceivably, the Court could be asked to evaluate the constitutional adequacy of the actual process of voting to initiate, ratify or promulgate an amendment. An amendment could be ruled procedurally unconstitutional as a result of a processual irregularity. Consider, for example, a claim that the initiating vote was in some way coerced or that the ratifying vote had occurred without fair advance notice to legislators. In either case, a constitutional challenge to an already-passed amendment on grounds of processual irregularity would require the Court to judge whether the vote had been so compromised as to justify invalidating the amendment altogether.²¹¹

These and other claims of processual irregularity are much less text bound than the subject-rule mismatch or temporal violations. Determining the point at which persuasion becomes coercion for a legislator in the context of a constitutional amendment would be difficult for a judge, particularly given that logrolling is common in legislative practice and

210. On this point, the Court's inquiry should be limited to whether Parliament had been prorogued or dissolved legally as a matter of fact. The Court should not, nor indeed could it I believe, inquire into whether it was legitimate for the governor general to dissolve or prorogue Parliament. This is not a matter for judicial oversight.

211. In *Hogan*, the courts of Newfoundland and Labrador rejected all of the arguments based on procedural irregularity. This would not preclude the Supreme Court of Canada, however, from taking a different view. See *Hogan*, *supra* note 8.

also in major constitutional reform.²¹² But judges commonly engage in difficult line drawing exercises, and this would be no different. Moreover, where legal doctrine in other jurisdictions might prohibit the Court from reviewing a political matter, the political question doctrine has been rejected in Canada²¹³ and therefore poses no bar to judicial review of such controversies.²¹⁴ Similarly, it would be difficult to evaluate what constitutes fair notice to a legislator, but judges could identify reasonable standards against which to measure a notice period alleged to be insufficient.

Other types of processual irregularity could arise where the voting involves non-legislators, which is not currently the case under Canada's formal amendment rules. But where the vote is a sanctioned referendum, for example, the Court could also evaluate constitutional challenges to voter suppression, the sufficiency of the duration of the voting period, the accessibility of voting locations and the availability of ballots in both official languages.²¹⁵ In these and other instances of processual irregularity, the Court could invoke the values of procedural fairness to invalidate a constitutional amendment that had failed to meet the expectations of constitutional democracy. These matters are different from those the Court identified in the *Secession Reference* as within the exclusive purview of legislative and executive political actors, namely those "various legitimate constitutional interests" that may be reconciled only "through the give and take of political negotiations".²¹⁶ Processual irregularities are not negotiable in the sense that they can be affirmatively

212. See Richard Johnston, "An Inverted Logroll: The Charlottetown Accord and the Referendum" (1993) 26:1 PS: Political Science & Politics 43 at 43.

213. The strongest statement rejecting the political question in Canada appears in a concurrence. See *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 491, 18 DLR (4th) Wilson J.

214. Nonetheless, one should note that there is an emerging separation of powers principle in Canada based partly on Parliamentary privilege and on the concern that courts should respect the autonomy of Parliament. See *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 21, [2005] 1 SCR 667.

215. See *Secession Reference*, *supra* note 4 at para 87. The Court stressed that "the results of a referendum have no direct role or legal effect in our constitutional scheme" but noted that "a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion". *Ibid.* Therefore, it is plausible that the Court might wish to ensure the integrity of the administration of a referendum even if the result of the vote did not have a legal effect.

216. See *ibid* at para 101.

authorized, though it is possible to imagine a court retroactively excusing them as insignificant. They are instead properly seen as violations of the constitutional amendment process.

A more timely constitutional challenge to a processual irregularity arose in connection with the recent moratorium on appointments to the Senate. On July 24, 2015, Prime Minister Stephen Harper declared that he would stop filling vacancies in the Senate, which at the time had 22 open seats in the 105-seat chamber.²¹⁷ These vacancies had accumulated since the Prime Minister last made an appointment in 2013.²¹⁸ Notwithstanding the Prime Minister's interest in insulating himself and his party from the legal controversies surrounding the Senate ahead of the 2015 federal election, he calculated that a moratorium would "force the provinces, over time, who as you know have been resistant to any reforms in most cases, to either come up with a plan of comprehensive reform or to conclude that the only way to deal with the status quo is abolition".²¹⁹ His strategy was to pressure the provinces to agree on a package of Senate reforms, whether linked or not to broader constitutional reforms, or to eliminate the Senate by attrition.

