CHAPTER TWENTY-SIX

AMENDING THE CONSTITUTION

I. NEGOTIATING A CONSTITUTIONAL AMENDMENT PROCEDURE

The year is 1864. You are a legal advisor to one of the delegates at the Charlottetown Conference, a key meeting that would lead to Confederation in 1867. Delegates at this conference have agreed to discuss the terms of union, including the rules that would ultimately appear in what we identify today as the *Constitution Act, 1867*. In the briefing materials you prepare for the delegate for whom you work, do you offer advice on how to design a procedure that will allow Canadians in the future to make alterations to the *Constitution Act, 1867* after it later

becomes law? If yes, why is it important to specify such a procedure in advance? If no, what do you gain and lose by keeping the *Constitution Act, 1867* silent on how it can be revised?

Assume you have prepared advice on how to design a procedure to alter what would become the *Constitution Act, 1867*. What is the content of your advice? Do you include specific details about who may initiate the change, who may ratify the change, and who may promulgate the change? Do you include limitations on what in the initial text can later be changed? And what about the possibility of changing the *Constitution Act, 1867* during periods of emergency: does your advice make it easier or harder to make changes at a time of stress, trauma, and presumably of great need in the country?

Class activity: Assemble yourselves into separate groups, each representing a different set of delegates at the Charlottetown Conference. Try to negotiate an agreement on whether to include such a procedure in the *Constitution Act, 1867*, and also on the finer points of the procedure. Did you succeed? What challenges did you encounter? What opportunities did you identify for common ground? In preparation for your negotiations, you may find it useful to read this overview of constitutional amendment: Markus Böckenförde, *Constitutional Amendment Procedures: International IDEA Constitution-Building Primer 10*, 2nd ed (Stockholm, Sweden: IDEA, 2017), online (pdf): <https://www.idea.int/sites/default/files/publications/constitutional-amendment-procedures-primer.pdf>.

As you read the materials in this chapter, keep in mind your early intuitions and expectations about whether, why, and how to create a procedure to update the *Constitution Act, 1867* and other constitutional laws that form part of the Constitution of Canada. Does the way Canadians amend the Constitution align with your first intuitions and expectations?

Our objective for this chapter is to introduce you to the design, history, and operation of constitutional amendment in Canada, with specific attention to how the relevant case law and academic analysis evaluates how the Constitution of Canada manages to balance enough flexibility to allow for change when it is needed but rigid enough to protect the fundamental commitments of the Constitution from easy repeal or replacement.

II. INTRODUCTION: WHY AMEND?

A constitution and procedures for its amendment are like hockey and pucks—one can hardly work as it is supposed to without the other. It is no surprise, then, that only a few of the world's constitutions—by one count fewer than 4 percent—do not codify amendment procedures authorizing alterations to their text: see Francesco Giovannoni, "Amendment Rules in Constitutions" (2003) 115 Public Choice 37 at 37. Why do almost all constitutional designers choose to write amendment procedures into their constitutional texts? There is certainly some soft pressure to conform to what appears to be a global norm of entrenching rules of constitutional amendment. But "other constitutions have them, so ours should too" just does not seem like a good enough reason to justify including anything in a constitution, especially because the process of constitution-making ordinarily involves fiercely competing interests, finite time and resources, and high costs in the event of failure.

The main purpose of amendment is evident in the word itself. The verb "to amend" derives from the Latin *emendare*, meaning "to free from fault": see Walter W Skeat, *A Concise Etymological Dictionary of the English Language* (Oxford: Clarendon Press, 1885) at 133. Where a political community identifies something in need of updating in its codified constitution or discovers an outright error in its text, the actors authorized to amend the constitution can initiate the process of constitutional amendment to free their constitution from the observed fault without having to write an altogether new constitution. This orderly process of piecemeal and peaceful constitutional change has many advantages over its alternatives. Would anyone prefer to live with a faulty constitution unsuited to the times or to risk outright revolutionary change accompanied perhaps by violence and the need to start from scratch?

Not all constitutional amendments are adopted in an orderly process, nor are they all done in piecemeal fashion. Here in Canada, as we show in Section III of this chapter, the successful patriation of the Constitution in 1982 and the failed Meech Lake and Charlottetown accords were far from orderly, and they were all efforts at wholesale constitutional transformation. These exceptions to how constitutional amendment has typically unfolded in Canada reinforce the rule that the procedures for constitutional amendment are designed to provide a clear and actionable roadmap for the amending actors to respond to the changing political, social, and economic needs of the country. At their best, amendment procedures in constitutional democracies aggregate and translate popular preferences into constitutional rules while balancing these preferences against the larger backdrop of a commitment to constitutionalism, human rights, and the rule of law.

Still, as Peter Hogg has quite rightly observed, "[i]t is always difficult to amend a country's constitution": see Peter W Hogg, "The Difficulty of Amending the Constitution of Canada" (1993) 31 Osgoode Hall LJ 41 at 60. Yet whether the process of amendment is ever successfully used, it is still important for a constitution to include amendment procedures. Perhaps the most basic motivation is to distinguish the constitutional text from ordinary law. Constitutions are generally altered only with recourse to procedures that are more demanding than the simple majority votes required to change or repeal an ordinary statute. Constitutions can confer fundamental rights and freedoms, create and constrain public institutions, and establish rules for the exercise of democracy. It is commonly asserted that the content of constitutions ought to be insulated from change by the variable whims of electoral majorities. Do you agree?

III. CONSTITUTIONAL AMENDMENT IN CANADA BEFORE 1982

The power of constitutional amendment is an important marker of sovereignty. As the materials that follow show, until 1982, this power was not fully exercisable by Canadian actors.

A. CONSTITUTIONAL AMENDMENT AT CONFEDERATION

The *British North America Act, 1867* (BNA Act; since renamed the *Constitution Act, 1867*) did not include a procedure for its own amendment in Canada by Canadian actors. The Act instead remained amendable by the same body that had written it to begin with—the Parliament of the United Kingdom. There were a few exceptions. First, s 92(1) of the 1867 Act (since repealed) authorized a provincial legislature to amend its own constitution as to the matters falling within its jurisdiction. And s 101 of the Act authorized the Parliament of Canada to make amendments concerning courts:

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

When compared with the otherwise plenary amendment power of the Parliament of the United Kingdom, these narrow domestic powers were a reminder that the BNA Act was essentially a colonial statute. The British *Statute of Westminster* later began to transform the Act from a colonial statute to a quasi-constitution. As discussed in Chapter 1, Introduction, the *Statute of Westminster* provided that no subsequent British statute would apply to Canada unless it had been enacted at the request and with the consent of Canada. Canadian legislative bodies were also authorized to repeal or amend imperial statutes applicable to Canada, with one major exception: the BNA Act. The result was that the Parliament of the United Kingdom retained its power over constitutional amendments to the most significant parts of

the Constitution of Canada. But this exception was softened by a practice, adopted at the 1930 imperial conference, that the Parliament of the United Kingdom would amend the Constitution of Canada only at the request and with the consent of Canada. See William Livingston, "The Amending Power of the Canadian Parliament" (1951) 45 Am Polit Sci Rev 437 at 437, 438, 441.

In 1949, the Parliament of the United Kingdom passed the *British North America (No 2) Act, 1949*, which conferred on the Parliament of Canada the power to amend, by simple majority, a limited category of matters concerning the "Constitution of Canada." The amendment was inserted into the *British North America Act, 1867*, as s 91(1):

> 91. ... [T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> (1) The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

Some critics feared that the amendment would allow the Parliament of Canada to amend the Constitution in respect of matters of importance to provinces without their consent. FR Scott explored the basis for this concern in an important article published the year after the amendment was adopted:

> It is clear that the refusal of the Canadian government to consult with the provinces before the adoption of the amendment, as urged by the Conservative party and by several provincial premiers, indicates its rejection of the compact theory of Confederation. Mr. St. Laurent in effect admitted this ... though he stressed that his proposal involved no change except a change of the venue where the amendments can be made, since only matters "within the exclusive concern of the federal authorities" were being dealt with. As no one knows, however, just what such matters may be, and as the provinces might take a different view from that of the Canadian government, or even of the Supreme Court were the question referred to it, we must consider this unilateral action by the federal Parliament as further evidence against the claims of those who would treat the constitution as a compact, either in law or in political theory.
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> As already noted, the federal amending power is an all-inclusive power, the "amendment from time to time of the Constitution of Canada," subject to certain exceptions. The phrase "the Constitution of Canada" includes the provincial constitutions. There is no separate "federal" constitution; the constitution is a single body of law setting up and apportioning authority to different organs of the state, some federal and some provincial. If the section had stopped there, it would have crystallized into law the present practice by which, through the joint address, Ottawa can secure any amendment it desires from the Parliament of the United Kingdom. But the section goes on to [stipulate] that the federal power of amendment shall not extend over [a number of subjects] ... .
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> In thus limiting its amending powers the federal Parliament has indicated its willingness to give a protection to provincial and minority rights which did not formerly exist. Formerly, only convention restrained Parliament from requesting any amendment—even one affecting so fundamental a right as the right to the two official languages in section 133 of the British

> North America Act. Now Parliament has withdrawn certain defined classes of matters from its competence, leaving them to be amended by a process to be agreed upon at the Dominion–provincial conference. ... However, should there be a failure to achieve agreement on the amending procedure for matters falling within any of the excepted classes ... , then presumably the former conventional method of amendment in London after a joint address from Ottawa will continue. This would indeed create an anomalous situation, since Ottawa would then possess both processes of amendment itself—one, over exclusively federal matters, by its own legislation, and the other, over all other matters, by joint address that Westminster cannot refuse to implement. In either case a mere majority vote in both Houses is sufficient for the adoption of the amendment. There may be political wisdom in consulting with the provinces before adopting a joint address requesting an amendment affecting provincial rights, but there is certainly no legal necessity for so doing.

See FR Scott, "The British North America (No 2) Act, 1949" (1950) 8 UTLJ 201 at 201, 202, 203-4. As Scott notes, the Parliament of Canada did not consult the provinces about the 1949 amendment. Should it have? On the one hand, the amendment did not affect the powers or prerogatives of the provinces, so on what basis could the provinces object? On the other hand, the amendment conferred a power that, as Scott suggests, Parliament could conceivably deploy to amend the Constitution in respect of provincial matters. Had you been a legal adviser to Prime Minister St Laurent at the time, would you have advised him to consult with the provinces? What information would assist you in making such a determination?

B. TOWARD A DOMESTIC AMENDMENT PROCEDURE

The 1949 amendment did not withdraw from the Parliament of the United Kingdom the power to formalize constitutional amendments to the Constitution of Canada. But by then, the power of constitutional amendment in Canada was divided—Canada would approve the amendment before officially requesting its entrenchment by the Parliament of the United Kingdom, and the United Kingdom, no longer able to exercise the discretion to deny Canada's request, would thereafter formalize the constitutional amendment by passing a parliamentary statute.

There remained the question how Canada might forward an amendment concerning matters of federal–provincial concern. It was clear that the Parliament of Canada had the legal authority to make the request unilaterally. But only a multilateral process of federal–provincial consultation and approval could clothe it with the necessary political authority. By 1965, four general principles could be identified from a historical study of the procedures that had been used since Confederation to make amendments to the BNA Act:

> *The first general principle* ... is that [n]o Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.
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> *The second general principle* is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle ... has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address to the Canadian House of Commons and Senate to the Crown.
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> *The third general principle* is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province.
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> *The fourth general principle* is that the Canadian Parliament will not request an amendment directly affecting federal–provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

> There have been five instances—in 1907, 1940, 1951, 1960 and 1964—of federal consultation with all provinces on matters of direct concern to all of them. There has been only one instance up to the present time in which an amendment was sought after consultation with only those provinces directly affected by it. This was the amendment of 1930, which transferred to the Western provinces natural resources that had been under the control of the federal government since their admission to Confederation. There have been ten instances [in 1871, 1875, 1886, 1895, 1915, 1916, 1943, 1946, and twice in 1949] of amendments to the Constitution without prior consultation with the provinces on matters that the federal government considered were of exclusive federal concern. In the last four of these, one or two provinces protested that federal–provincial consultations should have taken place prior to action by Parliament.

See Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer, 1965) at 15-16. As we will see below, in Section IV, Constitutional Amendment After 1982, the fourth general principle would feature prominently in the Supreme Court of Canada's reasons in *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25 [*Patriation Reference*].

Whether the practice of prior provincial consultation had matured into a convention was critical to designing a fully domestic amendment procedure for Canada. If it had, there would be a political requirement to entrench the convention into the amendment process. But had the practice been a mere practice all along—not a convention—there would be less pressure as a political matter, and certainly none rooted in constitutional law, to translate the practice into a constitutionally entrenched rule requiring provincial consultation for constitutional amendments involving matters of federal–provincial relations.

Serious efforts to design a domestic process of constitutional amendment had begun even before the coming into force of the *Statute of Westminster*. There were nearly 15 failed attempts to negotiate a constitutional amendment procedure. Spurred by the Balfour Report in 1926, the prime minister and the premiers of the provinces gathered the next year at an intergovernmental conference to begin the work of "patriating" the Constitution.

> The search for an amending formula became known as the patriation debate.
>
> Agreement on amending procedures would allow Canadians to "patriate" the Constitution. The words "patriate" and "patriation" were devised by Canadians (as an alternative to "repatriate" or "repatriation") to acknowledge the legal reality that the British North America Act, 1867, although largely developed by British North Americans in British North America, had never been legally domiciled in Canada and subsequently sent abroad. Hence, legally, the Constitution could not be repatriated or brought back home again after an absence. This legal distinction did not affect French language usage in Canada, which consistently employed the word "rapatriement."
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> The patriation debate, launched by the Balfour Report in 1926, would be marked by many attempts to resolve the issue and would last 56 years. Canada would become, with the adoption of the Statute of Westminster in 1931, an independent state in all respects except that the British Parliament would retain legislative authority over the British North America Act and its amendments, until the patriation issue was concluded in 1982.

See James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 25. For a detailed account of the many steps toward Canada's adoption of its new process of constitutional amendment, see Hurley at 25-67.

Canadian actors tried and tried again until they finally succeeded, almost six decades later, in bringing the Constitution home. Their efforts culminated with the adoption of the *Constitution Act, 1982*, which included in its text a complicated escalating structure of constitutional amendment, reviewed in Section IV, which follows.

Class activity: Hurley details over one dozen failed efforts to negotiate a homegrown plan for patriation. See Hurley, *Amending Canada's Constitution* at 25-67, online (pdf): <http://publications.gc.ca/collections/collection_2014/priv/CP32-63-1995-eng.pdf>. Pick one of those failed attempts and conduct additional research about it. Why was that specific plan inadequate to rally the agreement of all actors? What could have been done to reach an agreement on your chosen proposal? Was it missing something essential, or did it include something disqualifying?

IV. CONSTITUTIONAL AMENDMENT AFTER 1982

A. DESIGN ISSUES

If you participated in the class activity on the 1864 Charlottetown negotiations (see Section I, above), you would have recognized the many difficult issues that arise in designing an amending formula.

In the Canadian context, two have predominated. The first is the locus of sovereignty—that is, what or who should be vested with the power of constitutional amendment. Should the power be directly vested with citizens, or with the governments that are accountable to them? If the former, should an elected constituent assembly deliberate on constitutional amendments in advance of voting on them, or would ratification by a popular referendum with universal suffrage suffice? If the latter, are legislative assemblies the appropriate governmental institutions, and if so, given the federal nature of our polity, should some combination of legislative assemblies (both provincial and federal) be necessary to achieve constitutional change? Should certain groups, such as Indigenous peoples in Canada, be required to consent to amendments affecting their rights? As these questions make clear, identifying the locus of sovereignty for constitutional change is parasitic on an underlying conception of the nature of the political community whose terms of association are found in that constitutional document. And to the extent that there is a lack of an agreement on that conception—as is arguably the case in Canada—the process for constitutional amendment becomes a forum through which competing conceptions of the Canadian political community come into conflict.

Closely related to the first issue is a second: the correct balance to be struck between stability and flexibility. On the one hand, a constitution is meant to provide a framework within which the ordinary politics of political communities take place. If this framework were easily subject to change, it would be more difficult for it to provide a set of background rules for political decision-making. Moreover, since a constitution often addresses controversial issues, making constitutional change difficult arguably protects political decision-making because it reduces the capacity for constitutional politics to crowd out ordinary politics—that is, the politics of non-constitutional issues. On the other hand, a constitution that is too difficult to change may be incapable of responding to the changing nature of the political community or to fundamental challenges to the constitutional order itself. An overly rigid constitution risks becoming illegitimate, a "suicide pact," rather than the foundation for the ongoing existence and functioning of a political order. The balance between stability and flexibility plays out in the level of support required for constitutional change. For example, should there be a super-majority requirement within legislative assemblies? Is a simple majority sufficient for referenda?

B. THE LAW AND CONVENTION OF PROVINCIAL CONSENT

The process for amending the Canadian Constitution—often referred to as the amending formula—has been a source of ongoing controversy. This exploded in 1980 when, in the face of failure to secure the agreement of the provinces on what would become the *Constitution*

Act, 1982, the federal government announced its intention to secure the necessary constitutional amendment without provincial consent.

The federal move prompted a series of constitutional references before several provincial courts of appeal that were heard together by the Supreme Court in the 1981 *Patriation Reference*, excerpted below. The provinces argued that Canadian constitutional practice had crystallized into a *legal* requirement for provincial consent to constitutional changes affecting provincial interests. The federal government took the position that no such consent was required. Moreover, the provinces made the additional argument that a constitutional *convention* existed for provincial consent, a position that the federal government rejected as well. A majority of the Court held, in a 7–2 ruling, that there was no *legal* requirement of provincial consent. But a slightly smaller six-person majority also held that a constitutional *convention* had been established requiring a "substantial degree" of provincial consent to amendments affecting the provinces' interests.

Re: Resolution to amend the Constitution

[1981] 1 SCR 753, 1981 CanLII 25

[Reproduced first are the majority reasons on the issue of whether there was a *legal* requirement for provincial consent.]

LASKIN CJ and DICKSON, BEETZ, ESTEY, McINTYRE, CHOUINARD, and LAMER JJ:

The References in question here were prompted by the opposition of six provinces, later joined by two others, to a proposed Resolution which was published on October 2, 1980 and intended for submission to the House of Commons and as well to the Senate of Canada. It contained an address to be presented to Her Majesty the Queen in right of the United Kingdom respecting what may generally be referred to as the Constitution of Canada. The address laid before the House of Commons on October 6, 1980, was in these terms:

> ... An Act to give effect to a request by the Senate and House of Commons of Canada
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> Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.
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> Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:
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> 1. The *Constitution Act, 1981* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.
> 2. No Act of Parliament of the United Kingdom passed after the *Constitution Act, 1981* comes into force shall extend to Canada as part of its law.
> 3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.
> 4. This Act may be cited as the *Canada Act*.

... The proposed Resolution, as the terms of the address indicate, includes a statute which, in turn, has appended to it another statute providing for the patriation of the *British North America Act* (and a consequent change of name), with an amending procedure, and a *Charter of Rights and Freedoms* including a range of provisions (to be entrenched against legislative invasion) which it is unnecessary to enumerate. ... Although there was general agreement on the desirability of patriation with an amending procedure, agreement could not be reached at conferences preceding the introduction of the proposed Resolution into the House of Commons, either on the constituents of such a procedure or on the formula to be embodied therein, or on the inclusion of a *Charter of Rights*.

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There are two broad aspects to the matter under discussion which divide into a number of separate issues: (1) the authority of the two federal Houses to proceed by resolution where provincial powers and federal–provincial relationships are thereby affected and (2) the role or authority of the Parliament of the United Kingdom to act on the Resolution. The first point concerns the need of legal power to initiate the process in Canada; the second concerns legal power or want of it in the Parliament of the United Kingdom to act on the Resolution when it does not carry the consent of the provinces.

The submission of the eight provinces which invites this Court to consider the position of the British Parliament is based on the *Statute of Westminster, 1931* in its application to Canada. The submission is that the effect of the Statute is to qualify the authority of the British Parliament to act on the federal Resolution without previous provincial consent where provincial powers and interests are thereby affected, as they plainly are here. This issue will be examined later in these reasons.

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The proposition was advanced on behalf of the Attorney General of Manitoba that a convention may crystallize into law and that the requirement of provincial consent to the kind of resolution that we have here, although in origin political, has become a rule of law. (No firm position was taken on whether the consent must be that of the governments or that of the legislatures.)

In our view, this is not so. No instance of an explicit recognition of a convention as having matured into a rule of law was produced. The very nature of a convention, as political in inception and as depending on a consistent course of political recognition ... is inconsistent with its legal enforcement.

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Turning now to the authority or power of the two federal Houses to proceed by resolution to forward the address and appended draft statutes to Her Majesty the Queen for enactment by the Parliament of the United Kingdom. There is no limit anywhere in law, either in Canada or in the United Kingdom (having regard to s. 18 of the *British North America Act*, as enacted by *1875 (U.K.)*, c. 38, which ties the privileges, immunities and powers of the federal Houses to those of the British House of Commons) to the power of the Houses to pass resolutions. Under s. 18 aforesaid, the federal Parliament may by statute define those privileges, immunities and powers, so long as they do not exceed those held and enjoyed by the British House of Commons at the time of the passing of the federal statute.

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It is said, however, that where the resolution touches provincial powers, as the one in question here does, there is a limitation on federal authority to pass it on to Her Majesty the Queen unless there is provincial consent. If there is such a limitation, it arises not from any limitation on the power to adopt resolutions but from an external limitation based on other considerations which will shortly be considered.

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For the moment, it is relevant to point out that even in those cases where an amendment to the *British North America Act* was founded on a resolution of the federal Houses after having received provincial consent, there is no instance, save in the *British North America Act, 1930* where such consent was recited in the resolution. The matter remained, in short, a conventional one within Canada, without effect on the validity of the resolution in respect of United Kingdom action. ...

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This Court is being asked, in effect, to enshrine as a legal imperative a principle of unanimity for constitutional amendment to overcome the anomaly—more of an anomaly today than it was in 1867—that the *British North America Act* contained no provision for effecting amendments by Canadian action alone. ...

The effect of those [provincial] views, if they are correct ... , [is] to leave at least the formal amending authority in the United Kingdom Parliament. Reference will be made later to the ingredients of the arguments on legality. The effect of the present Resolution is to terminate any need to resort to the United Kingdom Parliament in the future. ...

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The provincial contentions asserted a legal incapacity in the federal Houses to proceed with the Resolution which is the subject of the References and of the appeals here. Joined to this assertion was a claim that the United Kingdom Parliament had, in effect, relinquished its legal power to act on a resolution such as the one before this Court, and that it could only act in relation to Canada if a request was made by "the proper authorities." ... It is not that the provinces must be joined in the federal address to Her Majesty the Queen; that was not argued. Rather their consent (or, as in the Saskatchewan submission, substantial provincial compliance or approval) was required as a condition of the validity of the process by address and resolution and, equally, as a condition of valid action thereon by the United Kingdom Parliament.

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The Court was invited to regard the Balfour Declaration of 1926 as embracing the provinces of Canada (and, presumably, the states of the sister dominion, Australia) in its reference to "autonomous communities." That well-known statement of principle ... is as follows:

> They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

It is impossible to seek nourishment for the provincial position in these appeals in this Declaration. The provinces did not come into the picture in the march to the *Statute of Westminster, 1931* until after the 1929 Conference on the Operation of Dominion Legislation, although to a degree before the Imperial Conference of 1930. ...

Although the Balfour Declaration cannot, of itself, support the assertion of provincial autonomy in the wide sense contended for, it seems to have been regarded as retroactively having that effect by reason of the ultimate enactment of the *Statute of Westminster, 1931* ... [which stated *inter alia*]:

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> 2(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
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> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of

Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion. ...

7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces,

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

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The *Colonial Laws Validity Act* was intended to be a liberating statute, releasing colonial legislatures from subservience to British common law (subject to Privy Council authority) and from subservience to British statute law unless such statute law applied expressly or by necessary implication to the colony. ... Following the Imperial Conference of 1930 and as a result of the Dominion–Provincial Conference of 1931, the provinces obtained an assurance that they too would benefit by the repeal of the *Colonial Laws Validity Act* and by being empowered to repeal any British legislation made applicable to them. This was achieved by s. 7(2) of the *Statute of Westminster, 1931*. There did not appear to be any need to include them in s. 4.

The most important issue was, however, the position of the Dominion *vis-à-vis* the *British North America Act*. What s. 7(1), reinforced by s. 7(3), appeared to do was to maintain the *status quo ante*; that is, to leave any changes in the *British North America Act* (that is, such changes which, under its terms, could not be carried out by legislation of the provinces or of the Dominion) to the prevailing situation, namely, with the legislative authority of the United Kingdom Parliament being left untouched. ...

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It was also urged upon this Court that s. 7(1), which in terms ("Nothing in this Act shall be deemed to apply to ... the British North America Acts, 1867 to 1930") removes the *British North America Act* (at least as it then stood) from the application of any terms of the *Statute of Westminster, 1931* was addressed to ss. 2 and 3 and not to s. 4. The argument goes that s. 7(1) does not exclude the application of s. 4; that s. 4 must be read in its preclusive effect on a dominion as having the provinces in view; that the "request and consent" which must be declared in a British statute to make it applicable to Canada, is the request and consent of the Dominion and the provinces if the statute is one affecting provincial interests or powers. ...

Nothing in the language of the *Statute of Westminster, 1931* supports the provincial position yet it is on this interpretation that it is contended that the Parliament of the United Kingdom has relinquished or yielded its previous omnipotent legal authority in relation to the *British North America Act*, one of its own statutes. ...

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At least with regard to the amending formula the process in question here concerns not the amendment of a complete constitution but rather the completion of an incomplete constitution.

We are involved here with a finishing operation ... . Were it otherwise, there would be no need to resort to the Resolution procedure invoked here, a procedure which takes account of the intergovernmental and international link between Canada and Great Britain. There is no comparable link that engages the provinces with Great Britain. Moreover, it is to confuse the issue of process, which is the basic question

here, with the legal competence of the British Parliament ... . The legal competence of that Parliament, for the reasons already given, remains unimpaired, and it is for it alone to determine if and how it will act.

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Support for a legal requirement of provincial ... is, finally, asserted to lie in the preamble of the *British North America Act* itself, and ... the nature of Canadian federalism. ...

What is stressed is the desire of the named provinces "to be federally united ... with a Constitution similar in Principle to that of the United Kingdom." The preamble speaks also of union into "One Dominion" and of the establishment of the Union "by Authority of Parliament," that is the United Kingdom Parliament. What, then, is to be drawn from the preamble as a matter of law? A preamble, needless to say, has no enacting force but, certainly, it can be called in aid to illuminate provisions of the statute in which it appears. ...

There is not and cannot be any standardized federal system from which particular conclusions must necessarily be drawn. ... Allocations of legislative power differ as do the institutional arrangements through which power is exercised. This Court is being asked by the provinces which object to the so-called federal "package" to say that the internal distribution of legislative power must be projected externally, as a matter of law, although there is no legal warrant for this assertion and, indeed, what legal authority exists (as in s. 3 of the *Statute of Westminster, 1931*) denies this provincial position.

At bottom, it is this distribution, it is the allocation of legislative power as between the central Parliament and the provincial legislatures, that the provinces rely on as precluding unilateral federal action ... . The Attorney General of Canada was pushed to the extreme by being forced to answer affirmatively the theoretical question whether in law the federal government could procure an amendment to the *British North America Act* that would turn Canada into a unitary state. That is not what the present Resolution envisages because the essential federal character of the country is preserved under the enactments proposed by the Resolution.

... There is here, however, an unprecedented situation in which the one constant since the enactment of the *British North America Act* in 1867 has been the legal authority of the United Kingdom Parliament to amend it. The law knows nothing of any requirement of provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power.

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What is central here is the untrammelled authority at law of the two federal Houses to proceed as they wish in the management of their own procedures and hence to adopt the Resolution which is intended for submission to Her Majesty for action thereon by the United Kingdom Parliament. The *British North America Act* does not, either in terms or by implication, control this authority or require that it be subordinated to provincial assent. Nor does the *Statute of Westminster, 1931* interpose any requirement of such assent. ...

[The next excerpt is from the majority reasons on the issue of a constitutional *convention* requiring substantial provincial consent.]

MARTLAND, RITCHIE, DICKSON, BEETZ, CHOUINARD, and LAMER JJ:

... The issue raised by the question is essentially whether there is a constitutional convention that the House of Commons and Senate of Canada will not proceed alone. The thrust of the question is accordingly on whether or not there is a conventional requirement for provincial agreement, not on whether the agreement should be unanimous assuming that it is required. ...

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The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period ... .

Being based on custom and precedent, constitutional conventions are usually unwritten rules. Some of them, however, may be reduced to writing and expressed in the proceedings and documents of imperial conferences, or in the preamble of statutes such as the *Statute of Westminster, 1931*, or in the proceedings and documents of federal–provincial conferences. They are often referred to and recognized in statements made by members of governments.

The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.

Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. ...

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It was submitted by counsel for Canada, Ontario and New Brunswick that there is no constitutional convention ... .

It was submitted by counsel for Manitoba, Newfoundland, Quebec, Nova Scotia, British Columbia, Prince Edward Island and Alberta that the convention does exist, [and] that it requires the agreement of all the provinces and that the second question in the Manitoba ... .

Counsel for Saskatchewan agreed that the question be answered in the affirmative but on a different basis. He submitted that the convention does exist and requires a measure of provincial agreement. Counsel for Saskatchewan further submitted that the Resolution before the Court has not received a sufficient measure of provincial consent.

We wish to indicate at the outset that we find ourselves in agreement with the submissions made on this issue by counsel for Saskatchewan.

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... We adopt the following passage of Sir W. Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at p. 136:

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

[Here, the majority discussed the Favreau White Paper, mentioned above, and the various amendments made to the Constitution. They noted that five of twenty-two amendments "directly affected federal–provincial relationships in the sense of changing provincial legislative powers" (at 891), each of which "was agreed upon by each province whose legislative authority was affected" (at 893). The majority continued:]

In negative terms, no amendment changing provincial legislative powers has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld.

There are no exceptions.

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In 1965, the White Paper had stated that

> The nature and the degree of provincial participation in the amending process ... have not lent themselves to easy definition.

Nothing has occurred since then which would permit us to conclude in a more precise manner.

Nor can it be said that this lack of precision is such as to prevent the principle from acquiring the constitutional *status* of a conventional rule. If a consensus had emerged on the measure of provincial agreement, an amending formula would quickly have been enacted and we would no longer be in the realm of conventions. ...

Furthermore, the Government of Canada and the governments of the provinces have attempted to reach a consensus on a constitutional amending formula in the course of ten federal-provincial conferences held in 1927, 1931, 1935, 1950, 1960, 1964, 1971, 1978, 1979 and 1980 (see Gérald A. Beaudoin ... [*Le partage des pouvoirs* (Laval, Quebec: Laval University, 1980)], at p. 346). A major issue at these conferences was the quantification of provincial consent. No consensus was reached on this issue. But the discussion of this very issue for more than fifty years postulates a clear recognition by all the governments concerned of the principle that a substantial degree of provincial consent is required.

It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in the political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.

It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with this requirement. The situation is one where Ontario and New Brunswick agree with the proposed amendments whereas the eight other provinces oppose it. By no conceivable standard could this situation be thought to pass muster. It clearly does not disclose a sufficient measure of provincial agreement. Nothing more should be said about this.

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The federal character of the Canadian Constitution was recognized in innumerable judicial pronouncements. ...

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. ...

• • •

It was contended by counsel for Canada, Ontario and New Brunswick that the proposed amendments would not offend the federal principle and that, if they became law, Canada would remain a federation. The federal principle would even be re-inforced, it was said, since the provinces would as a matter of law be given an important role in the amending formula.

It is true that Canada would remain a federation if the proposed amendments became law. But it would be a different federation made different at the instance of

a majority in the Houses of the federal Parliament acting alone. It is this process itself which offends the federal principle.

• • •

We have reached the conclusion that the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense.

