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# Quasi-Constitutional Amendments

RICHARD ALBERT†

## INTRODUCTION—A PHENOMENON AND ITS FEATURES

Defining what counts as a constitutional amendment has proven difficult for scholars of constitutional change.<sup>1</sup> In master-text constitutional democracies like the United States, some constitutional amendments may change the constitutional text but not its meaning, others may change its meaning but not its text, and still others may change both the text and its meaning.<sup>2</sup> The same definitional challenge confronts Canada. Its inherited traditions of unwritten constitutional norms combine sometimes uneasily with the modern vanguard of “written-ness” to complicate how we identify a constitutional change that amounts to a constitutional amendment.

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1. See, e.g., ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 55–59 (2009); Sanford Levinson, *How Many Times has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 25–32 (Sanford Levinson ed., 1995).

2. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457, 1459 (2001).

These definitional challenges have grown even more complicated in recent years as both master-text and partially codified constitutional democracies have seen the rise of a curious phenomenon resulting from the marriage of constitutional law and politics: quasi-constitutional amendments. A quasi-constitutional amendment is a sub-constitutional alteration to the operation of a set of existing norms in the constitution. It is a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function though not the formal status of constitutional law over time as a result of its subject-matter and importance—making it just as durable as a constitutional amendment.

#### A. *The Canadian Bill of Rights*

The Canadian Bill of Rights of 1960 was a quasi-constitutional amendment. Passed as a simple statute in Parliament, the government of the day had high ambitions for it.<sup>3</sup> The Justice Minister compared it to the Magna Carta, declaring that the government was “not enacting legislation for today only, or for this generation only, but that we are placing on our statute books legislation which we hope will have validity and effect in future generations.”<sup>4</sup> He insisted that the Bill of Rights would “become part of our constitution just as the Senate and House of Commons Act, the Supreme Court Act of 1875, the Yukon Territories Act, and Northwest Territories Act became part of our constitution just as soon

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3. The Bill of Rights was rooted in what Janet Hiebert calls “a novel (if not naïve) idea: creating a rights culture in governing that did not depend, exclusively, on judicial review.” Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7, 12 (2006). It created a duty on the Justice Minister to review every government bill for consistency with the list of recognized rights and freedoms, and to report any inconsistency to the House of Commons. S.C. 1960, Pt. I, § 3(1).

4. House of Commons Debates, July 7, 1960, 3d Sess., 24th Parl., v. VI 8–9, at 5885 (Can.).

as they were passed by parliament.”<sup>5</sup> The Minister added that “this bill of rights, although a statute of the parliament of Canada and not an amendment to the British North America Act, will be of equal force and effect as part of the Constitution of Canada.”<sup>6</sup> In short, the Bill of Rights would not be an ordinary law despite its legal status as just that.

Even more revealing was the admission from the government that it would have been “impossible” to enact the Bill of Rights as a constitutional amendment binding on both federal and provincial actors.<sup>7</sup> The government conceded that “the indications are clear that it would not be possible to get early agreement with the provinces for an amendment of the nature suggested”<sup>8</sup> when it was confronted with the criticism that there had been no provincial consultation and that the Bill of Rights should have introduced protections for rights and freedoms beyond only federal jurisdiction. Soon after the Bill of Rights was enacted, Bora Laskin suggested that although the Bill of Rights was a mere statute subject to ordinary repeal, it could over time become the beneficiary of “such reinforcement as may come from its public character and from public vigilance.”<sup>9</sup> Laskin recognized that the Bill of Rights could conceivably acquire special salience in law because of its significance in society.<sup>10</sup>

### *B. Origins, Advantages and Risks*

All quasi-constitutional amendments share one common point of origin, three distinct advantages, as well as three serious risks. As to their origins, quasi-constitutional amendments are the result of a self-conscious circumvention

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5. *Id.* at 5886.

6. *Id.*

7. *Id.* at 5887.

8. *Id.*

9. Bora Laskin, *Canada's Bill of Rights: A Dilemma for the Courts?*, 11 INT'L & COMP. L. Q. 519, 533 (1962).

10. *Id.*

of onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution. We are likely to see quasi-constitutional amendments in states whose constitutions are difficult to amend formally, often federal countries. Where constitutional actors determine, correctly or not, that the current political landscape would frustrate their plans for a constitutional amendment to entrench new policy preferences, they resort instead to sub-constitutional means—for instance, legislation or political practice—whose success requires less or perhaps even no cross-party and inter-institutional coordination.

Quasi-constitutional amendments entail three advantages for dominant constitutional actors. First, resorting to quasi-constitutional amendment allows constitutional actors to secure the functional equivalent of a constitutional amendment at a much lower political cost. Second, quasi-constitutional amendment has near-certain likelihood of success in light of the fewer veto opportunities standing in the way. Third, under the right conditions, a quasi-constitutional amendment may ultimately become as functionally durable as a formal amendment even though it may be formally subject to ordinary legislative repeal.

Yet even as quasi-constitutional amendments offer these important advantages to dominant constitutional actors, they nonetheless expose the constitution to three nontrivial risks. First, they blur the line separating the constitutional from the non-constitutional, and risk obscuring the ordinary hierarchy of authority in a constitutional democracy. Second, recourse to these sub-constitutional strategies for constitution-level changes may reveal and moreover reinforce a mismatch between constitutional design and political practice that constitutional actors can in turn exploit for politically expedient purposes. Third, circumventing the rules of formal amendment undermines the constitution itself and the very purpose of codification. I develop each of these critiques later in the text.

In this Article, I illustrate the phenomenon of quasi-

constitutional amendment with reference to the Constitution of Canada—perhaps the world’s most difficult to amend. I begin by identifying two additional quasi-constitutional amendments in Canada, both created after Patriation. I separate them into two major categories according to their form: one quasi-constitutional amendment made by ordinary law, and another made extra-legally outside the ordinary process of lawmaking. I then trace the phenomenon of a quasi-constitutional amendment in Canada to the difficulty of formal amendment. I subsequently explain how the legacy of formal amendment failure in Canada has made it politically attractive, if not necessary, for constitutional actors to innovate quasi-constitutional amendment as a new path to institutional reform. I close with reflections on the forms and limits of constitutional change in Canada and what quasi-constitutional amendment teaches us about the constitutional text and its context.