We have in the past seen instances of constitutionally delegated powers falling into desuetude. Constitutional desuetude occurs where a textually entrenched provision loses its binding quality on political actors as a result of its conscious and sustained non-use over time and its public repudiation by political actors.²²⁰ The desuetudinal provision remains in the constitutional text, but a constitutional convention emerges against its use.²²¹ In Canada, the powers of disallowance and reservation, both as to federal and provincial law, have arguably been informally repealed from the Constitution of Canada. None of the powers have been used for generations: The British powers of disallowance and reservation as to federal law were last used in 1873 and 1878, respectively, and the federal

217. See Josh Wingrove, "Canada's Harper Pledges Moratorium on Senate Appointments", *BloombergBusiness* (24 July 2015), online: <www.bloomberg.com>.

218. See Aaron Wherry, "When Will Stephen Harper Appoint Another Senator?", *MacLean's* (16 December 2013), online: <www.macleans.ca>.

219. Jason Fekete, "PM Slaps Moratorium on Senate Appointments Ahead of Election", *Ottawa Citizen* (24 July 2015), online: <www.ottawacitizen.com>.

220. See Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 63 *Am J Comp L* 641 at 644.

221. *Ibid* at 644–45.

powers as to provincial law were last used in 1943 and 1961, respectively.²²² The evolution of Canadian federalism has made it unthinkable to use any of them today.²²³ Yet all four powers remain entrenched in the constitutional text.

What the Prime Minister proposed to do with respect to the Senate raises the possibility of desuetude, both as to the prime ministerial power to nominate senators and as to the Senate itself. As a formal matter, senators are appointed by the governor general, whom the Constitution states “shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate”.²²⁴ In practice, however, it is the prime minister who must nominate candidates for appointment by the governor general. Former Prime Minister Stephen Harper therefore placed a moratorium not on Senate appointments but on Senate nominations, although this will as a consequence entail a moratorium on Senate appointments by the governor general. This prime ministerial power to nominate senators could conceivably fall into desuetude over time if another political actor or choice mechanism arises to fill the void, as might have occurred had the Supreme Court authorized consultative elections to fill senatorial vacancies.²²⁵ The moratorium also raises the possibility of the desuetude of the Senate itself as an institutional arm of the Parliament of Canada. As vacancies continue to increase, the Senate draws nearer to becoming an empty chamber. Were that to happen, the Senate would exist in name only, stripped of its function as a legislative body, and Parliament would effectively become a unicameral chamber. The question in both scenarios is whether desuetude is the constitutionally valid way to effect these changes.

222. *Ibid* at 658, 662.

223. *Ibid* at 656–69.

224. See *Constitution Act, 1867*, *supra* note 103, s 24.

225. See Albert, “Structure of Constitutional Amendment” *supra* note 21.

There is a strong argument that both of these changes—both to the prime ministerial power to nominate senators and to the depletion of the Senate itself—amount to procedurally unconstitutional constitutional amendments because they raise processual irregularities. The Supreme Court of Canada spoke obliquely to both issues in its recent *Senate Reform Reference*. The Court indicated that the “the method of selecting senators” refers to more than the formal senatorial appointment by the governor general.²²⁶ Any change to the “method” must respect the multilateral amendment procedure in section 38.²²⁷ The Court also advised that the Constitution does not authorize the “indirect abolition of the Senate”.²²⁸ Insofar as the moratorium on filling vacancies could eventually lead to a zero-member Senate, the declining number of senators would compromise the work of the chamber and gradually alter the balance of legislative and federal powers. This kind of change, the Court suggested, cannot validly result from the Prime Minister’s refusal to nominate senatorial candidates because it would authorize the Prime Minister to circumvent the onerous, yet constitutionally required, unanimity procedure for abolishing the Senate.²²⁹ Both of these changes are therefore susceptible to constitutional challenges as procedurally unconstitutional constitutional amendments.

B. Substantive Unconstitutionality

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

226. See *Senate Reform Reference*, *supra* note 5 at para 65.

227. *Ibid* at paras 64–67.

228. *Ibid* at para 102.

229. *Ibid* at para 110.