NOTES AND QUESTIONS

1. *Catalytic effect.* This decision has been credited with forcing the federal government and the provinces back to the negotiating table because although the Court acknowledged the legality of a unilateral federal move, it effectively declared such a move illegitimate. The negotiations culminated in an agreement between the federal government and the nine provinces other than Quebec. In a later case raising the issue of whether Quebec's agreement to constitutional change was required for the requirement of substantial consent, the Court concluded that there was no convention of a Quebec veto—that is, Quebec need not grant consent for amendments to be valid: *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793, 1982 CanLII 219.

2. *Unanimous or substantial agreement?* The Court relied on the Jennings test to evaluate whether a convention of provincial consent to amendments involving provincial legislative powers existed. Andrew Heard has observed that the Supreme Court

> appeared to assume that there must be a consistent and unanimous voice across the actors in order for a convention to exist. Such an assumption is not found in Jennings's writings on the subject or in subsequent academic discussions on the matter … . Had the members of the Supreme Court looked at the broader literature from the 1960s and 1970s about constitutional amendment, they would have found a widespread belief that unanimity was considered necessary to any broad constitutional package being negotiated.

See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 2014) at 176-77.

3. *The precedents.* The Court determined that only five of all previous amendments in Canada were relevant to determining whether, and if so, how much, provincial consent was required to make an amendment affecting federal–provincial relations. But there had been a total of 22 amendments to the BNA Act by the time the Court heard the *Patriation Reference* (reviewed in detail by the Court at 888-91). Should only 5 of these 22 previous amendments have been relevant to the Court's determination? Should all of them be examined to arrive at an answer? More than five? Fewer than five? Were some more relevant than others?

4. *Conventions in courts.* In the common law tradition, courts do not enforce conventions, but they do recognize them, as the Court did in the *Patriation Reference*. The Court (at 880-81) explained the basis for this distinction between enforcement and recognition (see above).

But does it really matter that the Court does not enforce a convention if it recognizes it as valid? Recognition may be an equally effective, albeit indirect, way of enforcing a convention, provided the Court is perceived by political actors and the public as authoritative on the matter.

And what is the difference between the authoritative recognition of the existence of a convention and its enforcement? Perhaps very little, as Farrah Ahmed, Richard Albert, and Adam Perry argue:

> A rule may be enforced simply by drawing a person's attention, and if necessary the attention of the community, to her violation or would-be violation. Once a light is shone on her

conduct in this way, the person may take it upon herself to either correct her behavior or to make amends. This is a mild response compared to other forms of enforcement. What nonetheless makes this a kind of enforcement is that the person has not been allowed to violate the rule without consequence.

If it seems strange to define declaration as a kind of enforcement, consider an example from England and Wales. A standard administrative law remedy is a declaration that an administrative act is unlawful. The declaration does not invalidate the act, nor does it lead to damages or the like, nor even does it impose any ongoing obligation. Even so, declarations … are considered "one of the most important remedies in review proceedings." The reason is that the government almost invariably responds to a declaration by taking steps to avoid or correct for the illegality. Declarations enforce administrative law standards because the government is committed to acting lawfully, and because the government treats the court as an authority regarding its legal obligations … .

Conventions can likewise be enforced by judges through declarations. Suppose there is a general legal duty to comply with conventions. If a constitutional actor breaks a convention, then (provided any conditions regarding standing, justiciability, and the like were satisfied) a complainant could obtain a declaration of illegality. The declaration would be a form of legal enforcement, because it would be an exercise of legal authority.

Conventions can also be enforced through declarations as a form of non-legal enforcement. The scenario we have in mind parallels the legal case: the would-be convention-violator is committed to complying with her conventional obligations, and the person or body making the declaration is regarded as an authority on what the convention requires. The authority need not be a court. In the United Kingdom, for example, the Ministerial Code contains most of the important conventions applicable to ministers. The arbiter of what the Code requires is the prime minister, and her decisions are treated by ministers as conclusive. When the prime minister declares that some act would contravene the Code, other actors treat the matter as settled, and act accordingly. In this way, the prime minister enforces the Code. But of course, a court could also be treated as an authority on conventions. In such a case, a court's declaration that an act is not convention-compliant would be a form of non-legal enforcement. Yet it would be a formal type of judicial enforcement.

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[I]n the Patriation Reference, the Supreme Court stopped short of what it considered to be enforcing a convention. The Court believed that it could not enforce conventions because "they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules." The Court specified that "unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce." And so, concluded the Court, "to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach." …

The Court's declaration followed from a threatened violation of the convention. The declaration prevented the convention from being violated with impunity, given the political pressure the declaration placed on political actors, who ultimately tailored their conduct to the convention. The analysis of enforcement we offered in Section 2 of this article suggests that the Court's declaration in the Patriation Reference amounted to enforcement.

See Farrah Ahmed, Richard Albert & Adam Perry, "Judging Constitutional Conventions" (2019) 17 Int'l J Const L 787.

Indeed, as William Lederman has argued, judicial recognition of a convention may induce voluntary compliance:

> I suggest that the non-enforceability of conventions by the Court is of only marginal importance, at least in nearly all situations. In nearly all cases, the power authoritatively to ... declare the terms of established constitutional conventions will be enough to attract voluntary compliance from the political actors. At the end of the day, if the prestige of the Supreme Court of Canada and the legitimacy of its power of judicial review in our federal system are widely accepted by the official political actors and by the people at large, the judicial declaration will induce willing compliance. If there is no such official and general acceptance of the role of the Court, what effective enforcement measures would be possible anyway? Fortunately, it appears that we do have this kind of acceptance in Canada.

See William Lederman, Comment: "The Supreme Court of Canada and Basic Constitutional Amendment: An Assessment of Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)" (1982) 27 McGill LJ 527 at 537-38.

The Court's choice to recognize a constitutional convention may not have been without consequence. According to Adam Dodek, the Supreme Court has "unnecessarily invited future controversy and conflict between the courts and the executive." Dodek actually suggests that what the Court did amounted to "declaration," something more than mere "recognition"—the Court has opened itself to the possibility that it would inaccurately articulate the relevant constitutional convention and thereby "set the stage for confusion, conflict and potential crisis": see Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference" (2011) 54 SCLR (2d) 117 at 131, 138, 141.

5. *The case for unilateralism.* The Court held hearings on April 28-30 and again on May 1 and 4, 1981, and issued its reasons on September 28 of the same year. This four-month period may have offered then Prime Minister Pierre Trudeau an opportunity to go it alone. This route was suggested by Bruce Ackerman and Robert Charney:

> [W]hy didn't Trudeau call an extraordinary national referendum on the proposed Liberal constitution: Charter of Rights, patriation, amending procedure, the works? The Supreme Court had already made it impossible to repatriate by Canada's 114th Dominion Day on the sheer assertion of parliamentary sovereignty. Why waste the summer in the way it was wasted—for, as you will recall, constitutional discussion did in fact tend to peter out as Canadians turned their attention to the problems of energy pricing and a bank rate that was rising to record heights. ...
>
> So far as we can tell, moreover, Trudeau might well have won such a referendum in a big way ... . Indeed, such a referendum would have given Trudeau that wide electoral support from all regions of the country that his Liberal Party so evidently lacked in a normal parliamentary election. To make the mystery more complete, ... the prime minister was perfectly aware of the legitimating power of a national referendum. His own proposal for replacing the constitution's interim amending procedure contemplated a special referendum if seven premiers, representing 80 per cent of the Canadian population, could agree on a counter-proposal to Trudeau's own general amending procedure. ...
>
> Why, then, did Trudeau not break the impasse caused by provincial opposition and judicial delay by calling the Canadian People to the polls to speak on the legitimacy of the Liberal constitution? ... Wouldn't a landslide victory have vastly enhanced the perceived legitimacy of the liberal nationalist effort at repatriation?

See Bruce Ackerman & Robert Charney, "Canada at the Constitutional Crossroads" (1984) 34 UTLJ 117 at 128-30.

6. *Autochthony.* The view advanced by Ackerman and Charney appears to have been rooted in the concept of autochthony. As Peter Hogg explains:

> [A]utochthony requires that a constitution be indigenous, deriving its authority solely from events within Canada. ... The legal force of the *Canada Act 1982* and the *Constitution Act,*

> *1982*, like other United Kingdom statutes extending to Canada, depends upon the power over Canada of the United Kingdom Parliament. These instruments have an external rather than a local root. If patriation means the securing of constitutional autochthony, I conclude that it has not been achieved.

See Peter Hogg, "Patriation of the Canadian Constitution: Has It Been Achieved?" (1983) 8 Queen's LJ 123 at 125-26. Hogg did not believe that patriation made the Constitution of Canada autochthonous. Would a national referendum as suggested by Ackerman and Charney have done the trick? Is the Canadian Constitution autochthonous today? Does it matter if it is not?

7. *Indigenous peoples.* Can we consider patriation to have been "autochthonous" in the sense of deriving its authority from an inclusive process that gave voice to all persons? For Indigenous peoples, one scholar argues that patriation was both a "monumental achievement" and a "monumental defeat":

> For Indigenous people, the *Constitution Act, 1982* represents a contradiction or a constitutional paradox. It is both an instrument of colonization and an instrument of decolonization. Despite all of the efforts to place their issues on the constitutional table and protect Indigenous rights (ultimately through the inclusion of section 25 and 35 of the *Constitution Act, 1982*), most Aboriginal organizations viewed the amended constitution as a major defeat. All of the national and all but one provincial Indigenous organization (the Métis Association of Alberta) walked away from the constitutional table or rejected the amended constitution because it failed to offer sufficient protection to Indigenous peoples, or to enunciate an appropriate and detailed understanding of what sections 25 and 35 recognized, affirmed, and protected.
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> • • •
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> Although easily construed as a monumental defeat, patriation also represented a monumental victory for Indigenous peoples. ... With the entrenchment of section 35, Aboriginal and treaty rights were recognized and affirmed, arguably as *sui generis* rights originating within Indigenous nations or the agreements between Indigenous nations and settler society. Moreover, section 25 affords these rights further protection from the *Canadian Charter of Rights and Freedoms*.

See Kiera Ladner, "An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat" in Lois Harder & Steve Patten, *Patriation and its Consequences* (Vancouver: UBC Press, 2015) 267 at 270-71.

C. THE CONSTITUTION'S AMENDING FORMULA

If we define sovereignty as the power to make the final choice about how to structure the institutions of government, how to allocate powers, and how to reflect this in a Constitution, then patriation formalized Canada's sovereignty by transferring that power to Canadian political institutions. But, as it turns out, there is not one single-decision rule for amending the Canadian Constitution. Rather, there are five rules—five rules that make up the amending formula, as it is called—contained in part V of the *Constitution Act, 1982*, each of which purports to apply to different types or categories of amendments:

1. The "general amending formula," or the "7/50 formula," found in s 38(1), requires the consent of the Parliament of Canada and the legislative assemblies of two-thirds of the provinces having at least 50 percent of the population of all the provinces. This general amending formula gives no province alone a veto on amendment, which has been a source of dissatisfaction in Quebec. This procedure is the only one in the Constitution subject to time limits: an amendment cannot be proclaimed until one year after the initiation of the amendment process unless every province has indicated assent or dissent (s 39(1)), and an amendment dies unless it has received the

appropriate degree of support within three years of the start of the process (s 39(2)). Section 38(3) permits a province to opt out of an amendment derogating from its legislative powers, proprietary rights, or other rights and privileges. If the amendment transfers legislative powers from the provinces in relation to education or cultural matters, the province opting out is also entitled to reasonable compensation (s 40). Section 38 is the default formula for constitutional amendments—that is, it applies to amendments that do not fall under the other amending formulas. Moreover, s 42 specifically assigns some amendments to s 38—for example, "the principle of proportionate representation of the provinces in the House of Commons" (s 42(1)(a)) (the amendments specified by s 42 cannot be the subject of opting out).

2. The "unanimity procedure," found in s 41, requires that consent be provided by Parliament and the legislative assemblies of all the provinces in relation to amendments to the office of the Queen, the governor general, and the lieutenant governor of a province; the minimum number of members to which a province is entitled in the House of Commons as of 1982 (because of the "Senate floor rule" found in s 51A of the *Constitution Act, 1867*); the general use of the English and French languages; the composition of the Supreme Court of Canada; and any amendment to the amending formula.
3. The "bilateral procedure," found in s 43, deals with provisions of the Constitution affecting only some provinces. Where an amendment is in relation to a provision affecting one or more but not all provinces, only the legislative assemblies of the provinces affected and Parliament need consent to the amendment.
4. The "federal unilateral procedure," in s 44, allows Parliament alone to make amendments to the federal executive or the House of Commons or Senate (provided amendments to the Houses of Parliament do not affect their powers or their method of selection in ways protected by other parts of the amending formula). Section 44 replaces the old s 91(1) of the *Constitution Act, 1867*, which was similarly worded.
5. The "provincial unilateral procedure" in s 45 replaces the old s 92(1) of the *Constitution Act, 1867* and permits the province to amend its constitution, provided that the amendment does not affect matters governed by other parts of the amending formula, such as the office of the lieutenant governor.

In addition to part V, s 35.1 provides that amendments affecting Aboriginal rights or changes to s 91(24) of the *Constitution Act, 1867* will be preceded by a constitutional conference of first ministers and representatives of Indigenous peoples. However, s 35.1 does not impose a duty to obtain the consent of Indigenous peoples.

NOTES AND QUESTIONS

1. *Using part V.* The amending formula in part V of the *Constitution Act, 1982* has been used successfully on 11 occasions since 1982. The "7/50" formula has been used only once to pass the *Constitutional Amendment Proclamation, 1983*. Most notably, this amendment altered the Aboriginal rights provisions in ss 25 and 35 of the *Constitution Act, 1982*; added ss 35(3), 35(4), 35.1; and amended s 25(b). Section 44 has been relied on by Parliament three times. The *Constitution Act, 1985* (Representation) repealed and replaced s 51 of the *Constitution Act, 1867* (which had been amended many times since 1867) to lay down new rules governing representation in the House of Commons; the *Constitution Act, 1999* (Nunavut) amended the relevant provisions of the *Constitution Act, 1867* to provide for the representation of Nunavut in the House of Commons and the Senate; and the *Fair Representation Act* (2011) replaced s 51(1) of the *Constitution Act, 1867* to readjust the number of members of the House of Commons and provincial representation in it.

The remaining seven amendments have been made through s 43, and have all involved the federal government and one other province. For example, s 43 was used in 1993 to extend

language rights in New Brunswick by adding s 16.1 to the *Constitution Act, 1982*. The most controversial amendments involving s 43 have concerned denominational school rights in Newfoundland (three amendments) and Quebec (one amendment). The Newfoundland amendments all involved changes to term 17 of the Newfoundland Terms of Union (which were constitutionalized by the *Newfoundland Act*, 12 & 13 Geo VI, c 22 (UK)). Term 17 replaced s 93 of the *Constitution Act, 1867* with respect to Newfoundland, and entrenched a set of denominational school rights. In 1987, term 17 was amended to extend those rights to Pentecostal schools (Constitution Amendment, 1987). However, in 1997 (Constitution Amendment, 1997 (*Newfoundland Act*)), and again in 1998 (Constitution Amendment, 1998 (*Newfoundland Act*)), term 17 was amended first to dilute and then to remove the constitutional protection accorded to denominational schools. Both these amendments were made after province-wide referenda in which a majority of Newfoundlanders voted in favour of the amendments.

During the parliamentary debate surrounding the first amendment, religious groups argued (unsuccessfully) that Parliament should approve the proposed amendment because of the impact on minority rights. Is there a federal obligation to enact such a measure simply because the majority in the province so wishes? Conversely, does the federal Parliament owe a special obligation to protect the denominational school rights of minority groups who are liable to be outvoted in the political process?

The second amendment was challenged in the courts on the ground that the appropriate amending formula was s 38, not s 43, because denominational school rights were elements of national citizenship. The challenge was rejected on the grounds that term 17 applied only to Newfoundland, and hence s 43 was the appropriate provision to amend it: *Hogan v Newfoundland (AG)*, 2000 NFCA 12, leave to appeal refused, [2000] SCCA No 191 (QL). The Quebec amendments also abolished denominational school rights in that province by providing, in a new s 93A, that s 93 no longer applied to Quebec (Constitutional Amendment, 1999 (Quebec)). A similar constitutional challenge was rejected by the Quebec courts: *Potter c Québec (Procureur général du)*, 2001 CanLII 20663, [2001] RJQ 2823 (CA), leave to appeal refused, [2002] CSCR No 13 (QL). Do you agree with these holdings?

2. *Population and power.* The general amending formula creates asymmetries among provinces with regard to their power to drive or block an amendment. A professor of mathematics has concluded that "under paragraph 38(1)(b), the provinces are not all equal. The inequality is a consequence of the different provincial populations and the requirement that, to succeed, an amendment must be supported by a coalition of at least seven provinces containing at least one-half of the total population of the provinces." As a result, at the time he conducted his study, "an amendment supported by all provinces except Ontario and Quebec will fail, whereas one supported by all except British Columbia and Alberta will succeed": see D Marc Kilgour, "A Formal Analysis of the Amending Formula of Canada's Constitution Act, 1982" (1983) 16 Can J Polit Sci 771 at 772. Does this exacerbate regional divisions in Canada? Is there any other way to design the general amending formula without requiring unanimity?

3. *Opting out.* The right to opt out provided in s 38(3) is not without its critics. On one view, the incompleteness of the opt-out right—it does not authorize compensation on all matters—has the potential to generate provincial inequalities:

> Consider, for example, environmental protection, which falls under both federal and provincial jurisdiction. If the other provinces agreed to hand over all authority in this area to Ottawa, Quebec could express its disagreement and withdraw from such a constitutional amendment; it would not, however, have a constitutional right to receive any federal funding for environmental projects, since they would fall outside the areas of education and culture. The citizens of Quebec, by paying federal taxes, would be paying for the environmental protection of all the provinces while at the same time taking on the expense of their own protection system. In other words, except for matters of culture and education, a province choosing to opt out of a particular amendment would see its citizens doubly taxed.

See Gil Rémillard, "The Constitution Act, 1982: An Unfinished Compromise" (1984) 32 Am J Comp L 269 at 277. Do you agree with Rémillard that the opt-out right raises the risk of provincial inequalities?

4. *Public participation in the amendment process.* The amendment procedure in part V of the *Constitution Act, 1982* imposes no requirement of public participation (such as a referendum) and has been criticized for being elitist and undemocratic. We will consider this criticism in more detail below after we examine the failed attempts at constitutional reform associated with the Meech Lake and Charlottetown accords.

5. *A complicated process.* Writing in the year of patriation, an American scholar observed that "perhaps as a reflection of the complex politics of Canadian federalism, the new domestic amendment procedures are unusually complicated." It reflected, he said, "the inescapable fact" that "Canada is a society of weak national loyalties." For him, "an amendment process which reflects the decentralized quality of such a society is neither good nor bad. It is only accurate": see Walter Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) 45 Law & Contemp Probs 283 at 297, 302. Do you agree that Canada's amendment formula is too complicated? Would we be better served with only one amendment procedure to amend any part of the Constitution? If so, how would you design that single procedure? What degree of provincial agreement would be necessary, if any, to amend the Constitution? One scholar has argued that the varying levels of difficulty reflected in the five procedures of Canada's amending formula serve an important purpose: the hierarchy of amendment difficulty signals which provisions of the Constitution are more important, and therefore harder to amend, than others: see Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59 McGill LJ 225.

6. *Amending the amending formula.* Section 49 of the *Constitution Act, 1982* required the prime minister to convene a first ministers' conference by 1997 in order to review the amending formula:

> A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

The amending formula was discussed at a meeting of first ministers on June 20-21, 1996, but so little time was devoted to them—only a few minutes, it is said—that one observer has stated that "clearly no review of the provisions of Part V was actually conducted": see John D Whyte, "'A Constitutional Conference … Shall Be Convened …': Living with Constitutional Promises" (1996) 8 Const Forum Const 15 at 16. The prime minister at the time nonetheless declared after the meeting that the constitutional obligation imposed by s 49 had been fulfilled. Do you believe the first ministers should have devoted more time to reviewing the amending formula? Why do you think they spent so little time on them? Had you been sitting at the first ministers' table on the day the amending formula came up for discussion, how would you have suggested it be amended, if at all?

7. *Thinking about part V.* There remain many open questions about the amending formula. For further readings, see Benoît Pelletier, "Amending the Constitution of Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 253; Kate Glover, "Hard Amendment Cases in Canada" in Richard Albert, Xenophon Contiades & Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart, 2017) at 273; Sebastien Grammon, "The Protective Function of the Constitutional Amending Formula" (2017) Rev Const Std 171; Hoi L Kong, "Deliberative Constitutional Amendments" (2015) 41 Queen's LJ 105; Warren J Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383; Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42 UTLJ 139; Peter W Hogg, "Formal Amendment of the Constitution

of Canada" (1992) 55 Law & Contemp Probs 253; Samuel V LaSelva, "Federalism and Unanimity: The Supreme Court and Constitutional Amendment" (1983) 16 Can J Polit Sci 757.

D. FAILED CONSTITUTIONAL REFORMS: MEECH LAKE AND CHARLOTTETOWN

Alongside the eleven constitutional amendments that have been made since 1982, there have been two significant failures: the Meech Lake Accord and the Charlottetown Accord. Both accords began as efforts to win Quebec's acceptance of the 1982 constitutional amendments. The Meech Lake Accord included constitutional recognition of Quebec as a distinct society, entrenchment of the Supreme Court of Canada and provincial nomination of its justices, an increase in the number of items requiring unanimity under the amending formula, and controls on the federal spending power. Many of these elements reappeared in the Charlottetown Accord, along with changes to the distribution of powers, an entrenched Aboriginal right to self-government, an elected Senate with equal provincial representation, and a guaranteed level of Quebec representation in the House of Commons. How did we get to these efforts at wholesale constitutional reform in Canada so soon after the *Patriation Reference*? Richard Simeon offers a useful summary:

> For many, the exclusion of Quebec grievously undermined the legitimacy of the new constitutional order. In the short run, it meant that Quebec would proclaim a blanket use of the "notwithstanding clause" exempting all Quebec legislation from challenge under important sections of the new Charter; and that Quebec would refuse to engage in further discussion of constitutional renewal. In the longer run, it was feared that, however muted the Quebec independence movement now seemed, the imposition of the constitution on Quebec would be a powerful weapon in the hands of a future separatist movement. Many commentators felt that the country had reneged on a moral commitment, the 1980 promise that a "no" vote in the referendum was a vote for a renewed federalism and that no constitution could be fully secure without the voluntary accession of the second largest province, and the only one with a French-speaking majority.
>
> From this perspective, then, the overriding constitutional question which remained was to find some way to "[b]ring Quebec in" to the Canadian constitutional family. Two essential conditions had to be met … . First, there had to be a federal government in office which placed reconciliation with Quebec at the top of its agenda, and, more important, which was prepared to accept at least some of the fundamental assumptions about the distinctive character of Quebec which had underlain the aspirations of all Quebec governments since the Quiet Revolution of the 1960s. Second, there must be a government in Quebec which was equally committed to this goal, and which was unequivocally federalist in orientation.
>
> The first condition was met with the federal election of September, 1984. The new Conservative government was pledged to "national reconciliation"—including restoring harmony to the embittered state of federal–provincial relations and, more particularly, to constitutional reconciliation with Quebec (Mulroney, 1984). The second condition was met with the defeat of the PQ and the election of the federalist Liberals under Robert Bourassa in 1985.

See Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism" (1988) 14 Can Pub Pol'y S7 at S8-S9.

1. The Meech Lake Accord

For the rest of the story of how the Meech Lake Accord came to be, we now turn to Mary Dawson, the person responsible for drafting all constitutional amendments starting in 1981 and the lead legal adviser to the Government of Canada on constitutional matters from 1986

until her retirement. In 2012, Dawson gave a lecture at McGill University in which she offered a glimpse, from her unique perspective, into Canada's constitutional evolution:

> The constitutional negotiations known as the "Quebec Round" began quietly, indeed secretly. The foundation was laid in May 1986 at a symposium at Mont Gabriel, Quebec, where the Quebec minister of intergovernmental affairs confirmed Quebec's five conditions for acceptance of the patriation package of 1982. The Government of Quebec was asking for changes to the constitution that would have symbolic meaning but that it felt would have minimal impact on the constitution for those outside Quebec. The changes would relate to Quebec's distinctiveness, immigration agreements, the Supreme Court of Canada, the federal spending power, and the amending formula. This relatively short list was in sharp contrast to the much longer lists of demands that had been coming from Quebec in recent years.
>
> The provincial premiers agreed, in August 1986 at a meeting in Edmonton, to make the issues identified by Quebec their first priority and to set aside their other priorities until Quebec's demands had been addressed. Prime Minister Mulroney had written to them earlier in the summer to request that they consider this approach. ...
>
> Through the fall of 1986 and the winter of 1987, a series of bilateral meetings took place out of the public eye ... . During this period, federal officials began to work on draft amendments with their Quebec counterparts. As a rule, no paper was exchanged. ...
>
> While the Government of Quebec was reaching out to the rest of Canada through this process, at the same time it appeared to be doing everything that it could to avoid what it would consider to be yet another humiliation in the event of a public failure to achieve its modest set of conditions. ...
>
> When all the governments met at Meech Lake on April 30, 1987, the five conditions of Quebec had been well canvassed even though there had only been one meeting of officials, held early in March. ...
>
> The main point of contention was the "distinct society" clause, and this was the last component of the package to be agreed upon. ...
>
> Although the first ministers had before them detailed draft provisions for most of the elements of the package, the Meech Lake Communiqué issued that night contained only general descriptions of these various elements. The one exception was the distinct society clause. ...
>
> The agreement covered the five elements requested by Quebec, some of them generalized to apply to all provinces either at or before the April 30 meeting at Meech Lake or in the months immediately following that meeting, and there was a sixth element added at the April 30 meeting. This addition was to entrench in the constitution a requirement for annual first ministers' conferences, which were to cover Senate reform and fisheries roles and responsibilities, as well as for annual first ministers' conferences on the economy.
>
> It was also agreed that, until the Senate amendments were achieved, Senate appointments were to be made from lists provided by the provinces, so long as they were acceptable to the federal government. Senate reform was a high priority for the Western provinces. In recognition that this was intended to be the Quebec Round, detailed proposals for Senate reform were not developed, but the interim arrangement was included in the package. This procedure was to apply until comprehensive Senate amendments were made.
>
> The Meech Lake Communiqué of April 30, 1987, was approved unanimously by the prime minister and the premiers of all the provinces, including Quebec, and was met with great enthusiasm and the hope that this might be the end of our constitutional difficulties. That mood held through the technical discussions over the next month or two at the officials' level as small changes were discussed.

See Mary Dawson, "From the Backroom to the Frontline: Making Constitutional History or Encounters with the Constitution—Patriation, Meech Lake, and Charlottetown" (2012) 57 McGill LJ 955 at 979-82. (Citations omitted.)

The Meech Lake Accord contained within it many items that required unanimous approval for constitutional amendment—for example, changes to the amending formula—as well as items that could be approved under the general formula in s 38. As a consequence, the question of how the different amending formulas would interact was an important one. In theory, the Accord could have been voted on by legislative assemblies in two ways. The first route would have been to vote on each component separately according to the appropriate amending formula. This approach would have raised the possibility that some aspects of the Accord would have been adopted, but others rejected, an unacceptable political outcome because the package represented a compromise that its proponents believed stood or fell together. The second route was to present the amendments for approval as a package. The requirements of ss 38 and 41 were taken to apply to the entire package, meaning that unanimous approval was required within three years. The Accord died in June 1990, having failed to meet these requirements. The Charlottetown Accord, which was voted down in a national referendum in 1992, also contained a mix of amendments, some requiring approval under s 38, others under s 41.

The choice to apply the three-year time limit to ratify the Meech Lake Accord was controversial. Gordon Robertson, a former high-ranking civil servant in Canada, argued that there should be no time limit on its ratification. Robert Hawkins responded that the three-year time limit did indeed apply to the Meech Lake Accord. In a subsequent response written that same year, Ted Morton considered the implications of removing the three-year time limit in the middle of the ratification process and proposed a solution to improve the amendment process going forward:

> Every discussion and every legislative vote since the details of the Meech Lake Accord were agreed to by the eleven first ministers in June, 1987, have assumed that the Accord had to be ratified within a three year time limit or die. This apparently unanimous understanding was recently challenged by Gordon Robertson … .
>
> For Mr. Robertson, it follows that since the Meech Lake Accord can only be ratified under the unanimity rule of Section 41, it does not have any time limit. …
>
> To uncover the flaw in Mr. Robertson's logic, one must separate out what Meech Lake has blended together: two separate amending formulas. … If the first ministers had had the foresight to separate their amendments into two distinct proposals—a section 38 package and a section 41 package—there would be no controversy about time limits. (The section 38 package would have one; the section 41 package would not). Unfortunately, this is not the case. The result is confusion: Which amending rules govern the Meech Lake Accord?
>
> Mr. Robertson's solution is to subsume the section 38 amendments under the section 41 requirements—unanimity, and no time limit. …
>
> Since the Accord is a package, it must be approved by the procedure necessary for whatever part or parts of the package requires the highest level of approval. That "highest level" is unanimity of the legislatures of all the provinces. Constitutional changes that require unanimity must be made pursuant to Section 41 and this is what is being done.
>
> Mr. Robertson's argument is plausible but not persuasive. Another solution is to import the three year time limit of section 38 into the section 41 procedure. The result is a procedure that requires unanimity (per section 41) and imposes a three year time limit (per section 38). This is truly "the highest level of approval," to use Mr. Robertson's own phrase, and it is the option the first minister (and the rest of Canada) thought they were choosing in the Spring of 1987. It is certainly as plausible as the Robertson option, and for the same reasons. While there are irrefutable reasons for preferring the unanimity requirement of section 41 to the "7/50 rule" of section 38, there is not any obvious reason for jettisoning the three year time limit. True, this makes it more difficult to gain approval for the Accord, but this may be its virtue not its vice.

> The Meech Lake Accord ... contain[s] a very distinctive—and it turns out, controversial—vision of Canada's future. Surely when constitutional changes of this magnitude and extent are contemplated, it makes sense to require the highest degree of political consensus to effect these changes. ...
>
> One conclusion is the intriguing possibility that the Accord itself may be invalid and "unratifiable," because it violates the "manner and form" requirements of the Constitution by lumping together matters that must be treated separately.
>
> • • •
>
> A less draconian solution is that when governments combine section 38 and section 41 amendments into a single constitutional "package," they must meet the full requirements of both sections: unanimity and the three year time limit. This approach satisfies all the requirements of both amending formulas. With the June, 1990 deadline approaching, Mr. Robertson's modest proposal would be a welcome lifeboat indeed.
>
> The problem is that it would be much more than a lifeboat. It would be an indefinite extension of Meech Lake into the future, without end! Is it really acceptable that constitutional change as far-reaching as Meech Lake should hang in the balance for five, ten, twenty years[?] ... .
>
> Political logic also precludes another recently rumored solution to the "deadline problem": retrospectively dividing the Accord into two separate packages—section 38 amendments and section 41 amendments. ...
>
> While this division is probably what should have been done at the outset—in June, 1987—it is much too late to do it now. How many times have Meech critics been told that the Accord is a "seemless webb" [*sic*], to be accepted or rejected intact. For governments suddenly to reverse themselves on this issue would be perceived as a hypocritical[;] ... would further poison the well of public opinion[;] and further divide the country.
>
> The lesson for the future seems clear. At a minimum, future proposals to amend the Constitution must not mix section 38 and section 41 type amendments in a single "package." Serious consideration should be given to adding a time limit to the section 41 amending formula. [Its] omission was probably an oversight in the first place. More generally, the very concept of a "package" approach to constitutional amendments may no longer be politically acceptable. This type of constitutional deal-making—consumated by eleven first ministers, behind closed doors, and then presented as a *fait accompli*—is a hangover from the pre-Charter era.
>
> The Charter has created the perception that the Constitution is no longer the exclusive preserve of the First Ministers. As the opposition to Meech Lake has so clearly demonstrated, there are now many groups in Canadian society who see themselves as stakeholders in the "new" constitution. These "Charter Canadians," as they have been labelled, are not going to accept exclusion from future constitutional changes. While the initiative for proposing constitutional amendments will still rest with Canada's eleven first ministers, they will have to defend any future changes in a public process that allows all interested parties to participate in a meaningful manner.