I stress at the outset, however, that this phenomenon of quasi-constitutional amendment is not limited to Canada. For instance, scholars have observed what I define as quasi-constitutional amendments in the United States and Australia, two rigid constitutional democracies,<sup>11</sup> both rooted in a master-text constitution. William Eskridge and John Ferejohn have identified in the United States what they call a super-statute, which is a law or cluster of laws that “seeks to establish a new normative or institutional framework for state policy” and “stick[s]” over time in the “public culture” in a way that it and its principles “have a broad effect on the law—including an effect beyond the four corners of the statute.”<sup>12</sup> The laws they identify as super-statutes, for instance the Sherman Act of 1890 and the Civil Rights Act of

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11. See DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 tbl.5.7 (2006) (ranking the United States and Australia as two of the most rigid constitutions in his sample of study).

12. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

1964,<sup>13</sup> have acquired a special “normative force” gradually over time.<sup>14</sup> Eskridge and Ferejohn understand super-statutes as mediating the difficulty of constitutional amendment with the core principle of popular sovereignty in the United States.<sup>15</sup>

In Australia, Scott Stephenson has observed constitution-level changes resulting from what he identifies as “constitutional statutes,” defined as laws that have “the function of regulating a fundamental feature of the lawmaking process,”<sup>16</sup> where “[t]he lawmaking process is broadly understood to include not only the enactment of law by the legislature, but also the application of law by the executive and the interpretation of law by the judiciary.”<sup>17</sup> Examples of constitutional statutes in Australia, which I might well understand as quasi-constitutional amendments, include statutes governing the administrative state, like the Administrative Decisions (Judicial Review) Act 1976 as well as rights-protecting statutes, both passed, Stephenson suggests, at least partly as a result of constitutional amendment difficulty.<sup>18</sup>

In the British tradition, Adam Perry and Farrah Ahmed have also theorized the concept of a “constitutional statute,” which they define as a law that is “about state institutions and which substantially influences, directly or indirectly, what those institutions can and may do.”<sup>19</sup> For them, the Scotland Act of 1998, the European Communities Act 1972,

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13. *Id.* at 1231–42.

14. *Id.* at 1270.

15. *See id.* at 1267–71.

16. Scott Stephenson, *The Rise and Recognition of Constitutional Statutes* 2 (Sept. 26, 2016) (unpublished manuscript) (on file with author).

17. *Id.* at 2–3.

18. *Id.* at 6–8.

19. Farrah Ahmed & Adam Perry, *Constitutional Statutes*, 37 OXFORD J. LEGAL STUD. 461, 471 (2016).

and the Human Rights Act 1998 are all examples of constitutional statutes.<sup>20</sup> Although the British Constitution is disaggregated over many texts and conventions, the judicial and political recognition of constitutional statutes may have the effect of creating what Perry and Farrah describe as a “graduated legal system” that distinguishes the constitutional from the non-constitutional.<sup>21</sup> It is in the interstices of constitutionality and sub-constitutionality that we find quasi-constitutional amendments. It is therefore possible that we might find quasi-constitutional amendments also in the few constitutional democracies like the United Kingdom with uncodified and disaggregated constitutions.

### I. ONE STATUTE AND A COMMITTEE

Quasi-constitutional amendments are not all created in the same way.<sup>22</sup> They may arise in the course of the normal legislative process, using the same institutions and rules commonly used to pass an ordinarily-entrenched statute, and may at that time or later be identified as a quasi-constitutional amendment. Constitutional actors may also make a quasi-constitutional amendment extra-legally—that is without engaging the formal legislative process at all. In this Part, I illustrate how each of these routes has been used to produce a quasi-constitutional amendment in Canada.

#### A. *Ordinary Lawmaking*

Consider first the Regional Veto Law. It is an ordinary

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20. *Id.* at 465, 471–72.

21. *Id.* at 464.

22. This is an important distinction from quasi-constitutional statutes in Canada, which are enacted just as other laws are, only “they are interpreted in the broad and generous manner usually reserved for constitutional rights” and they “trump later, conflicting ordinary laws unless those laws provide otherwise.” Vanessa MacDonnell, *A Theory of Quasi-Constitutional Legislation*, 53 *OSGOODE HALL L.J.* 508, 510 (2016).



statute passed by Parliament in 1996 shortly after the 1995 Quebec referendum.<sup>23</sup> The Regional Veto Law fulfilled the federal government's promise to give Quebec a veto over future constitutional amendments—a pledge made as an inducement to encourage Quebec voters to reject secession.<sup>24</sup>

The Regional Veto Law does for Quebec the same thing it does for the other regions of Canada, with the exception of the North.<sup>25</sup> It gives them each a veto in the constitutional amendment process.<sup>26</sup> The veto may be exercised by Ontario, Quebec, British Columbia and at least two provinces from each of the Atlantic and Prairie regions where the two represent at least half of the regional population.<sup>27</sup> The Regional Veto Law gives the veto to these regions indirectly through the federal government.<sup>28</sup> It requires a Cabinet minister to first obtain the consent of each of the five major regions as well as a majority of all provinces *before* introducing a major amendment proposal under the multilateral default amendment procedure.<sup>29</sup> The Regional Veto Law therefore confers a functional veto, not a formal one.

The Regional Veto Law has two important consequences. For one, it transforms the formal equality of the provinces

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23. See *An Act Respecting Constitutional Amendments*, (S.C. 1996, c. 1) (Can.).

24. See Robert A. Young, *Jean Chrétien's Québec Legacy: Coasting then Stickhandling Hard*, 9 REV. CONST. STUD. 31, 38 (2004).

25. *An Act Respecting Constitutional Amendments*, *supra* note 23, § 1(1).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* Canada's Constitution entrenches five amendment procedures. Three of them already give each of the affected provinces a veto over an amendment: the unilateral provincial procedure, the regional amendment procedure and the unanimity procedure. The fourth—the unilateral federal procedure—authorizes Parliament to amend its own internal constitution, and therefore makes no provision for provincial involvement. It is the fifth procedure—the multilateral default amendment procedure—that the Regional Veto Law was intended to address. See *infra* notes 58–67 and accompanying text.

under the Constitution's amendment rules into a deep formal inequality, giving special status to Ontario, Quebec and British Columbia and diminishing the power of the other seven provinces.<sup>30</sup> As Andrew Heard and Tim Swartz explain, the multilateral default amendment procedure has never really treated provinces as functional equals; populous provinces could always exercise more power than the others when they stood together.<sup>31</sup> The Regional Veto Law now formalizes and exacerbates what had before been only an implicit provincial inequality.