(i) Unwritten Fundamental Values

The Supreme Court has positioned itself to invalidate an amendment that violates an unwritten principle of Canadian constitutional law. Although the Court has not yet directly declared its power to invalidate an amendment on these grounds, its declaration that certain constitutional amendments must respect certain unwritten constitutional principles suggests that it may ultimately be prepared to exercise this extraordinary power. As discussed above, the Court has identified a handful of unwritten constitutional principles—federalism, democracy, constitutionalism, the rule of law and the protection of minorities—that negotiations in connection to any amendment on provincial secession must respect.²³⁰ The question is whether these unwritten constitutional principles govern only negotiations in connection with amendments concerning secession or whether they apply more broadly. The secession of a province is admittedly a momentous episode in the life of any federal state, particularly one like Canada where the seceding province would be one of Canada’s founding partners. If these unwritten principles are understood as unwritten constraints on all amendments, the Court could judge the validity of any future amendment against the standards they set—and what satisfies the standards would be a matter for judicial determination.

It is true, however, that the Court stressed in the *Secession Reference* that it is the role of elected representatives to negotiate the process of a provincial secession and that it is “not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so”.²³¹ The Court was careful to distinguish that its role was limited “[t]o the extent that the questions are political”.²³² The Court appears to have left itself some room to intervene where the questions are legal and not purely political, as where the issues implicate “a legal component”, there could be “serious legal repercussions”.²³³ The Court seems to imply that it could play some role—either advisory, supervisory or enforcement—in a constitutional amendment on provincial secession.

230. See Part III.B.1, *above*, for more on this point.

231. *Secession Reference*, *supra* note 4 at para 101.

232. *Ibid.*

233. *Ibid.*

The dividing line between legal and political is unclear at best, and it is the Court that would ultimately draw it.

It should come as no surprise that the Court identified these four principles as constraints on future constitutional change. They are among the most important to constitutional democracy.²³⁴ Indeed, constitutional designers around the world have judged them similarly fundamental. For example, the Brazilian Constitution and the German *Basic Law* formally entrench federalism against amendment.²³⁵ Democracy is protected against amendment in the Constitutions of Cameroon,²³⁶ the Dominican Republic²³⁷ and Equatorial Guinea.²³⁸ The rule of law is made unamendable in the Angolan²³⁹ and Czech Republic Constitutions.²⁴⁰ The protection of rights is an unamendable guarantee in the Constitutions of Ecuador,²⁴¹ Namibia,²⁴² Portugal²⁴³ and Ukraine.²⁴⁴ The Court's judgment that these four unwritten constitutional principles reflect important values in Canada is therefore consistent with broader global constitutional values.

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

234. Federalism is not a necessary feature of constitutional democracy but it is hard to disagree that the other three are.

235. *Brazil Const*, *supra* note 36, art 60(4)(I); *Basic Law*, *supra* note 37, art 79(3).

236. *Constitution du Cameroun* 1972, art 64 [*Cameroon Const*].

237. *Constitución de la República Dominicana* 2010, art 268.

238. *Constitución de la República de Guinea Ecuatorial* 1991, art 104 [*Eq Guinea Const*].

239. *Constituição de Angola* 2010, art 236(f).

240. *Ústavní zákon č 1/1993 Sb, Ústava České Republiky*, art 9(2) (Constitution of the Czech Republic).

241. *Constitución de la República del Ecuador* 2008, art 84.

242. *Namibia Const*, *supra* note 50, art 131.

243. *Constituição Portuguesa* 1976, art 288.

244. *Constitution of Ukraine* 1996, art 157 [*Ukraine Const*].

Judges in Canada, like their counterparts abroad, must still interpret them and identify their outer boundaries.

(ii) Non-Negotiable Founding Values

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

These non-negotiable founding values are not formally entrenched against amendment. They are accordingly unlike the formally unamendable provisions in constitutions around the world.²⁴⁵ Non-negotiable founding values, as defined here, are entrenched ordinarily like all other freely amendable constitutional provisions, with no express protections against amendment. What makes a non-negotiable founding value special is the Court’s interpretation in the course of litigation that a given provision is worthy of heightened status relative to others. The result is to transform an ordinary textual provision into a non-negotiable founding value with the capacity to disable another constitutional provision or to invalidate governmental action that would otherwise be permissible notwithstanding that founding value.