See FL Morton, "How Not to Amend the Constitution" (1989-90) 12:4 Can Parliamentary Rev 9.

Had you been advising the first ministers on whether or not the Constitution of Canada requires the three-year limit to apply to the Meech Lake Accord, what would have been your advice? Would your answer have been different if the first ministers had asked you for your advice not about what the Constitution requires but about what would make it more likely for the Accord to be approved? Setting aside the Meech Lake Accord, do you think it is a good idea to impose a time limit to approve an amendment? Is it a good idea for all kinds of possible constitutional amendments or only for certain kinds?

The sequence of events leading ultimately to the defeat of the Meech Lake Accord suggests that defeat was a result of much more than the three-year time limit alone. As Ian Peach explains, the Accord faced substantial resistance from many corners of the country:

> By the time of the 1988 federal election, support for the Meech Lake Accord was beginning to unravel. The concerns of Indigenous peoples provided a key platform for those seeking amendment to the Accord. From this began to arise a greater understanding of Indigenous claims among the public and sympathy for their constitutional aspirations. Thus, when Elijah Harper stood up against the passage of the Meech Lake Accord, he was strongly backed by not only Indigenous groups, such as the Assembly of Manitoba Chiefs (who provided Harper with direct support and encouragement), the Assembly of First Nations, the Inuit Tapirisat of Canada, the Native Council of Canada, and the Dene Nation but also by many Canadians who applauded his action and viewed him as championing their own dislike of the Accord. ...
>
> Premiers who were elected subsequent to the negotiation of the Accord also articulated concerns about it ... . As well, in the wake of Quebec premier Bourassa's decision to use the notwithstanding clause to preserve Quebec's sign law, Manitoba premier Gary Filmon ... declared that he would not bring the Accord forward to the Manitoba legislature unless substantial changes were made to it. ... [I]t became clear by the spring of 1990 that something had to be done to secure acceptance of the Accord in the three provinces that had not yet approved it.
>
> Several provinces [... expressed] concerns about the exclusion of Indigenous peoples, among others. In an effort to move beyond the impasse that had developed over the Accord, [New Brunswick Premier Frank] McKenna introduced a "companion resolution" to the Accord in the New Brunswick Legislative Assembly on 21 March 1990, as a strategy to address concerns about the Accord and secure the necessary support to allow its passage in the New Brunswick, Newfoundland, and Manitoba legislatures. On 27 March 1990, the government of Brian Mulroney decided to study this option with the establishment of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Constitutional Accord, commonly known as the Charest Committee.
>
> The Charest Committee tabled its report on 17 May 1990. The report generally agreed with the content of the New Brunswick companion resolution and recommended its adoption. On the treatment of Indigenous issues, the committee recommended that the companion resolution provide for a separate process of constitutional conferences every three years, beginning no later than one year after the companion resolution came into force, and that first ministers recognize Indigenous peoples in the body of the constitution, building on the "Canada clause" proposed by Manitoba.
>
> With the results of the Charest Committee and the provincial studies in hand, the Mulroney government called a final First Ministers Conference for 3 June 1990 ... . [T]he outcome was an agreement by all premiers to secure passage of the Accord and the companion resolution by the 23 June 1990 deadline. Among other elements, the agreed-upon companion resolution contained a commitment to future constitutional conferences on Indigenous issues. The commitment to future discussions instead of addressing Indigenous issues directly in the companion resolution, however, generated a negative reaction among Indigenous leaders, who argued that it continued the "two founding nations" myth and the hierarchy of recognition contained in the Meech Lake Accord itself. Indigenous leaders also protested their exclusion from the June 1990 First Ministers Conference.
>
> Three days after the conclusion of the June 1990 First Ministers Conference, Premier Filmon attempted to introduce a resolution to approve the Accord into the Manitoba legislature, but [legislative assembly member] Elijah Harper refused to provide the necessary unanimous consent to introduce the motion. Four days later, on June 16th, the Assembly of Manitoba Chiefs made public its intention to defeat the Meech Lake Accord. The following day, Prime Minister Mulroney sent Senator Lowell Murray and others to negotiate with the

> Assembly of Manitoba Chiefs in an attempt to persuade them to end their efforts to defeat the Accord, but to no avail. Although Premier Filmon eventually introduced the motion to approve the Accord on June 20th, there was insufficient time for the legislature to approve it prior to a scheduled adjournment on June 22nd. With passage in Manitoba impossible, Premier Wells adjourned the Newfoundland House of Assembly for an indeterminate period on June 22nd, thereby cancelling the proposed free vote on a motion to approve the Meech Lake Accord and ensuring the Accord's defeat.

See Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16 Rev Const Stud 1 at 8-11 (footnotes omitted).

Although one cannot know for certain, it is likely that the Manitoba legislature would have approved the resolution had it been put to a vote, and Newfoundland's House of Assembly would have thereafter approved the resolution as well, thus making the Meech Lake Accord official. But history took a different path, and, for better or worse, the name Elijah Harper will forever be linked to the defeat of the Meech Lake Accord. Harper, you will remember, was the Manitoba member of the Legislative Assembly (MLA) who refused to give his consent to allow the Manitoba premier to introduce the resolution to approve the Accord. Below is how he was remembered in an obituary written shortly after his death:

> Not since Louis Riel in the late 19th century had a person of aboriginal descent had such an impact on Canadian history. Except in mid-June, 1990, Elijah Harper, a 40-year-old Ojibwa-Cree and Manitoba MLA, made his bold stand peacefully, though defiantly, holding an eagle feather.
>
> In his opposition to the Meech Lake Accord, which included Quebec's five demands before it would sign the Constitution of 1982, Mr. Harper became an instant media sensation. He was the Canadian Press newsmaker of 1990 and the subject of hundreds of newspaper and television stories and commentaries. He became an overnight celebrity, and people started wearing T-shirts with his photograph on them and badges that proclaimed, "Elijah Harper for Prime Minister." A CTV movie, *Elijah*, was even made about him in 2007.
>
> For Mr. Harper, however, his refusal to support the accord was always much more than a quest for his 15 minutes of fame. Indeed, he did not even want it. "I don't like this notoriety," he told former Manitoba NDP premier Howard Pawley in the midst of the deliberations. "I am looking forward to getting back to the trapline and looking at the stars at night."
>
> Nonetheless, few images from the constitutional battles of the 1980s and 90s are as memorable as that of Mr. Harper, with his long black hair pulled back in a ponytail sitting in the Manitoba Legislature with an eagle feather in his hand refusing to give his consent so that Manitoba premier Gary Filmon could introduce a motion to ratify the accord by the June 23, 1990, deadline.
>
> As Mr. Filmon recalls, Mr. Harper spoke to him before the crucial session began. "I don't want to do this," he told Mr. Filmon, "but I have to do it for my people." Added Jack London, who was at the time the legal counsel for the Assembly of Manitoba Chiefs (AMC): "The emotional toll on Elijah was immense. But he did not take his decision lightly or without considerable thoughtfulness."
>
> Mr. Filmon, head of a Conservative minority government, required unanimous consent from all MLAs to introduce the motion for debate, which was to be followed by 10 days of public hearings. It was going to be close to meet the deadline. Yet eight times between June 12 and June 21, on each occasion that the Speaker asked if there was unanimity to proceed, Mr. Harper said, "No, Mr. Speaker."
>
> • • •
>
> The next day, the Manitoba legislature adjourned without voting on the accord, essentially killing it (a deed completed when, soon after, Newfoundland premier Clyde Wells refused to allow a vote on the accord).

> In Ottawa, prime minister Brian Mulroney was naturally livid that a technicality could derail his prized accord. Later, in one of Mr. Mulroney's unguarded conversations with Peter C. Newman, he put it like this, "Aboriginals are not to blame for Meech Lake's failure despite Elijah Harper's stupidity. ... He turned down a sweetheart deal."
>
> Mr. Harper saw the situation much differently. A spiritual man, he had a dignified calming influence on Manitoba and Canadian politics. "I was listening to the people," Mr. Harper said in 2005 when Mr. Mulroney's comments became public. "When he says I'm stupid, he calls our people stupid. We're not stupid. We're the First Nations people. We're the very people who welcomed his ancestors to this country and he didn't want to recognize us in the Constitution."
>
> Elijah Harper died on May 17 from cardiac failure resulting from complications from diabetes and kidney problems.

See Allan Levine, "Native Leader Elijah Harper Helped Scuttle Meech Lake," *The Globe and Mail* (20 May 2013), online: <http://www.theglobeandmail.com/news/politics/native-leader-elijah-harper-helped-scuttle-meech-lake/article12033338>.

There were many criticisms levelled against the Meech Lake Accord. As one scholar has written:

> Women's organizations, aboriginal peoples and multicultural groups were among the more vigorous dissenters from the Accord. Many women were concerned that the loose language of the Accord, referring to certain Charter guarantees but not to others, would undermine sexual equality which was not expressly mentioned. Aboriginal peoples were dismayed that a constitutional agreement could be concluded with such secrecy and swiftness to meet Quebec's demands when no progress had been made towards their quest for self-determination at four successive constitutional conferences.

See WH McConnell, "The Meech Lake Accord: Laws or Flaws" (1988) 52 Sask L Rev 115; see also Beverley Baines, "Women's Equality Rights and the Meech Lake Accord" (1988) 52 Sask L Rev 265 (arguing that Meech Lake put the Charter-based equality rights of women in jeopardy); David Taras, "Television and Public Policy: The CBC's Coverage of the Meech Lake Accord" (1989) 15 Can Pub Pol'y 322 (arguing that media coverage was oriented toward conflict and gave Canadians a distorted view of what was at stake); Thomas J Courchene, "Meech Lake and Socio-Economic Policy" (1988) 14 Can Pub Pol'y S63 (arguing that the implications for socio-economic management were positive).

In an important article written shortly after the demise of the Meech Lake Accord, Roderick Macdonald summarized the five major legal critiques of the Accord that had gained traction by the fall of 1988, fewer than two years before its defeat:

> The first of these to emerge was the "progressive" critique, in which the *Meech Lake Accord* was condemned for the succor which it offered to the discredited constitutional agenda of federal/provincial relations, language rights, and provincialism. The *Meech Lake Accord* was also criticized on this basis for reinforcing the political ethic of executive federalism and elite accommodation. Implied in this critique was the more general claim that traditional (or pre-1982) constitutional politics in Canada was outdated because it served only the interests of the country's political and economic elites. Those who advanced this claim were especially anxious to argue that the 1982 round empowered ordinary Canadians and enfranchised previously excluded constituencies.
>
> Closely linked with this first critique was a second—the "*Charter*" argument. These skeptics of the *Meech Lake Accord* were deeply troubled by the "distinct society" clause. They feared, notwithstanding their quasi-entrenchment in 1982, that modern and more fundamental concerns about the relationship of individual and state were being moved once again to the bottom of the constitutional agenda[; and] that Canadian and Quebec politicians had conspired successfully to recapture legislative authority to override recent constitutional

gains relating to respect for individual liberty, to the promotion of equality, and to the greater enfranchisement of women.

The "distinct society" clause also provided a focus for the third, or "provincial egalitarian" critique of the Meech Lake Accord. On this view, the clause was inimical to a true federalism. By creating a special status for one province it fundamentally undermined the notion of equality of citizens, regardless of provincial residence, upon which Canadian political institutions were argued to have been built. Many who took this position also suggested that the clause would confer additional legislative jurisdiction on Quebec, not exercisable by other provinces.

A fourth criticism of the Meech Lake Accord, the "centralist" critique, found its roots in the belief, first advanced by Sir John A. Macdonald a century ago, that the federal government must be ascendant for Canada to resist assimilation by the United States. Critics argued that the spending power provisions of the agreement would enfeeble the federal government. These provisions would also operate a massive power shift to larger and more economically self-sufficient provinces such as British Columbia, Alberta, Ontario, and Quebec at the expense of the country's poorer provinces. Coupled with this critique ... was the assertion that, by giving up exclusive control over national institutions such as the Senate and the Supreme Court, the central government was destroying ... the quasi-unitary model of federalism upon which the country was built.

A final objection ... may be characterized as the "paralysis" critique. Many early Meech Lake Accord opponents argued that the extension to all provinces of a constitutional veto over amendments relating to federal institutions such as the Senate would nullify all hope for their reform. ... Also connected with this concern was the belief that other pressing items of constitutional reform—Western alienation, Aboriginal rights, the accession of the territories to provincehood, multiculturalism, and regional economic disparity—would never be addressed.

See Roderick A Macdonald, "... Meech Lake to the Contrary Notwithstanding (Part I)" (1991) 29 Osgoode Hall LJ 253 at 269-70.

Quite apart from the *content* of the Meech Lake Accord, many questioned the *process* by which the text had been written and ultimately proposed to Canadians. See Brian Schwartz, "Fathoming Meech Lake" (1987) 17 Man LJ 1 at 4.

Perhaps the most vocal critic of all was former Prime Minister Pierre Trudeau, the driving force behind the patriation of Canada's Constitution. After the Prime Minister and the provincial premiers had agreed in principle to the Accord, Trudeau published the following:

What a magician this Mr. (Brian) Mulroney is, and what a sly fox! ...

In a single master stroke, this clever negotiator has thus managed to approve the call for Special Status (Jean Lesage and Claude Ryan), the call for Two Nations (Robert Stanfield), the call for a Canadian Board of Directors made up of the 11 first ministers (Allan Blakeney and Marcel Faribeault), and the call for a Community of Communities (Joe Clark).

He has not quite succeeded in achieving sovereignty-association, but he has put Canada on the fast track for getting there. It doesn't take a great thinker to predict that the political dynamic will draw the best people to the provincial capitals, where the real power will reside, while the federal capital will become a backwater for political and bureaucratic rejects.

What a dark day for Canada was this April 30, 1987! In addition to surrendering to the provinces important parts of its jurisdiction (the spending power, immigration), in addition to weakening the Canadian Charter of Rights, the Canadian state made subordinate to the provinces its legislative power (Senate) and its judicial power (Supreme Court); and it did this without hope of ever getting any of it back (a constitutional veto granted to each province). It even committed itself to a constitutional "second round" at which the demands of the provinces will dominate the agenda.

> All this was done under the pretext of "permitting Quebec to fully participate in Canada's constitutional evolution." As if Quebec had not, right from the beginning, fully participated in Canada's constitutional evolution!
>
> • • •
>
> The possibility exists, moreover, that in the end Mr. Bourassa, true to form, will wind up repudiating the Meech Lake accord, because Quebec will still not have gotten enough. And that would inevitably clear the way for the real saviours: the separatists.
>
> As for Mr. Mulroney, he had inherited a winning hand.
>
> • • •
>
> But since 1982, Canada had its Constitution, including a Charter which was binding on the provinces as well as the federal government. From then on, the advantage was on the Canadian government's side; it no longer had anything very urgent to seek from the provinces; it was they who had become the supplicants. ... Even a united front of the 10 provinces could not have forced the federal government to give ground: With the assurance of a creative equilibrium between the provinces and the central government, the federation was set to last a thousand years!
>
> Alas, only one eventuality hadn't been foreseen: that one day the government of Canada might fall into the hands of a weakling. It has now happened. And the Right Honourable Brian Mulroney, PC, MP, with the complicity of 10 provincial premiers, has already entered into history as the author of a constitutional document which—if it is accepted by the people and their legislators—will render the Canadian state totally impotent. That would destine it, given the dynamics of power, to eventually be governed by eunuchs.

See Pierre Elliott Trudeau, "Say Good-bye to the Dream of One Canada," *La Presse* and the *Toronto Star* (27 May 1987).

2. The Charlottetown Accord

After the failure of the Meech Lake Accord, the first ministers went back to the drawing board. In contrast to the closed-door process that had produced the Meech Lake Accord, the Charlottetown process was more open. Patrick Monahan has argued that the process surrounding the Charlottetown Accord illustrates the democratic potential of constitutional amendment in Canada. The federal government established the Citizens Forum on Canada's Future (chaired by Keith Spicer) in November 1990, and established a joint House–Senate committee to consider proposals for changes to the amending formula (the Beaudoin-Edwards Committee) in December 1990. The federal government's constitutional proposals were then released in September 1991. Initially, these proposals were put before a second joint House–Senate committee (the Beaudoin-Dobbie Committee). However, in response to public demand for greater participation, the federal government convened five conferences held in early 1992, attended by federal and provincial politicians, interest groups' representatives, and everyday Canadians. The final phase of the Charlottetown process was an intergovernmental negotiation, in which governments and Indigenous representatives were the sole participants. See Patrick J Monahan, "The Sounds of Silence" in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 222.

The Charlottetown process culminated in a national referendum on October 26, 1992, asking Canadians the following question: "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?" See Government of Canada, "Proclamation Directing a Referendum Relating to the Constitution of Canada, SI/92-180, Registration 1992-10-07" (last modified 10 January 2022), online: *Justice Laws Website* <https://lois-laws.justice.gc.ca/eng/regulations/SI-92-180/FullText.html>. This

agreement was the package of amendments known as the Charlottetown Accord—an ambitious group of proposals agreed to by Canada's first ministers, including the leaders of the Yukon and the Northwest Territories, as well as Indigenous leaders. In an article published the year after the failure of the Accord, Robert Vipond explained what the Accord had sought to do and how the referendum came to be.

Robert C Vipond, "Seeing Canada Through the Referendum: Still a House Divided"

(1993) 23 Publius 39 at 40-47

The failure of Meech was particularly bitter because this was the first time in living memory that the government of Quebec had actually accepted the risk of agreeing to a multilateral and comprehensive package of constitutional reforms with English Canada, only to have the agreement scuttled by provincial legislatures in English Canada. ... For many Quebeckers, the rejection of Meech entailed the rejection of Quebec.

The powerful sense of rejection ... had several consequences. [I]t pushed support for greater Quebec sovereignty to unprecedented heights—60-65 percent in some polls. ... [T]he death of Meech led Bourassa to announce that he would boycott all multilateral intergovernmental negotiations ... . Within Quebec itself, the failure of Meech produced two large-scale efforts to chart Quebec's constitutional future on its own terms and, if necessary, unilaterally.

The first, popularly known as the Allaire report, was commissioned by the governing Liberal party in Quebec and was adopted as party policy in March 1991. The second, the Bélanger-Campeau Commission, was a sort of Quebec "Estates General" and included representatives from the Quebec National Assembly, business, labor, the cooperative movement, and the arts community among others. ... Both called for a referendum in Quebec, by the end of October 1992, on Quebec's constitutional future.

Bourassa accepted the referendum recommendation, but he also left open the possibility that a constitutional referendum in Quebec could be framed around a new federalist constitutional proposal from the rest of Canada—should one be forthcoming. Bourassa thus purchased some maneuverability at the same time as he "laid down the gauntlet to the Rest of Canada."

The rest of Canada was initially slow to respond ... .

... However reluctantly, the federal and provincial governments concluded that the national unity question was perhaps even more urgent than ever before, that sentiment favoring separation in Quebec had grown dangerously since the failure of Meech, and that it therefore was crucial to respond fairly (though not cravenly) to Quebec's constitutional demands.

This time, however, the approach would be different. ... As Richard Johnston observed, the basic idea was to create a constitutional logroll, in which the rest of Canada would get something it wanted out of constitutional reform in return for accommodating Quebec. With that premise in place, the Quebec round of constitutional negotiations gave way to the Canada round.

Two candidates for inclusion on the constitutional agenda stood out. One was Senate reform. ...

The other compelling subject of constitutional reform was aboriginal self-government. ...

The demands for Senate reform and aboriginal self-government arose from radically different grievances, but both were couched in the powerful language of equality. ...

There was also the question of process. If the intergovernmental class learned nothing else from Meech, it learned that the prevailing constitutional reform process was deeply flawed. One problem was essentially tactical and, in principle, easily corrected. By the terms of the Constitution Act of 1982, constitutional amendments proceed differently according to their subject matter ... . When the accord was negotiated in 1987, the first ministers agreed to submit all of the amendments to the more rigorous requirement of unanimity rather than sever the package into two distinct lots. The clear, yet largely unforeseen, consequence of this tactic was to straitjacket the process ... . This time the federal government promised that things would be different, either by uncoupling the two sorts of amendments or by leaving those that required unanimity to another day.

The other process problem ran considerably deeper. In the fallout from Meech, the intergovernmental class learned very quickly that the Canadian public would no longer tolerate the closed processes of "executive federalism" (i.e., high-level intergovernmental bargaining). ... Determined not to repeat the error, virtually all of the governments engaged in constitutional discussions set about to create a more open and consultative process that would forestall the sort of populist and democratic criticism that helped to derail Meech. ...

The challenge of creating a constitutional package that could negotiate these different and often cross-cutting priorities was formidable. Quebec's demand for significant—even massive—decentralization was unacceptable to those who looked to the national government for leadership on matters of redistributive social and economic policy and who wanted a strong Ottawa to resist the pressures of continental economic integration. One possible solution was to create an "asymmetrical" federal system in which Quebec would have jurisdiction over a number of policy areas not available to the other provinces, thus giving Quebec the control it wanted without producing wholesale decentralization. ... Yet, the argument that asymmetry is a legitimate and well established part of Canadian federalism was simply no match for the sleek principle, now become orthodoxy, that provincial equality or uniformity is a fundamental and inviolable constitutional value. ...

Senate reform posed a different sort of problem. Quebec, already wary of its declining demographic position in Canada, could never support a scheme that would reduce its representation to that of any other province—especially if one of the other goals of institutional reform was to create the conditions under which the Senate could stand up effectively to the House of Commons. What Senate reformers were less prepared for was the still more fundamental question concerning the definition of representation. ... [W]hy assume that territorial identity is the best or only basis of representation? Why not, alternatively, create a Senate that would be apportioned on the basis of gender, dividing representation equally between women and men?

Even the question of aboriginal self-government proved nettlesome. One might have thought that recognizing a right of self-government for aboriginal peoples was morally unambiguous and politically compelling, but it was not. For one thing, it was unclear what would happen if the claims of aboriginal self-government conflicted with those of Quebecois self-determination. ...

The federal government tabled its constitutional proposals before Parliament in September 1991. ... Most of the subjects addressed by the Meech Lake Accord reappeared, albeit in slightly different form. The reform of national representative institutions received prominent treatment. The government proposed some recalibration of the division of powers toward the provinces. It also recommended the entrenchment

of a lavish "Canada Clause," an introductory constitutional statement "to affirm the identity and aspirations of the people of Canada." Once tabled, these proposals were considered by an all-party, special joint parliamentary committee. The Beaudoin-Dobbie Committee subsequently held hearings across Canada on the proposals and, after considerable tribulation and six mini-constitutional assemblies, produced a refined version of the federal proposals at the end of February 1992.

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Despite [a number of] missteps, the outlines of a constitutional reform package began to take shape by the spring of 1992. ... [M]ultilateral meetings continued throughout the summer of 1992 until an agreement was reached in Charlottetown in late August. Quebec, British Columbia, and Alberta were already committed to holding constitutional referenda. Following suit, the federal government announced that it would introduce legislation calling for a full national referendum on the Charlottetown Accord, to be held 26 October 1992.

... [T]he Charlottetown Accord was a complex compromise among several divergent constitutional claims. First, the accord attempted to respond to Quebec's constitutional demands by replicating the major elements of Meech, albeit with several new twists. Like Meech, the Charlottetown Accord included a provision delimiting the federal spending power, another guaranteeing Quebecois representation on the Supreme Court, and a third that would give Quebec (and any other province) a veto over constitutional amendments that would materially alter national institutions. Finally, Charlottetown followed Meech in recognizing Quebec as a "distinct society" ... . However, the clause was more narrowly circumscribed than its predecessor in Meech, and it was placed within a larger statement of the fundamental values underlying the Canadian nation—the Canada Clause.

Second, Charlottetown proposed several changes to the division of powers, all of them essentially decentralizing in nature. ...

Third, the Charlottetown Accord envisioned important changes to the structure and functioning of Parliament. Responding to calls for Senate reform, the upper house would be reconstituted, providing equal representation for each province ... . Under the proposal, the Senate would not be a "confidence chamber" in the sense that its disagreement with the House of Commons would not bring down the government. Rather, in most cases, the Senate was to have a suspensive veto that, when exercised, would trigger a joint sitting with the House of Commons. Concurrently, the House of Commons would be enlarged, principally to compensate large provinces (e.g., Ontario and Quebec) for the equalization of representation in the Senate. Moreover and more controversially, the final negotiations with Bourassa produced a provision to guarantee Quebec at least 25 percent of the seats in the House of Commons in perpetuity, a hedge against the demographic trends that show Quebec's population declining as a proportion of Canada's population.

Fourth, the Charlottetown Accord enshrined the "inherent right" of aboriginal self-government, recognizing aboriginal governments as one of three orders of government in the country. The self-government provisions tugged in different directions. On one hand, Charlottetown committed itself to an "inherent" right of self-government that would allow aboriginal peoples "to safeguard and develop their languages, cultures, economies, identities, institutions, and traditions." On the other hand, aboriginal laws would be subject both to the Charter of Rights (though aboriginal governments, like others, would be allowed to use the override clause), and to the requirement that aboriginal laws be consistent with "peace, order, and good government in Canada." How aboriginal self-government was to be realized was left to a series of political agreements that would define the process. To buy time for this

process to take shape, the accord explicitly delayed judicial enforcement of the self-government provisions for five years.

It was perhaps inevitable that even the supporters of the Charlottetown Accord would have difficulty finding a common thread to hold this sprawling agreement together. In point of fact, however, there was a basic idea that underlay both the accord and other recent attempts at constitutional reform, namely, the idea of inclusion. ... The Meech Lake Accord, for its part, attempted to respond to modem Quebec nationalism ... by reinforcing what was different about Quebec. Paradoxical or not, the explicit purpose of Meech remained, as Mulroney repeatedly said, to bring Quebec "back into the constitutional family."

In an important sense, Charlottetown was but the next stage of this inclusionary constitutional politics ... . Yet there was one crucial difference ... . Both in 1982 and again at the time of Meech, the communities that stood to gain from the inclusionary thrust of the effort largely supported constitutional reform. This time they did not—at least not among the general citizenry. Put to the test of a national referendum, the Charlottetown Accord was defeated in Quebec, rejected decisively in western Canada, and both supported and opposed by aboriginal communities. In short, the accord was unpopular in the very communities that were meant to benefit most from its provisions.

NOTES AND QUESTIONS

1. *The outcome.* The people of Canada voted against the Charlottetown Accord. Canadian electors outside Quebec rejected the Accord by a margin of 54.3 percent to 45.7 percent. In British Columbia, 68.3 percent voted against; in Manitoba, Alberta, and Saskatchewan, the votes against were, respectively, 61.6 percent, 60.2 percent, and 55.3 percent. In Yukon, the final vote was 56.3 against, and in Nova Scotia, the Accord was rejected by 51.2 percent of voters. Only in New Brunswick (61.8 percent), Newfoundland (63.2 percent), the Northwest Territories (61.3 percent), and Prince Edward Island (73.9 percent) did a significant majority of the province or territory support the Accord. In Ontario, the Accord secured the approval of the slimmest majority (50.1 percent): see Elections Canada, "The 1992 Federal Referendum: A Challenge Met—Report of the Chief Electoral Officer of Canada" (17 January 1994), online (pdf): *Government of Canada* <https://publications.gc.ca/collections/collection_2013/elections/SE1-8-2-1992-1-eng.pdf> at 58. In Quebec, where 83 percent of the province turned out to vote, the Accord was rejected by a majority of voters: see Référendums au Québec, online: *Elections Quebec* <https://www.electionsquebec.qc.ca/francais/tableaux/referendums-quebec-8484.php>.

2. *Mega-constitutional politics.* Peter Russell has argued that in the wake of the Meech Lake and Charlottetown accords, the politics of constitutional reform has become so-called mega-constitutional: see Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004). The characteristic feature of mega-constitutional politics is the unwillingness of various constitutional actors to undertake piecemeal or incremental constitutional reform through constitutional amendment, tackling issues one at a time—for example, Senate reform and the spending power. Instead, complex amendment packages of the sort found in the Meech Lake and Charlottetown accords will be the norm for major constitutional amendment proposals into the foreseeable future. Arguably, one of the legal implications of mega-constitutional politics is that ss 38 and 41 will apply cumulatively to future packages of constitutional amendments, making major amendments extraordinarily difficult, if not impossible, as we discuss in Section V of this chapter. But it appears that piecemeal or incremental constitutional reform outside the procedures in part V of the *Constitution Act, 1982* has since become a new strategy, and may perhaps be

more probable now than pursuing major reforms using the procedures in part V. We have seen evidence of this new strategy of non-constitutional reform with respect to the process for Senate appointments. We discuss these reforms and their implications in Section V of this chapter.

3. *Is part V undemocratic?* Alan Cairns has argued that the dominance of governments in the amending formula is inconsistent with popular sovereignty and the "citizens' constitution" enshrined with the Charter of Rights in 1982:

> The amending formula defines Canada as a country of governments presiding over and speaking for the national and provincial communities that federalism sustains. Its implicit assumption is that only the cleavages defined by federalism have to be catered to in the amending formula, and they can be represented by governments. The Charter, however, defines Canadians as a single community of rights-bearers, makes only limited concessions to provincialism, and clearly engenders a non-deferential attitude toward those who wield government power. The community message of the Charter contradicts the community message of the amending formula. The Charter, in addition to defining Canadians in terms of rights, also singles out specific categories for particular recognitions and rights—women, official-language minorities, multicultural Canadians, and others. By so doing it states that the federal–provincial cleavage, and the communities derived from it, do not exhaust the constitutionally significant identities that Canadians now possess. Succinctly, the Charter states what the amending formula denies, that "federalism is not enough"—that Canadians are more than a federal people.

See Alan C Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1991) at 6-8. Do you agree with Cairns? If so, should there be some guarantee of popular input in the amendment process? Should it come at the stage of formulating an amendment—for example, in the form of a constituent assembly—or at the time of approval—for example, in a referendum? Cairns levelled his criticism at the process that led to the negotiation of the Meech Lake Accord, which occurred almost entirely behind closed doors and with minimal input from legislatures (which were presented with the Accord by first ministers as a *fait accompli*), let alone citizens. Matthew Mendelsohn agrees, but takes a different route to reach the same answer that citizens must participate in the process of constitutional reform. He argues that the key is to "elaborate an appropriate process for the inclusion of the public in a nonmajoritarian manner" because we in Canada "have not yet fully accepted that the requirement of citizen participation must go beyond ratification in a referendum." He adds that "the process of constitutional reform is flawed because the negotiation process relies on elites and brokerage, while the ratification process is public and majoritarian, with public participation grafted onto institutions that remain essentially unchanged in their requirement of executive leadership": see Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" (2000) 33 Can J Polit Sci 245 at 271.

4. *A constitutional convention requiring a referendum.* Some commentators have argued that resorting to a referendum during the Charlottetown process established a constitutional convention of popular ratification of amendments. Do you think a convention exists that there should be a referendum before any constitutional amendment? Before a package of major constitutional changes? What about prior to a major reform to our electoral system—even though part V makes no express mention of whether any of its five procedures should be used to formalize changes to Canada's electoral system? For the view that a convention might exist, see Jeffrey Simpson, "The Referendum and Its Aftermath" in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 193 at 193; Roger Gibbins & David Thomas, "Ten Lessons from the Referendum" (1992) 15 Can Parliamentary Rev 3 at 3. For the view that a convention might not exist, see Benoît Pelletier, "Reinventing Canada: The Challenges that Canada Faces in the

Twenty-First Century" (2010) 4 JPPL 133 at 142; Peter Meekison, "Canada's Quest for Constitutional Perfection" (1993) 4 Const Forum Const 55 at 56. For a framework to answer the question on your own, see Richard Albert, "The Conventions of Constitutional Amendment in Canada" (2016) 53 Osgoode Hall LJ 399 at 413-15, 422-33.

