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Constructive Unamendability in Canada and the United States

Richard Albert*

I. INTRODUCTION

The Canadian and United States Constitutions are unique among the constitutions of the world. Partly written and partly unwritten,¹ the Constitution of Canada traces its beginnings to a British colonial statute.² Still today, the patriated Constitution of Canada remains a creation of the Parliament of the United Kingdom.³ The first principle of Canadian government is therefore the continuing though nonetheless largely ceremonial ubiquity of the Crown.⁴ The Constitution of Canada is also something of a structural hybrid: it authorizes judicial review yet entrenches a limited mechanism for the legislative branch to effectively overrule the Supreme Court.⁵

The United States Constitution is exceptional in its own right. For Alexis de Tocqueville, the Constitution was “the most perfect federal constitution that ever existed”.⁶ It is a rare “example of constitutional

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¹ N.A.M. MacKenzie, “The Background of the Canadian Constitution” (1953) 6 Res Judicatae 281, at 284.

² *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [reprinted in R.S.C. 1985, App. II, No. 5].

³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Canada is of course not the only independent state whose Constitution is a creation of the Parliament of the United Kingdom. See *An Act to constitute the Commonwealth of Australia* (U.K.), 63 & 64 Vict., c. 12.

⁴ See David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 2013).

⁵ See Tsvi Kahana, “Canada” in Dawn Oliver & Carlo Fusaro, eds., *How Constitutions Change: A Comparative Study* (Oxford, U.K.: Hart Publishing Ltd., 2011) 9, at 9.

⁶ Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, Inc., 1994), at 166.

superlongevity”,⁷ having survived uninterrupted since its drafting over two centuries ago. Former British Prime Minister William Gladstone once called it “the most wonderful work ever struck off at a given time by the brain and purpose of man”.⁸ Written, supreme, entrenched, supplemented by a bill of rights, and enforced by courts exercising the power of judicial review, the United States Constitution set the early standard for constitutionalism,⁹ although its influence abroad has declined dramatically since its bicentennial.¹⁰

Interestingly for constitutional comparativists, the Canadian and United States Constitutions share one similarity that sets them apart from many of the world’s written constitutions: neither entrenches formal unamendability.¹¹ Perhaps even more interestingly for Canadian constitutional scholars, the Supreme Court of Canada’s recent *Senate Reference*¹² is inextricably though not expressly connected to the unamendability of the Constitution of Canada, even though Canada does formally entrench any textually identifiable form of unamendability.

Formal unamendability is a common design in modern constitutions.¹³ Although neither the Canadian nor United States Constitution currently entrenches formal unamendability, both entrench a peculiar form of unamendability that I have elsewhere called *constructive unamendability*.¹⁴ Constructive unamendability derives from a political climate that makes it unlikely, though not impossible, to achieve the requisite supermajorities to pass a formal amendment. It therefore results neither from formal constitutional design nor from interpretive constitutional law, but rather from constitutional politics. In Canada and the United States, the Senate is constructively entrenched against formal amendment. This is perhaps no coincidence given that the

⁷ Zachary Elkins *et al.*, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009), at 162.

⁸ William E. Gladstone, “Kin Beyond Sea” (1878) 127 *North Am. Rev.* 179, at 185.

⁹ See Stephen Gardbaum, “The Myth and Reality of American Constitutional Exceptionalism” (2008) 107 *Mich. L. Rev.* 391, at 393.

¹⁰ See David S. Law & Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87 *N.Y.U. L. Rev.* 762, at 853.

¹¹ In the United States, the temporarily unamendable Importation and Census-Based Taxation Clauses expired in 1808. See U.S. Const., art. V (1789).

¹² *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32 (S.C.C.) [hereinafter “*Senate Reference*”].

¹³ See *infra*, Part II. I am grateful to Tom Ginsburg (Chicago) for sharing with me his data from the Comparative Constitutions Project on unamendable constitutional provisions historically and currently entrenched in written constitutions.

¹⁴ Richard Albert, “Constitutional Disuse or Desuetude: The Case of Article V” (2014) 94 *B.U.L. Rev.* 1029, at 1042-44.

strong federalist motivations for both Constitutions catalyzed the creation of a Senate whose design and function was to protect subnational interests. While Senate reform in Canada and the United States is difficult if not inconceivable precisely because of constructive unamendability, other countries have had moderate success in reforming their own Senates.¹⁵

There is a certain irony in the modern constructive unamendability of the Senate of Canada. For much of its history, the Constitution of Canada did not entrench a formal amendment rule. Senate reform was not possible as a domestic matter without the consent of the Parliament of the United Kingdom, which retained the exclusive authority to amend the Constitution of Canada.¹⁶ Yet when Canadian political actors adopted the *Constitution Act, 1982* and finally entrenched rules authorizing domestic institutions to formally amend the Constitution of Canada,¹⁷ Senate reform became no more realizable given the deep divisions that had been

¹⁵ For example, in the United Kingdom, the House of Lords now restricts membership earned on the basis of heredity. See *House of Lords Act 1999* (U.K.), 1999, c. 34. Belgium has evolved by constitutional amendment from a purely unitary to a fully federal state in which the federated entities are represented in the Senate. See Neal Alan Carter, "Complexity as Shock Absorber: The Belgian Social Cube" (2002) 8 ILSA J. Int'l & Comp. L. 963, at 980-81; Michael O'Neill, "Re-Imagining Belgium: New Federalism and the Political Management of Cultural Diversity" (1998) 51 Parliamentary Aff. 241, at 254-58; see also Senate Legal Service, *The Federal Parliament of Belgium*, online: <http://senate.be/english/federal_parliament_en.html> (describing the changing functions of bicameralism in Belgium from 1831 to 1993, when the most significant constitutional changes occurred). The Chilean Senate has been democratized by constitutional amendment and is no longer unelected. See Claudio A. Fuentes, "A Matter of the Few: Dynamics of Constitutional Change in Chile, 1990-2010" (2011) 89 Tex. L. Rev. 1741, at 1756. The Indonesian legislature became bicameral by constitutional amendment. See Kurniawan Hari, "Indonesia to Inaugurate Bicameral Legislature" *Jakarta Post* (October 1, 2004), online: <<http://www.thejakartapost.com/news/2004/10/01/indonesia-inaugurate-bicameral-legislature.html>>. But other efforts to reform the Senate have met with failure. For example, a recent referendum to abolish the Irish Senate failed. See Shawn Pogatchnik, "Ireland votes against abolishing Senate in referendum, prime minister's plan gets a 'wallop'" *National Post* (October 5, 2013), online: <<http://news.nationalpost.com/2013/10/05/ireland-votes-against-abolishing-senate-in-referendum-prime-ministers-plan-gets-a-wallop>>. In Spain, Senate reform appears to have support, but political actors have yet to make significant progress on any serious structural proposals, perhaps due to the intractability of the issue. See Elisa Roller, "Reforming the Spanish Senate: Mission Impossible?" (2002) 25 West Eur. Pol. 69, at 84-88.

¹⁶ Peter W. Hogg, "Formal Amendment of the Constitution of Canada" (1992) 55 L. & Contemp. Probs. 253, at 253 [hereinafter "Hogg, 'Formal Amendment'"]. There were two exceptions. First, provinces were authorized to amend their own provincial constitutions. See *Constitution Act, 1867*, Part VI, s. 92(1) [repealed]. Second, in 1949, the United Kingdom passed an amendment authorizing the Parliament of Canada to formally amend the Constitution of Canada in relation only to a narrow menu of federal powers. See *British North America (No. 2) Act, 1949* (U.K.), 13 Geo. VI, c. 81.

¹⁷ See Procedure for Amending Constitution of Canada, Part V, ss. 38-49, *Constitution Act, 1982*.

sown by the constitutional negotiations that produced those new formal amendment rules. The failure of the 1987 Meech Lake Accord¹⁸ and the 1992 Charlottetown Accord¹⁹ prove how difficult Canada's new formal amendment rules made it then, and still make it today, to formally amend the Senate of Canada.

Faced with the constructive unamendability of the Senate, political actors in Canada and the United States may resort to arguably legal though illegitimate methods to circumvent the political strictures preventing formal amendment. For example, the Equal Suffrage Clause in the United States protects a state from any diminishment in its representation in the United States Senate without its consent.²⁰ For small states, this clause was a "constitutional essential" at the founding.²¹ Without the protection the Equal Suffrage Clause afforded them against larger and more populous states, small states would have refused to ratify the United States Constitution.²² The Equal Suffrage Clause is not formally unamendable. But the equality of state representation in the Senate has become constructively unamendable insofar as no state would freely consent to a diminution of its representation in the Senate. Political actors could nonetheless circumvent the constructive unamendability of a state's Senate representation by resorting to the strictly legalistic, though substantively illegitimate, double amendment strategy, as I will discuss below.²³

In Canada, one particular Senate reform at issue in the *Senate Reference* may once arguably have been legal, but it has always been illegitimate.²⁴ The Government of Canada's effort to formally amend senator selection using the unilateral federal amendment procedure under section 44 of the *Constitution Act, 1982*, amounts to an improper circumvention of the multilateral general amendment procedure under section 38.²⁵ In its advisory opinion, the Supreme Court concluded that

¹⁸ The 1987 Constitutional Accord, Ottawa, Ontario, June 3, 1987.