Prior to *Potter*,²⁴⁶ one might have suggested that section 93 of the *Constitution Act, 1987*, is an example of an ordinarily entrenched constitutional provision that had been conferred special status over time as a non-negotiable founding value.²⁴⁷ Section 93 delegated to the provinces jurisdiction over education and preserves denominational education rights as they existed at Confederation.²⁴⁸ It was critical to the

245. See Part II.B, *above*, for more on this point.

246. *Supra* note 8.

247. *Constitution Act, 1867*, *supra* note 103, s 93.

248. See Richard Albert, “American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective” (2005) 88:5 Marq L Rev 867 at 879.

compromise negotiated between Ontario and Quebec at the time, which created the Canada we know.²⁴⁹ Section 93 was called the “*Grundnorm*, the basic premise” of the Constitution of Canada.²⁵⁰ The Court moreover recognized the importance of section 93 in litigation. In *Adler v Ontario*, the Court rejected the claim that section 93’s preferential preservation of denominational education rights for Protestant schools in Quebec and Roman Catholic schools in Ontario to the exclusion of other religious traditions violated the freedom of conscience and religion, as well as the right to equality, in sections 2 and 15 of the *Charter*.²⁵¹ For the Court, section 93 was “the product of an historical compromise which was a crucial step along the road leading to Confederation”.²⁵² Without this “solemn pact”, this ‘cardinal term’ of Union, there would have been no Confederation”, reasoned the Court.²⁵³ As a result, section 93 is “a child born of historical exigency” and therefore “does not represent a guarantee of fundamental freedoms”.²⁵⁴

But *Potter* precludes that view for now. *Potter* upheld the validity of the *Constitution Amendment, 1997 (Quebec)*,²⁵⁵ which provides that the denominational schools provisions of section 93 no longer apply to Quebec. Meanwhile, the denominational schools protections still apply in Ontario and are legally subject to amendment through section 43, though they may be constructively unamendable today.²⁵⁶ One might also suggest that section 133 of the *Constitution Act, 1867*,²⁵⁷ which protects the equal status and use of English and French in federal institutions, reflects a non-negotiable founding value that has become informally unamendable as a political matter. As in the Indian “basic structure doctrine”,²⁵⁸ courts do not always respect the written rules of formal amendment: Here, the Court could conceivably resist an amendment through section 41 that

249. *Ibid* at 878–79.

250. Edward McWhinney, *Quebec and the Constitution, 1960–1978* (Toronto: University of Toronto Press, 1979) at 11 (emphasis in original).

251. *Adler v Ontario*, [1996] 3 SCR 609 at paras 28–50, 30 OR (3d) 642.

252. *Ibid* at para 29.

253. *Ibid* at para 30.

254. *Ibid*.

255. *Supra* note 8.

256. For a discussion of constructive unamendability, see Albert, “Constructive Unamendability”, *supra* note 54 at 194–208.

257. *Constitution Act, 1867*, *supra* note 103, s 133.

258. See Part II.C, *above*, for more on this point.

proposed to change the equal status of Canada's two official languages by formal amendment. The Court might recognize that this is a non-negotiable founding value that political actors cannot amend, even though Part V appears to authorize it.

The special status of a constitutional provision like section 133, or any other provision not formally entrenched against amendment but treated as special, might be a basis for the Court to invalidate an amendment that comes into conflict with it. In this way, a formally ordinary provision can become imbued with special meaning over time, even though it may not have been intended as a matter of constitutional design to be unamendable when it was written. This evolution of a constitutional provision may have happened to the Japanese Constitution with respect to its Pacifism Clause, which commits Japan to “forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes”.²⁵⁹ The Pacifism Clause, like section 133, is not formally unamendable, but it may have become a superconstitutional norm that can no longer be amended without political actors facing substantial resistance from the public.²⁶⁰ Courts might point to these types of provisions as embodying the unamendable constitutional identity of a regime—an identity that cannot be changed in the normal course of amendment.²⁶¹

(iii) Amendment-Revision Unamendability

A third basis upon which the Court could invalidate an amendment is the distinction between amendment and revision, explained above.²⁶² The Court could determine that a constitutional amendment, either proposed or enacted, will so fundamentally alter the Constitution that it cannot lawfully be achieved by a simple constitutional amendment.

259. *Nihonkoku Kenpō*, art 9.