Second, the Regional Veto Law adds a new hurdle to what is already a difficult amendment process. It imposes a prior restraint on the power of Cabinet ministers to propose an amendment—something not contemplated by the constitutional amendment rules themselves.<sup>32</sup> It also complicates amendment under the multilateral default procedure by changing the sequence for a successful Parliament-initiated amendment: the Constitution requires federal proposal, then provincial ratification, but the Regional Veto Law now requires provincial consent, then federal proposal, and finally provincial ratification.<sup>33</sup> This has the potential to exacerbate amendment difficulty because the provincial government that would grant its consent prior to the federal proposal might differ from the one that controls the assembly when the time later comes to formally ratify the amendment. The Regional Veto Law, passed as a simple statute, therefore now constrains the federal government and indeed all constitutional actors contemplating major constitutional change.

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

31. *Id.* at 341.

32. See *infra* notes 57–68 and accompanying text.

33. See *An Act Respecting Constitutional Amendments*, *supra* note 23.

### B. *Extra-Legal Change*

Turn now to what one prominent scholar has called the “frustrating puzzle” of Senate reform<sup>34</sup>—a subject of enduring debate since Confederation.<sup>35</sup> It took nearly 150 years for constitutional actors to change the Senate in any material way.<sup>36</sup> On January 19, 2016, the Minister of Democratic Institutions and the Government Leader in the House of Commons announced an Independent Advisory Board for Senate Appointments.<sup>37</sup> The Advisory Board is not formalized in a law. Its stated purpose is to create a “new, non-partisan, merit-based process to advise on Senate appointments.”<sup>38</sup> Its larger purpose is to create an “independent appointments process” that will “contribute to creating a less partisan and more effective institution to serve Canadians.”<sup>39</sup>

According to the official release, the Advisory Board was “established to provide advice to the Prime Minister on candidates for the Senate” and will be “guided by public, merit-based criteria in order to identify Canadians who would make a significant contribution to the work of the Senate.”<sup>40</sup> The Government moved expeditiously on Senate reform to secure the Senate’s “fundamental role in the representation of regional and minority interests in the

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34. C.E.S. Franks, *The Senate and its Reform*, 12 Queen’s L.J. 454, 454 (1987).

35. ROBERT A. MACKEY, *THE UNREFORMED SENATE OF CANADA* 1 (1926).

36. One important change, effective as of 1965, requires Senators to retire by age seventy-five. Constitution Act, 1965, c 4, § 29(2) (Can.).

37. For a comprehensive catalogue of official announcements related to the new appointment process, see Senate Appointment Resources (June 23, 2017), <https://www.canada.ca/en/democratic-institutions/services/senate-appointment-process.html>.

38. Press Release, Gov’t of Can., Government Announces Immediate Senate Reform (Dec. 3, 2015), <http://www.marketwired.com/press-release/government-announces-immediate-senate-reform-2079118>.

39. *Id.*

40. *Id.*

legislative process.”<sup>41</sup>

The Government established six categories of merit-based criteria.<sup>42</sup> The first relates to gender, indigenous, and minority status, with a view to gender balance in the Senate.<sup>43</sup> Non-partisanship and personal qualities of integrity and ethical conduct are also important, as is knowledge of the legislative process and the Constitution.<sup>44</sup> The Advisory Board will also look favorably on bilingual candidates and on nominees who have a record of leadership or achievement in public or community service, or in service to their profession or field of expertise.<sup>45</sup>

The new Senate appointments process has unfolded in two phases.<sup>46</sup> During the first phase, called the “transitional process,” the Advisory Board made appointment recommendations to the Prime Minister in early 2016 to fill Senate vacancies in Manitoba, Ontario and Quebec.<sup>47</sup> For each vacancy—five in total were identified—the Advisory Board prepared a list of five individuals who, in its estimation, deserve consideration for appointment to the Senate, and who “meet the constitutional eligibility requirements at the time of the appointment to the Senate.”<sup>48</sup> The Advisory Board is said to have consulted broadly to ensure that a “diverse slate of individuals with a variety of backgrounds, skills, knowledge and experience”

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41. *Id.*

42. Huguette LaBelle, REPORT OF THE INDEPENDENT ADVISORY BOARD FOR SENATE APPOINTMENTS PERMANENT PROCESS (JULY TO NOVEMBER 2016) (2016) [hereinafter *Independent Advisory Board*].

43. *Id.* at 7–8.

44. *See id.* at 14.

45. *Id.*

46. *Id.* at 4.

47. *Id.*

48. *Id.* at 13–50. The constitutional requirements relate to age (between 30 and 75), citizenship, real and personal property, and residency. *Id.*

required for a well-functioning Senate were nominated for the Board's consideration.<sup>49</sup> The Prime Minister ultimately nominated seven women and men to the Senate, three from Ontario and two each from Manitoba and Quebec.<sup>50</sup>

The second phase in the new process was launched in July 2016.<sup>51</sup> It is described as "the permanent phase of the independent Senate appointments process," a process that now "features an application process that is open to all Canadians."<sup>52</sup> The first round of the application process was open for a four-week period ending on August 4, 2016.<sup>53</sup> In this permanent phase, the Advisory Board will be guided by the same criteria as the first "with the end goal of ensuring a high standard of integrity, collaboration, and non-partisanship in the Senate."<sup>54</sup>

## II. FORMAL AMENDMENT DIFFICULTY IN CANADA

Neither the Regional Veto Law nor the new Senate appointments process could have been formalized in a constitutional amendment. The Constitution is just too rigid and the constitutional politics of amendment are just too fraught with the risk of failure. A leading authority on the Canadian Constitution quite rightly identifies constitutional design as a key source of Canada's challenges:

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49. *Id.* at 10.