¹⁹ Consensus Report on the Constitution: Final Text, Charlottetown, Prince Edward Island, August 28, 1992.

²⁰ See U.S. Const., art. V (1789) ("Provided that ... no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

²¹ Douglas G. Smith, "An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution" (1997) 34 San Diego L. Rev. 249, at 322.

²² See Max Farrand, ed., *1 The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1996), at 196, 201 (quoting Roger Sherman).

²³ See *infra*, section IV.1.

²⁴ I do not believe that it was legal, and only note that it was "arguably" legal out of respect for two of the constitutional experts, Peter Hogg and Warren Newman, who advised the Government of Canada in the *Senate Reference*.

²⁵ Compare *Constitution Act, 1982*, s. 44 with ss. 38 and 42.

section 44 was not the proper formal amendment procedure to amend senator selection,²⁶ but reasonable minds can disagree on this point, given the debatably permissive language of section 44.²⁷ As a strictly legalistic matter, therefore, it was arguably once an open question whether section 44 could be validly deployed to amend senator selection. But, as I will discuss below,²⁸ when illuminated by history, context and the architecture of Canada's formal amendment rules, whether section 44 is the proper procedure to amend senator selection is much less debatable.

In this paper, I illustrate the concept of constructive unamendability with reference to senator selection in the Canadian Constitution and the Equal Suffrage Clause in the United States Constitution. I evaluate the constructive unamendability of the Senate in both countries, I suggest that the constructive unamendability of the Senate of Canada has compelled Canadian political actors to innovate new methods for constitutional change, and I show how Canadian political actors attempted to circumvent the Constitution to amend the constructively unamendable Senate. Drawing from the late political theorist Georges Liet-Veaux's concept of "fraude à la constitution",²⁹ I suggest that the Government of Canada's use of section 44 to formally amend senator selection may once have been both arguably legal in form yet illegitimate in substance. I conclude with brief reflections on the relationship between legality and legitimacy.

II. THE FORMS OF UNAMENDABILITY

Written constitutions commonly entrench formal amendment rules that authorize political actors to change the constitutional text.³⁰ In his study of amendment difficulty, Donald Lutz illustrates that formal amendment rules may range from easy, as in New Zealand, where only a simple legislative majority is needed, to extraordinarily difficult, for

²⁶ *Senate Reference*, *supra*, note 12, at para. 69.

²⁷ *Constitution Act, 1982*, s. 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."

²⁸ See *infra*, Section IV.2.

²⁹ Georges Liet-Veaux, "La 'fraude à la constitution': Essai d'une analyse juridique des révolutions communautaires récentes: Italie, Allemagne, France" (1943) 59 *Revue du droit et de science politique en France et à l'Étranger* 116, at 145 [hereinafter "Liet-Veaux"].

³⁰ See Francesco Giovannoni, "Amendment Rules in Constitutions" (2003) 115 *Pub. Choice* 37, at 27.

instance in Australia, where national and subnational actors must agree to an amendment.³¹ Generally, however, formal amendment involves special procedures whose enhanced difficulty as compared to regular legislative procedures makes amendment a unique moment in the life of a constitutional democracy.

Perhaps we should take comfort, as Peter Hogg has written, “from the fact that it is always difficult to amend a country’s constitution”.³² Rigidity is a feature not a failing of written constitutionalism insofar as it makes a constitution generally more difficult to amend than a law.³³ Indeed, the degree of difficulty of formal amendment is partly, as a functional matter, what distinguishes constitutional text from ordinary law.³⁴ Yet constitutional rigidity becomes a defect when formal amendment exceeds mere difficulty and becomes an impossibility. One scholar suggests that the federalization of constitutional change has made formal amendment in Canada “largely impossible”.³⁵ Walter Dellinger, one of the leading scholars of constitutional change, has described the Constitution of Canada as “unduly rigid”, and observed that “it affords little or no possibility of reforming those existing institutions of government which play a critical role in the amendment process”.³⁶ The difficulty of formal amendment in Canada is exacerbated by judicially imposed constraints on formal amendment,³⁷ perhaps most notably by the Supreme Court’s informal entrenchment of the duty to negotiate in

³¹ Donald S. Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006), at 170.

³² Peter W. Hogg, “The Difficulty of Amending the Constitution of Canada” (1993) 31 *Osgoode Hall L.J.* 41, at 60.

³³ See Edward Schneider, *Crafting Constitutional Democracies: The Politics of Institutional Design* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2006), at 222.

³⁴ See Donald S. Lutz, “Toward a Theory of Constitutional Amendment” in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995) 237, at 240.

³⁵ Bettina Petersohn, “Constitutional Reform and Federal Dynamics: Causes and Effects” in Arthur Benz & Jörg Broschek, eds., *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford: Oxford University Press, 2013) 297, at 316.

³⁶ Walter Dellinger, “The Amending Process in Canada and the United States: A Comparative Perspective” (1982) 45 *L. & Contemp. Probs.* 283, at 300.

³⁷ Consistent with the Canadian experience, Xenophon Contiades and Alkeme Fotiadou observe in their important analysis of constitutional change that “although the role of the judge is usually invisible in amending formulas, informal change thrives within surroundings of slow-moving formal change”. Xenophon Contiades & Alkeme Fotiadou, “Models of Constitutional Change” in Xenophon Contiades, ed., *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Oxford: Routledge, 2013), at 422.

the *Secession Reference*³⁸ as well as the informal entrenchment of its own essential features in the recent *Nadon Reference*.³⁹

Formal amendment in Canada may be difficult but it is not impossible, at least not as a result of an express entrenchment of formally unamendable constitutional provisions. As I have explained elsewhere, an unamendable constitutional provision is “impervious to the constitutional amendment procedures enshrined within a constitutional text and immune to constitutional change even by the most compelling legislative and popular majorities”.⁴⁰ Constitutional designers entrench unamendable provisions for preservative, transformative or reconciliatory purposes⁴¹ but in most cases intend them “to last forever and to serve as an eternal constraint on the state and its citizens”;⁴² hence the phrase *eternity clause* that some scholars have used to describe them.⁴³

Written constitutions entrench a variety of provisions against amendment. Germany, for example, makes human dignity unamendable.⁴⁴ The Algerian,⁴⁵ Brazilian⁴⁶ and Ukrainian⁴⁷ Constitutions make unamendable all of their constitutional rights. The Constitution of Bosnia and Herzegovina makes unamendable the requirement that the country remain or become party to specific international human rights agreements.⁴⁸ In Turkey and Togo, secularism is unamendable,⁴⁹ as is theocracy in Iran and Afghanistan,⁵⁰ socialism in Cuba,⁵¹ unitarism in

³⁸ See *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 88-105 (S.C.C.).

³⁹ See *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, at paras. 90-105 (S.C.C.).

⁴⁰ Richard Albert, “Constitutional Handcuffs” (2010) 42 *Ariz. St. L.J.* 663, at 665-66.

⁴¹ *Id.*, at 678-98.

⁴² *Id.*, at 666.

⁴³ See, e.g., Donald P. Kommers, “German Constitutionalism: A Prolegomenon” (1991) 40 *Emory L.J.* 837, at 846; Alexander Somek, “Constitutional Theory as a Problem of Constitutional Law” (1998) 32 *Isr. L. Rev.*, at 572 n.19; Manfred Zuleeg, “What Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union” (1997) 45 *Am. J. Comp. L.* 505, at 510.

⁴⁴ German Basic Law, Part I, art. 1(1) and at Part VII, art. 79(3) (1949) [hereinafter “German Basic Law”].

⁴⁵ Algeria Const., Title IV, art. 178 (1996).

⁴⁶ Brazil Const., s. VIII, s. II, art. 60, s. 4(IV) (1988).

⁴⁷ Ukraine Const., Title XIII, art. 157 (1996).

⁴⁸ Bosnia & Herzegovina Const., art. II(7) (1995).

⁴⁹ Togo Const., Title XIII, art. 144 (1992); Turkey Const., Part I, art. 4 (1982).

⁵⁰ Afghanistan Const., c. X, art. 149 (2004); Iran Const., c. XIV, art. 177 (1980).

⁵¹ Cuba Const., c. XV, art. 137 (1976).

Indonesia and Kazakhstan,⁵² monarchism in Jordan and Kuwait,⁵³ republicanism in France, Haiti, and Italy,⁵⁴ the separation of powers in Greece,⁵⁵ presidential term limits in El Salvador and Guatemala,⁵⁶ and political pluralism in Portugal and Romania.⁵⁷

Unamendability comes in many forms. Constitutional designers have innovated creative mechanisms to formally entrench provisions against amendment, political actors have developed effective ways to achieve the informal equivalent of formal unamendability, and scholars have advanced theoretical arguments about the limits of both formal and informal unamendability. Yet we lack a vocabulary to classify comprehensively the many forms of unamendability entrenched by constitutional designers, interpreted by political actors and theorized by scholars. In this Part, I offer a preliminary typology of six major forms of unamendability we may perceive in liberal democracies. These forms of unamendability may be divided into two primary categories — substantive and procedural — with three secondary variations: formal, informal and theoretical.