260. In Japan, Article 9 has achieved its special status as a result of its history and high public salience. See Richard Albert, “Amending Constitutional Amendment Rules” (2015) 13:3 *Intl J Const L* 655.

261. See Gary J Jacobsohn, *Constitutional Identity* (Cambridge, Mass: Harvard University Press, 2010) at 125 (suggesting that the Indian Supreme Court invokes the basic structure doctrine to protect constitutional identity).

262. See Part II.C.I, *above*, for more on this point.

On this view, the change would amount to a constitutional revision that transforms the core framework of the Constitution and results in the creation of a new constitutional order. The Court might deem this change unachievable by an amendment process reserved for changes that occur within the existing framework of the rules entrenched in the *Constitution Act, 1982*, and insist that it must instead be validated by a higher form of authority.

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

The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.²⁶³

There are three takeaways from the Court’s discussion of amendment and revision in the *Secession Reference*. First, constitutional changes that are “radical and extensive” or “profound” can be achieved using the formal amendment rules entrenched in the *Constitution Act, 1982*. Formal amendment can therefore be used to transform some significant part or feature of the Constitution, presumably provided it conforms to the exacting thresholds entrenched in the Constitution’s default multilateral or unanimity procedures.²⁶⁴ Second, according to the Court,

263. *Secession Reference*, *supra* note 4 at para 84.

264. *Constitution Act, 1982*, *supra* note 77, ss 38, 41, 42.

the *Constitution Act, 1982* may appear by its text to be a complete code for formal amendment, but it is not. The Court recognizes that the text is silent on important matters of constitutional change, particularly those that would result in changes “inconsistent with our current constitutional arrangements”.²⁶⁵ Third, the Court recognized that formal amendment is appropriate for a provincial secession, but it did not definitively state that all other “radical and extensive” or “profound” changes could likewise be achieved by formal amendment. The Court was careful to insist that provincial secession, though transformative, may be accomplished by amendment, but it did not foreclose the possibility that other kinds of transformative changes would be foreclosed by amendment and would require more exacting procedures consistent with the theory of revision.

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

It is worth pondering the Court’s insistence that provincial secession may be achieved by formal amendment. A provincial secession by any province, let alone by one of Canada’s original founding partners, would most assuredly alter the balance and framework of Canadian federalism, not to mention the territorial integrity of the country—incidentally

265. *Secession Reference*, *supra* note 4 at para 84.

something that many constitutional democracies make unamendable.²⁶⁶ Yet the Court concluded that we should treat a secession simply as an amendable matter, not a revisable one. This decision was almost certainly driven more by constitutional politics than constitutional law. Recognizing that provincial secession in Canada is a very real looming possibility, admittedly with oscillating degrees of likelihood, the Court was reluctant to define secession as subject only to revision because successful secession would have entailed a new constitution.²⁶⁷ For a country whose modern constitutional renewal efforts have met with momentous failure, the prospects are dim for successfully negotiating a new constitution after a successful secession vote.

C. Hybrid Forms of Unconstitutionality

Procedural and subject matter unconstitutionality are the conventional forms of unconstitutional constitutional amendment. Yet constitutional politics in Canada suggest that hybrid forms of unconstitutionality could emerge in the future if and when the Court faces a problematic amendment and ultimately takes the extraordinary action of invalidating it. Three of these hybrid forms of unconstitutionality derive, respectively, from statutory law, the recognition of constitutional conventions and unamendability by textual implication.

(i) Statutory Unconstitutionality

The Court could interpret the Regional Veto Law,²⁶⁸ as well as the provincial and territorial referenda and plebiscite laws discussed above,²⁶⁹ as a source of *constitutional* constraint on future amendments—over and above the obvious *political* constraints they pose. As a political matter,

266. See e.g. *Constitution du Burkina Faso* 1991, art 165; *Cameroon Const*, *supra* note 236, amended by *La Constitution de la Republique du Cameroun* 1996, art 64; *Constitution of the Union of Comoros* 2001, art 37; *Eq Guinea Const*, *supra* note 238, art 104; *Constitution of the IVth Republic* 2010 art 163 (Madagascar); *Constitution of the Republic of Tajikistan* 1994, art 100; *Ukraine Const*, *supra* note 244, art 157.