5. *Lessons learned.* Immediately after the defeat of the Accord, Kathy Brock suggested three lessons that could be learned from the failure of the Charlottetown Accord. First, "in future any rounds of macro-constitutional change must necessarily be inclusive and open." Second, "the roles and responsibilities of the political leaders must be significantly altered." Brock specifies that "leaders must be responsible to public demands but willing to make independent decisions and then to defend those decisions before the public in terms that are meaningful to them." And third, "any amendments intended to respond to the needs of specific groups or provinces within the Canadian community must strengthen the nation as a whole." Brock concludes her third lesson by suggesting that "perhaps the *Economist* summed up this aspect of the Canadian mind-set when it observed that Canada is the only country that could have a popular revolution in favour of the status quo": see Kathy L Brock, "Learning from Failure: Lessons from Charlottetown" (1993) 4 Const Forum Const 29 at 31-32. Are these the only lessons to be learned from the failure of the Charlottetown Accord?

6. *Money and the referendum.* The Charlottetown Accord campaign complicates what we know about the effect of money in politics. It is commonly believed that the expenditure of money—in advertisements, individual voter contact, and get-out-the-vote operations—can determine outcomes in elections. Supporters of the Charlottetown Accord spent $11.25 million to promote it while its opponents spent $883,000 against it: see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 115. How can we explain the Accord's rejection in light of this imbalance in expenditures? Could it be that money does not matter as much in politics as we might think?

7. *Markets and the referendum.* In the course of the Charlottetown campaign, some supporters resorted to financial arguments to persuade voters to approve the Accord. They argued that economic disaster would befall Canada if the Accord were rejected; the other side described this argument as a scare tactic. The day after Canada rejected the Accord, the TSE 300 (a now-obsolete stock market index linked to the performance of 300 stocks listed on the Toronto Stock Exchange) rose 48.27 points, and the one-month treasury bill rate fell 0.45 percent—both evidence that the financial market did not collapse as had been predicted: see Pauline M Shum, "The Canadian Constitutional Referendum: Using Financial Data to Assess Economic Consequences" (1995) 28 Can J Economics 794 at 795.

8. *The root causes of amendment failure.* In her study of modern efforts to reform the Constitution of Canada, Jamie Cameron traces the roots of the problems all the way back to Confederation.

Jamie Cameron, "Legality, Legitimacy and Constitutional Amendment in Canada"

in Richard Albert & David R Cameron, *Canada in the World: Comparative Perspectives on the Constitution of Canada* (Cambridge: Cambridge University Press, 2017) at 81-97

Patriation came in 1982 at high cost: Quebec was dealt a grave insult that largely robbed patriation of legitimacy in that province and radically escalated the danger of separation. Quebec's exclusion and the gaping legitimacy deficit it caused set off a chain reaction that further imperiled the fragile status of constitutional reform and threatened Canada's durability as a nation. On its face, the Meech Lake Accord (MLA)

was a well-intentioned reform initiative aimed at completing patriation by healing the wounds of 1982 through a "Quebec Round" which would redress the province's grievances. Unanimous agreement at the level of executive federalism anchored the Accord's legitimacy, gestured in humility toward amend-making with Quebec, and initially augured well for the MLA's acceptance.

By courting Quebec's agenda, entertaining asymmetric arrangements and privileging Quebec as a distinct society, the MLA ignored pent-up demands and expectations for movement on women's and aboriginal rights, as well as on Senate reform. Over the MLA's three-year ratification period from 1987 to 1990, the legitimacy of prioritizing Quebec and sidelining other issues steadily declined. Process deficits were a further, critical aggravation: the MLA process was closed, lacking in transparency and non-inclusive; it shut out newly empowered voices that had the resources, political will and visibility to confront the bygone legitimacy of executive federalism. Three years after its announcement was celebrated, the Accord failed for want of ratification on 23 June 1990. The text of the Accord required unanimity and, as the deadline neared, the Manitoba and Newfoundland legislatures refused to ratify the MLA.

In a climate of escalating anxiety over Canada's future, Meech Lake's defeat made the next initiative inevitable. ... The "Canada Round" was the result of an expedited but nationally inclusive process of democratic renewal, which proposed constitutional reforms across a range of institutional and substantive issues. Addressing the substantive and procedural deficits of the MLA backfired, however, because the Charlottetown Accord's unwieldy reforms did not register as authentic in the democratic domain. ...

Each of the post-patriation textual initiatives set a high threshold for the legality of constitutional reform. But in each instance, the proposals for change were misaligned with pre-existing and developing expectations of what legitimizes constitutional change. The lesson and legacy of the Accords is that constitutional reform cannot be attempted again, with any realistic prospect of success, until that threshold misalignment is addressed. ...

In the aftermath of failed reform, the amendment process was described as "deeply dysfunctional," because managing concurring and competing legitimacies spun out of control, creating a "widespread sense of powerlessness" and perception that constitutional change had been rendered impossible. Time has not substantially altered that assessment ... . There is little doubt that reform cannot realistically be initiated again until the legality and legitimacy of constitutional amendment are better aligned.

Patriation and the Accords were high-stakes initiatives, and each gambled in its own way on the legitimacy of constitutional reform. Legitimacy deficits that were unquestionably situational found strong voice in the fractures, expectations, demands, and emotions in play at a time when Canada's survival was in peril. Those dynamics spiraled during the patriation crisis and could not be contained when the follow-up Accords were proposed. Though the "current states of affairs" and factual rigidities of this narrative are compelling, the particulars of Canada's extended patriation crisis were forged in the longer history of amendment and a text that never provided for the legality—or legitimacy—of change. It is the central purpose of this article to show that Canada's experience of amendment in and after 1982 is vitally connected to the primal challenge since Confederation in 1867, and that has been to define the terms of Canada's amendment sovereignty. That could and can only be done by bringing the legality and legitimacy of change into alignment. A project that has been a key preoccupation throughout is, today, still the unfinished work of Canada's 150-year-old Constitution.

... It is instructive that Part V's amendment rules place Canada at the extreme end of spectrum of textual rigidity, but perhaps more telling that a textual measure dramatically understates the obstacles to constitutional change. In principle, textual singularity is incomplete as a measure of amendment rigidity because it fails to validate a host of non-quantitative elements—including situational or factual rigidities—which play a determinative role in enabling and disabling constitutional change. Significantly, it also fails to account for amendment rigidities which are grounded in legitimacy deficits that compromise or subvert the process of change. As shown in this chapter, these points have particular salience for Canada's amendment history.

This, then, is the object lesson for Canada, and for theories of amendment and amendment rigidity more generally. Just as a regime of legality is necessary to legitimize amendments to a constitutional text, legality has limits and is not sufficient where extra-textual legitimacy deficits undermine the authority and acceptability of constitutional change.

E. IS COMPREHENSIVE CONSTITUTIONAL REFORM POSSIBLE?

The failure of the Meech Lake and Charlottetown accords has raised the question whether constitutional amendment on such a scale is possible in Canada. Before we can determine whether major reforms are possible, it is helpful to understand why the two most recent constitutional amendment packages in Canada failed to succeed. Two scholars have developed a theory of "amending process overload" that may explain constitutional amendment failure in Canada.

Christopher P Manfredi & Michael Lusztig, "Why Do Formal Amendments Fail? An Institutional Design Analysis"

(1998) 50 World Politics 377 at 381-93

[W]e argue that conditions are ripe for amending process overload where (1) constitutions are difficult to amend, (2) the institutional structure allows for the existence of numerous constitutional actors (both state and societal), and (3) the existing constitutional language and judicial practice provide for a wide range of interpretation.

The proximate cause of amending process overload is what might be termed *redistributive indeterminacy*. Redistributive indeterminacy entails uncertainty on the part of constitutional actors about the redistributive impact of constitutional modification. This redistributive indeterminacy has three sources: what we call *amending process rigidity*, *interpretive fluidity*, and *institutional inclusiveness*. In turn, redistributive indeterminacy manifests itself in two ways, through what we refer to as regulative rule demands and interpretive rule demands.

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[H]igh levels of amending process rigidity increase the importance of redistributive indeterminacy. Mistakes are more difficult to redress. Rather than imitating the fluidity of the legislative process, high amending process rigidity ensures that each amendment is treated as a discrete issue. As a result, not only are groups less willing to compromise on their demands for the sake of maintaining policy coalitions, but these

groups are also more likely to make their demands in unambiguous language that is invulnerable to interpretations that may run counter to the sponsoring group's intent.

Interpretive fluidity is a second variable impacting on redistributive indeterminacy, and it is a function of how much scope constitutional language leaves for interpretation. ... Indeed, judicial interpretation is especially important because it alone has the status of constitutional law; it is therefore more authoritative and less easily challenged or altered than other types of interpretation. Thus, while political actors must be concerned with future interpretation by all sources, it is judicial interpretation that contributes most to interpretive fluidity.

... Occasionally certain groups, typically those that have historically not had political status and that have fared poorly in the public policy arena, will seek ambiguous language in proposed constitutional amendments. They do this as an innocuous means of entrenching constitutional objectives, subsequently hoping for the chance of favorable interpretations through the courts. The aboriginal movement in Canada attempted this strategy in both the 1981 Patriation Round and the 1992 Charlottetown Round. By contrast, groups that are more firmly established in the political process are more likely to seek the entrenchment of carefully worded amendments, even if it is more difficult to secure agreement on such amendments. This is because groups that enjoy a high degree of political status do not want to risk losing gains already made to the vagaries of interpretively fluid constitutional language.

Of course, as mentioned, interpretive fluidity is more contentious where constitutions feature high levels of amending process rigidity. It is especially contentious in circumstances where there is a large and indeterminate number of constitutional actors—thus the importance of our third variable.

The relevance of the institutional inclusiveness variable is based on the presumption that constitutionally entrenched institutions reflect the interests of those who brought about their creation. ... [T]he constitutional arena is confined to those who can mobilize for special or enhanced constitutional status ... .

... The number and types of groups that can claim enhanced constitutional status is conditioned by constitutional rules in two ways. First, rules can specifically privilege certain groups. A federal constitution, for example, privileges national and subnational governments to the exclusion of other collectivities. This explicit recognition of status provides a power base that privileged groups seek to protect and, where possible, expand. The history and development of Canadian constitutional politics can be understood from such a perspective.

The second means by which rules condition enhanced constitutional status is that they have the potential to provide market niches for aggressive new political entrepreneurs. Indeed, an externality associated with the construction of certain types of rules is that such rules may provide unanticipated opportunities for groups to acquire enhanced constitutional status.

Redistributive indeterminacy conditioned by the three factors described above manifests itself in two types of demands by constitutional actors: *regulative rule demands* and *interpretive rule demands*. Regulative rule demands are direct attempts to reduce the ambiguity of redistributive indeterminacy. ...

Constitutional actors also make demands for interpretive rules to clarify the impact of existing rules and principles. In other words, they seek to ensure that the redistributive impact of rules and policies will be as favorable as possible ... .

Both regulative and interpretive rule demands are attempts by groups to overcome redistributive indeterminacy by limiting the maneuverability of judicial decision makers. These demands are typically contentious and invite counterdemands by groups that are hostile or even indifferent to such demands. Such counterdemands are most likely, we argue, where a large number of constitutional actors

perceive a one-shot opportunity to amend an interpretively fluid constitution. This perception, in turn, increases the likelihood that the politics of constitutional modification will generate multiple demands for regulative and interpretive rules designed to ensure particular policy outcomes. The result is a degree of overload that may cause the amending process to collapse. ...

The 1982 amending formula intensifies amending process rigidity in two ways. First and most obviously, it gives all provinces a veto over many comprehensive reforms. Thus, all constitutional actors are aware that constitutional change will be more difficult to achieve than in the past. The result is an incentive for elites to front-load their constitutional demands into one omnibus package, rather than deal with issues sequentially and discretely. ...

Second, the 1982 amending formula intensifies amending process rigidity through the inclusion of a sunset clause (section 29(2)), whereby all amendments must be ratified by the appropriate legislatures within three years of the date that the first legislature ratifies. Section 29(2) therefore creates an incentive for provinces to delay ratification in the hopes of extracting concessions ... . Provinces that delay ratification can thus make public demands for concessions that are very difficult to retract. As such, bargaining that once took place in private—so-called elite accommodation—is subjected to a second, more public round of bargaining in the ratification stage. It is in this second stage that the original agreement can potentially break down. The Charlottetown Accord process institutionalized this second round of bargaining through the use of a nationwide series of referenda.

The post-1982 era also witnessed a number of problems associated with interpretive fluidity ... .

The Constitution Act (1982) entrenched a weak commitment to aboriginal rights under sections 25 and 35. However, the act left the precise meaning and function of aboriginal rights undefined, to be worked out in a series of constitutional conferences held between 1983 and 1987. Thus, aboriginal leaders came to the bargaining table in 1983 with regulative rule demands regarding a native charter of rights and freedoms and an aboriginal veto. In addition, they made a series of interpretive rule demands dedicated to clarifying the operation of native self-government ... . These interpretive rule demands have been fairly consistent since 1983. Indeed, it was intransigence on the part of many governmental actors that led to the failure of constitutional conferences on aboriginal rights in 1983, 1984, 1985, and 1987. It also explains why, in June 1990, aboriginal leaders rejoiced in the irony that Elijah Harper—a native Indian—was afforded the opportunity to scuttle the Meech Lake Accord single-handedly.

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The Charlottetown Accord affords the best illustration of the problems associated with the amending process overload model. By 1992 the degree of amending process rigidity inherent in the 1982 amending formula was apparent to all constitutional actors. Thus, these actors were not willing, as were the Western provinces during the Meech Lake negotiations, for example, to postpone discussion of their objectives to future constitutional rounds. There was a general consensus that Charlottetown represented a one-shot opportunity to effect constitutional change and that opportunities missed were opportunities lost. The result was a host of regulative rule demands that contributed in part to the Charlottetown Accord's ballooning to sixty amendments—a dramatic increase from the seven amendments contained in the Meech Lake Accord. ...

Interpretive fluidity also played an important role at Charlottetown. The most controversial component of the Meech Lake Accord was the Distinct Society Clause ... . At Charlottetown other constitutional actors had become aware of the

potential significance of interpretive clauses on the redistributive impact of existing constitutional language. As a result of a number of (often contradictory) interpretive rule demands by constitutional actors, the Charlottetown Accord included a "Canada Clause" that sought to accommodate these demands. The clause was an ensemble that recognized both the equality of the provinces and Quebec's status as a distinct society; it committed Canadians to a respect for individual and collective rights, without specifying how inevitable clashes between the two might be resolved; and it committed Canadians to racial, ethnic, and gender equality, despite the fact that racial and ethnic equality were already guaranteed under section 15 of the charter and gender equality was guaranteed under section 15 and section 28. The only rationale for this redundancy would be to influence the redistributive impact of competing rights claims and hence to privilege certain social cleavages over others. Interpretive fluidity and the interpretive rule demands that resulted also account in large part for the size of the Charlottetown Accord. Indeed, a full twenty-two amendments were dedicated to interpreting "aboriginal rights" as they exist under sections 25 and 35 of the Constitution Act (1982).

Finally, the Charlottetown Accord also conforms to the third source of amending process overload described in our model: it featured unprecedented societal input. ... Indeed, the referendum campaign witnessed the emergence of a number of societal opinion leaders who evidently carried a good deal of influence with their respective constituents. The referenda resulted in the defeat of the accord in most provinces, as well as at the aggregate level.

In summary, the 1982 Constitution Act was a watershed document in more than the obvious ways, since it changed the institutional context of constitutional modification in Canada. It transformed a flexible and exclusive modification environment without the unique interpretive fluidity of rights-based litigation into one that was inflexible, inclusive, and dominated by judicial interpretation of individual rights. As a result, a much higher level of redistributive indeterminacy became attached to proposals for constitutional modification. The impact of this change became fully apparent during the Charlottetown Accord process, when amending process overload contributed to the accord's ultimate failure.

It is one thing to look backward to understand why the Meech Lake and Charlottetown accords failed. But what about the future of constitutional reform in Canada? Michael Lusztig argues that major amendment proposals like the ones in the Meech Lake and Charlottetown accords are "doomed to fail" because they create the wrong incentives and they require compromises too great for political actors to swallow. See Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail" (1994) 27 Can J Polit Sci 747 at 748.

Another way to describe the Constitution of Canada is to call it unamendable. Many constitutions around the world expressly identify rules, principles, procedures, symbols, and values as unamendable, meaning that no measure of support for changing any of them is sufficient to amend them in any way. For example, republicanism is unamendable in France, as is secularism in Turkey and human dignity in Germany. The Constitution of Canada is not unamendable in the same manner, yet it may nonetheless be unamendable in the sense that major constitutional reform is now virtually impossible. Richard Albert has argued that the Constitution of Canada is "constructively unamendable" for matters that are in theory amendable using the general amending formula or the unanimity procedure:

> Constructive unamendability "takes root where the political climate makes it practically unimaginable, though nonetheless always theoretically possible, to achieve the necessary

> agreement from political actors to entrench a formal amendment. This type of unamendability derives from deep divisions among political actors who reach the point of stalemate in their dialogic interactions. Under these conditions, formal amendment becomes impossible unless constitutional politics somehow manages to perform heroics to break the stalemate. The stalemate may itself derive from political incompatibilities, unpalatable preconditions to formal amendment, or a simple unwillingness to entertain thoughts of formal amendment despite the constitutional text authorizing the change political actors are unwilling to attempt. Alternatively or in addition, the stalemate may derive from the structural design of the constitution, for instance, a complex horizontal and/or vertical separation of powers that creates multiple veto points along the path to formal amendment."

See Richard Albert, "Constructive Unamendability in Canada and the United States" (2014) 67 SCLR (2d) 181 at 195.

Even if the Constitution of Canada is constructively unamendable today, it may not be tomorrow as political forces realign into a configuration more open to major constitutional change. In addition, moments of crisis or emergency could overcome the present constructive unamendability of the Constitution, if indeed, it has reached this point of stasis. Kate Glover cautions that we should not overdo claims of the impossibility or complexity of constitutional amendment in Canada. The reason why is important for democracy and legitimacy in Canadian constitutional law and government:

> When we start from the position that Part V is unclear and difficult to apply, political actors can too easily avoid the hard work of negotiating multilateral reform. They can rely on interpretive uncertainties to feed claims about political impossibilities and to challenge alternative proposals. Further, when we frame our understanding of Part V in terms of complexity, the courts become the default site for resolving disputes about formal amending procedure. The courts' involvement has benefits. It ensures that the issues are canvassed in a public forum. It provides the opportunity for a range of perspectives to be heard. And, it can resolve disputes that stall reform, providing analytical frameworks for future deliberations. But there are downsides. A judge-centric approach to understanding Part V grounds constitutional legitimacy in judicial interpretation rather than in the effective action of government or the lived experience of the community. That is, it shifts beliefs about where governance happens. Moreover, when procedural issues are resolved judicially, the actors involved in the amending process miss out on the potential benefits of working through problems of procedure cooperatively before sitting down to negotiate the merits of particular reforms. The potential benefits include building collegiality, articulating common ends, narrowing issues, enhancing political investment in the amending process, learning others' positions, adjusting expectations, constructing frameworks for further negotiation, accommodating competing interests, reconciling rights and responsibilities, suspending absolutes, agreeing to disagree, and so on.

See Kate Glover, "Complexity and the Amending Formula" (2015) 24 Const Forum Const 9 at 10.

The amendment process overload thesis helps explain why the Meech Lake and Charlottetown accords failed. The theory of mass input/legitimization predicts that future constitutional amendment proposals are unlikely to succeed. The idea of constructive unamendability suggests that the Constitution of Canada may be just as unamendable, if only temporarily, as some of the world's constitutions that explicitly take certain items off the amendment table. These theories, however, have consequences not only for how we think about the Constitution but also about how its meaning changes over time, and who does the changing. When, if ever, might it be profitable for a constitution to be difficult, and perhaps even impossible, to amend? Are there certain periods of time in the life of a constitutional democracy when we might want to discourage major constitutional reforms or at least complicate them more than would ordinarily be the case?

V. MODERN CHALLENGES TO CONSTITUTIONAL CHANGE

A. INDIGENOUS PEOPLES AND RESTORATIVE JUSTICE

1. Section 35.1

In 1983, the Constitution of Canada was amended to include a "commitment to participation" for Indigenous peoples in future constitutional conferences. See Government of Canada, "Constitutional Amendment Proclamation, 1983, SI/84-102" (1 October 1995), online: *Solon.org* <https://www.solon.org/Constitutions/Canada/English/cap_1983.html>. The commitment reads as follows:

> Commitment to participation in constitutional conference
>
> 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867,* to section 25 of this Act or to this Part,
>
> (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
>
> (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Section 35.1 was passed as an amendment to the Constitution of Canada using s 38, requiring approval resolutions from both houses of Parliament and seven of the ten provinces, whose total population amounts to at least half of the total provincial population. That was the first and only successful use s 38.

Section 35.1 requires that any amendment proposal affecting three specific sections of the Constitution must be preceded by a constitutional conference of first ministers and representatives of Indigenous peoples. Those three sections are, first, s 91(24) of the *Constitution Act, 1867,* which concerns the legislative authority of Parliament as to "Indians, and Lands reserved for the Indians"; second, s 25 of the *Constitution Act, 1982*, which concerns "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" in relation to land claims agreements and the Royal Proclamation of 1763; and, third, s 35.1 itself.

This commitment to participation does not impose a duty to obtain the consent of Indigenous peoples. Should the Constitution be revised to give Indigenous peoples the right to withhold consent on amendments affecting these matters? If yes, how would consent be obtained—directly from the Indigenous peoples in Canada, from their representatives, or in some other way?

Nonetheless, s 35.1 "affirms by implication that Aboriginal 'peoples' have a distinct constitutional character and role. That unique character is political and governmental in nature." See Paul LAH Chartrand, "Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada" (2011) 19 Waikato L Rev 14 at 20. Chartrand offers further background on s 35.1:

> Section 35.1 itself resulted from national conferences on constitutional reform at which the participants were all Canadian first ministers and representatives of the Aboriginal peoples of Canada. Representatives of the Aboriginal peoples of Canada have, since the 1980s participated in intergovernmental meetings on national and provincial political issues.
>
> An Aboriginal "people" is a distinct constitutional entity that has governmental functions and that has a distinct role in constitutional statecraft. The history of Aboriginal peoples, in particular the negotiations and agreements leading to the historic treaties with the First Nations, demonstrates that Aboriginal peoples are distinct constitutional entities whose consent matters for constitutional legitimacy.

It will be recalled that s 35.1 constitutionalises the commitment of the federal and provincial governments to the "principle" that Aboriginal peoples have a role in constitutional reform on matters that affect their interests and rights. If this is a principle then s 35.1 ought to be read so as to apply beyond the specific provisions that are listed in s 35.1 and to include all provisions of the Constitution that affect the interests and rights of Aboriginal peoples, including the relevant provisions of the Constitution Act 1930. This interpretation makes the present argument applicable to the intention of First Nations to seek changes to the lands and natural resources provisions in that Constitutional document, as mentioned above.

The principle that Aboriginal peoples' representatives have a legitimate role in governmental and intergovernmental affairs in Canada is reinforced by the federal policy first adopted in 1995 which recognises the inherent right of self-government and leads to negotiations on the modern treaties with First Nations.

See Chartrand at 20-21. For more background, see Patrick Macklem & Douglas Sanderson, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016).

Moving from 1983 to 1992, the agreement that was reached on final text of the Charlottetown Accord acknowledged the insufficiency of s 35.1. This is clear in both the length and detail that was proposed to replace what currently appears in s 35.1. Here is what was proposed to replace s 35.1:

35.1(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

(3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

(4) Where an issue arises in any proceedings in relation to the scope of the inherent right of self-government, or in relation to an assertion of that right, a court or tribunal

(a) before making any final determination of the issue, shall inquire into the efforts that have been made to resolve the issue through negotiations under section 35.2 and may order the parties to take such steps as may be appropriate in the circumstances to effect a negotiated resolution; and

(b) in making any final determination of the issue, shall take into account subsection (3).

(5) Neither the right referred to in subsection (1) nor anything in subsection 35.2(1) creates new aboriginal rights to land or abrogates or derogates from existing aboriginal or treaty rights to land, except as otherwise provided in self-government agreements negotiated under section 35.2.

35.2(1) The government of Canada, the provincial and territorial governments and the Aboriginal peoples of Canada, including the Indian, Inuit and Metis peoples of Canada, in the various regions and communities shall negotiate in good faith the implementation of the right of self-government, including issues of

(a) jurisdiction,

(b) lands and resources, and

(c) economic and fiscal arrangements,

with the objective of concluding agreements elaborating relationships between governments of aboriginal peoples and the government of Canada and provincial or territorial governments.

(2) Negotiations referred to in subsection (1) may be initiated only by the representatives or governments of the Aboriginal peoples concerned, and shall, unless otherwise agreed by the parties to the negotiations, be conducted in accordance with the process for negotiations outlined in an accord entered into by the government of Canada, the provincial and territorial governments and representatives of the aboriginal peoples.

(3) All the Aboriginal peoples of Canada shall have equitable access to negotiations referred to in subsection (1).

(4) agreement negotiated under this section may provide for bodies or institutions of self-government that are open to the participation of all residents of the region to which the agreement relates as determined by the agreement.

(5) The parties to negotiations referred to in subsection (1) shall have regard to the different circumstances of the various aboriginal peoples of Canada.

(6) Where an agreement negotiated under this section

(a) is set out in a treaty or land claims agreement, or in an amendment to a treaty including a land claims agreement, or

(b) contains a declaration that the rights of the aboriginal peoples set out in the agreement are treaty rights, the rights of the Aboriginal peoples set out in the agreement are treaty rights under subsection 35(1).

(7) Nothing in this section abrogates or derogates from the rights referred to in section 35 or 35.1, or from the enforceability thereof, and nothing in subsection 35.1(3) or in this section makes those rights contingent on the commitment to negotiate under this section.

35.3(1) Except in relation to self-government agreements concluded after the coming into force of this section, section 35.1 shall not be made the subject of judicial notice, interpretation or enforcement for five years after this section comes into force.

(2) For greater certainty, nothing in subsection (1) prevents the justiciability of disputes in relation to

(a) any existing rights that are recognized and affirmed in subsection 35(1), including any rights relating to self-government, when raised in any court; or

(b) the process of negotiations under section 35.2.

(3) Nothing in subsection (1) abrogates or derogates from section 35.1 or renders section 35.1 contingent on the happening of any future event, and subsection (1) merely delays for five years judicial notice, interpretation or enforcement of that section.

35.4(1) Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to their authority.

(2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.

(3) For greater certainty, nothing in this section extends the legislative authority of the Parliament of Canada or the legislatures of the provinces or territories.

35.5(1) Subsections 6(2) and (3) of the Canadian Charter of Rights and Freedoms do not preclude a legislative body or government of the Aboriginal peoples of Canada from exercising authority pursuant to this Part through affirmative action measures that have as their object the amelioration of conditions of individuals or groups who are socially or economically disadvantaged or the protection and advancement of aboriginal languages and cultures.

(2) For greater certainty, nothing in this section abrogates or derogates from section 15, 25 or 28 of the Canadian Charter of Rights and Freedoms or from section 35.7 of this Part.

35.6(1) The treaty rights referred to in subsection 35(1) shall be interpreted in a just, broad and liberal manner taking into account their spirit and intent and the context of the specific treaty negotiations relating thereto.

(2) The government of Canada is committed to establishing treaty processes to clarify or implement treaty rights and, where the parties agree, to rectify terms of the treaties, and is committed, where requested by the Aboriginal peoples of Canada concerned, to participating in good faith in the process that relates to them.

(3) The governments of the provinces and territories are committed, to the extent that they have jurisdiction, to participating in good faith in the processes referred to in subsection (2), where jointly invited by the government of Canada and the Aboriginal peoples of Canada concerned or where it is specified that they will do so under the terms of the treaty concerned.

(4) The participants in the processes referred to in subsection (2) shall have regard to, among other things and where appropriate, the spirit and intent of the treaties, as understood by the aboriginal peoples concerned.

(5) For greater certainty, all those Aboriginal peoples of Canada who have treaty rights shall have equitable access to the processes referred to in this section.

(6) Nothing in this section abrogates or derogates from any rights of the Aboriginal peoples of Canada who are not parties to a particular treaty.

35.7 Notwithstanding any other provision of this Act, the rights of the Aboriginal peoples of Canada referred to in this Part are guaranteed equally to male and female persons.

[35.8* The government of Canada and the provincial governments are committed to the principle that, before any amendment described in section 45.1 is made,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces will be convened by the Prime Minister of Canada; and

(b) The Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.]

(* SQUARE BRACKETED ITEM: The final wording of this provision (based on existing section 35.1 added in 1984) is to be revisited when the consent mechanism is finalized for section 45.1, at which time concerns will be addressed in respect of amendments directly referring to Aboriginal peoples in some but not all regions of Canada).

35.9(1) At least four constitutional conferences on aboriginal issues composed of the Prime Minister of Canada, the first ministers of the provinces, representatives of the Aboriginal peoples of Canada and elected representatives of the governments of the territories shall be convened by the Prime Minister of Canada, the first to be held no later than 1996 and the three subsequent conferences to be held one every two years thereafter.

(2) Each conference convened under subsection (1) shall have included in its agenda such items as are proposed by the representatives of the Aboriginal peoples of Canada.

35.91 For greater certainty, nothing in this part extends the powers of the legislative authorities or governments of the territories.

The differences between the two are vast. How does the Charlottetown version improve upon the current version? Are there improvements you would make to the Charlottetown version? What would they be? And which of part V's amendment procedures would be required to bring them into law?

2. The Uluru Statement from the Heart

Canada is, of course, not the only jurisdiction currently working toward reconciliation. A fellow Commonwealth country, Australia, is currently in the midst of a national discussion on whether and how to amend its constitution.

In December 2015, the Government of Australia and the Opposition agreed on a 16-member Referendum Council "to consult widely throughout Australia and take the next steps towards achieving constitutional recognition of the First Australians." Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (October 2016) at 1, online (pdf): <https://www.referendumcouncil.org.au/sites/default/files/2016-12/referendum_council_discussion_paper.pdf>.

The Referendum Council was interested in the views of Australians on whether the constitution should be reformed and, if so, how. The driving force behind these efforts was to invite Australians to "think about some specific proposals for symbolic and practical reform and how they might ensure that the Constitution treats Aboriginal and Torres Strait Islander peoples more fairly" (at 1). The Referendum Council also committed to consulting with Indigenous peoples in a forum and format designed and led by Indigenous peoples themselves.

Amending the Constitution of Australia requires a referendum, hence the name of the commission created in Australia. Here is the Australian amendment procedure:

> This Constitution shall not be altered except in the following manner:
>
> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.
>
> But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.
>
> When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.
>
> And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.
>
> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.
>
> In this section, Territory means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

See Commonwealth of Australia Constitution Act, s 128.

In May 2017, First Nations from across Australia issued what is known as the Uluru Statement from the Heart. The Uluru Statement calls for two reforms: a First Nations Voice to Parliament and a Makarrata Commission. These reforms would require a constitutional amendment, which is possible only with a referendum.

The first reform would create a permanent institution to express the views of First Nations to the Parliament and to the government on issues affecting First Nations. The second reform would create a commission to oversee treaty-making and truth-telling in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, UN GA res 61/295.

Here is the full text of the Uluru Statement:

> Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.
>
> This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.
>
> How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?
>
> With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.
>
> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.
>
> These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.
>
> We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.
>
> We call for the establishment of a First Nations Voice enshrined in the Constitution.
>
> Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.
>
> We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.
>
> In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

See "The Uluru Statement from the Heart" (2017), online: *Referendum Council* <https://ulurustatement.org/the-statement>.