This is not the first effort to classify the forms of unamendability. In the most important contribution to the study of unamendability, Melissa Schwartzberg classifies unamendability along similar though materially distinguishable dimensions: temporary and formal.⁵⁸ Schwartzberg's classification turns on two inquiries: whether entrenchment is temporally limited or unlimited, and whether it is formally specified or implicitly enforced.⁵⁹ This generates a classification of four forms of unamendability: (1) formal, time-unlimited entrenchment; (2) formal, time-limited entrenchment; (3) *de facto* entrenchment; and (4) implicit entrenchment.⁶⁰

For Schwartzberg, *formal, time-unlimited entrenchment* refers to a textually entrenched constitutional provision that is not subject to a time limitation, for instance, Portugal's absolute entrenchment of republican government.⁶¹ *Formal, time-limited entrenchment* introduces a temporal

⁵² Indonesia Const., c. XVI, art. 37, s. 5 (1945); Kazakhstan Const., s. IX, art. 91(2) (1995).

⁵³ Jordan Const., c. III, art. 126 (1984); Kuwait Const., Part V, art. 175 (1962).

⁵⁴ France Const., Title XVI, art. 89 (1958); Haiti Const., Title XIII, art. 284-4 (1987); Italy Const., Title VI, s. 2, art. 139 (1948).

⁵⁵ Greece Const., Part IV, s. II, art. 110 (1975).

⁵⁶ El Salvador Const., Title VI, c. II, arts. 154, 248 (1983); Guatemala Const., Title IV, c. III, arts. 187, 281 (1985).

⁵⁷ Portugal Const., Part IV, Title II, art. 288(i) (1976); Romania Const., Title VII, art. 152 (1991).

⁵⁸ Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007), at 8-16 [hereinafter "Schwartzberg"].

⁵⁹ *Id.*, at 8.

⁶⁰ *Id.*, at 8-16.

⁶¹ Portugal Const., Part IV, Title II, art. 288(b) (1976).

wrinkle to textual entrenchment: the absolute entrenchment of a given clause or constitutional text expires after a pre-defined period of time. As an example, Schwartzberg points to the United States Constitution's temporary entrenchment of the slave trade until 1808.⁶² Under Schwartzberg's classification, *de facto entrenchment* refers to a textual provision that is unamendable despite not being textually entrenched against formal amendment and whose "amendment is virtually impossible because of exceptionally high procedural barriers to change".⁶³ Finally, *implicit entrenchment* incorporates the normative view that a norm may be so fundamental to the constitutional order that its amendment would transform the regime. It also incorporates the positive view that a norm has become so deeply embedded as a matter of fact that amending it would be unimaginable.⁶⁴ These four forms of unamendability illustrate how states may entrench constitutional provisions against formal amendment.

Yet Schwartzberg's four-part classification may be refined. Instead of classifying unamendability along temporal and formal dimensions to yield four forms of unamendability, I propose classifying unamendability along substantive and procedural dimensions to yield six forms. Like Schwartzberg's classification, the one I propose interrogates whether entrenchment is specified in the constitutional text and it also examines the duration of the entrenchment. But the classification I propose asks additional qualitative questions about entrenchment itself, namely, whether formal entrenchment concerns subject matter or procedural unamendability; whether informal entrenchment derives from judicial interpretation or constitutional theory; and whether informal entrenchment relates to either subject matter or procedural unamendability. Below, I illustrate each of these with examples. I note, however, that this is a preliminary classification that reflects important limitations of its own, as I will explain below.⁶⁵

1. Substantive Unamendability

Unamendable provisions often reflect substantive restrictions on what is amendable. These restrictions concern the content or subject matter of a constitutional rule. For example, a rule that divests political

⁶² U.S. Const., art. V (1789).

⁶³ Schwartzberg, *supra*, note 58, at 12.

⁶⁴ *Id.*, at 13-14.

⁶⁵ See *infra*, Section II.3.

actors of the power to amend a provision guaranteeing republican government, secularism or federalism represents a substantive restriction on the amending power. Each of these three examples — unamendable republicanism, secularism and federalism — is a substantive restriction because it limits *what* may be amended. But identifying what is unamendable is only part of the inquiry into substantive unamendability. We must also inquire *how* these substantive restrictions arise to begin with. There are three principal possibilities: substantive restrictions may be formally entrenched in the constitutional text; they may emerge informally; or they may be grounded in constitutional theory.

Formal substantive unamendability refers to subject matter unamendability codified in the text of the constitution. For example, under the Italian and French Constitutions, respectively, “the republican form [of the state] cannot be a matter of constitutional amendment”⁶⁶ and “the republican form of government cannot be the object of an amendment”.⁶⁷ In contrast, *informal substantive unamendability* results from a binding judicial interpretation by the national court of last resort. The best example is the basic structure doctrine developed by the Indian Supreme Court. Contrary to the Indian Constitution’s grant of plenary formal amendment power to the legislature,⁶⁸ the Court has ruled that some amendments are beyond the legislative power: what constitutes the “basic structure” of the Indian Constitution is unamendable.⁶⁹ This “basic structure” prohibits amendments to unwritten principles such as federalism and secularism.⁷⁰ Finally, *theoretical substantive unamendability* refers to constitutional theories positing that constitutionalism and liberal democracy require certain unamendable democratic pre-conditions. In the American context, for example, Walter Murphy suggests that human dignity is the most fundamental substantive value, and should therefore be unamendable,⁷¹ though neither the constitutional text nor a judicial opinion insulates human dignity from formal amendment.

⁶⁶ Italy Const., Title VI, s. 2, art. 139 (1948).

⁶⁷ France Const., Title XVI, art. 89 (1958).

⁶⁸ See India Const., Part XX, art. 368 (1950).

⁶⁹ Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford: Oxford University Press, 1999), at 197-202.

⁷⁰ Vivek Krishnamurthy, “Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles” (2009) 34 *Yale J. Int’l L.* 207, at 208.

⁷¹ Walter F. Murphy, “The Art of Constitutional Interpretation: A Preliminary Showing” in M. Judd Harmon, ed., *Essays on the Constitution of the United States* (Port Washington, NY: Kennikat Press, 1978) 131, at 156.

2. Procedural Unamendability

Constitutional provisions may also be unamendable in procedural terms. Whereas substantive unamendability entrenches a constitutional provision against formal amendment by reference to the content or subject matter of the provision, procedural unamendability likewise entrenches a constitutional provision against formal amendment but does so by reference to the process of formal amendment itself. The three variations of substantive unamendability — formal, informal and theoretical — apply as well to procedural unamendability: formal procedural unamendability, informal procedural unamendability, and theoretical procedural unamendability.

Formal procedural unamendability refers to procedural unamendability codified in the constitutional text. For instance, the Mexican Constitution effectively makes itself unamendable in the event of rebellion leading to its violation, suspension or replacement: “This Constitution shall not lose its force and effect even if its observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein should become established as a result of a public disturbance, as soon as the people recover their liberty, its observance shall be reestablished, and those who had taken part in the government emanating from the rebellion, as well as those who cooperated with such persons, shall be judged in accordance with this Constitution and the laws that have been enacted by virtue thereof.”⁷² This illustrates formal procedural unamendability insofar as the procedural restriction on formal amendment — prohibiting formal amendment in connection with rebellion — is codified in the constitutional text.

The second type of procedural unamendability — *informal procedural unamendability* — results from the political process. Informal procedural unamendability develops where the procedures required by a formal amendment rule are so onerous that political actors cannot realistically (though they could theoretically) meet the amendment threshold. It reflects procedural unamendability arising informally from the dialogic interactions of political actors, in contrast to the textually commanded unamendability that characterizes formal procedural unamendability. The Articles of Confederation illustrate informal procedural unamendability: the 13 states could theoretically satisfy the

⁷² Mexico Const., Title IX, art. 136 (1917).

demanding unanimity threshold for formally amending the Articles,⁷³ but in practice it was not possible for them to fulfil those procedures.⁷⁴

Theoretical procedural unamendability is the third type of procedural unamendability. Whereas formal and informal procedural unamendability refer respectively to procedural restrictions codified in the constitutional text and born of the political process, theoretical procedural unamendability derives from the distinction between amendment and revision. According to constitutional theorists, most notably Carl Schmitt, there is a difference between amendment and revision: amendment is possible “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved”.⁷⁵ Where a constitutional change adds to, subtracts from or alters the constitution in a way that does not “preserve the constitution itself”⁷⁶ but instead transforms its fundamental framework, such a change amounts to a revision, not an amendment.⁷⁷ In constitutional theory, anything more than simply “fine-tuning what is already in place” cannot be achieved by formal amendment.⁷⁸ As a matter of constitutional theory, therefore, certain rules, principles, practices and structures are unamendable pursuant to the ordinary amendment process, but they may be achieved in a more involved process of constitutional revision. This procedural distinction illustrates theoretical procedural unamendability.