50. *Prime Minister Announces Intention to Recommend the Appointment of Seven New Senators*, GOV'T CAN. (March 18, 2016), <http://pm.gc.ca/eng/news/2016/03/18/prime-minister-announces-intention-recommend-appointment-seven-new-senators>.

51. *Minister of Democratic Institutions Announces Launch of the Permanent Phase of the Independent Senate Appointments Process*, GOV'T CAN. (July 7, 2016), [http://news.gc.ca/web/article-en.do?nid=1095799&tp=1&\\_ga=1.62793134.328809842.1468471660](http://news.gc.ca/web/article-en.do?nid=1095799&tp=1&_ga=1.62793134.328809842.1468471660).

52. *Id.*

53. *Id.*

54. *Independent Advisory Board*, *supra* note 42.

Successful constitutions divide into two main groups: those that are short, contain statements of abstract principles, and are difficult to amend; and those that are long, contain detailed provisions, and are relatively easy to amend. . . . Canada has a constitution that is difficult to amend yet includes many details. Not surprising, this approach has proven unsuccessful. We have the worst of both worlds.<sup>55</sup>

The Constitution of Canada entrenches an escalating structure of five procedures of formal amendment.<sup>56</sup> Each may be used to amend specifically designated provisions and principles, and each rises in difficulty according to the importance of its associated provisions or principles.<sup>57</sup> Although some of the five amendment procedures are relatively easy and others are not, the complexity of the entire package of formal amendment rules may make the Constitution of Canada the most difficult in the democratic world to amend—not necessarily a badge of honor.<sup>58</sup>

#### A. *The Rules of Constitutional Amendment*

The lowest amendment threshold is the unilateral provincial procedure. It authorizes a provincial assembly to unilaterally amend the provincial constitution.<sup>59</sup> The next-lowest threshold, the unilateral federal procedure, confers an analogous power upon the Parliament of Canada: the power to unilaterally amend what Ian Greene has described as

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55. C.E.S. Franks, *Representation and Policy-Making in Canada*, in CANADA'S CENTURY: GOVERNANCE IN A MATURING SOCIETY 68, 81 (C.E.S. Franks et al. eds., 1995).

56. Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 944–45 (2014).

57. *See id.*

58. *See* Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 ALTA. L. REV. 85, 105–06 (2015). Canada's Constitution may be the most difficult to amend only as relates to its basic structure. *See id.* at 96.

59. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 45 (U.K.) [hereinafter *Constitution Act, 1982*].

Parliament's internal constitution<sup>60</sup> and matters relating exclusively "to the executive government of Canada or the Senate and House of Commons."<sup>61</sup> The third amendment route, the regional amendment procedure, incorporates the major feature of the unilateral federal amendment procedure: it applies to amendments affecting "one or more, but not all, provinces" and requires the consent of the House of Commons and Senate, and also the approval of the legislative assemblies of the affected provinces.<sup>62</sup> This procedure must be used for amendments that have a provincial-federal interest in relation to at least one province and be at most regional, not national, in scope.<sup>63</sup>

The two remaining amendment procedures are the most difficult. The multilateral default procedure applies to all subjects not otherwise assigned to a specific amendment procedure. It applies also exclusively to a specially designated class of subjects including proportional representation in the House of Commons, the powers and membership of the Senate (including the method of senatorial selection), the Supreme Court of Canada for all items except its composition, the creation of new provinces, and the boundaries between provinces and territories.<sup>64</sup> A successful amendment under this procedure requires approval from both federal and provincial actors: the House of Commons and the Senate, as well the provincial legislative assemblies of at least two-thirds of the provinces whose aggregate population amounts to at least half of the national

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60. Ian Greene, *Constitutional Amendment in Canada and the United States*, in *CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES* 249, 251 (Stephen L. Newman ed., 2004).

61. *Constitution Act, 1982*, *supra* note 59, § 44.

62. *Id.* § 43.

63. *Id.*

64. *Id.* § 42.

total.<sup>65</sup> This is an onerous threshold by any measure.

The unanimity procedure is even more difficult than the multilateral default procedure. It requires the approval of both houses of Parliament and each provincial legislative assembly.<sup>66</sup> This procedure must be used for amendments involving the monarchy, the right to provincial representation in the House of Commons relative to the Senate, Canada's official languages beyond their provincial or regional use, the composition of the Supreme Court of Canada, and Canada's formal amendment rules themselves.<sup>67</sup> Each of these five procedures, then, requires a greater quantum of agreement than the former, from a simple unicameral majority to successfully pass an amendment using the unilateral provincial procedure all the way up to the agreement of all federal and provincial legislatures, under the unanimity rule. In this escalating structure of amendment, the difficulty of amendment rises according to the importance of the amendable matter, the variable being the degree of provincial consent required for ratification.

### *B. The Constitution in Comparative Perspective*

By comparison with other democratic constitutions, the Constitution of Canada may well be the most rigid, but only as to matters that Peter Russell has identified as involving "mega constitutional politics." The term refers to amendments that "address the very nature of the political community on which the constitution is based,"<sup>68</sup> that have a "tendency to touch citizens' sense of identity and self-

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65. *Id.* § 38(1).

66. *Id.* § 41.

67. *Id.*

68. See PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 75 (1992).



worth,”<sup>69</sup> and those that are “concerned with reaching agreement on the identity and fundamental principles of the body politic.”<sup>70</sup> The escalating structure of amendment identifies which matters trigger mega constitutional politics: the ones amenable by either the default multilateral amendment procedure, or the unanimity procedure. Both authorize major reforms to the basic structure of the Constitution, for instance to the framework of government, to the polity, to Canadian identity, or to federal-provincial relations.

We cannot know for certain whether these amendment procedures do in fact make the Canadian Constitution the most difficult to amend because the leading comparative study of constitutional rigidity has excluded Canada from the study sample.<sup>71</sup> The reason why is telling. Donald Lutz, the political scientist who created the index, admitted that he could not reliably determine what has constitutional status in Canada, and therefore what counts as an amendment to its Constitution.<sup>72</sup> However, had he measured these two onerous amendment procedures in Canada, he might have found that they rank the country ahead of the difficulty score Lutz had calculated for the United States (5.10), the most rigid constitution in his 36-country sample.<sup>73</sup>

Using Lutz’s own methodology, which quantifies every possible step in a formal amendment process and then

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69. *Id.*

70. *Id.*

71. Lutz, *supra* note 12, at 6 tbl.I.I. It is moreover difficult to quantify what scholars have referred to as “amendment culture,” which may be more determinative of formal amendment difficulty than the amendment procedures themselves. *See generally* Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT’L J. CONST. L. 686 (2015) (explaining theory of “amendment culture”).