Here in Canada, the Truth and Reconciliation Commission issued a report enumerating 94 Calls to Action. But none called expressly for constitutional reform in Canada. Could Canada benefit from its equivalent of the Referendum Council created in Australia to examine how the Constitution of Canada should be reformed to advance the objectives of the Truth and Reconciliation Commission Report? Could Canada benefit from its equivalent of the Uluru Statement, tailored to the specificities of the history and context of the Canadian experience?

B. CONSTITUTIONAL AMENDMENT AND QUEBEC SOVEREIGNTY

1. A Quebec Veto and the Regional Veto Act

Quebec governments have pressed for the inclusion of a Quebec veto in the amending formula. To date they have been unsuccessful, except for the list of matters in s 41 (the unanimity formula), which gives a veto to all the provinces. The Meech Lake and Charlottetown accords would have expanded the list of matters subject to s 41. Would this have been advisable?

In October 1995, a referendum on sovereignty was narrowly defeated in Quebec (discussed below). This prompted the federal Parliament to enact *An Act respecting constitutional amendments*, SC 1996, c 1 (the Regional Veto Act), which provides a regional veto—including a veto for Quebec—in the form of a federal government promise not to propose any constitutional amendment without the agreement of the five regions of Canada, except in circumstances where a province affected can exercise a veto or opt out of the amendment. The Act reads:

> 1(1) No Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 of the *Constitution Act, 1982* or may express its dissent under subsection 38(3) of that Act, unless the amendment has first been consented to by a majority of the provinces that includes:
>
> (a) Ontario;
>
> (b) Quebec;
>
> (c) British Columbia.
>
> (d) two or more of the Atlantic provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Atlantic provinces; and
>
> (e) two or more of the Prairie provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Prairie provinces;
>
> (2) In this section,
>
> Atlantic provinces means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador;
>
> Prairie provinces means the provinces of Manitoba, Saskatchewan and Alberta.

Does this make the amending formula unnecessarily rigid? As we discuss below in Section VI, the Constitution of Canada is already difficult to amend. The Regional Veto Act makes it harder. But is it now too hard?

Two scholars have shown that the effect of the Regional Veto Act is to end the legal equality of the provinces in the constitutional amendment process. Whereas part V of the *Constitution Act, 1982* treats all provinces equally, with no province having any special power in the amendment process, the Regional Veto Act creates two classes of provinces—those with veto power, and those without: see Andrew Heard & Tim Swartz, "The Regional Veto Formula and Its Effects on Canada's Constitutional Amendment Process" (1997) 30 Can J Polit Sci 339. There is another point to note: the Regional Veto Act now imposes new requirements for a constitutional amendment under s 38—requirements that do not appear in part V of the *Constitution Act, 1982*. Do either of these provide grounds to argue that the Regional Veto Act is constitutionally invalid?

2. Quebec Secession

In recent years, discussions of the amending formula have centred on the potential secession of Quebec. This issue has attracted the attention of legal commentators because of the 1995

sovereignty referendum in that province, which rejected sovereignty by an extremely narrow margin. Part of the federal government's response was to convince Quebeckers that the road to independence would be costly and difficult. In particular, the federal government sought to respond to the view, asserted by some Quebec sovereigntists, that a "yes" vote would automatically effect the legal secession of the province. They did this by asserting that a "yes" vote had no concrete legal effect and would at best result in a political process of intergovernmental negotiations that might culminate in a package of constitutional amendments that would have to comply with the rules spelled out in part V to become effective. The centrepiece of this part of the federal strategy—referred to as "Plan B"—was the posing of the following three reference questions to the Supreme Court of Canada on September 30, 1996:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

See *Order in Council PC* 1996-1497 (30 September 1996) as cited in *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 at para 2.

The expectation among legal commentators was that the Court would answer the first two questions in the negative and that, as a consequence, it would decline to answer the third question. With respect to question 1, it was thought that the Court would simply point out that although the Constitution contains no provisions governing secession of a province, the Constitution does not expressly prohibit it, meaning that secession is legally possible. However, what secession requires is a constitutional amendment and, hence, compliance with the amending formulas in part V of the *Constitution Act, 1982*. The legal secession of a province from Canada would require many constitutional amendments: for one list, see Peter Russell & Bruce Ryder, *Ratifying a Postreferendum Agreement on Quebec Sovereignty* (Toronto: CD Howe Institute, 1997). Legal commentators generally assumed that most of the required changes would engage amending formulas other than s 45 (the provincial unilateral procedure) because the required changes would go much further than the constitution of a province. And because every other amending formula requires the consent of the federal government, it was thought that the Court would simply hold that a unilateral secession, by definition, is unconstitutional.

In its advisory opinion, the Supreme Court confounded those expectations. The following extract contains the part of the Court's judgment dealing specifically with the constitutionality of unilateral secession. The earlier portions of the judgment, in which the Court set out the principles of the Canadian Constitution on which it drew to deal with the secession issue, are found in Chapter 2, Judicial Review and Constitutional Interpretation.

Reference re Secession of Quebec

[1998] 2 SCR 217, 1998 CanLII 793

THE COURT (Lamer CJ and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, and Binnie JJ):

[83] Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving

statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada." This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. ...

[84] 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.

[85] The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. ... By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada *unilaterally*.

[86] The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral." We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

[87] Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the

Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

[88] The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

[89] What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

[90] The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. ...

[91] For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

[92] However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose *no*

obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. ... The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

[93] Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. ... A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

[94] In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of *all* the participants in the negotiation process.

[95] Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. ...

[96] No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. ... Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, ... when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation ... .

[97] In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

[98] The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the *Patriation Reference* [*Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25], a distinction was drawn between the law of the

Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the *law* of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

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[100] The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. ... The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. ... Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

[101] If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, 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. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. ...

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[104] Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. ... However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

NOTES AND QUESTIONS

1. *Clear majority, clear question, and the duty to negotiate.* Until the judgment, it had been thought that referenda played no role in constitutional amendment. Indeed, an earlier draft of part V would have permitted amendment on the basis of a positive result in a national referendum; this procedure was ultimately removed. The central holding in the *Secession Reference* is that "a decision of a clear majority of the population of Quebec on a clear question to pursue secession" (at para 93) would trigger a duty to negotiate the required constitutional amendments to give effect to the desire to secede. However, the Court did not define "clear majority" or "clear question." Commentators have given the clear majority requirement varying interpretations: a super-majority requirement—for example, 60 percent or two-thirds; a simple majority but with the results free from doubt that could be created, for example, by voting irregularities;

or a majority of eligible voters, as opposed to simply a majority of votes cast. What do you think? On the issue of what a clear question would be, the Court says no more than that the question should be on secession. Would this preclude posing a question that omitted any reference to secession—for example, a question that referred to sovereignty, or to renewed federalism? In this context, consider the question posed to voters in the 1995 referendum:

> Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

See Secrétariat du Québec aux relations canadiennes, "Historical Background" (last visited 22 November 2021) at para 19, online: *Gouvernement of Québec* <https://www.sqrc.gouv.qc.ca/relations-canadiennes/politique-affirmation/rappels-historiques-en.asp>.

Is this question "a clear question to pursue secession"? Recall that the Court did not specify who the parties to constitutional negotiations would be—that is, which parties would be under the duty to negotiate. The judgment refers variously to "the other provinces and the federal government" (at paras 86, 88, 151), "the representatives of two legitimate majorities" (at para 93), and "participants in Confederation" (at paras 69, 88, 149, 150). Does this mean that negotiations would be bilateral—that is, between Quebec and the federal government—or multilateral? If the negotiations are multilateral, would they be limited to representatives of the federal and provincial governments, or would they include Indigenous peoples?

2. *No judicial supervision.* Arguably, the ambiguities in the judgment would not have posed a difficulty if the Court had indicated its future willingness to flesh out the legal framework governing secession and to supervise both the process and outcome of constitutional negotiations. However, the Court declined to do so, effectively leaving the interpretation and application of the rules of the Canadian Constitution governing secession to "the political actors." Is this the normal division of labour between courts and legislatures in constitutional interpretation? If not, what reasons did the Court give for departing from this norm? Are these reasons convincing? Consider the following explanation offered by Sujit Choudhry and Robert Howse:

> [O]nce we examine the political context surrounding the *Quebec Secession Reference*, it becomes evident that the Court acted in the face of the failure of federal political institutions to face the challenge posed by the referendum process in Quebec to the legitimacy of the Canadian constitutional order … . Before the reference questions had been issued, it was entirely open to the federal government to lay down principles governing referenda and secession.

See Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) 13 Can JL & Jur 143.

Both the federal Parliament and the Quebec National Assembly have accepted the Court's invitation to contextualize the constitutional norms regarding secession: see *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26 (the federal Clarity Act) and *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, SQ 2000, c 46 (Quebec's Fundamental Rights Act). On what constitutes a clear majority, s 2 of the Clarity Act provides:

> 2(1) Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

(2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account

(a) the size of the majority of valid votes cast in favour of the secessionist option;

(b) the percentage of eligible voters voting in the referendum; and

(c) any other matters or circumstances it considers to be relevant.

(3) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant.

(4) The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada unless the House of Commons determines, pursuant to this section, that there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

By contrast, s 4 of the Fundamental Rights Act provides (citations omitted):

> When the Québec people [are] consulted by way of a referendum under the Referendum Act, the winning option is the option that obtains a majority of the valid votes cast, namely fifty percent of the valid votes cast plus one.

Do these provisions potentially conflict? How? If they do, do you think the Court will intervene in a subsequent case? Note that the Court did seem to suggest that it would pronounce on the correct amending formula for achieving secession (although the note below raises some questions about this).

3. *Secession without a constitutional amendment?* In the *Secession Reference*, the Court refers to the need for a constitutional amendment to effect secession, states that the constitutional negotiations to secure such an amendment could be unsuccessful, and refuses to speculate on what the consequences of a failure of negotiations would be. However, consider the following paragraph:

> [103] To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

Does this passage effectively create a right to unilateral secession after good-faith negotiations? If so, can this be squared with the Court's holding that unilateral secession is unconstitutional?

Conversely, does it explain the Court's statement that a right to unilateral secession is "the right to effectuate secession without prior negotiations with the other provinces and the federal government" (at para 86), as opposed to the right to secede without prior consent? Does it leave the enforcement of the rules of the Canadian Constitution governing secession to the international community?

4. *Section 45, Quebec Nationhood, and the French Language.* In November 2006, the House of Commons adopted a motion recognizing that "the Quebecois form a nation within a united Canada." See "House Passes Motion Recognizing Quebecois as Nation," *CBC News* (27 November 2006), online: <https://www.cbc.ca/news/canada/house-passes-motion-recognizing-quebecois-as-nation-1.574359>. Fifteen years later, in May 2021, the National Assembly of Quebec introduced Bill 96, an omnibus bill intended to protect the French language in Quebec. One of the Bill's provisions proposes to amend the *Constitution Act, 1867* using Quebec's power to unilaterally amend its provincial constitution under s 45 of the *Constitution Act, 1982*. Here is the text of the proposal:

> 159. The Constitution Act, 1867 (30 & 31 Victoria, c. 3 (U.K.); 1982, c. 11 (U.K.)) is amended by inserting the following after section 90:
>
> "FUNDAMENTAL CHARACTERISTICS OF QUEBEC"
>
> "90Q.1. Quebecers form a nation."
>
> "90Q.2. French shall be the only official language of Quebec. It is also the common language of the Quebec nation."

See Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess, 42nd Leg, 2021 (adopted in principle 3 November 2021), online: <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-96-42-1.html>.

What is the scope of a province's power under s 45? By its own terms and the design of part V of the *Constitution Act, 1982*, the provincial unilateral amendment power in s 45 is limited expressly to those matters that do not exceed the scope of a province's jurisdictional authority. But are there additional limitations? Consider this analysis:

> Several implicit constitutional issues also limit the scope of section 45. For one thing, provinces cannot unilaterally amend their constitution in a way that would jeopardize the conditions of the 1867 union or the federal principle. The same can be said of section 93 of the Constitution Act, 1867, which recognizes denominational education rights, and therefore is a limit to section 45. Furthermore, provisions considered indispensable for the implementation of the federal principle were declared *ultra vires* to section 92(1) in *OPSEU*, and thus escape the scope of section 45. Accordingly, the unilateral secession of a province was deemed unconstitutional in *Reference re Secession of Quebec*.
>
> Another important implicit limit to the unilateral modification of provincial constitutions constitutional rights and freedoms. Every right protected in the Charter constitutes a limit to section 45. The only way to circumvent this limit is for a province to invoke the notwithstanding clause found in section 33. Then again, this clause applies only to sections 2 and 7–15 of the Charter, and has a five-year sunset clause. Even before the entrenchment of the Charter, there was the belief that the Canadian Constitution encompassed an implied bill of rights. This theory was based on the fact that the Constitution was similar in principle to that of the United Kingdom. Although not all constitutionalists agree on the merits of this theory, it could still be a limit on section 45.
>
> Furthermore, provincial legislatures cannot delegate their powers—for example, via deliberative referendums—under section 45. This conclusion is based on *In re The Initiative & Referendum Act (Manitoba)*, which positedthat allowing provincial laws to be adopted or modified directly by citizens instead of the legislature was *ultra vires* section 92(1). It was also confirmed in *obiter dictum* in *OPSEU*. Finally, provinces cannot unilaterally remove

subject-matter jurisdictions from section 96 courts, which are administered by the provinces but appointed by the federal government, as determined by case law.

See Emmanuel Richez, "The Possibilities and Limits of Provincial Constitution-Making Power: The Case of Quebec" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 164 at 168.

Class activity: Assemble yourselves into two pairs of two separate groups. In the first pairing, one group will make the case that Quebec may use its power in s 45 to insert the newly proposed s 90Q.1 into the *Constitution Act, 1867*. The other group in the first pairing will argue that s 45 does not grant Quebec this authority. In the second pairing, one group will make the case that Quebec may use its power in s 45 to insert the newly proposed s 90Q.2 into the *Constitution Act, 1867*. The other group in this second pairing will argue that s 45 does not grant Quebec this authority. Which side in each pairing is more compelling to you?

5. *Section 43 and Quebec's future in Canada.* It has long been assumed that securing Quebec's constitutional future in Canada would require the use of either the general amending formula in s 38 or the unanimity procedure in s 41. For some matters of constitutional importance, it is clear that recourse to one of these sections is mandatory; but for others, it is an open question that David Cameron and Jacqueline Krikorian have recently answered by suggesting that the bilateral procedure in s 43 could be used to amend the Constitution to give Quebec the reassurance and recognition that many of its political leaders have in the past demanded.

David R Cameron & Jacqueline D Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process"

(2008) 58 UTLJ 389 at 414-20

Canada has ... been trapped in an unsatisfactory state of irresolution with respect to national unity since 1982. Quebec—as reflected in its government, its legislature, and, arguably, its people—has not assented to the constitutional arrangements by which it is governed. While this appears at the moment to make little difference in the day-to-day lives of ordinary citizens, it is a state of affairs widely regarded as unsatisfactory for a constitutional democracy. Moreover, it is seen by many as exposing the country to an unacceptable risk of fracture should a crisis arise. Yet while many would acknowledge that there remains some unfinished business as far as Quebec is concerned, doing nothing seems to be the best option available to policy makers. There has been a sense that an impasse between Quebec and the rest of Canada is better than another round of failed constitutional talks.

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To date, Quebec's constitutional concerns have not been addressed in a manner that would make it acceptable for its residents, its government, or its legislature to formally consent to the 1982 Constitution. For reasons outlined above, events are at an impasse. The recent success of the initiative of the government of Canada, however, appears to suggest that there may be an opportunity for progress. Building on the resolution recognizing the Québécois as a nation within Canada, the House of Commons and the National Assembly could introduce a bilateral constitutional amendment that would give official status to the French language in the province of Quebec and possibly recognize the French culture in the province.

A bilateral constitutional amendment addressing language issues is expressly permitted under s. 43 of the *Constitution Act, 1982*. New Brunswick, in conjunction with the federal government, adopted such an amendment for this very purpose when it bestowed a kind of enhanced status on the French and English languages. Moreover, the Supreme Court of Canada has already both accepted and endorsed the notion that French is the predominant language in Quebec. In [*Ford v Quebec (AG)*, [1988] 2 SCR 712, 1988 CanLII 19], it held that the National Assembly could adopt a law providing that French would have greater public visibility than English, expressly stating that the government of Quebec could require the French language to be given predominance on signage in order to reflect the "*visage linguistique*" of the province. In the process, the Court effectively acknowledged and endorsed the notion that the vitality of the French language and culture in Quebec is a valid public-policy goal.

In this context, it would be possible for the governments of Canada and Quebec to use New Brunswick's bilateral constitutional amendment as a precedent to introduce a measure that builds upon the essence of the November 2006 House of Commons resolution recognizing the Québécois nation in Canada. We are arguing, in other words, that a bilateral constitutional amendment is a potential *process* by which the long-standing concerns of Quebec could begin to be addressed in the Constitution. Our overall objective here is not to provide solutions to the constitutional impasse, or even the text of a possible provision; rather, our goal is to map out a process by which the real and valid concerns of the francophone community in Quebec might successfully be addressed and to indicate the issues that could be considered if and when such discussions should occur.

We envision that such an amendment would reaffirm Quebec's existing legislative authority and act as an interpretive provision that informs how the Constitution is read and understood in Quebec. We are not advocating a measure that allocates new powers or redistributes existing heads of power; such a proposal would change the nature and balance of Canadian federalism and require the consent of all the provinces. Rather, we are arguing for consideration of a bilateral constitutional amendment that pertains only to Quebec. To this end, we believe there are at least two options worthy of consideration. The first is to introduce an amendment to s. 16 of the Charter dealing with official languages, while the second is to introduce a provision similar in nature to s. 27 of the Charter that would apply exclusively to Quebec.

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The focus of the proposed bilateral constitutional amendment would pertain to the French language, and possibly the French culture, in Quebec. It could entrench French as the official language of the province and acknowledge that the National Assembly has the authority to both preserve and protect Quebec's distinct cultural institutions. Such a provision would, in effect, simply reflect the existing status of the French language in Quebec by constitutionalizing the *raison d'être* of the provisions legally enacted in Bill 101 ... . [A] constitutional amendment of this nature would entrench the status of one of the core elements of the Québécois nation in the province, as well as beginning to address one of Quebec's legitimate core concerns, namely, the amendment of the Canadian Constitution in 1982 without Quebec's priorities being addressed and without Quebec's consent. In this sense, our proposal is positive in nature—to constitutionalize the rights of the French community, not to detract or take away from the existing rights of anglophones in the province. In fact, a provision in the proposed bilateral amendment expressly recognizing and protecting the existing rights of the English community in the province of Quebec would be an essential part of any bilateral amendment, in order to reassure the anglophone community in the province that their status has not been altered.

A second option for a bilateral amendment recognizing the predominance of French in Quebec would be to adopt a provision akin to s. 27 of the Charter:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Section 27 ... informs how the Constitution is to be interpreted, but it does not give special powers or legislative authority to one government or community over another; rather, it acknowledges the importance and value that Canadians accord to multiculturalism and provides an assurance that these considerations will give guidance to any court that must render a decision in a constitutional challenge to a government measure or action.

We believe that a provision similar in nature to s. 27 could be introduced as a bilateral constitutional amendment, with the proviso that it applied to Quebec. ... It is our position that the Quebecois nation is no less deserving of recognition in the Constitution than is our multicultural heritage and that, in the context of Quebec, such recognition is extremely important both politically and symbolically.

... [W]e would suggest that the nature of the bilateral amendment should be focused on the use and status of the French language and, possibly, the French culture. The overwhelming success of the Canadian government's resolution recognizing the Québécois as a nation—which Harper explained was specifically linked to the French language—suggests that Parliament accepts that the specificity of Quebec and the French language is a distinctive feature of the Quebec reality, a position that is obviously accepted by the National Assembly of Quebec.

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... [I]t is worth noting that one of the main reasons that the Meech Lake and Charlottetown Accords were so strongly contested was not simply the fact that the amendments required the consent of other provinces but also that each purported to declare something about the country as a whole ... . This is not the case with the suggestions we have put forward. The bilateral amendment process involves two government actors—the National Assembly and government of Quebec, on the one hand, and Parliament and the government of Canada, on the other—not all the provinces and territories. Furthermore, the amendment makes no attempt to capture a Canadian vision and situate Quebec within it; rather, it identifies one vital element in Quebec's existing laws and complex reality and offers that element a degree of constitutional recognition.

Such a bilateral amendment would serve two important public-policy objectives. First, the constitutional provision would have considerable symbolic importance for Canadians both inside and outside of Quebec. ...

A second rationale for this type of bilateral amendment is that it would be used as an interpretive aid in any future constitutional litigation challenging measures to promote or protect the French language in Quebec ... . Although Quebec legislation entrenching French language rights might still be found to violate, for example, the Charter's freedom-of-expression or equality measures, a bilateral constitutional amendment of this nature would, in effect, mandate the courts to carefully balance the language rights of the Québécois community within the province and the rights of the individual before striking down a contested statute. ...

• • •

We recognize that this proposal may provoke controversy because some may feel that it has the potential to affect the standing of the English minority in Quebec. In the years since the passage of Bill 101, however—through court cases, legislative adjustment, and social adaptation—Quebec has achieved a condition of "linguistic

> peace," in which the anglophone minority, by and large, has accepted the basic provisions of Bill 101, has learned French, and has accommodated itself to the position of English in the linguistic landscape of Quebec. The proposed amendment would recognize contemporary reality and give greater security to the French language and to francophones within the framework of the Constitution of Canada. We also believe that, in the "big picture," by assuring the Québécois nation that they have a secure future within the Canadian federation, we would be providing stability and security to the anglophone community in Quebec.

QUESTIONS

Does your reading of s 43 accommodate the range of amendments that Cameron and Krikorian suggest is possible? Would amendments of the kind suggested be accepted as legitimate outside Quebec? Would Quebec be satisfied by amendments like these without their being approved by the rest of Canada?

C. CONSTITUTIONAL AMENDMENT AND ALBERTA SOVEREIGNTY

While secessionist sentiment appears to have declined for now in Quebec, it appears to have risen in Alberta, and there now exists a federal political party with the capacity to harness the energies of Albertans and more generally of persons elsewhere in Western Canada. Founded in 2019 as the Wexit Party—a play on Brexit to promote the West's exit from Canada—today the party is known as the Maverick Party.

On November 9, 2019, the Premier of Alberta created the Fair Deal Panel. In his mandate letter to the Panel, the Premier acknowledged the forces that had led to the creation of Wexit:

> Recent public opinion surveys suggest that as many as one third of Albertans support the concept of separating from the Canadian federation, and that three quarters of Albertans understand or sympathise with this sentiment. Many Albertans who indicate support for federalism are demanding significant reforms that will allow the province to develop its resources, and play a larger role in the federation, commensurate with the size of its economy and contribution to the rest of Canada.

See *Letter from the Premier to the Fair Deal Panel*, 9 November 2019, online (pdf): *Government of Alberta* <https://www.alberta.ca/external/news/letter-from-premier-to-panel.pdf>.

The Panel's nine members were directed to "listen to Albertans and their ideas for Alberta's future," focusing on "ideas that would strengthen [the] province's economic position, give [it] a bigger voice within Confederation, or increase provincial power over institutions and funding in areas of provincial jurisdiction." See *Letter from the Premier* at 1.

In its final report submitted in May 2020, the Fair Deal Panel wrote that it "encourages the Government of Alberta to act vigorously and swiftly ... to secure a fair deal for Albertans. Some Albertans believe that the only way to get Ottawa and other provinces to pay attention to unfairness and misunderstandings is to use the threat of separation ... . Listening to Albertans, the panel understands their anger ... . But we do not believe the threat of secession is a constructive negotiating strategy. However, we believe that if the federal government and the rest of Canada do not respond positively and quickly to Albertans' demands for a fair deal, then support for secession will only grow. The panel also wishes to make clear ... the best option is to achieve a fairer deal for Albertans, and for all Canadians, within Confederation. How will we know when we have a fair deal for Alberta? In the panel's opinion, we will know when Albertans trust people in Ottawa to act in this province's best interests, and when Alberta's position within the Canadian federation has been equitably reset." See *Fair Deal Panel, Report to*

Government, May 2020 at 8, online (pdf): *Government of Alberta* <https://open.alberta.ca/dataset/d8933f27-5f81-4cbb-97c1-f56b45b09a74/resource/d5836820-d81f-4042-b24e-b04e012f4cde/download/fair-deal-panel-report-to-government-may-2020.pdf>.

The Panel's final report made 25 recommendations. One of its recommendations urged the Government of Alberta to proceed with a referendum on equalization, "asking a clear question along the lines of: 'Do you support the removal of Section 36, which deals with the principle of equalization, from the Constitution Act, 1982?'" (*Fair Deal Panel Report* at 7, 16-18).

On June 7, 2021, the Premier introduced a motion in the Legislative Assembly to propose the following question for a referendum to be held on October 18, 2021: "Should Section 36(2) of the *Constitution Act, 1982*—Parliament and the Government of Canada's commitment to the principle of making equalization payments—be removed from the Constitution?" See *Referendum Question on Equalization Introduced*, 7 June 2021, online: *Government of Alberta* <https://www.alberta.ca/release.cfm?xID=793270E30BF4E-EC74-8973-B92812EA0E3AB9F3>.

Asked to explain his motivation, the Premier of Alberta explained that a "yes" vote on the referendum would give the province a strong claim to request negotiations to change the equalization formula in Canada.

Equalization would require either a change of federal policy or a constitutional amendment using the procedure outlined in s 38 of the *Constitution Act, 1982*, otherwise known as the 7/50 formula. Given that, what do you suppose was the strategy behind the equalization referendum, since a successful referendum will not on its own change equalization?

D. SENATE REFORM

Since Confederation, the Senate has been the subject of several reform proposals. No major constitutional amendments have been made with regard to the function of the institution, but it has been amended in two noteworthy ways over the years. First, the size of the Senate, as detailed in s 22 of the *Constitution Act, 1867*, has changed. In its initial version, s 22 created a Senate consisting of three regional divisions—Ontario, Quebec, and the maritime provinces (Nova Scotia and New Brunswick), each with 24 senators. When Prince Edward Island joined Canada in 1873, it was given four senators, and Nova Scotia and New Brunswick were reduced to ten seats each. In 1915, the Senate was reorganized into four regional divisions to accommodate a new Western division. This new division consisted of already-admitted provinces—Alberta, British Columbia, Manitoba, and Saskatchewan—and it was given an equal complement of 24 senators. The addition of Newfoundland into Canada in 1949 entitled the province to six senators. The Yukon and the Northwest Territories were given one senator each in 1975, and, in 1999, the new territory of Nunavut was also given one senator.

A second noteworthy change was an amendment to its terms of service. At Confederation, according to s 29 of the *Constitution Act, 1867*, a senator could serve for life. In 1965, a mandatory retirement age of 75 for all new senators was imposed.

Heather Hughson, "Senate Reform: The First 125 Years"
(21 September 2015), online: *Policy Options* <http://policyoptions.irpp.org/magazines/september-2015/the-future-of-the-senate/senate-reform-thefirst-125-years>

The Senate is an institution about which we—citizens, academics, and politicians alike—know very little, except that we dislike it, and so concocting new ideas for reform is something of a Canadian pastime. But as significant as Senate reform could be, it has always had a low priority. Few governments have the political will to see

through a plan whose benefits will not be immediately visible to voters and whose potential costs, in the event of failure, could be astronomically high. The result is a long trail of discarded and forgotten alternative Senate models, dating back nearly all the way to Confederation.

Most of the delegates at the 1864 Quebec conference, where the institutions of government for Canada were conceived, had direct experience with elected upper houses, and many of them were even the same people who had pushed for the change to election in the united Province of Canada (now Ontario and Quebec) and Prince Edward Island only a few years earlier. Despite this, the delegates at the conference were nearly unanimous in their disapproval ... . Their eventual solution was to have a second chamber that was democratically illegitimate by design, so that it could not challenge the House of Commons for parliamentary supremacy yet could still perform vital democratic functions.

Delegates at the Quebec conference spent more time discussing the Senate—its functions, purpose and design—than any other institution of governance. Nevertheless, dissatisfaction arose almost immediately. Long-standing concerns about regional or provincial representation at the federal level had not been dispelled by a Senate where seats were distributed equally by region but the regions had no choice in who those representatives would be; and subsequent proposals have overwhelmingly aimed to make the Senate into a proper chamber of federalism, usually by devolving powers to the provinces in some way.

This tendency appears clearly in the very first times that Senate reform came to the floor of Parliament, in 1874 and 1875, when Liberal MP David Mills tabled a motion calling for the devolution of Senate appointment powers to the provinces, calling federal appointment "inconsistent with the Federal principle." Although the Commons agreed to the 1875 resolution, he never produced any actual plan for reform and eventually withdrew his motion; but the same phrase appeared again in a motion at [the] 1893 Liberal Party convention, where it received unanimous support. Devolution first appeared in an official party campaign platform in 1908 under Robert Borden's Liberal-Conservatives, and it became such a frequent fixture in election campaigns that by 1925, when it appeared once more in the Liberal Party's campaign platform, Conservative Leader Arthur Meighen sarcastically remarked, "So that old bird is to be provided with wooden wings and told to fly again." Devolution, in some form or another, remained the dominant model for Senate reform in Canada until the 1980s.

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It was not until the 1960s that Senate reform began to look like a credible possibility—because Canadian federalism had evolved to include more power-sharing between levels of government and a greater role for the provinces in national affairs. ...

During this time of increased interest in upper house reform, one small change was actually implemented: the introduction of mandatory retirement at age 75 in 1965. ...

Real Senate reform came to the national agenda in 1969, when the government of Pierre Trudeau accepted in principle some degree of devolution that would secure formal and direct expression of provincial interests in the Senate, though no agreement was reached regarding the specifics. ...

The turning point was the government's 1978 White Paper on constitutional reform, which set out a two-stage plan for patriating the Constitution. [The first stage ...] included the creation of a new upper house, the House of the Federation, which would be indirectly elected by the provincial and federal legislatures and have a 120-day suspensive veto over parliamentary legislation. What followed was a back-and-forth series of plans for Senate reform as part of a constitutional overhaul, as

> the federal government asserted the right to proceed unilaterally while the provinces demanded to be involved in the reform of a central institution of Canadian federalism. ... The unilateral approach ended with the Supreme Court's 1979 ruling on upper house reform, which required provincial consultation for anything that would "affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process."
>
> The Senate was left nearly untouched during the patriation of the Constitution in 1982, ... because Canadian political thought about the Senate was undergoing a paradigm shift. In 1981, the Canada West Foundation published a booklet advocating a completely different model from any seen before. The Triple-E model called for an equal number of senators per province, direct election of senators and effective powers capable of challenging the House of Commons. In a few years, it completely replaced "devolution plus" as the default model for upper house reform, particularly in the western provinces ... .
>
> What happened next warrants a much longer account in the history of Senate reform, as the plans changed quickly and frequently. But it was that haphazard and overly complicated approach that made the Meech Lake and Charlottetown Accords particularly frustrating for reformers ... .
>
> Major Senate reform was a key part of the Charlottetown Accord, preparations for which began almost immediately after the demise of Meech. At the end of a series of meetings with all provinces but Quebec, Premier Bob Rae of Ontario agreed to a Triple-E Senate, on the condition that the House of Commons would have seats distributed purely on the basis of population, which would give Ontario an additional 18 MPs. The agreement, however, was rejected [by] Quebec, and a final round of negotiations produced a "One and a Half E" Senate plan. There would be an equal number of seats, but provinces could decide whether to appoint or elect those senators. The third E, effectiveness, was dropped entirely, with the Senate reduced to a very brief suspensive veto, after which any disputes would be resolved in a joint sitting, where senators would be outnumbered by MPs by over five to one. It was a quintessentially Canadian plan, combining features of nearly every prior popular proposal in an attempt to create a hybrid chamber that would satisfy all types of reformers, but ultimately it satisfied none, and the Accord was defeated.