3. Temporary Unamendability

Temporality is best understood as a tertiary variation on unamendability. It is neither a primary category — like substantive or procedural unamendability — nor a secondary variation such as formal, informal or theoretical unamendability. In any given constitutional regime, the forms of unamendability may be of either temporary or indefinite duration. For example, formal substantive unamendability may

⁷³ Articles of Confederation, art. 13 (1781): “And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”

⁷⁴ James Madison criticized the Articles of Confederation on these grounds. See “The Federalist No. 40” in Jacob E. Cooke, ed., *The Federalist* (Hanover, NH: Wesleyan University Press, 1961) [hereinafter “Cooke”] 258, at 263.

⁷⁵ Carl Schmitt, *Legality and Legitimacy* (Durham, NC: Duke University Press, 2004), at 150.

⁷⁶ *Id.*

⁷⁷ *Id.*, at 151.

⁷⁸ See Jason Mazzone, “Unamendments” (2005) 90 Iowa L. Rev. 1747, at 1750-52.

be entrenched temporarily, as we see in the United States Constitution,⁷⁹ or indefinitely, as we see in the German Basic Law,⁸⁰ subject of course to revision, replacement or revolution.⁸¹ Likewise, formal procedural unamendability may be entrenched temporarily or indefinitely. A constitutional text may disable its formal amendment rules on procedural grounds for the duration of the regime, which is reflected in the Mexican Constitution,⁸² or for a more limited period of time, a strategy the Cape Verdean Constitution illustrates by prohibiting formal amendment for five years after its coming-into-force.⁸³

Informal substantive and procedural unamendability may similarly be temporary or indefinite. A national high court could, for instance, interpret the constitution as anchored in inviolable unwritten principles that are immune from formal amendment — thereby entrenching informal substantive unamendability — but this decision is susceptible to refinement or reversal by a successor court. With regard to informal procedural unamendability, the political climate that gives rise to unamendability need not necessarily be permanent. It may evolve to either assuage or exacerbate the social, cultural and economic conditions that have generated the political intractability that had given rise to informal procedural unamendability to begin with. Theoretical substantive and procedural unamendability may also have temporary or indefinite variations. Scholars could construct arguments on the merits and shortcomings of both temporary and indefinite theoretical substantive unamendability, as well as the merits and shortcomings of both temporary and indefinite theoretical procedural unamendability. For these reasons, I find it analytically useful *not* to treat temporality as its own category of unamendability and instead to view temporality as a variation on one of the six forms of unamendability.

The six-part classification I have suggested exhibits an important limitation of its own. The distinction between substance and procedure is not as clear as it might seem because substantive restrictions on formal

⁷⁹ See U.S. Const., art. V (1789) (temporarily entrenching art. I, s. 9, cl. 1 and 4 from formal amendment until the year 1808).

⁸⁰ See German Basic Law, Part VII, art. 79(3) and Part II, art. 20(1) (1949) (permanently entrenching federalism against formal amendment).

⁸¹ Unamendability cannot survive revolution. See Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge: Cambridge University Press, 2010), at 70. Indeed, unamendability may in fact provoke revolution. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund ed., 1982) (1915), at 66.

⁸² See *supra*, Section II.2.

⁸³ See Cape Verde Const., Part VI, Title III, art. 309(1) (1980).

amendment are often cast in procedural terms. Consider again the Mexican Constitution, which disables its formal amendment rules as to the entire Constitution in the event of rebellion. I have characterized this as an example of formal *procedural* unamendability because it entrenches a textual rule invalidating formal amendments made during rebellion and does not expressly insulate the subject matter of a constitutional provision from formal amendment. Yet we could alternatively characterize this prohibition as an example of formal *substantive* unamendability insofar as its actual, though implicit, purpose is to protect the *content* of the Constitution. The substance-process divide is thus less definitive than the classification suggests.

Nonetheless, this classification is modestly useful because it complicates our understanding of unamendability. It demonstrates that unamendability may be textually entrenched, informally derived or abstractly theorized in terms of the content of a provision or principle, or in terms of a more generalized restriction on political actors. This classification also illustrates that a procedural limitation on formal amendment may conceal a substantive prohibition. Finally, this classification questions whether temporality should be a dominant category in defining the forms of unamendability. The result may be more questions than answers, but it brings us closer to understanding how unamendability becomes entrenched in a constitutional regime.

III. CONSTRUCTIVE UNAMENDABILITY

Neither the Canadian nor the United States Constitution entrenches formal substantive or procedural unamendability.⁸⁴ Nor is it clear that either regime entrenches informal substantive unamendability, although one could argue that the Canadian Supreme Court's interpretation of section 93 of the *Constitution Act, 1867* effectively entrenches it against formal amendment.⁸⁵ But both Canada and the United States entrench

⁸⁴ In the United States, the Importation and Census-Based Taxation Clauses are examples of temporary formal substantive unamendability, but those expired in 1808. See U.S. Const., art. V (1789).

⁸⁵ *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.). As the Court has explained (at para. 25), section 93 “grants to the provinces the power to legislate with regard to education”, a grant of authority “subject to certain restrictive conditions, among them s. 93(1) which provides that no law may prejudicially affect any right or privilege with respect to denominational schools which any class of persons had at the time of Union.” *Id.*, at para. 25. As a result, “[t]he effect of this subsection is to entrench constitutionally a special status for such classes of persons, granting them rights which are denied to others.” *Id.* The Court has described s. 93 as “the product of an historical compromise which was a crucial step along the road leading to Confederation”, *id.*,

similar forms of informal procedural unamendability.⁸⁶ Informal procedural 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 pre-conditions 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.

We may use the term “constructive unamendability” as a shorthand for informal procedural unamendability. In law, “constructive” denotes an imputed characteristic, one that exists by virtue of a legal fiction rather than a legal fact.⁸⁷ It refers to a derivative consequence we may infer from a state of affairs that is not legally required but exists as a social fact.⁸⁸ A constitutional provision or principle is therefore “constructively” unamendable when the constitutional text defines it as freely amendable but the political reality demonstrates that it is not. Unamendability may be imputed to a provision or principle when political actors have expressed their unwillingness or shown their inability to satisfy the constitution’s textually mandated procedures to formally amend that provision or principle. This constructive unamendability need not be an indefinite feature of a provision or principle; political circumstances may evolve to alleviate the pressures that generated the intractable conditions to begin with, just as an uncontentious provision or principle may later become constructively unamendable as a result of new political fault lines.

at para. 29, and as a “solemn pact” and “cardinal term” without which there would have been no Confederation. *Id.* Although the Court has not expressly declared s. 93 unamendable, as the Indian Supreme Court has done with respect to the basic structure (see *supra*, Section II.1), the Court has suggested that s. 93 merits greater solicitude than other constitutionally entrenched provisions.

⁸⁶ Recall that this type of procedural unamendability results from the political process and not from a textual command against formal amendment. See *supra*, Part II.2.

⁸⁷ Bryan A. Garner, ed., *Black’s Law Dictionary*, 9th ed. (St. Paul, MN: West, 2009), at 356.

⁸⁸ See *Middleton v. Parke*, 3 App.D.C. 149, at 160-61 (1894).

Federal democracies may be more vulnerable to producing forms of constructive unamendability where a formal amendment targets the distribution of powers between the national and subnational states. The design of formal amendment rules in federal democracies often serves to protect dual interests, and consequently confers veto powers upon both the national and subnational for amendments to federalist institutions. Canada and the United States are both strong federal democracies whose foremost federalist institution — the Senate — is constructively unamendable as a result of this shared veto power. Other federal democracies entrench formal amendment rules similar to the design of the Equal Suffrage Clause, which requires special subnational consent to formally amend a state's representation in the Senate. In Australia, for example, a formal amendment to the powers, boundaries or representation of a state requires a majority of voters in that affected state to approve the amendment, in addition to first securing a simple majority in both houses of the bicameral national legislature and securing approval in a national referendum.⁸⁹ Austria adopts a similar rule for formal amendments to its Federal Council.⁹⁰ It is therefore important to observe that federalism may be one cause of constructive unamendability.

1. The Equal Suffrage Clause

In the United States, the Equal Suffrage Clause is constructively unamendable.⁹¹ The general formal amendment rule requires Congress and the states respectively to propose a formal amendment by two-thirds vote and to ratify it by three-quarters supermajority.⁹² Under the Equal

⁸⁹ Australia Const., c. VIII, art. 128 (1900).

⁹⁰ See Austria Const., c. II, arts. 26, 34-35, 44 (1920).