72. *See* Lutz, *supra* note 11, at 179 n.16.

73. *See id.* at 170 tbl.5.7.

aggregates the scores of each discrete step in a given amendment procedure to generate its index of difficulty, we arrive at an index of 4.50 for the multilateral default procedure, and 5.00 for the unanimity procedure.<sup>74</sup> Yet as I have shown elsewhere in detail, Canada's formal amendment rules have been informally amended by judicial interpretation, parliamentary and provincial laws, and perhaps also by constitutional convention such that their outer measure of formal amendment difficulty under Lutz's scale may be upwards of 8.00.<sup>75</sup>

It is telling that Lutz could not determine what has constitutional status in Canada. This problem of identification—what the constitution is, and precisely *where* it is—has made it possible for constitutional actors to exploit the blurred distinction between constitutional and ordinary law to create quasi-constitutional amendments that may later mature into constitution-level changes. As I will suggest below, quasi-constitutional amendments are not fated to achieve constitutional status, though in some circumstances, they may well become as durable as formal constitutional amendments.

### III. THE CONSEQUENCE OF FORMAL AMENDMENT DIFFICULTY

Equally telling is that many of the most formally rigid constitutional democracies have generated the phenomenon of quasi-constitutional amendment. It is no coincidence that constitutional actors in Canada, the United States, and Australia have found recourse in sub-constitutional means to make constitution-level changes. These constitutions are extraordinarily difficult to amend,<sup>76</sup> perhaps even constructively unamendable for all but the

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74. See Albert, *supra* note 58, at 94, 99–100.

75. *Id.* at 99–100.

76. See Lutz, *supra* note 11, at 170 tbl.5.7.

most routine matters of governance.<sup>77</sup> The impetus behind quasi-constitutional amendment, then, is the difficulty of formal amendment.

A. *The Legacies of Formal Amendment Failure*

Where constitutional actors determine, correctly or not, that the current political landscape would frustrate their plans for a constitutional amendment to entrench new policy preferences, they resort instead to sub-constitutional means whose successful execution requires less or perhaps even no cross-party or inter-institutional coordination. Their resort to sub-constitutional procedures reflects a strategic choice to circumvent the onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution. In Canada, the political choice to chart a sub-constitutional path to constitutional change has been informed, if not compelled, by the modern legacies of formal amendment failure.

The 1987 Meech Lake and 1992 Charlottetown Accords promised transformative constitutional changes on the scale of Patriation. Meech Lake would have recognized the distinctiveness of Quebec within Canada, changed how senators are selected, constitutionalized the Supreme Court, and granted provinces new powers over immigration and constitutional amendment.<sup>78</sup> Charlottetown would have gone even further, for instance, introducing a “Canada Clause” to express national values, redefining the federal distribution of powers, recognizing Aboriginal rights, reforming national institutions including the House of Commons, the Senate and the Supreme Court, and moreover, amending the rules

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77. See Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. 2D 181, 182–83 (2014).

78. 1987 Constitutional Accord, Ottawa, Ontario, June 3, 1987 [hereinafter *Meech Lake Accord*].

of constitutional amendment.<sup>79</sup> Yet both major packages of amendments were defeated, the Meech Lake Accord as a result of an elapsed ratification deadline,<sup>80</sup> and the Charlottetown Accord at the hands of the people in an extra-constitutional referendum.<sup>81</sup>

These failures have not been without consequence. Writing in 1994, Edward McWhinney observed that “Canadians as a whole are tired of the seemingly unending constitutional debate of the last three and half decades which has pre-empted consideration by Ottawa of other, deemed more pressing, economic problems.”<sup>82</sup> Beyond just constitutional fatigue, however, Warren Newman has more recently suggested that formal amendment failure has had an “incalculable impact on our national psyche and on the way in which our political actors approach the question of constitutional reform.”<sup>83</sup> Newman described the effect of our formal amendment failure as a “trauma,” and concluded that “[i]t may not yet be a propitious time for Canada’s political leaders to ‘reopen’ the Constitution in a broad and concerted way.”<sup>84</sup> The time may never yet come.

For constitutional actors, the prime directive is self-preservation. If indeed Canadians have grown tired of constitutional debates, elected constitutional actors will heed that caution and remember well that the Conservative

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79. GOV'T CAN., CONSENSUS REPORT ON THE CONSTITUTION: CHARLOTTETOWN, FINAL TEXT 417–18, 420–21, 423, 435 (1992) [hereinafter *Charlottetown Accord*].

80. See Richard Albert, *Temporal Limitations in Constitutional Amendment*, 21 REV. CONST. STUD. 37, 52–53 (2016).

81. See Richard Albert, *The Conventions of Constitutional Amendment in Canada*, 53 OSGOODE HALL L.J. 399, 401–02 (2016).

82. Edward McWhinney, *Quebec and Canadian Federalism*, 2 CAN. PARLIAMENTARY REV. 1, 3 (1994).

83. Warren J. Newman, *Living with the Amending Procedures: Prospects for the Future of Constitutional Reform in Canada*, 37 SUP. CT. L. REV. 2D 383, 407 (2007).

84. *Id.*

government was routed at the polls not coincidentally the year after Charlottetown's defeat.<sup>85</sup> Whether Canadians would be open to a new round of major constitutional change is an empirical question in need of fresh data drawn from generations since Meech Lake and Charlottetown. But perception often overruns reality, and today we regard constitutional politics in Canada as inhospitable to major formal constitutional reforms due to what Michael Lusztig has described as the need for "mass input" and "legitimization,"<sup>86</sup> shorthand for the nearly impossible political agreement by parties with incommensurable interests that almost inevitably doom comprehensive constitutional change involving federalism.