The difficulty of large-scale constitutional amendment suggested that Senate reform, if it were to happen at all, would occur outside of the multilateral amendment procedures in part V of the *Constitution Act, 1982*. A minority Conservative government elected in 2006 began with a Senate term-limits bill that would have set an eight-year term limit for new senators: see Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Sess, 39th Parl, 2006 (first reading 30 May 2006). The government then proposed to establish a framework for consultative provincial and territorial elections to fill vacancies: see Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess, 39th Parl, 2007 (first reading 13 November 2007). Neither of these bills went anywhere, but after winning a majority in the federal general elections of May 2011, the government reintroduced both proposed reforms in a single bill: see Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Sess, 41st Parl, 2011 (first reading 21 June 2011). These reforms entailed recourse to the federal unilateral amendment procedure in s 44—or so the government thought. In 2014, the Supreme Court weighed in on these and other possible reforms.

Reference re Senate Reform

2014 SCC 32 (footnotes omitted)

THE COURT (McLachlin CJ and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ):

I. Introduction

[1] The Senate is one of Canada's foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation. Yet from its first sittings, voices have called for reform of the Senate and even, on occasion, for its outright abolition.

[2] The Government of Canada now asks this Court [by way of a reference] to answer essentially four questions: (1) Can Parliament unilaterally implement a framework for consultative elections for appointments to the Senate? (2) Can Parliament unilaterally set fixed terms for Senators? (3) Can Parliament unilaterally remove from the *Constitution Act, 1867* the requirement that Senators must own land worth $4,000 in the province for which they are appointed and have a net worth of at least $4,000? and (4) What degree of provincial consent is required to abolish the Senate?

[3] We conclude that Parliament cannot unilaterally achieve most of the proposed changes to the Senate, which require the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces. We further conclude that abolition of the Senate requires the consent of all of the provinces. Abolition of the Senate would fundamentally change Canada's constitutional structure, including its procedures for amending the Constitution, and can only be done with unanimous federal-provincial consensus.

• • •

III. The Senate

[13] It is appropriate to briefly introduce the institution at the heart of this Reference.

[14] The framers of the *Constitution Act, 1867* sought to adapt the British form of government to a new country, in order to have a "Constitution similar in Principle to that of the United Kingdom": preamble. They wanted to preserve the British structure of a lower legislative chamber composed of elected representatives, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state.

[15] The upper legislative chamber ... was modeled on the British House of Lords, but adapted to Canadian realities. As in the United Kingdom, it was intended to provide "sober second thought" on the legislation adopted by the popular representatives in the House of Commons ... . However, it played the additional role of providing a distinct form of representation for the regions that had joined Confederation and ceded a significant portion of their legislative powers to the new federal Parliament ... . While representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of population. This was intended to assure the regions that their voices would continue to be heard in the legislative process even though they might become minorities within the overall population of Canada ... .

[16] Over time, the Senate also came to represent ... ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process ... .

[17] Although the product of consensus, the Senate rapidly attracted criticism and reform proposals. Some felt that it failed to provide "sober second thought" and reflected the same partisan spirit as the House of Commons. Others criticized it for failing to provide meaningful representation of the interests of the provinces as originally intended, and contended that it lacked democratic legitimacy.

[18] In the years immediately preceding patriation of the Constitution, proposals for reform focused mainly on three aspects: (i) modifying the distribution of seats in the Senate; (ii) circumscribing the powers of the Senate; and (iii) changing the way in which Senators are selected for appointment. These proposals assumed the continued existence of an upper chamber, but sought to improve its contribution to the legislative process.

[19] In 1978, the federal government tabled a bill to ... [readjust] the distribution of seats between the regions; remov[e] the Senate's absolute veto over most legislation and replac[e] it with an ability to delay the adoption of legislation; and giv[e] the House of Commons and the provincial legislatures the power to select Senators: *Constitutional Amendment Act, 1978* (Bill C-60), June 20, 1978, cls. 62 to 70. The bill was not adopted and, in 1980, this Court concluded that Parliament did not have the power under the Constitution as it then stood to unilaterally modify the fundamental features of the Senate or to abolish it: *Reference re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 ("*Upper House Reference*").

[20] ... The question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution. ...

IV. The Part V Amending Procedures

[21] The statute that created the Senate—the *Constitution Act, 1867*—forms part of the Constitution of Canada and can only be amended in accordance with the Constitution's procedures for amendment: s. 52(2) and (3), *Constitution Act, 1982*. Consequently, we must determine whether the changes contemplated in the Reference amend the Constitution and, if so, which amendment procedures are applicable.

[22] Before answering these questions, we discuss constitutional amendment in Canada generally. We examine in turn the nature and content of the Constitution of Canada, the concept of constitutional amendment, and the Constitution's procedures for amendment.

A. The Constitution of Canada

[23] The Constitution of Canada is "a comprehensive set of rules and principles" that provides "an exhaustive legal framework for our system of government": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference* "), at para. 32. It defines the powers of the constituent elements of Canada's system of government—the executive, the legislatures, and the courts—as well as the division of powers between the federal and provincial governments ... . And it governs the state's relationship with the individual. Governmental power cannot lawfully be exercised, unless it conforms to the Constitution ... .

[24] The Constitution of Canada is defined in s. 52(2) of the *Constitution Act, 1982* as follows:

> 52. ...
> (2) The Constitution of Canada includes
> (*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

The documents listed in the Schedule to the *Constitution Act, 1982* as forming part of the Constitution include the *Constitution Act, 1867*. Section 52 does not provide an exhaustive definition of the content of the Constitution of Canada: *Supreme Court Act Reference*, at paras. 97-100; *Secession Reference*, at para. 32.

[25] The Constitution implements a structure of government and must be understood by reference to "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning": *Secession Reference*, at para. 32; see generally H. Cyr, "L'absurdité du critère scriptural pour qualifier la constitution" (2012), 6 *J.P.P.L.* 293. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts ... . Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law ... .

[26] These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an "internal architecture," or "basic constitutional structure": *Secession Reference*, at para. 50 ... . The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole": *Secession Reference*, at para. 50 ... . In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.

B. Amendments to the Constitution of Canada

[27] The concept of an "amendment to the Constitution of Canada," within the meaning of Part V of the *Constitution Act, 1982*, is informed by the nature of the Constitution and its rules of interpretation. As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture.

C. The Part V Amending Procedures

[28] Part V of the *Constitution Act, 1982* provides the blueprint for how to amend the Constitution of Canada ... . It tells us what changes Parliament and the provincial legislatures can make unilaterally, what changes require substantial federal and provincial consent, and what changes require unanimous agreement.

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(2) The Amending Procedures

[32] Part V contains four categories of amending procedures. The first is the general amending procedure (s. 38, complemented by s. 42), which requires a substantial degree of consensus between Parliament and the provincial legislatures. The second is the unanimous consent procedure (s. 41), which applies to certain changes deemed fundamental by the framers of the *Constitution Act, 1982*. The third is the special arrangements procedure (s. 43), which applies to amendments in relation to provisions of the Constitution that apply to some, but not all, of the provinces. The

fourth is made up of the unilateral federal and provincial procedures, which allow unilateral amendment of aspects of government institutions that engage purely federal or provincial interests (ss. 44 and 45).

(a) The General Amending Procedure

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[34] The process set out in s. 38 is the general rule for amendments to the Constitution of Canada. It reflects the principle that substantial provincial consent must be obtained for constitutional change that engages provincial interests. Section 38 codifies what is colloquially referred to as the "7/50" procedure—amendments to the Constitution of Canada must be authorized by resolutions of the Senate, the House of Commons, and legislative assemblies of at least seven provinces whose population represents, in the aggregate, at least half of the current population of all the provinces. Additionally, it grants to the provinces the right to "opt out" of constitutional amendments that derogate from "the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province."

[35] By requiring significant provincial consensus while stopping short of unanimity, s. 38 "achieves a compromise between the demands of legitimacy and flexibility": J. Cameron, "To Amend the Process of Amendment," in G.-A. Beaudoin et al., *Federalism for the Future: Essential Reforms* (1998), 315, at p. 324. Its "underlying purpose ... is to protect the provinces from having their rights or privileges negatively affected without their consent": Monahan and Shaw, at p. 192.

[36] The s. 38 procedure represents the balance deemed appropriate by the framers of the *Constitution Act, 1982* for most constitutional amendments, apart from those contemplated in one of the other provisions in Part V. Section 38 is thus the procedure of general application for amendments to the Constitution of Canada. As a result, the other procedures in Part V should be construed as exceptions to the general rule.

[37] Section 42 complements s. 38 by expressly identifying certain categories of amendments to which the 7/50 procedure in s. 38(1) applies [here the Court quoted the section] ... .

[38] This provision serves two purposes. First, the express inclusion of certain matters in s. 42 provided the framers of the *Constitution Act, 1982* with greater certainty that the 7/50 procedure would apply to amendments in relation to those matters ... . Second, the provincial right to "opt out" from certain amendments contemplated in s. 38(2) to (4) does not apply to the categories of amendments in s. 42. This ensures that amendments made under s. 42 will apply consistently to all the provinces and allows the changes contemplated in the provision to be implemented in a coherent manner throughout Canada.

[39] Section 42(1)(*b*) of the *Constitution Act, 1982* expressly makes the general amendment procedure applicable to amendments in relation to "the powers of the Senate and the method of selecting Senators." We discuss below the meaning of this statutory language and its bearing on the questions before us.

(b) The Unanimous Consent Procedure

[40] Section 41 of the *Constitution Act, 1982* sets out an amending procedure requiring unanimous consent in relation to certain matters:

> 41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great

Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

[41] Section 41 requires the unanimous consent of the Senate, the House of Commons, and all the provincial legislative assemblies for the categories of amendments ... . It is an exception to the general amending procedure. It creates an exacting amending procedure that is designed to apply to certain fundamental changes to the Constitution of Canada. ...

(c) The Special Arrangements Procedure

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[43] Section 43 applies to amendments in relation to provisions of the Constitution of Canada that apply to some, but not all, of the provinces. The determination of its scope and of the effects of its interaction with other provisions of Part V presents significant conceptual difficulties ... . We will limit our remarks on s. 43 to what is necessary to answer the Reference questions before us.

[44] At the very least, s. 43 is triggered when a constitutional amendment relates to a provision of the Constitution of Canada that contains a "special arrangement" applicable only to one or several, but not all, of the provinces. In such cases, the use of the 7/50 procedure would overshoot the mark, by making adoption of the amendment contingent upon the consent of provinces to which the provision does not apply. Section 43 also serves to ensure that those provisions cannot be amended without the consent of the provinces for which the arrangement was devised: Monahan and Shaw, at p. 210.

(d) The Unilateral Federal and Provincial Procedures

[45] Sections 44 and 45 of the *Constitution Act, 1982* provide for unilateral federal and provincial procedures of amendment:

[44] Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

[45] Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

[46] These sections fulfill the same basic function as ss. 91(1) and 92(1) of the *Constitution Act, 1867*, which were repealed when the *Constitution Act, 1982* was enacted ... .

• • •

[48] ... [S]s. 44 and 45 give the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government. This limited ability to make changes unilaterally reflects the principle that Parliament and the provinces are equal stakeholders in the Canadian constitutional

design. Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution. This said, those institutions can be maintained and even changed to some extent under ss. 44 and 45, provided that their fundamental nature and role remain intact.

V. How Can the Senate Changes Contemplated in the Reference Be Achieved?

[The Court went on to conclude that the majority of the changes to the Senate contemplated in the Reference could only be achieved through amendments to the Constitution, with substantial federal–provincial consensus. The implementation of consultative elections and senatorial term limits was found to require the consent of the Senate, the House of Commons, and the legislative assemblies of at least seven provinces representing, in the aggregate, half the population of all the provinces (s 38 and s 42(1)(b), *Constitution Act, 1982*). A full repeal of the property qualifications was found to require the consent of the legislative assembly of Quebec (s 43, *Constitution Act, 1982*). As for Senate abolition, it was found to require the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces (s 41(e), *Constitution Act, 1982*). Select portions from the reasoning on these issues have been included below.]

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A. Consultative Elections

[50] [Section 24] of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General ... . In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada ... .

[51] The Attorney General of Canada (supported by the attorneys general of Saskatchewan and Alberta as well as one of the *amici curiae*) submits that implementing consultative elections for Senators does not constitute an amendment to the *Constitution of Canada*. He argues that this reform would not change the text of the *Constitution Act, 1867*, nor the means of selecting Senators. He points out that the formal mechanism for appointing Senators—summons by the Governor General acting on the advice of the Prime Minister—would remain untouched. Alternatively, he submits that if introducing consultative elections constitutes an amendment to the Constitution, then it can be achieved unilaterally by Parliament under s. 44 of the *Constitution Act, 1982*.

[52] In our view, the argument that introducing consultative elections does not constitute an amendment to the Constitution privileges form over substance. It reduces the notion of constitutional amendment to a matter of whether or not the letter of the constitutional text is modified. This narrow approach is inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted, as discussed above. While the provisions regarding the appointment of Senators would remain textually untouched, the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered.

[53] We conclude that each of the proposed consultative elections would constitute an amendment to the Constitution of Canada and require substantial provincial consent under the general amending procedure, without the provincial right to "opt out" of the amendment (s. 42). ...

(1) Consultative Elections Would Fundamentally Alter the Architecture of the Constitution

[54] The implementation of consultative elections would amend the Constitution of Canada by fundamentally altering its architecture. It would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought.

[55] The *Constitution Act, 1867* contemplates a specific structure for the federal Parliament, "similar in Principle to that of the United Kingdom": preamble. The Act creates both a lower *elected* and an upper *appointed* legislative chamber: s. 17. It expressly provides that the members of the lower chamber—the House of Commons—"shall be elected" by the population of the various provinces: s. 37. By contrast, it provides that Senators shall be "summoned" (i.e. appointed) by the Governor General: ss. 24 and 32.

[56] The contrast between election for members of the House of Commons and executive appointment for Senators is not an accident of history. The framers of the *Constitution Act, 1867* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of "sober second thought."

[57] As this Court wrote in the *Upper House Reference*, "[i]n creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could *canvass dispassionately the measures of the House of Commons* ": p. 77 (emphasis added). The framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives.

[58] Correlatively, the choice of executive appointment for Senators was also intended to ensure that the Senate would be a complementary legislative body, rather than a perennial rival of the House of Commons in the legislative process. Appointed Senators would not have a popular mandate—they would not have the expectations and legitimacy that stem from popular election. This would ensure that they would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons. ...

• • •

[60] The proposed consultative elections would fundamentally modify the constitutional architecture we have just described and, by extension, would constitute an amendment to the Constitution. They would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.

[61] Federal legislation providing for the consultative election of Senators would have the practical effect of subjecting Senators to the political pressures of the electoral process and of endowing them with a popular mandate. Senators selected from among the listed nominees would become popular representatives. ...

[62] The Attorney General of Canada counters that this broad structural change would not occur because the Prime Minister would retain the ability to ignore the results of the consultative elections[.] ... [T]he purpose of [Bills C-20 and C-7] is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections ... . A legal analysis of the constitutional nature and effects of proposed legislation cannot be premised on the assumption that the legislation will fail to bring about the changes it seeks to achieve.

[63] In summary, the consultative election proposals set out in the Reference questions would amend the Constitution of Canada by changing the Senate's role within our constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy.

[The Court went on to add that s 42 expressly made the general amending procedure applicable to a change of this nature and that the proposed change was beyond the scope of the unilateral federal amending procedure in s 44 both because it was covered by s 42 and because it involved a change to the Senate's fundamental nature and role.]

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B. Senatorial Tenure

[71] It is not disputed that a change in the duration of senatorial terms would amend the Constitution of Canada, by requiring a modification to the text of s. 29 of the *Constitution Act, 1867* ... [which provides that a Senator who is summoned to the Senate shall hold his place in the Senate until he attains the age of 75 years]. The question before us is which Part V procedure applies to amend this provision.

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[73] In essence, the Attorney General of Canada proposes a narrow textual approach to this issue. Section 44 of the *Constitution Act, 1982* provides: "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to ... the Senate ... ." Neither s. 41 nor s. 42 expressly applies to amendments in relation to senatorial tenure. It follows, in his view, that the proposed changes to senatorial tenure are captured by the otherwise unlimited power in s. 44 to make amendments in relation to the Senate.

[74] We agree that the language of s. 42 does not encompass changes to the duration of senatorial terms. However, it does not follow that all changes to the Senate that fall outside of s. 42 come within the scope of the unilateral federal amending procedure in s. 44 ... .

[75] We are unable to agree with the Attorney General of Canada's interpretation of the scope of s. 44. ... The history, language, and structure of Part V indicate that s. 38, rather than s. 44, is the general procedure for constitutional amendment. Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under the general amending procedure. Section 44, as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role.

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[78] The question is thus whether the imposition of fixed terms for Senators engages the interests of the provinces by changing the fundamental nature or role of the Senate. ... In our view, this question must be answered in the affirmative.

[79] As discussed above, the Senate's fundamental nature and role is that of a complementary legislative body of sober second thought. The current duration of senatorial terms is directly linked to this conception of the Senate. ...

[80] The imposition of fixed senatorial terms is a significant change to senatorial tenure. We are not persuaded ... that the fixed terms contemplated in the Reference are a minor change because they are equivalent in duration to the average term historically served by Senators. ... Fixed terms provide a weaker security of tenure. They imply a finite time in office and necessarily offer a lesser degree of protection

from the potential consequences of freely speaking one's mind on the legislative proposals of the House of Commons.

[81] It may be possible, as the Attorney General of Canada suggests, to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure. ...

[82] ... The imposition of fixed terms, even lengthy ones, constitutes a change that engages the interests of the provinces as stakeholders in Canada's constitutional design and falls within the rule of general application for constitutional change—the 7/50 procedure in s. 38.

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C. Property Qualifications

[The Court found that the removal of the net worth requirements would not alter the fundamental nature of the Senate and was exactly the kind of amendment intended to be covered by the unilateral federal amendment power in s 44].

• • •

[91] Similarly, the removal of the real property requirement (s. 23(3), *Constitution Act, 1867*) would not alter the fundamental nature and role of the Senate. However, the removal of the real property requirement for Quebec's Senators would constitute an amendment in relation to a special arrangement [for senators from that province]. It would thus attract the special arrangements procedure and require the consent of Quebec's National Assembly (s. 43, *Constitution Act, 1982*).

• • •

VI. Senate Abolition: How Can It Be Achieved?

[95] Finally, the Reference asks which of two possible procedures applies to abolition of the Senate: the general amending procedure or the unanimous consent procedure?

[96] The Attorney General of Canada argues that the general amending procedure applies because abolition of the Senate falls under matters which Part V expressly says attract that procedure—amendments in relation to "the powers of the Senate" and "the number of members by which a province is entitled to be represented in the Senate" (s. 42(1)(*b*) and (*c*)). Abolition, it is argued, is simply a matter of "powers" and "members": it literally takes away all of the Senate's powers and all of its members. Alternatively, the Attorney General of Canada argues that since abolition of the Senate is not expressly mentioned anywhere in Part V, it falls residually under the general amending procedure.

[97] We cannot accept the Attorney General's arguments. Abolition of the Senate is not merely a matter of "powers" or "members" under s. 42(1)(*b*) and (*c*) of the *Constitution Act, 1982*. Rather, abolition of the Senate would fundamentally alter our constitutional architecture—by removing the bicameral form of government that gives shape to the *Constitution Act, 1867*—and would amend Part V, which requires the unanimous consent of Parliament and the provinces (s. 41(*e*), *Constitution Act, 1982*).

A. Abolishing the Senate Does Not Fall Within Section 42(1)(b) and (c)

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[102] To interpret s. 42 as embracing Senate abolition would depart from the ordinary meaning of its language and is not supported by the historical record. The

mention of amendments in relation to the powers of the Senate and the number of Senators for each province presupposes the continuing existence of a Senate and makes no room for an indirect abolition of the Senate. Within the scope of s. 42, it is possible to make significant changes to the powers of the Senate and the number of Senators. But it is outside the scope of s. 42 to altogether strip the Senate of its powers and reduce the number of Senators to zero.

B. Abolishing the Senate Would Alter the Part V Amending Formula

[103] The Attorney General of Canada argues that Senate abolition can be accomplished without amending Part V and that it therefore does not fall within the scope of s. 41(*e*), which requires unanimous federal–provincial consent for amendments to Part V. He argues that the Senate can be abolished without textually modifying the provisions of Part V. The references to the Senate in Part V would simply be viewed as "spent" and as devoid of legal effect.

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[106] We disagree with these submissions. Once more, the Attorney General privileges form over substance. Part V is replete with references to the Senate and gives the Senate a role in all of the amending procedures, except for the unilateral provincial procedure ... . Part V was drafted on the assumption that the federal Parliament would remain bicameral in nature, i.e. that there would continue to be both a lower legislative chamber and a complementary upper chamber. Removal of the upper chamber from our Constitution would alter the structure and functioning of Part V. Consequently, it requires the unanimous consent of Parliament and of all the provinces (s. 41(*e*)).

[107] ... [T]he notion of an amendment to the Constitution of Canada is not limited to textual modifications—it also embraces significant structural modifications of the Constitution. The abolition of the upper chamber would entail a significant structural modification of Part V. Amendments to the Constitution of Canada are subject to review by the Senate. The Senate can veto amendments brought under s. 44 and can delay the adoption of amendments made pursuant to ss. 38, 41, 42, and 43 by up to 180 days: s. 47, *Constitution Act, 1982*. The elimination of bicameralism would render this mechanism of review inoperative and effectively change the dynamics of the constitutional amendment process. The constitutional structure of Part V as a whole would be fundamentally altered.

NOTES AND QUESTIONS

1. *The motivations for the Reference.* It is worth asking why this matter was referred to the Supreme Court to begin with. Adam Dodek has considered the possibilities and concluded that the choice was both reactive and proactive:

> For over a year and a half Bill C-7 was stalled in the House of Commons, reportedly due to internal opposition within the Conservative caucus. And this came after Senate reform legislation was shifted from the Senate to the House due to opposition within the Conservative Senatorial ranks. However, the Harper Government could not simply abandon its commitment to Senate reform without significant political cost, as the Prime Minister had personally invested much political capital in the issue. Abandoning Senate reform would have injured Mr. Harper as a leader and would have hurt the image of [the] Conservative Party with its followers who actively, and often fervently, supported Senate reform. ... Mr. Harper was forced to demonstrate some action, and referring his legislation to the Supreme Court for a

ruling both demonstrated action and bought him some time while the matter was under consideration by the Supreme Court.

• • •

In November 2013, Prime Minister Harper gave a speech to Conservative Party members in which he blamed "the courts" for standing in the way of Senate reform, presumably referring to the ruling of the Québec Court of Appeal against the government's unilateral Senate reform proposals, but also presaging the Supreme Court of Canada's hearing of the Senate Reform Reference later that same month. ... On the day that the Supreme Court issued its "advisory opinion," the Prime Minister "shut the door" on his "career pledge to reform the Senate" and blamed the Supreme Court for stranding Canadians with a scandal-plagued Senate. ...

Whether the Prime Minister expected to "lose" the reference or not, the case was a political win–win for the Harper Government. If the Supreme Court ruled in his favour, the Prime Minister could proceed unilaterally with enacting Bill C-7. In the face of a green light from Supreme Court and pressure from the Senate scandal, it is hard to imagine that internal caucus opposition would have been sufficient to overcome the Prime Minister's will to implement his reforms to the Senate. If the Supreme Court ruled against him, as it did, then the Prime Minister would be able to claim—as he did—that he had tried but that the Supreme Court had thwarted his attempts at Senate reform. The Senate Reform Reference thus presented an opportunity for the Harper Government to both obtain political sanction and deflect political blame for desired policy choices.

A critical factor in explaining the timing of the Harper Government's decision to bring the reference is ... the proactive strike. ... On May 2, 2012, the Québec government initiated a reference of its own to its Court of Appeal ... . [A] ruling on the constitutionality of Bill C-7 by the Supreme Court became inevitable because there is an automatic right of appeal from a provincial court of appeal reference to the Supreme Court of Canada. ... The decision of the Québec government forced the Harper Government's hand; it had to act. By initiating a reference to the Supreme Court of Canada, the Harper Government could frame the questions and have some control over the timing and the process. Thus the decision to bring the reference can be seen as both a reaction to the Government of Québec and as a proactive strike to get ahead of the Québec Court of Appeal decision and attempt to best defend the Harper Government's strategy of federal unilateralism.

See Adam Dodek, "The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism" (2015) 60 McGill LJ 623 at 653-56. The reference procedure has been discussed in Chapter 13, The Role of the Judiciary. Do the government's motivations for referring this matter of Senate reform to the Supreme Court give fodder to detractors of the reference procedure, who argue that the procedure politicizes the judiciary? Or are these motivations squarely within the type we expect to lead to a reference? This was not the first time the Court was asked to advise the government on Senate reform; the earlier occasion, referred to in the *Senate Reform Reference* was *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, 1979 CanLII 169 [*Upper House Reference*]. For further discussion of the use of references as political strategy, see Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) ch 9.

2. *The Court in constitutional reform.* One possible consequence of the *Senate Reform Reference* is that the Court may have assured itself a central role in future constitutional reforms. Although the Court has in the past invoked the idea that the Constitution has an "internal architecture," this time the Court relied on the idea of the Constitution's "architecture" to conclude that the proposed reforms to the Senate would not be possible without recourse to the multilateral amendment procedures in part V. But the Court did not explain precisely what that architecture entails in connection with the amending formula. There may have been good reasons for the Court not to give a full account of the Constitution's

architecture and which changes to it would require recourse to which particular amendment procedure. The Court has reserved to itself future room to identify and define the specificities of the Constitution's architecture, and in doing so it has all but ensured that it will be an integral player in any effort to amend the Constitution in a materially significant way, whether or not the amendment touches the Senate. Is this a positive development, in your view? Dennis Baker and Mark Jarvis have suggested that it may not be:

> At one time, the Court told Canadians that "constitutional conventions plus constitutional law equal the total constitution of the country"; now Canadians have learned to expect novel constitutional components to appear whenever they are necessary to determine the outcome of a particular constitutional controversy. If it is not in the text, perhaps it is in the architecture? By failing to restrict itself to constitutional *law*, the Court has expanded the potential effect of constitutional entrenchment. Whatever the "constitutional architecture" is, it appears to be beyond the reach of ordinary statutes.
>
> And given that "constitutional architecture" might bolster an argument that one must consider not only the form but also the substance of a reform, it becomes important for other political actors to know precisely what it entails. While we can read the constitutional text, we can only guess what the Court sees behind it. There is a certain irony in that, as the Court delves further into more informal and expansive interpretations in judgments across a variety of fields, it forces other political actors to undertake more formal and narrow amendments.
>
> This approach privileges the Court over other institutions in controlling the content of the Constitution.

See Dennis Baker & Mark Jarvis, "The End of Informal Constitutional Change in Canada?" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 185 at 200-1.

3. *Deliberation in democracy.* The proposal for consultative elections would have improved the democratic pedigree of the Senate insofar as its new members would have been elected by voters, assuming provinces and territories had adopted the plan. Yet, the Court concluded that the government could not enact this constitutional reform unilaterally using the amendment power in s 44. The Court's interpretation of part V therefore appears to be rooted in a commitment not to just any kind of democracy but to a particular vision of deliberative democracy. As Yasmin Dawood has argued, "[t]he Court's interpretation of the amending procedures is based on a fundamental democratic commitment to consultation and deliberation between and among the relevant stakeholders." She adds that, according to the Court's reasons in the *Senate Reform Reference*, "constitutional change cannot take place through unilateral decision making by Parliament even if the proposed reforms improve the democratic caliber of a given institution": see Yasmin Dawood, "The Senate Reference: Constitutional Change and Democracy" (2015) 60 McGill LJ 737 at 760. Should the Court have placed less emphasis on the procedure proposed by the government to reform the Senate in light of the likelihood that the Senate would have become more democratic? Why should process stand in the way of a favourable outcome?

4. *Reimagining the Senate's role.* If you could give the Senate a new role, what function or functions would you give to it? One proposal suggests

> assigning the Senate the task of reviewing the constitutionality of bills proposed by the House of Commons with the purpose of ameliorating the democratic deficit created by the institution of judicial review of legislation, and therefore contributing to the overall democratic legitimacy of the constitutional order.

In this role, the Senate "would be acting as a chamber of 'sober second thought,' not as to the desirability of the policies advanced in the relevant bills, but as to their consistency with the constitution": see Joel I Colón-Ríos & Allan C Hutchinson, "Constitutionalizing the Senate: A Modest Democratic Proposal" (2015) 60 McGill LJ 599 at 617-18. Although controversial,

there may be a lot to commend in this proposal. It gives the Senate a role that actually matters in improving Parliament's legislative output, by helping the House of Commons steer its bills clear of constitutional invalidity. There would, of course, be no guarantee of constitutional validity until the Supreme Court has addressed the matter, but the senatorial review of bills for constitutionality could help reassure the House that its bills were consistent with the Constitution. The proposal could also contribute to better use and management of judicial resources; presumably, the Senate's review could point the House of Commons' attention to problem areas in its bills and thereby perhaps reduce future claims of constitutional invalidity, which would, in turn, foster more efficient use of scarce judicial resources. That said, Parliament already employs legal counsel to help evaluate bills for constitutionality, and the government is advised by the Department of Justice on the constitutional validity of its bills. The proposal might therefore be duplicative, at least in part, of the roles of other actors in the legislative process. Do you think this proposal is a good idea?

5. *Senate reform after the Reference.* A new majority Liberal government elected in October 2015 undertook an important reform to the method of selecting persons for eventual appointment to the Senate. The new method involved two stages. In the first stage, introduced in early 2016, a new Independent Advisory Board for Senate Appointments was convened to give advice to the prime minister to fill vacancies in the Senate. The first batch of individuals selected through this new method was appointed in March 2016. The second stage of the new method of senatorial selection began in July 2016. In this new phase—intended by the government to be permanent—individual Canadians can apply to be considered by the advisory board, which will in turn choose from among those applicants to make recommendations to the prime minister for Senate vacancies. The purpose of these reforms was to create an independent appointments process that would, according to the new government, lessen the partisanship and improve the effectiveness of the Senate. The effect of these reforms has been to avoid the familiar and indissoluble problems that have felled prior large-scale efforts at constitutional reform across many Canadian public institutions. This incremental approach is also non-constitutional in the sense that it is said by the government not to require a constitutional amendment. Do you think this new method of senatorial selection is a good idea? Do you believe it can be adopted—it is already in use—without a constitutional amendment? For a defence and explanation of an early version of this new method of selecting senators, see Stephane Dion, "Time for Boldness on Senate Reform, Time for the Trudeau Plan" (2015) 24 Const Forum Const 61. For a deep dive into Senate reform, with the appropriate distance of time since the Senate Reform Reference, see Emmett Macfarlane, *Constitutional Pariah* (Vancouver: UBC Press, 2021).

6. *The Senate and reconciliation.* As you contemplate the possibility of Senate reform, it is worth wondering whether the Senate, despite its shortcomings, can be a site of reconciliation. One scholar makes just this point:

> The under-representation of Indigenous people and Nations in the Senate (and Canada's other central political institutions) is an important challenge that must be tackled if the Senate is to become an institution for reconciliation. It is interesting to note that the Senate has historically been much better than the House of Commons in representation for Aboriginal people … and that trend has continued in the contemporary period. Approximately 11.6% of the current senators identify as Aboriginal, and historically about 2.5% of all senators since Confederation have been Aboriginal people. In comparison, 3.1% of the members of the most recent (42nd) Parliament were Aboriginal people, and only approximately 1% of all members historically have identified as Aboriginal. This difference is likely due to the prime minister's discretion in the appointment process for the Senate, which has been recognized as a better tool than elections for increasing minority representation in political institutions.
>
> Why is the direct representation of Indigenous people important for reconciliation? Some would critique this notion as being essentialist and would argue that representation of

Indigenous people (or any other minority population) does not guarantee fairer or more just policy-making in relation to members of that population. I share the view of Melissa Williams (2005, 26), who argues that "fair political representation of marginalised groups requires the legislative presence of those groups." "Sharing the River: Aboriginal Representation in Canadian Political Institutions" in Robert C Thomsen and Nanette L Hale, eds, *Canadian Environments: Essays in Culture, Politics and History* (Brussels: Peter Lang, 2005) 25 at 26.