⁹¹ Amending the Equal Suffrage Clause may seem unlikely. The clause was entrenched at the founding as part of a great compromise deemed crucial to the formation of the Union. See Bradford R. Clark, "Constitutional Compromise and the Supremacy Clause" (2008) 83 *Notre Dame L. Rev.* 1421, at 1430-35. Yet today the Equal Suffrage Clause is not free from scholarly attack. See Sanford Levinson, *Our Undemocratic Constitution* (Oxford: Oxford University Press, 2006), at 50-51. The primary point of contention is that senators from smaller states have smaller constituencies than those from larger states, effectively giving residents of smaller states greater representation in the Senate on the basis of their residency alone. See *id.*, at 50. For example, the seven smallest states in the Union, represented by 14 senators, have a combined population of 4.8 million people. *Id.* The 4.9 million residents in Michigan, however, are represented in the Senate by only two legislators. *Id.*

⁹² U.S. Const., art. V (1789). The U.S. Constitution also authorizes formal amendment via constitutional convention, but this procedure has never been successfully used. See Michael B. Rappaport, "Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them" (2010) 96 *Va. L. Rev.* 1509, at 1512. Seth Barrett Tillman, "A Textualist Defense of Article I,

Suffrage Clause, “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”.⁹³ The Equal Suffrage Clause therefore creates an exception to the general formal amendment rule: a formal amendment ordinarily requires Congress and three-quarters of states to agree to a formal amendment, but a formal amendment diminishing a state’s representation in the Senate — “depriv[ing] [the state] of its equal Suffrage in the Senate” — requires in addition the consent of the state whose representation in the Senate is changed.⁹⁴

The Equal Suffrage Clause seems by its terms to require the additional consent of only the state deprived of its equal representation in the Senate. But it actually requires the unanimous consent of all states.⁹⁵ The reason becomes evident when we consider a hypothetical illustration. Assume the requisite supermajorities agree by formal amendment to reduce Maine’s representation in the Senate. Under the Equal Suffrage Clause, the amendment would be invalid without Maine’s consent. Yet all other states would likewise be required to consent to the change in their own relative Senate representation given their resulting deprivation of “equal Suffrage in the Senate”.⁹⁶ As Sanford Levinson explains, “Vermont’s failure to consent to [Maine’s] reduced representation in the Senate would doom the proposal, since otherwise one would be foisting an ‘unequal Suffrage’ on Vermont, relative to [Maine]’s, without its consent.”⁹⁷ This unanimity requirement highlights what Michael Dorf has referred to as the “near-impossibility”⁹⁸ of amending the Senate.

Observers appear to have conflated the difficulty of formally amending the Senate with its absolute unamendability. For instance, the Supreme Court of the United States has described the Equal Suffrage Clause as a “permanent and unalterable [exception] to the power of amendment”.⁹⁹ Leading constitutional scholars have similarly interpreted the clause as formally unamendable: Raoul Berger has described the

Section 7, Clause 3: Why *Hollingsworth v. Virginia* Was Rightly Decided, and Why *INS v. Chadha* Was Wrongly Reasoned” (2005) 83 Tex. L. Rev. 1265, at 1290 n. 64.

⁹³ U.S. Const., art. V (1789).

⁹⁴ “Changing” a state’s representation in the U.S. Senate can mean that the state’s representation is either increased or diminished relative to the representation of other states.

⁹⁵ Sanford Levinson, “Designing an Amendment Process” in John Ferejohn *et al.*, eds., *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2001) 271, at 284.

⁹⁶ See Sanford Levinson, “The Political Implications of Amending Clauses” (1996) 13 Const. Commentary 107, at 122, note 32.

⁹⁷ *Id.*

⁹⁸ Michael C. Dorf, “The Constitution and the Political Community” (2011) 27 Const. Commentary 499, at 506.

⁹⁹ *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, at 348 (1855).

clause as “expressly excepted from the sweep of the amendment power”;¹⁰⁰ Douglas Bryant has stated that it “may not be altered and is forever part of the Constitution”;¹⁰¹ Daryl Levinson has called it “explicitly unamendable”;¹⁰² Doug Linder has described it as “expressly unamendable”;¹⁰³ Eric Posner and Adrian Vermuele interpret it as “entrenched ... against subsequent amendment”;¹⁰⁴ and Jack Balkin deems it “unamendable”.¹⁰⁵ These interpretations may reflect either a general reference to “unamendability” incorporating its substantive and procedural dimensions as well as its formal and informal forms, or they may result from a misreading of the clause. In either case, their references to unamendability are imprecise.

We know, however, that the Equal Suffrage Clause does not entrench a formally unamendable rule against altering Senate representation. By its own terms, the Equal Suffrage Clause makes Senate representation amendable provided the concerned state(s) consent to the change. This procedural requirement to secure state consent is qualitatively different from the wholesale disabling of formal amendment rules resulting from a rule imposing formal substantive unamendability. Under formal substantive unamendability, the constitutional text prohibits formal amendment under that regime even with the unanimous consent of all involved political actors.¹⁰⁶ The German Constitutional Court has enforced the Basic Law’s absolute entrenchment of human dignity as a form of formal substantive unamendability, recognizing human dignity as “a paramount principle of the constitution and the highest constitutional value”.¹⁰⁷ The human dignity protection, which holds that “human dignity shall be inviolable”¹⁰⁸ and is in

¹⁰⁰ Raoul Berger, “New Theories of ‘Interpretation’: The Activist Flight from the Constitution” (1986) 47 Ohio St. L.J. 1, at 6.

¹⁰¹ Douglas H. Bryant, “Unorthodox and Paradox: Revising the Ratification of the Fourteenth Amendment” (2002) 53 Ala. L. Rev. 555, at 562.

¹⁰² Daryl J. Levinson, “Parchment and Politics: The Positive Puzzle of Constitutional Commitment” (2011) 124 Harv. L. Rev. 657, at 697 n. 128.

¹⁰³ Douglas Linder, “What in the Constitution Cannot be Amended?” (1981) 23 Ariz. L. Rev. 717, at 717.

¹⁰⁴ Eric A. Posner & Adrian Vermuele, “Legislative Entrenchment: A Reappraisal” (2002) 111 Yale L.J. 1665, at 1681.

¹⁰⁵ Jack M. Balkin, “The Constitution as a Box of Chocolates” (1995) 12 Const. Commentary 147, at 149.

¹⁰⁶ Of course, political actors and citizens could alternatively decide to adopt an altogether new constitution and thereby create a new constitutional regime.

¹⁰⁷ Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 2012), at 397 (quoting *Aviation Security Case* (2006), 115 BVerfGE 118, at 152).

¹⁰⁸ German Basic Law, Part I, art. 1(1) (1949).

turn formally entrenched against amendment,¹⁰⁹ is evidently different in kind from the Equal Suffrage Clause.

Some scholars have recognized that the Equal Suffrage Clause is not theoretically absolutely unamendable.¹¹⁰ Nonetheless, unanimity among states is very likely unachievable on most questions in the United States and perhaps least probable on amending the Senate. The consequence is therefore the same: the Equal Suffrage Clause is unamendable in the United States, just as human dignity is unamendable in Germany. But it is significant that the vehicle for unamendability in each instance is different. In Germany, as in other constitutional states where a provision is deliberately entrenched against formal amendment, unamendability is an informed choice reflected in the constitutional design of the master text. In contrast, the unamendability of the Equal Suffrage Clause derives from constitutional politics, not constitutional design.

2. The Senate in Part V

In Canada, senator selection is constructively unamendable. Senator selection is unamendable under the rules of formal amendment not because it is legally unamendable as a matter of constitutional design, but rather because political actors cannot realistically expect to assemble the constitutionally required supermajorities to formally amend it. To understand why senator selection is constructively unamendable, we must first understand the structure of formal amendment in Canada, specifically its escalating features.

The defining feature of Canada's formal amendment rules is its escalating structure of formal amendment. The text entrenches five distinguishable amendment procedures, each expressly designated for amending only specific categories of provisions in the Constitution of Canada.¹¹¹ One procedure is devoted exclusively to formally amending a provincial constitution. Under this procedure, "the legislature of each province may exclusively make laws amending the constitution of the province".¹¹² The other four amendment procedures are cumulative: the

¹⁰⁹ *Id.*, Part VII, art. 79(3).

¹¹⁰ See, e.g., Joel Colon-Rios, "The Three Waves of the Constitutionalism-Democracy Debate in the U.S. (and an Invitation to Return to the First)" (2010) 18 *Willamette J. Int'l L. & Disp. Resol.* 1, at 33 n. 110; Elai Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment" (1996) 28 *Colum. J.L. & Soc. Probs.* 251, at 278.

¹¹¹ *Constitution Act, 1982*, Part V.