267. As I have explained above, revision generally entails a new constitution, unless the process is provided for expressly in the constitutional text, as it is in some constitutions. See Part II.C.1, *above*, for more on this point.

268. *Supra* note 137, s 3(1).

269. See Part III.C.1, *above*, for more on this point.

these two sets of laws now impose significant obstructions to major formal amendment in Canada because they require political actors to do more than is already required of them—and Canada’s amendment process is known to be quite onerous to begin with. These additional hurdles certainly complicate the task of consolidating political agreement for certain kinds of amendment, but they may raise two separate constitutional concerns. First, they may compel the unconstitutionality of a constitutional amendment; second, the additional hurdles may themselves be unconstitutional. The second is more probable, though it is difficult to know at this stage what the Court would do.

The first question raised by these Parliamentary and provincial statutes is whether the Court would declare an amendment unconstitutional if it had failed to conform to one or more of them. The question asks whether the Court *would* do it, not whether it *could*, since I take the position for the narrow purposes of this inquiry that the Court now possesses the power to invalidate an amendment.

To evaluate the question, let us imagine a major constitutional amendment has been proposed under the default multilateral amendment procedure by a cabinet minister who has *not* secured the consent of the various regions as required by the Regional Veto Law. Let us further imagine that the proposal secures the consent of both houses of Parliament and then proceeds to ratification by the requisite seven provinces representing at least fifty percent of the total provincial population, as required by section 38, though importantly without having been submitted to a provincial or territorial referendal exercise as required by law in one or more of the ratifying provinces. The Court could conceivably interpret these statutes as binding upon political actors in the amendment process and also on itself. It might well conclude that the Regional Veto Law is a lawful statutory supplement to the formal process of constitutional amendment. Insofar as the Law is internally applicable upon the cabinet ministers in the course of their decision making and negotiations on behalf of the Government of Canada, it remains enforceable as long as it is in force. The same would be true of the provincial and territorial laws on referenda and plebiscites: These are lawful statutory supplements that are internally applicable within the province or territory, and the larger constitutional amendment process provides the framework within which those laws are operationalized. On this view, the formal constitutional

amendment process would include those Parliamentary and provincial laws and therefore any violation of these rules would be subject to the Court's declaration of their incompatibility with both the statutory law itself and the larger framework of constitutional amendment, which would include both the Constitution and these laws.

Alternatively, assuming the amendment had satisfied the requirements of Part V, the Court could issue a declaration that the amendment is valid notwithstanding the failure of political actors to comply with these statutory supplements. As a result, the amendment would survive the constitutional challenge, and the Regional Veto Law as well as the provincial and territorial laws on referenda and plebiscites would likewise survive, though they would be deemed inapplicable.

My own view is that the Court should invalidate these laws as unconstitutional. Although neither the Regional Veto Law nor the provincial or territorial statutes possesses constitutional status, each inappropriately seeks to approximate constitutional status by adding constraints to the process of formal constitutional amendment—constraints that these laws intend political actors to treat as equally authoritative as the textual constraints in the Constitution. The efficacy of these statutory constraints derives from their perception as binding on political actors engaged in the amendment process. The problem is that their regulation of the constitutional amendment process is an effort to incorporate them into the Constitution when in reality they are only simple statutory enactments. The binding quality of statutory law is of course secondary to constitutional law, whose supremacy is acknowledged in the *Constitution Act, 1982*: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”²⁷⁰ Here, the Regional Veto Law as well as the provincial and territorial referenda and plebiscite laws are inconsistent with the formal amendment rules insofar as they impose additional requirements for amendment. That inconsistency should be sufficient reason to invalidate them if they are challenged as unconstitutional. This reading requires us to interpret the *Constitution Act, 1982* as creating a complete code for formal amendment, with an exception for unwritten constitutional principles that, by their very nature as unwritten, are not textually entrenched.

270. *Constitution Act, 1982*, *supra* note 77, s 52(1).