### B. *The New Path to Institutional Reform*

No wonder, then, that a non-constitutional path to institutional reform has replaced the constitutional route. As Harvey Lazar observed in 1997, this is "a necessary step for healing the wounds of the country",<sup>87</sup> certainly "the only politically viable option for managing the federation"<sup>88</sup> after decades of nearly uninterrupted attention to constitution-level changes.<sup>89</sup> Whether on fiscal, social, environmental, or aboriginal policy, constitutional actors carefully avoid the "c-word."<sup>90</sup> The parliamentary recognition of Quebec as a distinct society, for instance, joins with the Regional Veto Law and the new appointment process to illustrate the

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85. See DAVID McLAUGHLIN, POISONED CHALICE: THE LAST CAMPAIGN OF THE PROGRESSIVE CONSERVATIVE PARTY? 10–11 (1994).

86. Michael Lusztig, *Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail*, 27 CAN. J. POL. SCI. 747, 748 (1994).

87. Harvey Lazar, *Non-Constitutional Renewal: Toward a New Equilibrium in the Federation*, in CANADA: THE STATE OF THE FEDERATION 1997—NON-CONSTITUTIONAL RENEWAL 3, 28 (Harvey Lazar ed., 1998).

88. *Id.* at 7.

89. *See id.* at 3.

90. *See id.* at 12–20.

“circuitous” ways that “changes of a constitutional character” occur now and likely into the near future<sup>91</sup> given the present political improbability of constitutional amendment.

Resort to sub-constitutional means is a more profitable route for constitutional actors because it requires less or even no cross-party or inter-institutional coordination. Both the Regional Veto Law and the Advisory Board for Senate appointments were the product of a majority government, meaning that neither major change confronted any substantial risk of failure. Each was promised near-certain success in light of the few veto opportunities standing in their way. Neither of these functionally constitution-level changes required support from the opposition or the provinces to become effective, though one could argue that each of them changed the basic structure of the Constitution, and therefore should have required a deeper measure of approval across political parties or levels of government.

The Regional Veto Law and the new process for Senate appointments were introduced at a much lower political cost than ordinarily required for an amendment, yet both amount to the functional equivalent of a formal amendment. Both, in fact, were part of the Meech Lake and Charlottetown Accords, though in different but recognizable forms: the precursor to the Regional Veto Law was proposed as a provincial veto and the new process for Senate appointments would have, in the case of Meech, given provinces the power of nomination, and in Charlottetown it would have created a Triple-E Senate.<sup>92</sup>

The Regional Veto Law, an ordinary law, has had two extraordinary consequences. First, it has achieved what Meech and Charlottetown could not—and importantly it did

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91. Lois Harder & Steve Patten, *Looking Back on Patriation and its Consequences*, in *PATRIATION AND ITS CONSEQUENCES: CONSTITUTION MAKING IN CANADA* 3, 21 (Lois Harder & Steve Patten eds., 2015).

92. See *Meech Lake Accord*, *supra* note 78 §§ 2, 9; *Charlottetown Accord*, *supra* note 79, at 5.

so outside of the formal amendment process. Quebec now has the veto promised to it. Moreover, the effect of the Regional Veto Law is substantial insofar as it effectively amends the rules of constitutional amendment by imposing formal requirements over and above those established by the Constitution itself. What is important here is that the Regional Veto Law changes the formal amendment rules—specifically, the multilateral default procedure—by way of a simple federal law in defiance of the formal rules of amendment themselves which by their very text require the agreement of Parliament and of each provincial assembly to amend any part of the Constitution’s formal amendment rules.<sup>93</sup> And yet the enacting Parliament expected constitutional actors to nonetheless abide by the Regional Veto Law despite its inconsistency with the formal rules of amendment. Even though it is an ordinary law that did not earn its functionally special status through any of the formal routes, the Constitution provides for achieving special status.

The new process for Senate appointments has likewise achieved what neither Meech nor Charlottetown could: it has changed the way Senators are selected. Reading the recent *Senate Reference* would suggest that changes to the method of senator selection require a constitutional amendment. The relevant issue in the *Senate Reference* was the constitutionality of the Senate Reform and Senate Appointments Consultation bills.<sup>94</sup> These bills proposed to create a framework of consultative provincial and territorial elections to fill Senate vacancies. The Senate Reform bill proposed that senators “should be chosen from a list of Senate nominees submitted by the government of the province or territory,”<sup>95</sup> with the list of nominees “to be

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93. *Constitution Act, 1982*, *supra* note 59, § 41.

94. Reference re Senate Reform, [2014] 1 S.C.R. 704, para. 2. (Can.).

95. Bill C-7, *An Act Respecting the Selection of Senators and Amending the*

determined by an election held in the province or territory.”<sup>96</sup> The bill furthermore insisted that the prime minister “must consider names from the most current list of Senate nominees selected for that province or territory” when “recommending Senate nominees to the Governor General.”<sup>97</sup> The Senate Appointments Consultation bill had the same objective: to constrain the prime minister to consider provincial or territorial consultative election winners for appointment to the Senate.<sup>98</sup>

The operative question in the *Senate Reference* was “whether Parliament, acting alone, can reform the Senate by creating consultative elections to select senatorial nominees endorsed by the populations of the various provinces and territories.”<sup>99</sup> The Court rejected the two major arguments for the bills.<sup>100</sup> First, the Court was not convinced by the argument that creating a framework for consultative senatorial elections does not constitute an amendment simply because the formal process for appointing individuals to the Senate—by official summoning by the Governor General on the advice of the prime minister, as required by the 1867 Constitution Act<sup>101</sup>—remains unchanged.<sup>102</sup> The Court refused to accept this argument because, the Court observed, doing so would “privilege[] form over substance,”<sup>103</sup> and would ignore that such a change “would fundamentally

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*Constitution Act, 1867 in Respect of Senate Term Limits*, 1st Sess., 41st Parl., 2011, § 1 [hereinafter *Senate Reform Bill*].

96. *Id.* § 2.

97. *Id.* § 3.

98. See Reference re Senate Reform, [2014] 1 S.C.R., para. 62 (Can.).

99. *Id.* para. 49.

100. *Id.* at 706.

101. *Constitution Act, 1867*, 30 & 31 Vict., c 3 §§ 24, 32 (U.K.).