¹¹² *Id.*, s. 45.

second threshold incorporates the first; the third incorporates the first and second; and the fourth incorporates all three.¹¹³ This framework is *escalating* insofar as the requirements for formal amendment escalate incrementally from the first amendment procedure through the fourth. The degree of amendment difficulty therefore increases from the first through the fourth amendment procedure. That each amendment procedure imposes increasingly difficult amendment procedures illustrates the defining feature of the escalating structure of formal amendment: amendment difficulty rises in proportion to the salience of the entrenched provision.¹¹⁴

Of the four escalating amendment procedures, all but the first may be initiated by one of three institutions: the House of Commons, the Senate or a provincial legislature.¹¹⁵ The first amendment procedure is the unilateral federal amendment procedure, which does not involve provincial legislatures. Under this procedure, the Parliament of Canada may on its own formally amend the Constitution “in relation to the executive government of Canada or the Senate and House of Commons”.¹¹⁶ It may be initiated only by the House of Commons or the Senate, and requires the assent of both institutions.¹¹⁷ This unilateral federal amendment procedure is available for a narrow class of matters involving what we can understand as Parliament’s internal constitution.¹¹⁸ This procedure is further constrained by the restriction that it may not be used to amend any matters expressly assigned to another amendment procedure.¹¹⁹

The second amendment procedure is the parliamentary-provincial amendment procedure. This procedure applies to formal amendments that affect “one or more, but not all, provinces”, for instance, an amendment concerning boundaries between provinces, the use of English or French within a province, or the public funding of provincial religious

¹¹³ *Id.*, Part V.

¹¹⁴ I have discussed elsewhere that this reflects a constitutional hierarchy of values. See Richard Albert, “The Expressive Function of Constitutional Amendment Rules” (2013) 59:2 McGill L.J. 225, at 247-51.

¹¹⁵ *Constitution Act, 1982*, Part V, s. 46(1).

¹¹⁶ *Id.*, s. 44.

¹¹⁷ *Id.*, s. 46(1).

¹¹⁸ *Id.* Parliament’s internal constitution includes matters of parliamentary privilege and legislative procedure. See Ian Greene, “Constitutional Amendment in Canada and the United States” [hereinafter “Greene”] in Stephen L. Newman, ed., *Constitutional Politics in Canada and the United States* (Albany, NY: State University of New York Press, 2004) 249, at 251.

¹¹⁹ *Constitution Act, 1982*, s. 44.

schools.¹²⁰ It requires approval resolutions of both the House of Commons and the Senate, and of the provincial legislature or legislatures affected by the amendment. The parliamentary-provincial amendment procedure incorporates the unilateral federal amendment procedure, which requires only the approval of the House of Commons and the Senate, and therefore establishes a lower threshold for formal amendment. It also applies to matters that are regional in effect rather than narrowly tailored to the internal operation of Parliament, and therefore of greater constitutional consequence to the country.

Just as the parliamentary-provincial amendment procedure incorporates the unilateral federal amendment procedure, the third amendment procedure incorporates the second. The third procedure is the default multilateral amendment procedure. It must be used to formally amend all parts of the Constitution not otherwise assigned to formal amendment by another procedure; it is therefore the Constitution's default amendment formula. This default multilateral amendment procedure requires approval resolutions from both houses of Parliament in addition to resolutions from the provincial legislatures of at least seven of Canada's 10 provinces.¹²¹ It imposes a strict though unconventional quorum requirement: the population of the ratifying provinces must amount to at least one-half of the total population of all provinces.¹²² Although it serves as the default amendment procedure, the default multilateral amendment procedure is also designated as the exclusive amendment procedure for specific items, namely, proportional provincial representation in the House of Commons, Senate powers and provincial representation, senator selection and eligibility, the Supreme Court of Canada, provincial-territorial boundary modification, and the creation of new provinces.¹²³ The default multilateral amendment procedure incorporates the parliamentary-provincial amendment procedure insofar as the former requires everything the latter does, but more in addition: a provincial supermajority and a quorum.

The final amendment procedure incorporates all three amendment procedures: the unanimity procedure. To formally amend a specifically designated class of matters, political actors must use this exacting amendment procedure requiring approval resolutions from both the House of Commons and the Senate, as well as approval resolutions from

¹²⁰ *Id.*, s. 43.

¹²¹ *Id.*, s. 38(1).

¹²² *Id.*

¹²³ *Id.*, s. 42(1).

each of the provincial legislatures.¹²⁴ The Constitution requires unanimity for five categories of items: the structure and institutions of Canada's constitutional monarchy, namely, the office of the Queen, the Governor General and the Lieutenant Governor of a province; the use of English or French subject to the amendments made possible through the parliamentary-provincial amendment procedure; the composition of the Supreme Court of Canada subject to the amendments made possible through the default multilateral amendment procedure; a specific ratio of provincial representation in the House of Commons to provincial representation in the Senate; and the entire structure of the amendment rules themselves.¹²⁵ This unanimity procedure imposes a higher threshold than the default multilateral amendment procedure. Whereas the latter requires the agreement of a significant supermajority of political actors involved in the formal amendment process, the former requires their unanimous consent.

Canada's robust federalism is evident in the escalating structure of its amendment rules. It is the varying degree of provincial consent that incrementally increases amendment difficulty along the four cumulative amendment procedures. Requiring no provincial consent under the federal unilateral amendment procedure, but requiring the consent of affected provinces under the parliamentary-provincial amendment procedure, as well as requiring the consent of a supermajority of provinces under the default multilateral amendment procedure, and moreover requiring the unanimous consent of provinces under the unanimity procedure demonstrates that the escalating structure of formal amendment in Canada is anchored in federalism. Three other features of Canada's formal amendment rules reflect the country's strong federalist design: the right to register provincial dissent;¹²⁶ the power to opt out of successful amendments and in some cases to receive compensation for opting out;¹²⁷ and the right to revoke both provincial dissent and assent.¹²⁸

It is against this intricate backdrop of escalating and federalist formal amendment rules that we must evaluate the formal amendability of senator selection. By its terms, the default multilateral amendment procedure must be used to formally amend senator selection.¹²⁹ This

¹²⁴ *Id.*, s. 41.

¹²⁵ *Id.*

¹²⁶ *Id.*, s. 38(2)-(3).

¹²⁷ *Id.*, s. 40.

¹²⁸ *Id.*, ss. 38(3)-(4), 42(1)-(2), 46(2).

¹²⁹ *Id.*, s. 42(1).

requires approval resolutions from both houses of Parliament in addition to approval resolutions from seven provinces representing one-half of the population.¹³⁰ The difficulty, or perhaps even the impossibility, of this default multilateral amendment procedure is what makes senator selection constructively unamendable. That political actors are required to agree broadly and deeply across both levels of government is what dooms the prospect of formally amending almost anything using the default multilateral amendment procedure, let alone senator selection, which is a deeply contested matter of long-standing political and historical complexity.

Scholars have explained why multilateral formal amendment is today virtually impossible in Canada. Michael Lusztig's theory of mass input/legitimization argues that significant amendatory change is not possible in Canada, though not because of constitutional fatigue brought about by recent constitutional failures, but rather because of deep structural reasons.¹³¹ Lusztig points to two problems in particular: first, the degree of compromise required by political actors in order to achieve constitutional reform is too great, and results in alienating their mass supporters; and second, constitutional reform efforts create incentives for interest groups to mobilize in order to attain special status and entrench that status in the constitutional reform.¹³² As Lusztig explains, "once one group is granted special status, it becomes increasingly difficult to deny such status to other groups".¹³³ This suggests why a formal amendment on senator selection would not remain a narrowly drawn exercise: it would trigger claims by groups demanding constitutional recognition in connection with both senator selection and with other constitutional matters.¹³⁴ David Cameron and Jacqueline Krikorian state the point well: it has become practically and politically impossible to propose an amendment on one issue without also responding to "an unmanageable range of demands from the country's other constitutional actors".¹³⁵ Multilateral constitutional amendment in Canada thus engages multiple parties on multiple matters involving multiple interest groups, culminating in amendment failure.

¹³⁰ *Id.*, s. 38(1).

¹³¹ See Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail" (1994) 27 *Can. J. Pol. Sci.* 747, at 748 [hereinafter "Lusztig"].

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*, at 771.

¹³⁵ David R. Cameron & Jacqueline D. Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process" (2008) 58 *U.T.L.J.* 389, at 394.

Amendment failure is not likely for *all* multilateral constitutional amendment efforts in Canada. It is likely only where multilateral amendment efforts attempt comprehensive constitutional modification, which we can understand as an amendment implicating a fundamental or constitutive principle of the constitutional community, the polity's constitutional identity, or the framework and interrelations of public institutions.¹³⁶ Where a multilateral constitutional amendment concerns these matters, failure is likely because political actors and interest groups will seek to reduce the level of indeterminacy that the comprehensive changes will entail by making demands both on the matter of comprehensive modification as well as on collateral constitutional issues of importance to them.¹³⁷ The consequence is *amending process overload*, defined "as the inability to achieve successful completion of constitutional modification as a result of key actors' making incompatible and intractable demands during the process of constitutional negotiation".¹³⁸ Modern Canadian constitutional history highlights these amendment failures.¹³⁹

Given the federalist origins of the Constitution of Canada, amending senator selection would implicate a fundamental and constitutive principle of the polity. Senator selection could therefore not be formally amended without comprehensive constitutional modification, which would in turn raise the likelihood of amending process overload. The consecutive failures of multilateral constitutional amendment since the 1980s have only made it more difficult to achieve comprehensive constitutional modification. As Ronald Watts suggests, "[t]he repeated failure to resolve [these constitutional issues] is itself likely to have a cumulative effect contributing to increased political contention and resentment".¹⁴⁰ Just as the Equal Suffrage Clause is freely amendable under the constitutional text yet practically unamendable in light of political forces, senator selection is not absolutely entrenched against formal amendment under the Constitution of Canada, but the evolution of Canadian federalism has made formally amending senator selection

¹³⁶ Christopher P. Manfredi & Michael Lusztig, "Why do Formal Amendments Fail? An Institutional Analysis" (1998) 50 *World Pol.* 377, at 380.