Both Indigenous and non-Indigenous scholars see the potential for a critical role for Indigenous people in Canada's political institutions like legislatures and the Senate. Williams's argument relies on two fundamental concepts in social justice: voice and trust.

The concept of trust relates to the fact that Indigenous people have little reason to trust that a majority settler political institution would act in the best interests of Indigenous Peoples or, relating to the concept of voice, even know what those interests might be. The issue of broken trust is a recurring theme in Canada's and the Crown's relationship with Indigenous Peoples, stretching from the early days of treaty-making. ...

For the Senate to truly be an institution of reconciliation, ... seats need to be reserved for members of Indigenous Nations. This goes beyond simply increasing the number of Indigenous people in the Senate. ... These types of reforms do not effectively challenge the dominant institutional culture. Instead, reserved seats as a mechanism for reconciliation ensures that Indigenous people are able to represent the interests of Indigenous Nations in the Senate in a treaty federalism relationship. As Richard Simeon argues, "To maintain unity in territorially divided societies, 'building out' through devolution and decentralization needs to be accompanied by 'building in,' ensuring that regional minorities have an effective voice and presence at the center." See "Constitutional Design and Change in Federal Systems: Issues and Questions" (2009) 39 *Publius* 241 at 247-48. Applying this concept to Indigenous Peoples and their place in Canada suggests that moving toward a more decentralized model of Indigenous-state relationship based in reconciliation and treaty federalism requires a concurrent move to "build in" Indigenous Peoples to Canada's central institutions, including the Senate. This move would have the additional positive benefit recognized by Williams (*supra* at 49), who aptly states, "Symbolically, separate representation for Aboriginal peoples within the Senate would represent Aboriginal peoples as a distinct partner in Canadian confederation." ... The UNDRIP affirms that Indigenous Peoples have the right to participate in central state institutions if they choose to do so (United Nations 2007). The creation of reserved seats would give Indigenous Peoples a similar institutional status to the provinces and territories, which would aid in the recognition of their coexisting sovereignties in the relationship of treaty federalism.

The distribution of seats is likely one of the more contentious questions in regard to reserved representation for Indigenous people in the Senate. The provinces and territories guard their number of seats in the Senate very closely, so removing seats from one or more of the provinces and territories to accommodate reserved Indigenous representation would likely be out of the question. A longstanding convention has been in place since 1873 that "no province or region has lost Senators as a result of other entries to Confederation" so it makes sense that this convention would have to be followed in constituting Indigenous Nations as another partner in Confederation. ... The clear path forward is adding seats to achieve the goal of reserved representation, as recommended in the Charlottetown Accord. The question then becomes, how many seats? ... It makes sense that the minimum number of seats must be four—one for First Nations, one for the Inuit, one for the Métis Nation, and one for off-reserve, non-treaty, and non-Status Indigenous people, as represented by the four national Indigenous organizations. ...

... One option for reserved Indigenous representation would be to treat Indigenous Peoples as the equivalent of a new province and award them six seats [as was done for the provinces admitted to Confederation after 1867]. ...

A more radical option would be to consider Indigenous Peoples as a separate entity deserving of its own allotment of seats equivalent to a region, so 24 seats in total. Those 24

> seats could be subdivided evenly, allowing each Indigenous group to have 6 seats equivalent to province within the "region." This would arguably be the best fit with a framework of reconciliation and treaty federalism, as it recognizes both the diversity of Indigenous Peoples and their individual contributions as founding partners in Confederation.
>
> Should neither of these options prove persuasive, yet another option is to allot seats based on population. ... While seats in the Senate have not historically been allotted based strictly on population, this option might be a path toward compromise with those who are concerned about the threat to conventional understandings of federalism or undermining of the power of the provinces, as it can be justified based on population.
>
> This section has provided four different options for moving forward. The 24-seat solution outlined above would arguably be the allotment that best reflects a vision of treaty federalism, which I see as the best analytical framework for moving toward a new relationship between the Canadian state and Indigenous Peoples. Nevertheless, the final number ... would have to be determined through dialogue ... as recommended in the Charlottetown Accord. While reaching consensus will likely be difficult, having this dialogue is a fundamental part of moving toward a relationship of reconciliation.

See Susan M Manning, "The Canadian Senate: An Institution of Reconciliation?" (2020) 54 J Can Stud 1 at 10-14.

E. THE STATUS OF THE SUPREME COURT

In this section, we return to the Supreme Court of Canada, a subject discussed in a number of chapters.

The importance of the Supreme Court in Canada's constitutional order was confirmed by part V of the *Constitution Act, 1982*. You will recall (see Section IV.C above) that part V creates five procedures to amend the Constitution, and two require a larger aggregation of majorities than the others. Different features of the Court are entrenched under each of these two amendment procedures: first, any amendment to the "composition of the Supreme Court of Canada" requires the use of the unanimity procedure in s 41(d); and second, any other change to the Supreme Court of Canada not related to its "composition" but that nonetheless amounts to an amendment to the Constitution of Canada requires the use of the general amending formula in s 38, as stated in s 42(d).

Patriation left open a question about the status of the Supreme Court: was the *Supreme Court Act*, RSC 1985, c S-26, which established the Court, considered part of the Constitution of Canada? Section 52(2) of the *Constitution Act, 1982* tells us that "the Constitution of Canada includes ... the Acts and orders referred to in the schedule" appended to the Act. The *Supreme Court Act* is not listed. What are we to make of this? On one reading, this is an insignificant omission because s 52(2), by using the term "includes," is not exhaustive. On another reading, however, the omission of such an important Act could not have been without reason—but what is it? Still another reading is that it would have been redundant to list the Act since part V already protected the Supreme Court's composition and other constitutional features.

The question is far from an academic one. On the contrary, it has real consequences. If the Constitution of Canada does not "include" the *Supreme Court Act*, then Parliament can freely use its legislative authority under s 101 to make amendments to it. But if the Constitution of Canada does "include" it, then Parliament's powers require some clarification. This was the subject of controversy in the *Supreme Court Act Reference*, also known as the *Nadon Reference*, discussed in Chapter 13.

Reference re Supreme Court Act, ss 5 and 6

2014 SCC 21 (most footnotes omitted; some integrated into text)

[In October 2013, Justice Nadon of the Federal Court of Appeal was appointed to the Supreme Court of Canada pursuant to s 6 of the *Supreme Court Act*. Section 6 stipulates that three of the nine judges of the Supreme Court should be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province."

Justice Nadon was not at that time a member of the *barreau du Québec*, although he had previously been a member for more than ten years. A lawyer filed suit in Federal Court to have the appointment vacated on the basis that it was not authorized under s 6 of the *Supreme Court Act*. Parliament then amended the Act to provide, via declaratory provisions, that for the purpose of s 6 of the Act, an appointee to the Supreme Court was from among the advocates of the province of Quebec if, *at any time*, they were an advocate of at least ten years' standing at the bar of that province. The governor in council then referred two questions to the Supreme Court. The first question asked whether a person who was, at any time, an advocate of at least ten years' standing at the *barreau du Québec* qualified for appointment under s 6 of the Act as being "from among the advocates of that Province." The second question asked whether Parliament could enact legislation to make such a person eligible for appointment in the event that they did not qualify under the statute in its unamended form.

By a majority of six to one, the Supreme Court answered both questions in the negative. The portion of the judgement dealing with question one has been reproduced in Chapter 13. Here we include excerpts from the Court's reasons on question two.]

McLACHLIN CJ and LeBEL, ABELLA, CROMWELL, KARAKATSANIS, and WAGNER JJ:

V. Question 2

A. The Issue

(2) Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2* [which were subsequently enacted as ss 5.1 and 6.1 of the *Supreme Court Act*]?

[72] In light of our conclusion that appointments to the Court under s. 6 require current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Quebec, in addition to the criteria set out in s. 5, it is necessary to consider the second question, which is whether Parliament can enact declaratory legislation that would alter the composition of the Supreme Court of Canada.

[73] The Attorney General of Canada argues that the eligibility requirements for appointments under s. 6 have not been entrenched in the Constitution, and that Parliament retains the plenary power under s. 101 of the *Constitution Act, 1867* to unilaterally amend the eligibility criteria under ss. 5 and 6.

[74] We disagree [with the Attorney General of Canada on this point]. Parliament cannot unilaterally change the composition of the Supreme Court of Canada. Essential features of the Court are constitutionally protected under Part V of the *Constitution Act, 1982*. Changes to the composition of the Court can only be made under the procedure provided for in s. 41 of the *Constitution Act, 1982* and therefore require

the unanimous consent of Parliament and the provincial legislatures. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42 of the *Constitution Act, 1982*, which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.

[The majority quoted s 41(d) and s 42(1)(d) of part V.]

[75] We will first discuss the history of how the Court became constitutionally protected, and then answer the Attorney General of Canada's arguments on this issue. Finally, we will discuss the effect of the declaratory provisions enacted by Parliament.

B. Evolution of the Constitutional Status of the Supreme Court

• • •

(1) The Supreme Court's Evolution Prior to Patriation

[77] At Confederation, there was no Supreme Court of Canada. Nor were the details of what would eventually become the Supreme Court expounded in the *Constitution Act, 1867*. It was assumed that the ultimate judicial authority for Canada would continue to be the Judicial Committee of the Privy Council in London. ...

[78] The *Constitution Act, 1867*, however, gave Parliament the authority to establish a general court of appeal for Canada [under s 101] ... .

[79] ... Sir John A. Macdonald, who was Canada's Prime Minister and Minister of Justice from 1867 to 1873 ... introduced bills for the establishment of the Supreme Court in 1869 and again in 1870 in the House of Commons. Both bills, which did not reserve any seats on the Court for Quebec jurists, faced staunch opposition from Quebec in Parliament. ...

• • •

[81] The bill that finally became the *Supreme Court Act* was introduced in 1875 by the federal Minister of Justice ... . The new Supreme Court had general appellate jurisdiction over civil, criminal, and constitutional cases. In addition, the Court was given an exceptional original jurisdiction not incompatible with its appellate jurisdiction, for instance to consider references from the Governor in Council ... .

[82] Under the authority newly granted by the *Statute of Westminster, 1931*, Parliament abolished criminal appeals to the Privy Council in 1933 ... . Of even more historic significance, in 1949, it abolished *all* appeals to the Privy Council ... . This had a profound effect on the constitutional architecture of Canada. ...

[83] ... [It] meant that the Supreme Court of Canada inherited the role of the Council under the Canadian Constitution. As a result, the Court assumed the powers and jurisdiction "no less in scope than those formerly exercised in relation to Canada by the Judicial Committee" ... , including adjudicating disputes over federalism. The need for a final, independent judicial arbiter of disputes over federal–provincial jurisdiction is implicit in a federal system ... .

[84] In addition, the elevation in the Court's status empowered it to exercise a "unifying jurisdiction over the provincial courts" ... . The Supreme Court became the keystone to Canada's unified court system. It "acts as the exclusive ultimate appellate court in the country" ... .

[85] With the abolition of appeals to the Judicial Committee of the Privy Council, the continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces. The Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes, and became the final word on matters of public

law and provincial civil law. Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.

[86] The role of the Supreme Court of Canada was further enhanced as the 20th century unfolded. In 1975, Parliament amended the *Supreme Court Act* to end appeals as of right to the Court in civil cases (S.C. 1974-75-76, c. 18). This gave the Court control over its civil docket, and allowed it to focus on questions of public legal importance. As a result, the Court's "mandate became oriented less to error correction and more to development of the jurisprudence" ... .

[87] As a result of these developments, the Supreme Court emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize the Supreme Court's position within the architecture of the Constitution.

(2) The Supreme Court and Patriation

[88] ... The *Constitution Act, 1982* enhanced the Court's role under the Constitution and confirmed its status as a constitutionally protected institution.

[89] Patriation of the Constitution [in 1982] was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the "supreme law of Canada" [here the Court cited the supremacy clause, s 52]. The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the "guardian of the constitution" ... . As such, the Supreme Court of Canada is a foundational premise of the Constitution. With the adoption of the *Constitution Act, 1982*, "the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" ... .

[90] Accordingly, the *Constitution Act, 1982* confirmed the constitutional protection of the essential features of the Supreme Court. Indeed, Part V of the *Constitution Act, 1982* expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures.

[91] Under s. 41(*d*), the unanimous consent of Parliament and all provincial legislatures is required for amendments to the Constitution relating to the "composition of the Supreme Court." The notion of "composition" refers to ss. 4(1), 5 and 6 of the *Supreme Court Act*, which codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. By implication, s. 41(*d*) also protects the continued existence of the Court, since abolition would altogether remove the Court's composition.

[92] The textual origin of Part V was the "April Accord" of 1981 (*Constitutional Accord: Canadian Patriation Plan* (1981)), to which eight provinces, including Quebec, were parties. The explanatory notes to this Accord confirm that the intention was to limit Parliament's unilateral authority to reform the Supreme Court. ... Pointedly, the explanatory note to s. 41(d) states: "This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Québec and are, therefore, trained in the civil law" ... . The intention of the provision was demonstrably to make it difficult to change the composition of

the Court, and to ensure that Quebec's representation was given special constitutional protection.

[93] ... Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. ... [This requirement precluded] the possibility that Quebec's seats on the Court could have been reduced or altogether removed without Quebec's agreement.

[94] Section 42(1)(*d*) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the *Supreme Court Act*. The express mention of the Supreme Court of Canada in s. 42(1)(*d*) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

[95] In summary, the Supreme Court gained constitutional status as a result of its evolution into the *final* general court of appeal for Canada, with jurisdiction to hear appeals concerning all the laws of Canada and the provinces, including the Constitution. This status was confirmed in the *Constitution Act, 1982*, which made modifications of the Court's composition and other essential features subject to stringent amending procedures.

C. The Arguments of the Attorney General of Canada

[96] The Attorney General of Canada argues (i) that the mention of the Supreme Court in the *Constitution Act, 1982* has no legal force, and (ii) that the failed attempts to entrench the eligibility requirements in the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992 demonstrate that Parliament and the provinces understood those requirements not to have been entrenched in 1982.

(1) The "Empty Vessels" Theory

[97] The Attorney General of Canada contends that the Supreme Court is not protected by Part V, because the *Supreme Court Act* is not enumerated in s. 52 of the *Constitution Act, 1982* as forming part of the Constitution of Canada. He essentially argues that the references to the "Supreme Court" in ss. 41(*d*) and 42(1)(*d*) are "empty vessels" to be filled only when the Court becomes *expressly* entrenched in the text of the Constitution ... . It follows from this, he argues, that Parliament retains the power to unilaterally make changes to the Court under s. 101 of the *Constitution Act, 1867* until such time as the Court is expressly entrenched.

[98] This contention is unsustainable. It would mean that the framers would have entrenched the Court's *exclusion* from constitutional protection ... . It would also mean that the provinces agreed to insulate this unilateral federal power from amendment except through the exacting procedures in Part V.

[99] Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot

have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the *Constitution Act, 1982*.

[100] ... By setting out in Part V how changes were to be made to the Supreme Court and its composition, the clear intention was to freeze the *status quo* in relation to the Court's constitutional role, pending future changes ... . This reflects the political and social consensus at the time that the Supreme Court was an essential part of Canada's constitutional architecture.

[101] It is true that at Confederation, Parliament was given the authority through s. 101 of the *Constitution Act, 1867* to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada." ... The unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken by the Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*. As a result, what s. 101 now requires is that Parliament maintain—and protect—the essence of what enables the Supreme Court to perform its current role.

(2) The Meech Lake Accord and the Charlottetown Accord

[102] The Attorney General of Canada argues that the Meech Lake Accord and the Charlottetown Accord would have expressly entrenched the qualifications for appointment to the Court in the Constitution, and that the failure to adopt these constitutional amendments means that the qualifications for appointment to the Court are not entrenched.

[103] We cannot accept this argument. As discussed above, the enactment of the *Constitution Act, 1982* protected the *status quo* regarding the Supreme Court. That expressly included the Court's composition, of which Quebec's representation on the Court is an integral part. The Meech Lake Accord and the Charlottetown Accord would have reformed the appointment process for the Court, and would have required that the Quebec judges on the Court be appointed from a list of candidates submitted by Quebec. These failed attempts at reform are evidence only of attempts at a broader reform of the selection process, but they shed no light on the issue of the Court's existing constitutional protection. The failure of the Meech Lake Accord and Charlottetown Accord simply means that the *status quo* regarding the Court's constitutional role remains intact.

D. The Effects of the Declaratory Provisions Enacted by Parliament

[104] Changes to the composition of the Supreme Court must comply with s. 41(*d*) of the *Constitution Act, 1982*. Sections 4(1), 5 and 6 of the *Supreme Court Act* codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. ...

[105] Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the *Constitution Act, 1982*. Any change to the eligibility requirements for appointment to the three Quebec positions on the Court codified in s. 6 therefore requires the unanimous consent of Parliament and the 10 provinces.

[106] Since s. 6.1 of the *Supreme Court Act* (cl. 472 of *Economic Action Plan 2013 Act, No. 2*) substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6, it seeks to bring about an amendment to the Constitution of Canada on a matter requiring unanimity of Parliament and

the provincial legislatures. The assertion that s. 6.1 is a declaratory provision does not alter its import. Section 6.1 is therefore *ultra vires* of Parliament acting alone. ...

[At the same time as it amended the *Supreme Court Act* to add s 6.1, Parliament had also amended the Act to confirm eligibility for appointment under s 5 on the basis of current or former standing at the bar for ten years. The majority concluded that this amendment was valid because it simply confirmed the status quo.]

NOTES AND QUESTIONS

1. *The process of constitutionalization.* How does a law become constitutional in nature, or constitutionalized? A law can become constitutionalized at the time a constitution is written—in this case, the authors of the constitution choose to exempt a law from the ordinary legislative process and instead make it amendable only by a special procedure, usually more difficult than that required to pass or amend an ordinary law. A law can also become constitutionalized over time as it acquires some special public salience. There is today increasing attention given to the phenomenon of a constitutional statute or a quasi-constitutional law. These are laws that were passed in the ordinary legislative process, but which have become politically entrenched in the sense that there is unlikely to be any political will to repeal them. In the United States, this is best reflected by the concept of a "superstatute": see William N Eskridge Jr & John Ferejohn, "Super-Statutes" (2001) 50 Duke LJ 1215. In the United Kingdom, Adam Perry and Farrah Ahmed have theorized the concept of a constitutional statute that is "quasi-entrenched": see Adam Perry & Farrah Ahmed, "The Quasi-Entrenchment of Constitutional Statutes" (2014) 73 Cambridge LJ 514. The *Supreme Court Act Reference* suggests another way that a law can become constitutional: by judicial interpretation. The Court explained that the "essential features of the Court" (at para 94), detailed in the *Supreme Court Act*, are now subject to the general amending formula. These essential features, the Court wrote, "include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence" (at para 94). What about Parliament's historical power under s 101? The Court explained that "Parliament undoubtedly has the authority under s. 101 to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court" (at para 101). Are you persuaded by how the Court arrived at its conclusion that the Constitution of Canada does indeed "include" those parts of the *Supreme Court Act* that reflect the Court's "essential features"?

2. *The Court as historian.* The Court's reasons in the Reference rely on its reading of its own historical evolution from Confederation to Patriation. There are questions, however, about whether the Court's reading of evolution is complete; it may be that a selective account of history was written to reinforce the conclusion that the Court sought to reach. The following account invites us to dig deeper into the Court's reading of history:

> This reading of the historical record is reasonably convincing, but it does seem rather convenient ... in portraying the Court's inevitable trajectory towards the apex of Canada's constitutional structure. For instance, abolition of appeals to the Privy Council can be seen as yet another one of Canada's slow, halting steps along the path towards independence—perhaps a halfway marker between the *Statute of Westminster, 1931* and patriation—rather than a positive affirmation of the role of a cherished national institution ... Canadian independence required the termination of appeals to the Privy Council, but "a realistic appraisal of the quality and stature of the Supreme Court [in the 1920s] demanded a delay." In 1947, when the way had been cleared for abolition, the "government continued to hesitate, a good indication that public opinion was still ambivalent." The Supreme Court's metamorphosis into a

"keystone" could be read as emerging due to historical happenstance rather than popular or political acclaim.

There are several interesting omissions from the Court's account of its journey. I discuss these in ascending order of importance. First, the Court gave little weight to the understanding of the actors in post-patriation constitutional reform efforts. For example, the drafters of the Meech Lake Accord proposed to add new sections to the *Constitution Act, 1867* in order to formally entrench the Court. In this process, unanimity was required for anything touching the composition of the Court while the general amending formula applied to all other changes. Though not conclusive, this historical precedent lends itself to the argument that the Court was not immediately entrenched in 1982. More could have been done to address the argument.

Second, although the abolition of automatic civil appeals has generally been seen as a significant event in the Court's evolution, it remains the case that there are criminal appeals as of right. Accordingly, the Court's control over its own docket is not absolute, and its freedom to focus on matters of fundamental legal importance not unfettered. Third, it is notable that the Court does not mention its controversial, patriation-enabling decision in the *Reference Re Resolution to amend the Constitution (Patriation Reference*). [See the discussion of the Reference above.] ... Its own decision [there] paved the way for the very patriation process that "enhanced the Court's role under the Constitution and confirmed its status as a constitutionally protected institution."

Fourth, there is no discussion of the clauses in the *Canadian Charter of Rights and Freedoms* (*Charter*)—which was entrenched by the adoption of the *Constitution Act, 1982*—that allow for the limitation of some protected rights. Notably, the notwithstanding clause contained in section 33 permits Parliament or a provincial legislature to expressly declare that legislation "shall operate notwithstanding" certain provisions of the Charter. The presence of this power has not prevented the emergence of a "highly juridical orientation to constitutionalism" ... .

Here, the Court's *own* adoption of a proportionality test that gave it the authority to determine whether limits on *Charter* rights can be justified, and its own retention of the final word as to the compatibility of legislative modifications with judicial decisions, solidified its position at the apex of Canada's constitutional order. My point is not that the Court's ultimate conclusion was wrong, but that it relied on a supporting narrative that was somewhat selective. A fuller, more critical account highlights just how historically contingent the Court's ascent was and how the Court itself paved part of the way.

See Paul Daly, "A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41 Queen's LJ 1 at 9-14 (footnotes omitted).

3. *The Court's "essential features."* The Reference made clear that the Court's "essential features" are constitutionally protected under part V, either under the unanimity procedure or the general amending formula. What was made much less clear, however, is the identity and scope of those essential features. We know from the Reference that they include the Court's composition and independence, as well as its jurisdiction as the final court of appeal. But, as one scholar observes, "we still do not have an exhaustive list of the Court's 'essential' features, leaving considerable uncertainty as to what future reforms will or will not require constitutional amendment." As a result, "considering Canada's difficulty in achieving reform via constitutional amendment, in practice the Supreme Court might end up unpacking its own composition and 'essential features' on a case-by-case basis": see Erin Crandall, "DIY 101: The Constitutional Entrenchment of the Supreme Court" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 211 at 222-23. The choice to refrain from giving an exhaustive list of its own essential features could have been made by the Court for strategic reasons of self-preservation and also to reassert its authority as the ultimate interpreter of the Constitution of Canada. In this way, the Court's reasons in

the Reference would have the effect of entrenching the Court against future changes without the Court first agreeing to them. Setting aside the constitutional politics of the Reference, should the Court, in the interest of the clarity of our constitutional law, have delineated its essential features?

VI. COMPARATIVE AND THEORETICAL PERSPECTIVES ON CONSTITUTIONAL AMENDMENT

A. THE WORLD'S MOST RIGID CONSTITUTION?

We know from the recent failures of comprehensive constitutional amendment in the Meech Lake and Charlottetown accords that the Constitution of Canada can sometimes be extraordinarily difficult to amend.

What makes the Constitution so hard to amend is not only the difficulty of assembling the necessary approvals from the majorities required by the general amending formula in s 38 and the unanimity procedure in s 41. (With one exception, neither procedure has been successfully used: see Section IV.C, above.) It is that the requirements for constitutional amendment go beyond those found in part V. As discussed above (see Section V.B.1), the 1996 Regional Veto Act requires the consent of a majority of provinces—including British Columbia, Ontario, Quebec, and at least two each from the Atlantic and Prairie provinces, representing at least half of the regional population—before an amendment using the general amending formula in s 38 is even proposed.

There are also laws—for example, in Alberta and British Columbia—mandating a binding provincial referendum before the legislative assembly votes on a major amendment requiring provincial approval: see *Constitutional Referendum Act*, RSA 2000, c C-25, ss 2(1), 4; *Constitutional Amendment Approval Act*, RSBC 1996, c 67, s 1; *Referendum Act*, RSBC 1996, c 400, s 4. Similar laws have been passed across the country authorizing (but not requiring) binding or advisory referenda before the legislative assembly votes on an amendment. These provincial laws drive home a point made by Carissima Mathen that

> both the general and unanimity formulas render the prospect of change vulnerable to idiosyncratic regional demands. In particular, the prospect that a single province could block an otherwise deeply popular change is open to criticism on the grounds of unfairness and, even, imperilling national unity.

See Carissima Mathen, "The Federal Principle: Constitutional Amendment and Intergovernmental Relations" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 65 at 75.

And, as we have discussed above (see Section IV.D) in connection with the Charlottetown Accord, some scholars have suggested that there now exists a constitutional convention requiring a national referendum before a major constitutional amendment is completed. What therefore makes the Constitution so difficult to amend is not only part V itself, but the legal and political infrastructure that has developed around it: see Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53 Alta L Rev 85 at 96-105.

How difficult is it to amend the Constitution of Canada in comparison with the constitutions of the world? Scholars have tried to answer this question. For example, Arendt Lijphart has concluded from a study sample of 36 countries that Canada ranks among the world's most rigid constitutions with respect to the majorities required for amendment, tied with Argentina, Australia, Germany, Japan, Korea, Switzerland, and the United States, each of which he identifies as requiring supermajorities exceeding two-thirds: see Arendt Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed (New Haven, Conn: Yale University Press, 2012) at 208. Another scholar, Astrid Lorenz,

studying 39 countries, concludes that Canada is tied with Chile and Switzerland, with an index of difficulty of 7.0, behind Belgium (9.5), the United States and Bolivia (9.0), and the Netherlands (8.5), followed by Australia, Denmark, and Japan, three countries tied at 8.0: see Astrid Lorenz, "How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives" (2005) 17 J Theor Polit 339 at 358-59.

In what is today the most referenced study of amendment difficulty, Donald Lutz generated a ranking of 36 countries, not including Canada, in which the United States holds the top score for amendment difficulty (5.10), followed by Switzerland and Venezuela (4.75), with Australia (4.65) and Costa Rica (4.10) next: see Donald Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006) at 170. Applying Lutz's methods to Canada, one scholar posited that the unanimity procedure would have scored 5.00, ranking Canada as the second on the list in terms of amendment difficulty. Measuring the unanimity procedure plus the requirements of the Regional Veto Act plus the provincial referenda required by some provinces prior to approving an amendment would have generated a score of 8.00, well above the United States, thought by most to be the world's most difficult constitution to amend: see Albert, "The Difficulty of Constitutional Amendment in Canada," above at 94-100.

Does it matter that our Constitution is difficult to amend? Recall from Section I of this chapter that one of the reasons why constitutions contain amendment procedures is to distinguish the constitutional text from an ordinary law, the former made harder to amend than the latter. But is it possible for the rules of constitutional amendment to be *too* difficult? What are the consequences of having a constitution that cannot be amended when it is necessary to make changes to the polity? Are there advantages to having a rigid constitution? One of the world's most difficult constitutions ever to amend—perhaps *the* most difficult—was the Articles of Confederation, the first constitution the United States adopted after its declaration of independence. The Articles of Confederation required the agreement of each of the 13 states to make any amendment. Many attempts were made, but all of them failed. After years of failed efforts to amend the Articles of Confederation, the people of the United States decided to start afresh by ratifying a new constitution in defiance of the Articles. That constitution has survived to this day: see Richard S Kay, "The Illegality of the Constitution" (1987) 4 Const Commentary 57.

B. FORMAL AND INFORMAL AMENDMENT

Our discussion of constitutional amendment has so far implicitly involved what we can identify as "formal" constitutional amendment as opposed to "informal" constitutional amendment. A formal constitutional amendment alters the text of the constitution, the term "formal" being roughly though not completely analogous to "written." In contrast, an informal constitutional amendment changes the meaning of the constitution without altering its text. The term "informal" here is, again, roughly though not completely analogous to "unwritten." Both these kinds of constitutional changes—written and unwritten—are evident in Canada, although the terminology is not uniformly accepted. A complicating factor is that Canada has no single master-text constitution in which we would expect to find most of our most important constitutional rules.

A constitution can change informally in many ways. It can change informally as a result of a new constitutional convention that is integrated, without any change to the text, into the larger body of constitutional commitments. It can change when a statute of some particular significance becomes more important than an ordinary statute and achieves what we might call quasi-constitutional status. A constitution can also change informally by executive action, by implicit repeal, and also by treaty, to name a few methods of informal constitutional change.

The most common way the Constitution of Canada has changed informally is by judicial interpretation. As Allan Hutchinson has observed, the courts "have become the preferred site for effecting important changes in the constitutional order." Hutchinson moreover argues that

this method of constitutional change is "less democratic" than the set of procedures established in part V to update the Constitution: see Allan Hutchinson, "Constitutional Change and Constitutional Amendment: A Canadian Conundrum" in Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abington, UK: Routledge, 2013) 51 at 56-57. Hutchinson is not alone in taking this view of informal constitutional change by judicial interpretation in Canada. Dale Gibson has expressed what seems to be an even stronger view on what he has called "judicial amendment" in Canada.

Dale Gibson, "Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution"

(1992) 55 Law & Contemp Probs 261 at 261-62, 266-68, 271-72, 276-80
(footnotes omitted)

[In *The Prince*] Machiavelli [warned] that constitutional amendment is "dangerous to carry through." Judicial amendment is as dangerous as formal amendment, though the danger lies chiefly in the consequences rather than in the implementation. No nine people, however wise and well informed, possess the individual or collective powers of imagination necessary to foresee fully the ramifications of major alterations to the constitutional norms upon which their nation's legal and governmental structures are founded. Even if they did, they would lack the range of experience and the moral authority required for sound determinations as to the direction such alterations should take. This is not to say that the democratic process necessarily produces better results, but only that there is danger in entrusting constitutional change to the unaided judicial process. ...

Judicial amendment of the Canadian Constitution was not invented by the Supreme Court of Canada. Its predecessor as Canada's court of last resort, the Judicial Committee of the British Privy Council, began the process. One of the Privy Council's most audacious amendments concerned the power bestowed on the Parliament of Canada by section 91(2) of the Constitution Act, 1867, to make laws in relation to "the regulation of trade and commerce."

The fact that it was listed second among the enumerated heads of federal jurisdiction, immediately after "the public debt and property," and ahead of such vital matters as taxation, postal service, defence, navigation and shipping, currency, coinage, and banking, must say something about the significance of federal regulation of trade and commerce in the eyes of those who negotiated, drafted, and debated the 1867 Constitution. The fact that it was expressed in more expansive language than the equivalent provision to the United States Constitution was certainly no accident. But a relentless progression of restrictive Privy Council rulings between the 1880s and the 1920s pared the power to the point where it could be described by Justice Idington of the Supreme Court of Canada as "the old forlorn hope, so many times tried, unsuccessfully."

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The Privy Council did not admit that it was "amending" the Constitution. ... Viscount Haldane claimed that the Judicial Committee's duty "now, as always, is simply to interpret the British North America Act." ... To classify an "interpretation" of section 91(2) that lacked any textual support, deprived the provision of any independent application ... as anything less than outright amendment serves only to obfuscate constitutional realities ... .

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I do not contend that every major constitutional ruling by the courts involves amendment. The amending decisions with which this article is concerned are relatively rare. ...