The unwritten constitutional principle of the rule of law also provides a justification for invalidating these statutory restrictions on constitutional amendment. The rule of law reflects democratic values of transparency, predictability and notice about the rules that govern official conduct.²⁷¹ As the repository for Canada's supreme body of formal amendment rules, the *Constitution Act, 1982* puts political actors on notice about what is expected for a formal amendment, and those requirements have been validated by the extraordinary procedure of constitutional adoption. The rule of law requires further criteria for constitutional amendment to be added only by similarly constitution-level procedures, not by simple statutory enactment. The Court conveyed a similar concern in the *Senate Reform Reference* when it underscored the improper constitution-changing effect of the statutorily created consultative elections, which would have arguably circumvented the amendment process by a simple law.²⁷²

(ii) The Recognition of Convention

The Court would unlikely rule an amendment unconstitutional where the amendment failed to respect a constitutional convention. It is possible that the Court would recognize the existence of a constitutional convention in the amendment process, in which case the amendment would not be unconstitutional. But political actors would likely feel a political or legal duty to pass the amendment in conformity with that constitutional convention. This is consistent with the outcome in the 1981 *Patriation Reference*, where the Court found constitutional amendment proposals constitutional as a matter of law, but improper as a matter of constitutional convention.²⁷³ The Court's recognition of a convention on a particular process or subject of constitutional amendment would exert significant pressure on political actors to respect the convention.

Above, I discussed one example of a practice that may have matured into a constitutional convention. Perhaps, I suggested, a convention has arisen requiring national referendal consultation for major constitutional amendment.²⁷⁴ Another example of a possible constitutional convention

271. See Albert, "Amendment by Stealth", *supra* note 18.

272. See *Senate Reform Reference*, *supra* note 5 at paras 62–63.

273. See *Patriation Reference*, *supra* note 3.

274. See Part III-C.2, *above*, for more on this point.

pursuant to which political actors could make a constitutional claim concerns the role of the territories in the formal amendment process.

Recall the Charlottetown referendum that was authorized by federal legislation²⁷⁵ and in turn executed by an official proclamation.²⁷⁶ The proclamation directed voters in both the Yukon Territory and the Northwest Territories—the only two territories at the time—to participate in the referendum. Voters cast their ballots at high participation rates of 70.0 percent and 70.4 percent, respectively, in both territories.²⁷⁷ Yet the formal amendment rules in the *Constitution Act, 1982* do not authorize the territories to participate in any of the multilateral amendment procedures—they do not even make mention of the territories. The multilateral amendment rule in section 38 actually emphasizes the exclusion of the territories from the relevant population when it declares that ratifying an amendment proposal requires the approval of the “legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty percent of the population of all the provinces”.²⁷⁸ The territories are similarly excluded from the unanimity procedures—they require only provincial ratification.²⁷⁹

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

275. *Referendum Act*, *supra* note 268, s 3(1).

276. *Referendum Act* SC 1992, c 30, Proclamation, 7 October 1992, SI/92-180, (1992) C Gaz II, 3931.

277. See Canada, *The 1992 Federal Referendum: A Challenge Met: Report of the Chief Electoral Officer of Canada* (Ottawa: The Chief Electoral Officer of Canada, 1994) at 58.

278. See *Constitution Act, 1982*, *supra* note 77, s 38.

279. *Ibid*, s 41.

constitutional amendment in light of their participation in the past.²⁸⁰ Nunavut, the latest territory admitted into Canada, would have a claim as strong as theirs in light of its equal status as a territory. The Court would have to evaluate whether the Charlottetown practice had matured into a constitutional convention. The Court would be unlikely to rule the amendment constitutionally invalid on the basis of this constitutional convention, but it could draw from precedent and refer to the *Jennings* test as it did in the *Patriation Reference* to ultimately recognize the convention,²⁸¹ which would in turn likely compel political actors to include the territories now as they had before.

(iii) Unconstitutionality by Implication

A third hybrid form of unconstitutional constitutional amendment may be described as unconstitutionality by implication. Where the architecture of the constitutional text suggests that certain constitutional principles or provisions demand greater constitutional protection, the Court could invalidate a constitutional amendment that violates one of these principles or provisions. Above, I suggested that the design of the legislative override could suggest that non-overridable rights and freedoms are higher in constitutional significance relative to others.²⁸² The Court could perhaps subject to greater scrutiny a constitutional amendment concerning these specially protected non-overridable rights and freedoms, for instance the right to vote.²⁸³ This is an admittedly speculative form of unconstitutionality, but the structure of the text raises it as a hybrid possibility.