¹³⁷ See *id.*, at 399.

¹³⁸ *Id.*, at 380.

¹³⁹ Christopher P. Manfredi, "Institutional Design and the Politics of Constitutional Modification: Understanding Amendment Failure in the United States and Canada" (1997) 31 *L. & Soc. Rev.* 111, at 122-26.

¹⁴⁰ Ronald L. Watts, "Canada: Three Decades of Periodic Federal Crises" (1996) 17 *Int'l Pol. Sci. Rev.* 353, at 368.

under the multilateral general amendment procedure virtually inconceivable. The Senate, which is seen as “impervious to formal change”,¹⁴¹ is therefore itself an obstacle to meaningful constitutional change through Part V.¹⁴² It may therefore be time, as Clyde Wells has suggested, to amend Canada’s formal amendment rules.¹⁴³

3. Constitutional Entrenchment and Federalism

The scope of constructive unamendability may be broad or narrow. In the broadest sense, one could describe an entire constitution as constructively unamendable. Formally amending the Articles of Confederation, for example, was described as a “political impossibility”¹⁴⁴ because the many failures of formal amendment were evidence that “even relatively trifling amendment had been proved to be impossible”.¹⁴⁵ In contrast, constructive unamendability can apply more narrowly to a specific constitutional provision or a particular feature of the polity. I apply this more narrow sense of constructive unamendability to the Canadian Constitution and the United States Constitution inasmuch as the Equal Suffrage Clause and senator selection are constructively unamendable. Neither the Canadian Constitution nor the United States Constitution is *generally* constructively unamendable; both can be and have been amended,¹⁴⁶ but both are constructively unamendable with relation to a particular substantive matter, in each case involving the Senate.

The constructive unamendability of the Equal Suffrage Clause and senator selection highlights the difficulty inherent in distinguishing

¹⁴¹ David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003), at ix.

¹⁴² See David C. Docherty, “The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About” (2002) 8 J. Legis. Stud. 27, at 46.

¹⁴³ Clyde K. Wells, “Reforming the Amending Formula: The Case for a Constitutional Convention” (1991) 2 Const. Forum 69, at 71-72.

¹⁴⁴ Thomas E. Baker, “Towards a ‘More Perfect Union’: Some Thoughts on Amending the Constitution” (2000) 10 Widener J. Pub. L. 1, at 5.

¹⁴⁵ Eugene C. Barker, “Economic Interpretation of the Constitution” (1944) 22 Tex. L. Rev. 373, at 379.

¹⁴⁶ The U.S. Constitution has not been formally amended as frequently in the modern era as it had been prior to the Second World War. It was amended most recently in 1992. See U.S. Const., amend. XXVII (requiring an intervening election before congressional salaries may be increased). The Constitution of Canada has been amended several times since the adoption of the *Constitution Act, 1982*, most recently in 2011 using s. 44 to amend the *Constitution Act, 1867*. See *Fair Representation Act*, S.C. 2011, c. 26 (adjusting the number of Members of Parliament consistent with the principle of proportionate provincial representation).

between substance and procedure in unamendability, as I have discussed above.¹⁴⁷ Although constructive unamendability is synonymous with *informal procedural unamendability*, it is the historical importance of the subject matter of both the Equal Suffrage Clause and senator selection that has given rise to their unamendability to begin with. What complicates our effort to distinguish substance from procedure is that the importance of the subject matter — here, the Senate and its protection of federalism — is reflected in the heightened procedural difficulty of the formal amendment rules required to amend the Equal Suffrage Clause and senator selection. We therefore cannot describe the constructive unamendability of the Equal Suffrage Clause in the United States or of senator selection in Canada as either entirely substantive or entirely procedural, but rather as partly both.

That the Equal Suffrage Clause in the United States and senator selection in Canada are constructively unamendable reflects the federalist constitutional design in both countries. The centrality of federalism in the creation and evolution of the Canadian and United States Constitutions is beyond the scope of this modest exposition of constructive unamendability. Scholars of law and political science have, in any event, explored this point in detail.¹⁴⁸ What is useful to highlight, however, is the influence of the states and the provinces in the design of the Equal Suffrage Clause and the rules of senator selection. Although political actors in neither instance adopted substantive unamendability, their interest was evidently to protect subnational interests in any proposed amendment to the Equal Suffrage Clause and senator selection.

Consider the United States. The Equal Suffrage Clause was conceived to safeguard the states against other government institutions, both the central government and the other states.¹⁴⁹ The drafters designed

¹⁴⁷ See *supra*, Section II.3.

¹⁴⁸ See, e.g., Milton J. Esman, “Federalism and Modernization: Canada and the United States” (1984) 14 *Publius* 21; Martha A. Field, “The Differing Federalism of Canada and the United States” (1992) 55 *L. & Contemp. Probs.* 107; C.E.S. Franks, “Not Dead Yet, But should it be Resurrected? The Canadian Senate” in Samuel C. Patterson & Anthony Mughan, eds., *Senates: Bicameralism in the Contemporary World* (Columbus, OH: Ohio State University Press, 1999), at 129-60; Calvin R. Massey, “The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States” (1990) *Duke L.J.* 1229; Jennifer Smith, “Canadian Confederation and the Influence of American Federalism” (1988) 21 *Can. J. Pol. Sci.* 443; Ronald L. Watts, “The American Constitution in Comparative Perspective: A Comparison of Federalism in the United States and Canada” (1987) 74 *J. Am. Hist.* 769; L. Kinvin Wroth, “Notes for a Comparative Study of the Origins of Federalism in the United States and Canada” (1998) 15 *Ariz. J. Int’l & Comp. L.* 93.

¹⁴⁹ See Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (Union, New Jersey: The lawbook Exchange, Ltd., 1932), at 160.

it to be a sovereignty-protecting and enhancing constitutional device.¹⁵⁰ At the Philadelphia Convention to draft the new Constitution, the first iteration of the Equal Suffrage Clause would have made it substantively and indefinitely formally unamendable: Roger Sherman proposed to make formally unamendable both equal suffrage and the importation of slaves.¹⁵¹ The Convention took a vote on Sherman's proposal, which he had formulated as follows: "that no state without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate".¹⁵² The proposal did not pass.¹⁵³ Following the defeat of Sherman's proposal, Gouverneur Morris later advanced a follow-up proposal that omitted reference to the "internal police" power of states: "that no state, without its consent, shall be deprived of its equal suffrage in the Senate".¹⁵⁴ The proposal passed without opposition, and today appears in the Constitution. Though it is not absolutely entrenched, it has become today procedurally inconceivable to amend.

The Canadian case is more contextual. Until recently, Canada could not formally amend its own Constitution. With few exceptions, the power of formal amendment belonged to the Parliament of the United Kingdom,¹⁵⁵ a power it ultimately surrendered at Canada's request. Canadian political actors struggled to reach agreement on how to formally amend the Constitution of Canada on their own without the involvement of the Parliament of the United Kingdom. James Hurley has recounted the more than one dozen failed efforts to agree on a constitutional design of formal amendment rules.¹⁵⁶ The root of the disagreement concerned the degree of provincial consent needed for formal amendment.¹⁵⁷ In the absence of formal amendment rules, political practice had generated conventions about the provincial role in formal amendment.¹⁵⁸ Although provinces had been often though not always consulted in formal amendments

¹⁵⁰ James Madison explained that the Equal Suffrage Clause was understood "as a palladium to the residuary sovereignty of the States". See "The Federalist No. 43" in Cooke, *supra*, note 74, 288, at 296.

¹⁵¹ Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1911), at 629.

¹⁵² *Id.*, at 630.

¹⁵³ *Id.*

¹⁵⁴ *Id.*, at 631.

¹⁵⁵ Hogg, "Formal Amendment", *supra*, note 16, at 253.

¹⁵⁶ James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa, Canada: Minister of Supply and Services Canada, 1996), at 25-60.

¹⁵⁷ William S. Livingston, "The Amending Power of the Canadian Parliament" (1951) 45 *Am. Pol. Sci. Rev.* 437, at 448.