The judicial decisions I classify as amendments ... are those that, whatever the sweep of their impact, are not capable of having been products of a fair construction of the Constitution Acts or of other documents of the Canadian Constitution. In "fair construction" I include not just obvious interpretations, but also imaginative rulings that, while perhaps unexpected, can be shown to flow logically from words or implications in the text.

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It should not be supposed that I necessarily object to judicial amendments of the Constitution. The point of the earlier examples was not to criticize substance but to illustrate process. ... Nor do I find fault in general with the fact that major constitutional amendments are made by courts. Observers of a more populist persuasion than I may consider it inappropriate for judicial appointees, lacking a democratic mandate, to engage in outright alteration of the country's most fundamental legal and political document. I do not—not absolutely, at any rate. There are, indeed, compelling reasons to believe that occasional judicial amendment of the Constitution is positively beneficial, and sometimes unavoidable. [Here Gibson cites the onerous conditions for amendment of the Constitution of Canada.] ...

The fact that judges amend the Constitution is not ... always a problem in itself. It is inevitable in some circumstances, and at times beneficial. The undemocratic nature of the process is a legitimate cause for concern, however. Some think that it is dangerous even to acknowledge publicly that courts sometimes amend constitutions. They seem to fear that the electorate will then insist that the power be taken away. In my view, that is a misplaced concern. The public already knows what the courts are doing, and I think its respect for the judiciary is less likely to be damaged by an open acknowledgement of the truth than by a transparent denial that the courts are going beyond mere "interpretation."

It is nevertheless anomalous that a democratic constitution should be capable of outright amendment by an undemocratic institution and undemocratic procedures. Therefore, courts should exercise self-restraint in these matters, permitting themselves to engage in constitutional amendment only when it is either inevitable that they do so, or when it would clearly be detrimental to the nation to leave the matter to the formal amendment process. In all other circumstances, judges should restrict their interpretation to the (rather generous, after all) forms of judicial review that fall within the scope of fair construction.

Hutchinson and Gibson are making two different claims, though each claim is related to the other in an important way at its core. Both are pointing to a particular phenomenon of constitutional change in Canada—that courts have changed the meaning of the Constitution in a way that suffers from a democratic deficit. But whereas Hutchinson stops short of identifying this kind of constitutional change by judicial interpretation as an "amendment," Gibson in fact labels it a "judicial amendment." What is at stake in calling a change an amendment? Do you agree with Gibson's critique of the Court? Taking Gibson's critique as well-founded, is there a way to prevent "judicial amendment"?

Lest we conclude that judicial "amendment" is something to be discouraged, it is worth nothing that courts are often compelled to act in the face of legislative inaction, delay, or stalemate. If courts do, in fact, amend the Constitution in an informal way, it may be because political actors are unable or unwilling to do so using the formal methods that part V offers.

As Adrian Vermeule has observed, the alternative to formal constitutional amendment, where it is difficult for whatever reason, is "judicially developed constitutional law, which itself changes over time in response to political, social, and cultural shifts"—what we might describe as a "judicial updating" of the Constitution if we are not comfortable with the idea of "judicial amendment": see Adrian Vermeule, "Constitutional Amendments and the Constitutional Common Law" in Richard W Bauman & Tsvi Kahana, eds, *The Least Dangerous Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 229 at 243, 245.

Another method of informal amendment in Canada may be described as "para-constitutional." This informal method of constitutional change is quite common in Canada, though has yet to be well-theorized until recently. As you read the excerpted passages to follow, consider the relative ease or difficulty of para-constitutional engineering alongside other forms of informal amendment: how would you rank the many methods of informal amendment on an ascending scale of difficulty? And does this ascending scale of difficulty map onto an ascending or descending scale of democratic legitimacy? What criteria do you use to evaluate democratic legitimacy?

Johanne Poirier & Jesse Hartery, "Para-Constitutional Engineering and Federalism: Informal Constitutional Change Through Intergovernmental Agreements"

(forthcoming 2021)

[W]e use the concept of para-constitutionality to explore the impact of intergovernmental agreements on federal constitutional orders. The reason is twofold.

First, the concepts of "para-constitutionality" or "para-constitutional engineering," adapted from legal sociology, have been used in the past to describe the function played by intergovernmental agreements in federal systems. Both ICC [Informal Constitutional Change] and para-constitutionality are umbrella concepts sharing a similar objective: accounting for constitutional alterations that take place without recourse to amendment procedures. The two theoretical frameworks developed somewhat in parallel, partly in different "epistemic communities." One mostly interested in constitutional change writ large, and largely in English language literature. The other in federal studies. We suggest that bringing para-constitutionality into conversation with ICC—and its more specific theories—is a worthwhile comparative law exercise. These two lines of scholarship might overlap, but they also use different examples, terms and experiences to enrich the analysis.

In addition, we believe there is added-value to the theory of para-constitutionality, particularly when we consider the two distinct etymologies of the prefix "para."

Borrowed from the Greek ϖ, "para" means "beside" (as in "*para*llel"). Of Latin descent, the prefix *paro* has a more aggressive connotation and signifies "against" or to "ward off." Political actors can therefore act "para-constitutionally" in two interrelated ways. ...

The Greek "para" entails creating norms "beside"—in parallel to—official law. Para-constitutional instruments and processes circumvent the ("big C" or "small c") constitution without necessarily contradicting it. ... This dimension of "para" points to the fact that, irrespective of the formal constitutional/unconstitutional status in positive constitutional law, instruments of public policy may have the effect of modifying the constitution, sometimes deliberately, sometimes not. And often, this will be achieved in incremental, and rather opaque, ways.

By contrast, "para-constitutionality" in the Latin sense is concerned with another set of questions. It is essentially a synonym of "unconstitutional" It describes instruments and processes that go *against* the Constitution. ...

Rules and practices that are constitutionally invalid can enjoy undeniable effectiveness for long periods of time. This will be the case until they are declared unconstitutional by a judge, to the extent that there is a judicial conduit for their constitutional review, or until political actors bring them into compliance with the Constitution. ... In other words, they may play a Greek style para-constitutional function, while the verdict on their para-constitutionality in the Latin sense is suspended or unknown.

The Greek/Latin distinction of para-constitutionality has the advantage of constantly reminding us of what we are concerned with in discussions on ICC. ...

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Constitutional politics in Canada have always been executive-led. ... Through agreements, federal partners can circumvent the constitution "Greek-style," whether or not the result is actually consistent with the constitution ("Latin style").

Intergovernmental agreements ("IGAs") are pragmatic instruments negotiated between federal partners. These malleable contract-like instruments perform a wide range of functions, both explicit and implicit. ...

In most cases, the avowed objective of IGAs is to coordinate the exercise of exclusive—but interrelated—powers or to clarify the respective responsibilities of distinct orders of government in the context of concurrent or shared jurisdiction. ... The purpose of these agreements is not usually to amend the constitution, but to operationalize it in a context where the implementation of coherent public policies requires intergovernmental collaboration.

That being said, IGAs can also play a role in restructuring federal constitutions, on the margins of their formal architectures. They can: (1) distort the distribution of legislative powers; (2) serve as alternatives to formal constitutional reforms; and (3) contribute to gradually transforming, in an *ad hoc* fashion, largely dualist federal systems into integrated federal ones, without providing them with the legal and institutional safeguards that are usually associated with integrated federations [such as ...] Australia, Brazil, Canada, India, Spain, and the United States.

In Canada, [the status of IGAs] is particularly blurry. Depending on the way they are drafted and their content, some may generate binding "contractual" obligations between the executives who enter into them. However, they cannot generate law of general application ... .

And yet, in Canada, the vast majority of IGAs are not incorporated at all. Under traditional norms of public law, they do not feature in the hierarchy of legal norms. In positive law, they do not even trump unilateral regulations of either order of government. Nevertheless, in practice, they can be highly effective in structuring relations between orders of government. Moreover—and perhaps more surprisingly—courts have occasionally treated non-incorporated IGAs as binding on third parties "as if they were law," generally in the name of cooperative federalism. In other words, courts can discretely turn a blind eye to public law orthodoxy to safeguard complex negotiated schemes. [Here Poirier and Hartery note that IGAs remain subject to legislative abrogation.]

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Hence, IGAs in Canada are often at the centre of administrative inter-delegation ... . The constitutionality of this type of "oblique" delegation has long been recognized by the Supreme Court of Canada. And yet, as mentioned above, these agreements have the effect of transforming, in an *ad hoc* manner, the dualist architecture of the Canadian federation whereby each order of government has its own

legislative and executive institutions. We do not necessarily decry this constitutional creativity, which can rationalize public action, but wish to underscore its Greek-style para-constitutional impact.

In Canada, IGAs can also serve as a substitute for constitutional reforms that are deemed unattainable. This was the case, for example, with a series of IGAs adopted in the mid-1990s in the wake of the failed Meech Lake and Charlottetown Accords. Faced with the impossibility of constitutional reform, the federal government undertook to demonstrate that the federation could be modernized "administratively" through agreements that did not require formal constitutional amendments (sometimes even without the assistance of legislative bodies). The goal was clearly to achieve some form of constitutional renewal by "contract." In other cases, constitutional mutations proceed incrementally, pragmatically, arguably not even intentionally. The long-term effect, however, is to transform the Constitution as it is lived.

Intergovernmental agreements therefore represent parallel mechanisms of public action, which bypass or restructure the federal constitution ... .

C. AN UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT?

It has become common for courts around the world to rule that a formal constitutional amendment is unconstitutional. How can that be? Imagine that amending actors follow all of the rules outlined in the Constitution to pass an amendment, with all required majorities or supermajorities properly assembled to approve an amendment. Further, imagine that the amendment is approved by all relevant bodies and that it is promulgated and subsequently entered into the text of the Constitution. This is often the kind of constitutional amendment that courts have invalidated as unconstitutional.

The seeds for finding an amendment unconstitutional were planted in India in 1951, only one year after the Constitution came into force when the Indian Supreme Court was asked whether the amendment power admitted of any limits. The Court answered no: see *Sri Sankari Prasad Singh Deo v Union of India*, 1951 AIR 458, 1952 SCR 89. Subsequently, however, the Court held that the power to amend the constitution could not be used to violate fundamental rights: see *Golaknath v State of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762. Shortly thereafter, the Court again narrowed the power holding that it could not be used to violate the "basic structure" of the Constitution: see *Kesavananda Bharati Sripadagalvaru v Kerala*, 1973 AIR 1361, 1973 SCC (4) 225 at para 1198. This basic structure of the Indian Constitution is not laid out anywhere in the Constitution; it is instead a judicially constructed notion of constitutional coherence that seeks to defend the Constitution from changes that are inconsistent with its own foundations.

A key case in the modern history of the Indian Constitution is *Minerva Mills Ltd v Union of India & Ors*, 1980 AIR 1789, 1981 SCR (1) 206. For our purposes, the relevant part of the case concerned an amendment to the amendment formula in the Indian Constitution. Section 55 of the *Constitution (Forty-second Amendment) Act, 1976* inserted two new subsections into art 368, which authorizes the two Houses of Parliament to amend the Constitution with a simple majority, subject to a few exceptions for amendments that require the approval of at least half of the states. The 42nd amendment introduced subss 4 and 5 into art 368:

> (4) No amendment of this Constitution ... shall be called in question in any court on any ground.
>
> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The effect of the amendment was to shield all constitutional amendments from the Supreme Court's power of judicial review. In *Minerva Mills*, the Indian Supreme Court declared this amendment unconstitutional.

Minerva Mills Ltd & Ors v Union of India & Ors

1980 AIR 1789, 1981 SCR (1) 206

CHANDRACHUD CJ:

In *Keshavananda Bharati* this Court held by a majority that though by Article 368 Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure. The question for consideration in this group of petitions ... is whether [s 55] of the Constitution (42nd Amendment) Act, 1976 transgress[es] that limitation, on the amending power.

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... The Preamble [to the Constitution] assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship, and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of "Fraternity assuring the dignity of the individual and the unity of the Nation." The newly introduced clause 5 of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever." No constituent power can conceivably go higher than the sky-high power conferred by clause 5, for it even empowers the Parliament to "repeal the provisions of this Constitution," that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. ... The power to destroy is not a power to amend.

Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and, therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

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Since, for the reasons above mentioned, clause 5 of Article 368 transgresses the limitations on the amending power, it must be held to be unconstitutional.

The newly introduced clause 4 of Article 368 must suffer the same fate as clause 5 because the two clauses are inter-linked. Clause 5 purports to remove all limitations on the amending power while clause 4 deprives the courts of their power to call in question any amendment of the Constitution. ... The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power ... .

> Clause 4 of Article 368 is in one sense an appendage of Clause 5, though we do not like to describe it as a logical consequence of Clause 5. If it be true, as stated in clause 5, that the Parliament has unlimited power to amend the Constitution, courts can have no jurisdiction to strike down any constitutional amendment as unconstitutional. Clause 4, therefore, says nothing more or less than what clause 5 postulates. If clause 5 is beyond the amending power of the Parliament, clause 4 must be equally beyond that power and must be struck down as such.

The idea of an unconstitutional constitutional amendment has migrated across the globe. Although the doctrine has yet to reach Canada, it is prominent in its neighbour, the United States. To date, there has yet to be a federal invalidation of a federal constitutional amendment, but federal and state courts have often invalidated state constitutional amendments. Consider one example, below, in which the United States Supreme Court, in a 6–3 decision, held unconstitutional an amendment to the Colorado Constitution that infringed the fundamental rights of gays and lesbians to participate in the political process.

Romer v Evans

517 US 620, 116 S Ct 1620 (1996)

KENNEDY J (Stevens, O'Connor, Suter, Ginsberg, and Breyer JJ concurring):

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 ... (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. ... [T]he cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. ... What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. ... Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Colo. Const., Art. II, 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

> "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority

status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing." *Ibid.*

• • •

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

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Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference ... that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. ...

• • •

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. ...

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

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It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. ... Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. ...

• • •

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ... Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

• • •

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered.

Consider a third instance of a court exercising the power to invalidate a constitutional amendment. In 2000, the Constitutional Court of Taiwan issued an extraordinary judgment that found both procedural and substantive grounds upon which to invalidate constitutional amendments.

Constitutional Court of Taiwan

Interpretation No 499, 2000/03/24

A constitutional amendment as a state act pertaining to the constitution is null and void inasmuch as a manifest and gross flaw occurs in the amendment procedure. A procedural flaw is considered manifest where the facts of the flaw can be determined without further investigation, whereas it is gross where the facts of the flaw alone render the procedure illegitimate. With such procedural flaws, a constitutional amendment violates the basic norm that underpins the validity of constitutional amendments. The amendment process for the disputed Additional Articles, which passed the third reading by the National Assembly on September 4, 1999, contravenes the principle of openness and transparency as set out above and is not in conformity with Article 38, Paragraph 2 of the Rules of the National Assembly (now defunct). Due to disputed procedural irregularities in which manifest flaws transpired without any further inquiry, the general public was not informed of how the Delegates of the National Assembly (hereinafter "Delegates") exercised their amending power. Thus, the constitutional principle that requires the Delegates to be accountable to both their constituents and their nominating political parties ... was not adhered to. With such a manifest and gross flaw, the act of disputed constitutional amendment violates the basic norm that underpins the validity of constitutional amendments.

The National Assembly is a constitutionally-established organ with its competence provided for in the Constitution. The Additional Articles, enacted by the National Assembly via the exercise of its amending power, are at the same level of hierarchy as the original texts of the Constitution. Some constitutional provisions are integral to the essential nature of the Constitution and underpin the constitutional normative order. If such provisions are open to change through constitutional amendment, adoption of such constitutional amendments would bring down the constitutional normative order in its entirety. Therefore, any such constitutional amendment shall be considered illegitimate, in and of itself. Among various constitutional provisions, Article 1 (the principle of a democratic republic), Article 2 (the principle of popular sovereignty), Chapter II (the protection of constitutional rights), and those providing for the separation of powers and the principle of checks and balances are integral to the essential nature of the Constitution and constitute the foundational principles of the entire constitutional order. All the constitutionally-established organs must adhere to the constitutional order of liberal democracy, as emanating from the said constitutional provisions, on which the current Constitution is founded.

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Article 1, Paragraph 3, Second Sentence of the Additional Articles provides, "The term of office of the Third National Assembly shall be extended to the day when the term of office of the Fourth Legislative Yuan expires;" Article 4, Paragraph 3, First Sentence provides, "The term of office of the Fourth Legislative Yuan shall be extended to June 30, 2002." Thereby, the term of office of the Third National Assembly will be extended by two years and forty-two days, and the term of office of the Fourth Legislative Yuan by five months, respectively. Pursuant to the principle of popular sovereignty, the power and authority of political representatives originate directly from the authorization of the people. Hence, the legitimacy of representative democracy lies in the adherence of elected political representatives to their social contract with the electorate. Its cardinal principle is that the new election must take place at the end of the fixed electoral term unless just cause exists for not holding the election. Failing that, representative democracy will be devoid of legitimacy. ... The just cause for not holding the election alluded to above must be consistent with the holdings of J.Y. Interpretation No. 31, which stipulated, "The State has been undergoing a severe calamity, which has made the election of both the Second Legislative Yuan and the Second Control Yuan de facto impossible." In this case, no just cause for not holding re-elections can be found to justify the disputed extension of the terms of both the Third National Assembly and the Fourth Legislative Yuan. ...

The amendment process of Articles 1, 4, 9, and 10 of the Additional Articles, adopted by the Third National Assembly by secret ballot in its Fourth Session, Eighteenth Meeting on September 4, 1999, is in contravention of the principle of openness and transparency and also violates the then-governing Article 38, Paragraph 2 of the Rules of the National Assembly, to the extent of constituting manifest and gross flaws. It therefore violates the basic norm that underpins the validity of constitutional amendments. Among the disputed Additional Articles, Article 1, Paragraphs 1 to 3 and Article 4, Paragraph 3 are in normative conflict with those provisions of the Constitution that are integral to its essential nature and underpin the constitutional normative order. Such conflict shall be proscribed under the constitutional order of liberal democracy. Hence, the disputed Articles 1, 4, 9, and 10 of the Additional Articles shall be null and void from the date of announcement of this Interpretation. The Additional Articles promulgated on July 21, 1997, shall continue to apply. It is so ordered.

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The primary function of legal interpretation is to resolve the issues of concurrence of norms (Normenkonkurrenz) and conflict of norms (Normen-konflikt), including doubts as to the gaps resulting from conflicting norms enacted at different times (which is considered an axiom in legal theory. See Karl Larenz, Methodenlehre der Rechtswissenschaft, 6th ed., 1991, S. 313ff.; Emil[i]o Betti, Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften, 1967, S. 645ff.). This is also the province and duty of any constitutional court. As regards the petitioners' claim that manifest and gross flaws existed in the disputed amendment process, it raises the question as to whether the constitutional amendment in question was faithfully carried out in accordance with the procedural requirements laid down in the Constitution and the Rules of the National Assembly. The answer to that question involves the choice of various standards of constitutional review and will be addressed separately. The other four claims are formed around the inter-provisional conflict or contradiction arising from the newly amended Additional Articles vis-à-vis the provisions of the Constitution and the Additional Articles. They also concern the petitioners' exercise of their powers. It is noted that even the supplementary written statement of the authority concerned dated January 19, 2000, submits that "the Constitutional Court can make

interpretations on petitions to resolve the conflicts among, or ambiguities about, constitutional provisions, as long as such provisions are in effect." As the present petitions request this Court to resolve the conflicts or ambiguities caused by the newly amended Additional Articles, the jurisdiction of this Court is beyond question. ...

The Constitution is the supreme law of the land. Constitutional amendment greatly affects the stability of the constitutional order and the welfare of the people and must be therefore faithfully carried out by the designated body in accordance with the principle of due process. [Under the Constitution as it stood] on July 21, 1997, the National Assembly, on behalf of the people, is the sole constitutional organ that has the power to amend the Constitution. ... Accordingly, it is imperative that the National Assembly observe the requirements of due process in the exercise of its power of amendment and fully reflect the will of the people. In the enactment and amendment of the Additional Articles, the process of the National Assembly must be open and transparent ... . Considering that constitutional amendment is the direct embodiment of popular sovereignty, the fact that the National Assembly never used a secret ballot in the previous nine rounds of constitutional amendments, including during the enactment and amendment of the Temporary Provisions and the Additional Articles, speaks to the principle of popular sovereignty. When the Delegates and their political parties are accountable to their constituents through such open and transparent amendment process, the constituents are able to hold them accountable through recall or re-election. Thus, the provision for the secret ballot in Article 38, Paragraph 2 of the Rules of the National Assembly shall not be applied to voting on any constitutional amendment. Not only must the readings for the adoption of a constitutional amendment comply with the Constitution strictly, but their procedures also need to conform to the constitutional order of liberal democracy (see J.Y. Interpretation No. 381).

[The Court then addressed numerous procedural flaws, including the fact that a secret ballot was used at second and third reading.]

Among the ... procedural flaws, the use of a secret ballot is a manifest and gross one. Within the bounds of the Constitution and legislation, the National Assembly may make its rules of procedure ex officio to carry out its powers on such matters as the quorum, the majority threshold, the introduction of bills, and methods of voting. Article 38, Paragraph 2 of the Rules of the National Assembly provides, "The chairperson shall have the prerogative in deciding the method of voting stated in the last paragraph, be it a show of hands, standing, electronic voting, or balloting. The vote shall remain to be cast by open ballot provided that more than one-third of the Delegates present request to do so, notwithstanding the chairperson's ruling on a secret ballot." While this rule is applicable to voting about general matters, adopting a constitutional amendment by secret ballot is in contravention of the above-stated principle of openness and transparency ... . The said Records indicate that a secret ballot had been proposed as the voting method for all the constitutional amendment bills in the second and third readings before the second reading started. Out of the 242 Delegates present, 150 voted in favor of this proposal. In the meantime, a counterproposal was submitted in accordance with Article 38, Paragraph 2 of the Rules of the National Assembly, demanding that all the constitutional amendment bills be voted on by open ballot. Eighty-seven out of the 242 Delegates present, more than one-third of the Delegates present, voted in favor of this counterproposal ... . [C]ontrary to Article 38, Paragraph 2 of the Rules of the National Assembly, the secret ballot was adopted by a simple majority as the voting method for the constitutional amendment bills. This also deviated from the voting method used for constitutional amendment bills in constitutional practice. The general public was thus left uninformed as to how the

Delegates exercised their power of amendment. ... In conclusion, the petitioners' claim that the process of amendment in question had manifest and gross flaws is sustained. To this extent, this amendment of the Constitution violates the basic norm that underpins the validity of constitutional amendments.

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In response to the argument of the authority concerned for the secret ballot on the basis of free mandate, it is noted that most modern democracies adopt free mandate vis-à-vis imperative mandate, under which political representatives are not merely the delegates of their constituents but are rather elected to represent the entire nation. Although political representatives are privileged from being questioned in any other place about their speeches and the votes they cast in the parliament and are not subject to recall under free mandate, it does not follow that political representatives are completely unconstrained by public opinion or their political parties. More importantly, in contrast to the constitutions of most Western democracies, our Constitution explicitly provides that political representatives at all levels are recallable (see Article 133 of the Constitution and J.Y. Interpretation No. 401). Against such a backdrop, the current system is not purely one of free mandate. Hence, free mandate cannot justify the deviation of the authority concerned from the Rules of the National Assembly to adopt a secret ballot.

... All constitutionally-established organs must adhere to the constitutional order of liberal democracy, as emanating from the said constitutional provisions, on which the current Constitution is founded (see Article 5, Paragraph 5 of the Additional Articles and J.Y. Interpretation No. 381). The power of the National Assembly, being a constitutionally-established organ, is conferred by the Constitution and thus must be governed thereby. ... [I]n the event that a constitutional amendment contravenes the constitutional order of liberal democracy, as emanating from the said foundational principles, it betrays the trust of the people, shakes the foundation of the Constitution, and thus must be checked by other constitutional organs. Such a check on the designated body that makes amendments is part of the self-defense mechanism of the Constitution. Thus, a constitutional amendment that contravenes the foundational principles of the Constitution and therefore causes normative conflict within the constitutional order shall be denied legitimacy.

Can you imagine a constitutional amendment being ruled unconstitutional in Canada? The Canadian experience with judicial pronouncements on constitutional amendments may be described as "pre-ratification amendment review."

Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions

(Oxford: Oxford University Press, 2019) at 223-26

The Canadian Supreme Court has a long history of advising lawmakers through its reference jurisdiction on how and whether to amend the constitution. In current practice, lawmakers will ask the Court for its opinion on whether an amendment bill or proposal is constitutional. Although the Court has the power to decline to answer, the Court generally agrees to give guidance to lawmakers—and lawmakers typically follow the Court's advice.

In the Patriation Reference, the essence of the question before the Court was whether the federal government was bound by law to secure the consent of none,

some, most, or all of the provinces before undertaking a major constitutional reform. The Court ultimately advised by a margin of 7–2 that there was no judicially enforceable law requiring the federal government to secure the agreement of the provinces. The Court also advised, by a margin of 6–3, that the federal government was bound by a legally unenforceable constitutional convention requiring it to secure substantial provincial consent before seeking to amend the constitution on a significant matter affecting federal-provincial relations. The Court's advisory opinion exercised what seems to have been binding political effect on lawmakers despite its formally advisory legal function.

In the high stakes involved in constitutional renewal at the time—especially with the continuing risk of Quebec's secession—we might have expected the force of political will to overrun a mere advisory opinion. Then prime minister Pierre Trudeau had threatened to go over the heads of the provinces directly to the people in a national referendum that would have legitimated the new constitution as the people's own. Yet the Court's Solomonic answer to the question whether the federal government was required to secure the consent of the provinces for this major reform compelled the federal government to drop its plan to proceed unilaterally without provincial consultation and consent, and instead to proceed multilaterally in conformity with the Court's declaration that "a substantial measure of provincial consent is required."

The federal government's initial preference for a referendal route to Patriation echoed the core of its proposal for an amendment formula. Trudeau had proposed in his "People's Package" that the constitution would be amendable in one of two ways: according to the Victoria Formula or by referendum in the face of provincial stalemate on a proposed amendment. But ultimately the chosen path followed the Court's advice in the Patriation Reference. Bruce Ackerman and Robert Charney are right that Trudeau missed an opportunity when he relented in the face of the Court's advisory opinion. Trudeau could have—and in their view should have—called a national referendum on the new constitution, both to break the stalemate among premiers and to give Canada its democratic moment—a moment that Canada, decades later, has yet to live.

The prime minister's choice at the time to take the non-referendal path to Patriation and instead to accept the Court's advice had three important consequences for making and remaking the constitution in Canada. First, it set an important precedent that the Court would be consulted on major questions concerning constitutional reform. Second, the political choice to consult the Court using the reference procedure and to abide by the Court's ruling entailed the collateral consequence that the Court's advice on constitutional reform would [be] followed in all but the most extraordinary circumstances. And, third, the prime minister's choice to accept the Court's advice bolstered the legitimacy of Court as an institution properly involved in overseeing the process of constitutional amendment in Canada. When Trudeau ceded his ground, the Court grew in status and importance, both real and perceived. No major national constitutional change to Canada's Constitution involving the federal and provincial government could henceforth be made without the Court weighing in on how the change could be made if indeed it could be made at all.

In 1998, sixteen years after Patriation, lawmakers returned to the Court in another case of constitutional change in Canada. In the Secession Reference, lawmakers asked the Court for its advice on whether and how Quebec could leave Confederation. The Court constructed a legal-political framework within which lawmakers could negotiate the terms of a province's exit from Canada. With notable exceptions, lawmakers on both sides of the secession debate have found victory in the Court's judgment—evidence that lawmakers recognize, if not accept, the Court's role in

giving advice on a fundamental matter of political self-understanding and constitutional change.

Another sixteen years later, in 2014, lawmakers again turned to the Court to resolve two disputes on the meaning and scope of the amendment rules in the constitution. Both the Senate Reform Reference and the Supreme Court Act Reference confirmed that lawmakers will go to the Court for answers on whether, how, and by whom the constitution may be amended—even where that amendment affects the Court's own powers. Both of the 2014 references locate enormous interpretive authority within the Court on future constitutional amendment in Canada. ... The lesson from these 2014 references is that political actors cannot today make an amendment that affects either of these open-textured concepts without the approval of the Supreme Court of Canada.

We can understand what the Court did in each of these periods of constitutional change since and including Patriation as directing political decision-making on both procedural and substantive grounds in a pre-ratification review of constitutional change. The Court's advisory opinion in the Patriation Reference was a pre-ratification procedural review on the process lawmakers could lawfully and legitimately use to patriate the constitution. The Court also engaged in a form of pre-ratification substantive review because the procedure the Court suggested lawmakers should follow was dictated by the content of the constitutional changes lawmakers wished to make. Had the constitutional changes not involved federal-provincial relations as they did, the Court would not have given the same instructions on how lawmakers should proceed. The Court's pre-ratification review of the Patriation package was therefore both substantive and procedural.

The same is true of the Secession Reference, the Senate Reform Reference, and the Supreme Court Act Reference. In each of these, the Court was asked for advice on how lawmakers could make major changes to the constitution before the changes had been promulgated. How a province can secede from the country, how to reform the Senate, and how to change the structure of the Court—these constitutional questions were the heart of the matter in each of these three references, and for each question the Court laid out the process the constitution requires lawmakers to follow.

Pre-ratification review of constitutional amendment gives the Supreme Court of Canada considerable power. It allows the Court to achieve the same result that foreign courts achieve when they invalidate a duly-passed constitutional amendment. Yet the Canadian Court avoids having to nullify the expressed will of the people and their elected representatives. This makes it less likely that the Court will fear the consequences of defying popular will and more likely that the Court will feel liberated to review the amendment question on the merits without worrying about the fallout from undoing an amendment that has already been promulgated with the support of the people. Pre-ratification review in Canada relieves the Court of the pressure it might otherwise feel to approve a popularly supported amendment—one that has survived the veto gates in the amendment process and by the fact of its survival enjoys a considerable measure of legal and sociological legitimacy. Put another way, pre-ratification review frees the Court to do what other courts do when they invalidate an amendment, but without confronting the strongest version of the counter-majoritarian critique that faces any court daring to invalidate a promulgated constitutional amendment.

Conceivably, a constitutional amendment could one day be proclaimed that would only later be challenged in court. If it were, how would Canadian courts respond? Could the Canadian Supreme Court follow the path of the Indian Supreme Court and adopt an equivalent to the basic structure doctrine? For discussion and comparison, see Vivek Krishnamurthy, "Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles" (2009) 34 Yale J Int'l L 207.

We know that superior and appellate courts in Canada have weighed in on the constitutional validity of a constitutional amendment: see *Hogan v Newfoundland (AG)*, 2000 NFCA 12, leave to appeal to SCC refused, [2000] SCCA No 191 (QL); *Potter c Québec (Procureur général du)*, 2001 CanLII 20663, [2001] RJQ 2823 (CA), leave to appeal to SCC refused, [2002] CSCR No 13 (QL). But the Supreme Court of Canada has not yet faced this question. Scholars have nonetheless explored the possibility of an unconstitutional amendment in Canada: see Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (2015) 41 Queen's LJ 153.

The judicial power to invalidate a constitutional amendment raises a similar problem of legitimacy as that raised by the institution of judicial review: see the discussion in Chapter 2, Judicial Review and Constitutional Interpretation. The problem is magnified in the case of constitutional amendment. In Section I of this chapter, it was suggested that the power of constitutional amendment is an incident of democracy and a marker of sovereignty. You will recall that the context for this discussion was a question concerning who should possess the power to amend the Constitution of Canada—the Parliament of the United Kingdom, or Canada itself. Today Canada possesses the power of constitutional amendment, settling the question whether Canada is a sovereign state. But on the horizon may await another question concerning sovereignty. Which institution or institutions possess the power of constitutional amendment as a final matter in Canada—the institutions authorized by part V of the *Constitution Act, 1982* to amend the Constitution, or the Supreme Court, which could one day be presented with an occasion to declare a constitutional amendment unconstitutional? Only if that day ever comes will we know with certainty where in Canada the ultimate power of constitutional amendment resides.