280. The Yukon and the Northwest Territories' governments unsuccessfully challenged their exclusion from the process that led to the Meech Lake Accord. See *Canada (Prime Minister) v Penikett* (1987), 45 DLR (4th) 108, [1988] 2 WWR 481 (YCA), leave to appeal to SCC refused, [1988] 1 SCR xii; *Sibbeston v Northwest Territories (Attorney General)* (1988), 48 DLR (4th) 691, [1988] 2 WWR 501 (NWTCA). Both cases were heard before the Charlottetown Referendum. Today, in light of the Charlottetown precedent, the governments of all three territories would stand on firmer ground were they to challenge their exclusion from negotiating and approving a major constitutional amendment.

281. See *Patriation Reference*, *supra* note 3 at 888, citing Sir W Ivor Jennings, *The Law and the Constitution*, 5th ed (London, UK: University of London Press, 1959) at 136.

282. See Part III-C.3, *above*, for more on this point.

283. See *Charter*, *supra* note 146, s 3.

Conclusion

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

The answer to the second question is contestable. If the evidence from other constitutional states is any indication, the debate on the legitimacy of judicial review of constitutional amendment in Canada will be similarly divided between those who argue for a majoritarian or “counter-majoritarian” understanding of constitutional democracy—the former adopting a formal reading of the constitution and the latter preferring a more substantive view.²⁸⁴ As the question of an unconstitutional constitutional amendment gains interest in the legal academy and among political actors anticipating a live challenge to a constitutional amendment, the broad strokes of the larger global debate are likely to reproduce themselves in Canada, though refashioned to reflect the peculiarities of Canadian constitutional law.

The key question on the theory and doctrine of unconstitutional constitutional amendment is whether Part V of the *Constitution Act, 1982* is a complete code for formal amendment in Canada. My own view is that if political actors manage to satisfy the extraordinary hurdles in Part V, the Supreme Court should in all but the rarest circumstances recognize

284. See Albert, “Constitutional Handcuffs”, *supra* note 7 at 664–66.

the amendment as constitutionally valid if it is challenged.²⁸⁵ I agree with Warren Newman's interpretation of Part V, specifically that "it is a triumph of constitutionalism and the rule of law that our Constitution sets out a series of written provisions that govern, in relatively precise terms, the set of circumstances in which the formal terms of the Constitution may be amended".²⁸⁶ We cannot be certain, however, that the Court will interpret Part V in the future as a complete code. As I have shown, the Court has, on occasion, layered new unwritten requirements onto the already onerous rules of formal amendment in the course of interpreting the Constitution. The foundation, it seems, has been laid for the Court to declare that a duly passed formal amendment violates either a stated or as yet unstated principle of Canadian constitutionalism.

I have suggested a modest framework for the Supreme Court of Canada to review the constitutionality of a constitutional amendment, a position in which the Court may find itself in the years ahead. There are three major categories of possible unconstitutional constitutional amendment under the Constitution of Canada, and each comprises at least three subsidiary categories. An amendment, I have shown, may be procedurally unconstitutional insofar as it reflects a subject-rule mismatch, a processual irregularity or a temporal violation. I have also shown that an amendment may be substantively unconstitutional as a result of unwritten unamendability, text-based unamendability or the enforcement of the amendment-revision distinction. Finally, I have also suggested that an amendment may be ruled unconstitutional under one of three hybrid forms of unconstitutionality: statutory unconstitutionality, judicial recognition of a constitutional convention, and unamendability by implication.

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

286. See Warren J Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383 at 406.

I have stressed that these three categories and nine total subsidiary forms are illustrative and not exhaustive of the bases upon which the Court could rule a constitutional amendment unconstitutional.

When the time comes for the Supreme Court of Canada to rule on a live challenge to a constitutional amendment, the Court will have to weigh the relative importance of textually entrenched constitutional law, unwritten constitutional norms and the inherited traditions of constitutional principles. In this article, I have sought to make two contributions to the study of constitutional amendment in Canada. First, I have suggested a way to understand one of the great ironies of constitutional law, namely how in certain circumstances a constitutional amendment could be ruled unconstitutional. Second, I have developed an outline for an analytical framework the Court could use to explain its reasoning for invalidating a constitutional amendment, should that conclusion be compelled by the law, facts and politics of the case and should the Court deem it necessary to take this extraordinary action. There remain refinements to make to this framework, but it is, I hope, a useful start to the project.