102. See Reference re Senate Reform, [2014] 1 S.C.R. at 735.

103. *Id.* para. 52.



alter the architecture of the Constitution.”<sup>104</sup> An amendment, then, according to the Court, is more than a formal alteration to the constitutional text,<sup>105</sup> though the Court could have been more definitive on what in fact counts as an amendment.<sup>106</sup>

Nor was the Court persuaded that the text of the formal amendment rules is unclear; on the contrary, the Court noted that the multilateral default amendment procedure states plainly that it must be used for changes to “the method of selecting senators.”<sup>107</sup> For the Court, this phrase “covers the implementation of consultative elections, indicating that a constitutional amendment is required and making that amendment subject to the general procedure [in Section 38].”<sup>108</sup> The Court continued: “[t]he words ‘the method of selecting senators’ include more than the formal appointment of senators by the Governor General.”<sup>109</sup> It includes all changes to the method of senatorial selection, beyond and including those related directly to the act of appointment itself.<sup>110</sup>

Yet today senators are selected under a new process that differs from how they have historically been chosen. The Senate has been reformed, but not in the large-scale fashion many have sought since Confederation; change has instead come incrementally, without engaging the formal

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104. *Id.* para. 53.

105. *Id.* para. 52.

106. See Kate Glover, *Complexity and the Amending Formula*, 24 CONST. F. 9, 11 (2015); see also Emmett Macfarlane, *Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada*, 60 MCGILL L.J. 883, 900 (2015).

107. Reference re Senate Reform, [2014] 1 S.C.R. para. 64 (quoting *Constitution Act, 1982*, supra note 59, § 42(b)(1)).

108. *Id.*

109. *Id.* para. 65 (quoting *Constitution Act, 1982*, supra note 59, § 42(b)(1)).

110. *Id.*

amendment process.<sup>111</sup> Formal appointment continues to be made by the Governor General, but the selection process itself has changed as a result of the Advisory Board which advises the prime minister according to public criteria that now bring to light at least part of what has in the past remained concealed. Whether the new process for Senate appointments is an improvement on the previous method of senator selection is not the point, although it does seem to democratize a body that has long been inaccessible to many Canadians.<sup>112</sup> The point is that senator selection has changed in a material way. Although the prime minister retains the discretion to choose whom to nominate, the range of discretion is narrowed. The creation of the Advisory Body is a significant change that would have been appropriately passed as a constitutional amendment had it been possible to amend the Constitution without opening the door to collateral matters. Paradoxically, the choice not to formalize the new process in a law, and instead to promulgate it informally, has perhaps saved it from unconstitutionality. Yet there can be no doubt that the new process is in fact new, and that it changes the way senators are selected—for better or worse.

What remains to be seen about both the Regional Veto Law and the new process of Senate appointments is whether they will endure with time. Under the right conditions, a quasi-constitutional amendment may ultimately grow as durable as a formal amendment, and it may be that the conditions surrounding both the Regional Veto Law and the new process are right for them to endure.

There are at least three conditions that foster the durability of a quasi-constitutional amendment. First, the

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111. Bruce M. Hicks, *Can a Middle Ground be Found on Senate Numbers?*, 16 *CONST. F.* 21, 21 (2007).

112. For an argument that enhancing the democratic character of the Senate appointments process cannot justify circumventing the rigid formal amendment rules, see Richard Albert, *Constitutional Amendment by Stealth*, 60 *MCGILL L.J.* 673, 678–80 (2015).

amendment must concern an important matter of public policy. Second, the matter must be one that has in the past proven difficult to resolve by amendment. Third, the amendment must bring relative constitutional peace to the issue, defusing the subject and removing it from the foreground of the political process. The Regional Veto Law and the new process of Senate appointments appear to meet each of these three conditions, which perhaps explains why the Quebec question has for now receded to the background of constitutional politics in Canada, as well as why reform regarding the perennially controversial question about the proper role, membership, and function of the Senate may soon follow. Constitutional actors are instead focusing on other matters deemed higher priorities—at least in some part a function of the success of the quasi-constitutional amendments that were introduced outside of the formal process of constitutional amendment.

There is an important difference between the quasi-constitutional amendment resulting from the Regional Veto Law and the one resulting from the new process of Senate appointments: the former emerged from the legislative process and the latter did not. This difference—call it the difference between executive-led quasi-constitutional amendments and Parliament-led quasi-constitutional amendments—may lead us to conclude that one is more legitimate than the other insofar as the legislative process is ordinarily more public, transparent, and deliberative than the decision-making process that occurs almost exclusively internally within the executive branch.

#### CONCLUSION: CONSTITUTIONAL CHANGE AND ITS MODERN FORMS

I have sought in this brief overview to identify a concept and to illustrate it with three examples, one prior to Patriation, and two afterwards. There may well be others, including perhaps the Clarity Act passed into law after the

Quebec Secession Reference.<sup>113</sup> The takeaway is that quasi-constitutional amendments occupy the space between constitutional and ordinary law. Neither constitutional nor ordinary, they float sometimes uneasily between these two worlds, complicating our understanding of how a constitution is made, what it is, and where to find it.

*A. The Paradoxes of Quasi-Constitutionality*

Perhaps because of their unsteady status, quasi-constitutional amendments raise two paradoxes for the theory and doctrine of constitutional change. First, although they become effective with recourse to sub-constitutional means, quasi-constitutional amendments may nonetheless over time acquire constitutional status as a result of their subject-matter or importance. This reflects a mismatch between their adoption and their effect. Ordinarily, special status derives at least in part from an equally special period of creation, whether by constitutional amendment requiring heightened legislative or popular thresholds or a self-conscious recognition and attendant declaration by the enacting body that the law or measure demands special solicitude.

Second, although quasi-constitutional amendments may rank higher than ordinary law in the constitutional hierarchy, they may sometimes be closer to unconstitutionality than constitutionality. Precisely because they arise sub-constitutionally, yet purport to and maybe in fact do enjoy special status in legislatures, in courts of law, or in the public square, quasi-constitutional amendments cannot validly claim the legal, sociological, and procedural legitimacy that constitutionality requires. It is true that the absence of one form of legitimacy need not always result in

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113. *See generally* 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, 2d Sess., 36th Parl., 1999.

unconstitutionality. For instance, the adoption of the United States Constitution in violation of the rules of change in the Articles of Confederation shows how sociological legitimacy may overcome procedural illegality.<sup>114</sup> This, however, is an exception to the general rule that constitutional status derives from the convergence of legal recognition, sociological acceptance, and procedural correctness. Because quasi-constitutional amendments lack these three features, they quite controversially verge on the border of unconstitutionality, and indeed courts would be justified in invalidating them even in the face of high popular and political support for these constitution-level changes made sub-constitutionally. The Regional Veto Law, for example, is quite possibly unconstitutional. I believe the same to be true of provincial laws requiring binding referenda before provincial assemblies can consider ratifying an amendment proposal.<sup>115</sup>

Yet quasi-constitutional amendments have an important function in constitutional democracies. They offer constitutional actors a way to update the constitution informally without recourse to onerous rules of constitutional amendment. If these rules were followed without exception for any constitution-level change, they could effectively freeze the constitution and fate it to a chronic incapacity to respond to the modern challenges of evolving political and cultural norms and of changing social and economic conditions. This interplay between constitutional and ordinary rules of change can be understood in terms of Heather Gerken's hydraulics theory of constitutional change: where the path to formal amendment is or seems to be blocked due to its difficulty, constitutional actors redirect their energies toward

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114. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 84 (1998).

115. See Richard Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 *QUEEN'S L.J.* 143, 177–78 (2015).

alternative paths to produce the same or a similar outcome, though with a different form.<sup>116</sup>

### B. *Constitutional Form and the Rule of Law*

The question, then, is whether anything of significance turns on form. In Canada, we can look to the Supreme Court for guidance as to why form matters. The answer is, quite simply, the rule of law. The Court has articulated a text-centric conception of the rule of law “requir[ing] that courts give effect to the Constitution’s text, and apply, by whatever its terms, legislation that conforms to that text.”<sup>117</sup> These positivist foundations of the rule of law are not without normative commitments. Indeed, the Court has explained that the rule of law entails respect for three principles: the supremacy of law over both public and private actors, the legal regulation of interactions between public and private actors, and the establishment and maintenance of positive laws that reflect an order of normative values.<sup>118</sup> For the Court, it is the text that should drive the evolution of law. The Court has moreover suggested that normative values, however they may be discovered and applied, must cohere with the text: the rule of law, the Court wrote, “is not an invitation to trivialize or supplant the Constitution’s written terms.”<sup>119</sup>

Constitutional actors have pushed the boundaries of constitutional form in their pursuit of constitutional reform.<sup>120</sup> Whether the reforms are needed is only one

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116. See Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 929 (2007).

117. *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, para. 67 (Can.).

118. *Id.* para. 58.

119. *Id.* para. 67.

120. See Mark D. Walters, *The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7*, 7 *J. PARLIAMENTARY & POL. L.* 37–38, 48–49 (2013).

question; another perhaps more important one probes the consequences of making major constitutional changes outside of the formal rules of constitutional change entrenched in the Constitution of Canada.

In one view, quasi-constitutional amendments undermine the integrity of the Constitution because they trade on the vulnerabilities of constitutional form. They exploit the partially codified and uncodified nature of the Constitution of Canada to introduce from the back door changes that are not possible through the front. The long-term results are uncertainty about what has constitutional status, a disjunction between constitutional text and practice, and no clear roadmap for how constitutional actors may change the constitution or whether the rules in the constitutional text reflect either the necessary or sufficient conditions for constitutional reform.

In another view, quasi-constitutional amendment is an innovative strategy to update a rigid constitution that otherwise frustrates constitutional reform. It matters less *how* we change the constitution than that it changes at all because the constitution should reflect the preferences of constitutional actors and the people they represent. Where the constitution ceases to accommodate the needs of the community it governs, it exposes itself as a tool of governance poorly designed to serve its intended function. The argument from this view would continue as follows: were constitutional actors to deny themselves recourse to innovations like quasi-constitutional amendment, the consequence could be that the constitution fails to endure in moments when the pressure for change continues to build over a long period of time without the possibility of any change ever bringing relief.

For now, the latter view is dominant in Canada.<sup>121</sup>

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121. See Allan C. Hutchinson, *Constitutional Change and Constitutional Amendment: A Canadian Conundrum*, in *ENGINEERING CONSTITUTIONAL CHANGE*:

Constitutional actors have forged new paths to institutional reform outside of the formal rules of constitutional change.<sup>122</sup> Whether these paths point the way to the future remains to be seen, but there is yet no sign to suggest otherwise. Constitutional actors have grown comfortable operating in the space between constitutional and ordinary law, though perhaps less out of preference than out of necessity. But only so much constitutional change is possible through judicial interpretation, particularly where the targets of change are “hard-wired” into the constitution, and not as cleanly changeable by interpretation<sup>123</sup> as might be the case for interpreting a right cast at a high level of abstraction. On matters of constitutional structure, constitutional actors today may have no other option but quasi-constitutional amendment because the road to major formal amendment appears closed.

Many questions present themselves for future research. I raise two of them here. First, what should be the process for repealing or revising a quasi-constitutional amendment? They are ordinarily entrenched, and therefore subject to ordinary repeal or revision in terms of the parliamentary threshold required. But so are quasi-constitutional statutes, with the important wrinkle that they may be repealed or revised only with clear legislative language. Should the same rule apply to quasi-constitutional amendments? Second, given the extraordinary difficulty of formal amendment in Canada, should we not expect to see more quasi-constitutional amendments—many more than the ones identified in this Article? The first question requires a more elaborate answer than is possible in these pages. The answer to the second likewise requires more research to explain, but is a bit less of a mystery. Much of the change we would expect to see as a result of the rigidity of the Constitution has been

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A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 51, 56–57 (Xenophon Contiades ed., 2013).

122. *Id.*

123. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 29 (2006).



redirected from the channels of formal amendment to the sphere of judicial interpretation in Canadian courts. The reasons why constitutional rigidity in Canada has sometimes led to quasi-constitutional amendments, and more often to informal amendment by judicial interpretation, will have to wait for another day.