¹⁵⁸ William R. Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 *Am. J. Comp. L.* 339, at 342.

affecting them, this was only an unwritten practice, not a formalized requirement.¹⁵⁹ Yet, as Peter Hogg observes, “unanimous provincial consent had been obtained for all amendments directly affecting provincial powers”.¹⁶⁰ By the 1960s, political practice had matured into what the Favreau Report recognized as a “principle” that the Parliament of Canada “will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces”.¹⁶¹

The principle of provincial agreement to changes affecting federal-provincial relationships is now entrenched in Canada’s formal amendment rules, specifically in the escalating and federalist structure of formal amendment in the *Constitution Act, 1982*.¹⁶² The default multilateral amendment procedure recognizes this principle by requiring provincial agreement for formal amendments to five expressly designated matters of federal-provincial concern, one of which is senator selection,¹⁶³ a matter with obvious implications for federalism. Prior to the entrenchment of Canada’s escalating and federalist formal amendment rules, an amendment to senator selection would have required provincial consultation and agreement under the principle of provincial agreement to changes affecting federal-provincial relationships. Today the same is true, though the principle has since been formalized in the constitutional text. Although senator selection is theoretically susceptible to amendment using the default multilateral amendment procedure, the current political setting has transformed that theoretical possibility into a functional impossibility.

IV. AMENDING THE UNAMENDABLE

In our present political climate, formally amending either the Equal Suffrage Clause in the United States or senator selection in Canada seems inconceivable. Both raise considerable political barriers to constitutional change — barriers that are anchored deeply within the structure of federalism. In light of the constructive unamendability of the

¹⁵⁹ Peter W. Hogg, “Constitutional Reform in Canada: A Comment on the Canadian Constitutional Crisis” (1980) 6 *Yale Stud. World Pub. Ord.* 285, at 290-91.

¹⁶⁰ Hogg, “Formal Amendment”, *supra*, note 16, at 254.

¹⁶¹ Honourable Guy Favreau, Minister of Justice, *The Amendment of the Constitution of Canada* (Ottawa: Department of Justice, 1965), at 14.

¹⁶² See *Constitution Act, 1982*, Part V.

¹⁶³ See *id.*, s. 42(1).

Equal Suffrage Clause in the United States and senator selection in Canada, political actors could reasonably presume that their formal amendment is impossible. Yet there is in fact a way to formally amend both of these constructively unamendable features. The problem, however, is that the strategy political actors must adopt in order to formally amend either of them within the current constitutional and political climate arguably gives rise to what democratic theorist Georges Liet-Veaux calls “fraude à la constitution”,¹⁶⁴ or in translation *fraud upon the constitution*.¹⁶⁵ In the United States, formally amending the Equal Suffrage Clause would require circumventing its spirit, as I will show below.¹⁶⁶ And in Canada, the Government of Canada’s recent effort to formally amend senator selection reflects a similar strategy to circumvent the spirit of the Constitution of Canada, as I will also demonstrate below.¹⁶⁷

For Liet-Veaux, political actors perpetrate constitutional fraud when they mask their intent to violate the spirit of the constitution by adhering strictly and legalistically to the constitution’s textual rules.¹⁶⁸ He worried that political actors might respect form while undermining content.¹⁶⁹ Political actors could therefore act simultaneously legally and illegitimately: it is constitutional fraud for political actors to act legally in the formal sense of respecting the written rules for formal amendment but illegitimately by undermining the purpose for which those rules have been entrenched to begin with. Constitutional fraud is not concerned with normatively good or bad outcomes; it can occur in the transition from democracy to autocracy, and from autocracy to democracy, or within fully democratic or autocratic regimes.¹⁷⁰ The concept of constitutional fraud applies where the legal form is exploited to achieve ends inconsistent with the constitutional framework within which those legal rules are embedded.

¹⁶⁴ Liet-Veaux, *supra*, note 29, at 145.

¹⁶⁵ Richard S. Kay, “Constituent Authority” (2011) *Am. J. Comp. L.* 715, at 734; see also Yaniv Roznai, “Explicit Limits Upon the Constitutional Amendment Power” (unpublished dissertation on file with author), at 37 [hereinafter “Roznai”].

¹⁶⁶ See *infra*, Section IV.1.

¹⁶⁷ See *infra*, Section IV.2.

¹⁶⁸ Liet-Veaux, *supra*, note 29.

¹⁶⁹ *Id.* “Respect de la forme pour combattre le fond, c’est la fraude à la constitution, ou plus exactement, le cas le plus intéressant de fraude à la constitution.”

¹⁷⁰ See Claude Klein & András Sajó, “Constitution-Making: Process and Substance” in Michel Rosenfeld & András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 419, at 434.

1. “Fraude à la Constitution” in the United States

The constructively unamendable Equal Suffrage Clause is amendable using the formalistic approach of constitutional fraud. Consider an illustration. Imagine a supermajority of both houses of Congress and a majority of political actors in 40 states wish to remove one senator from Maine’s congressional delegation, thereby reducing Maine’s representation in the Senate relative to other states. Under the Equal Suffrage Clause, Maine would have to consent to any diminishment in its Senate representation. But imagine Maine refuses to consent. In the face of Maine’s objection, it would appear that political actors could not proceed with this formal amendment. The Equal Suffrage Clause would therefore have fulfilled its purpose: to effectively entrench a form of symmetrical federalism where each state is sovereign in its sphere co-equal with others, and whose autonomy is afforded deference by national and state political actors.

Yet the Equal Suffrage Clause is not itself entrenched against formal amendment. Political actors could therefore circumvent its prohibition on consentless diminishments of Senate representation by deploying any one of Article V’s formal amendment procedures to repeal the Equal Suffrage Clause and then to formally amend the Constitution. To return to our illustration, the supermajorities in both houses of Congress would propose an amendment repealing the Equal Suffrage Clause, and would then transmit the proposal to the states for their ratification. To ratify the proposal, three-quarters of the states, or 38 in total, must approve. Supposing legislative majorities in 40 states support removing one senator from Maine’s congressional delegation, the amendment proposal would pass, resulting in a formal amendment to Article V removing the Equal Suffrage Clause altogether from the Constitution. The next step would require the supermajorities in the Congress and the majorities in at least 38 states to pass an amendment divesting Maine of one of its senators. This two-step formal amendment process would achieve what the Equal Suffrage Clause had sought to prevent by requiring Maine to consent to the change.

The double amendment procedure is legal but illegitimate. Even Akhil Amar, who concedes that using the procedure would “have satisfied the literal text of Article V”, recognizes that it is a “sly scheme”.¹⁷¹ Although the double amendment procedure respects the

¹⁷¹ Akhil Reed Amar, *America’s Constitution: A Biography* (New York: Random House, 2005), at 293.

constitutional text, its strict insistence on positivism ignores the implicit limits discernible beyond the text's narrow legalistic prescriptions and thereby makes circumventing the constitution possible.¹⁷² This textual subterfuge is, in the words of Walter Murphy, a "sleazy" way around the textual constraint the Constitution imposes.¹⁷³ Yaniv Roznai suggests the procedure is intolerable as a matter of constitutional theory and should be rejected.¹⁷⁴ The argument is at its strongest in connection with the Equal Suffrage Clause, which was designed specifically to prevent the very outcome this double amendment procedure would allow. Still, double amendment is valid as a strictly legalistic matter, and political actors could therefore resort to deploying it as a way to amend the unamendable.

2. "Fraude à la Constitution" in Canada?

Just as political actors in the United States could argue that the constructively unamendable Equal Suffrage Clause is amendable pursuant to this purely formalist but illegitimate reading of the United States Constitution, political actors in Canada could similarly suggest that senator selection is susceptible to formal amendment under a similarly legalistic approach that would nonetheless be illegitimate. This reflects the strategy the incumbent Government of Canada has followed on Senate reform in connection with its use of section 44 to amend senator selection. Acting on behalf of the Government, the Minister of State for Democratic Reform recently introduced Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*,¹⁷⁵ known as the *Senate Reform Act*, an effort to formally amend senator selection. The Government of Canada's pursuit of Senate reform through Bill C-7 doubled as its admission that multilateral formal amendment through section 38 was impossible.

Bill C-7 was the predicate for the Reference to the Supreme Court of Canada on Senate Reform. Pursuant to the *Supreme Court Act*,¹⁷⁶ the

¹⁷² Virgílio Afonso da Silva, "A Fossilised Constitution?" (2004) 17 Ratio Juris. 454, at 459.

¹⁷³ Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: Johns Hopkins University Press, 2007), at 504 n. 24.

¹⁷⁴ See Roznai, *supra*, note 165, at 37-38.

¹⁷⁵ 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., 60 Elizabeth II, 2011 (First reading: June 21, 2011) [hereinafter "Bill C-7"].

¹⁷⁶ *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53.

Governor in Council referred six questions to the Supreme Court for its opinion on Senate reform generally and on Bill C-7 specifically. The bill proposes a framework for provincial and territorial elections to fill Senate vacancies. It requires the Prime Minister to consider senatorial nominees for recommendation to the Governor General from a list drawn up by the province or territory on the basis of an election.¹⁷⁷ The bill also proposes to establish a single nine-year term for senators.¹⁷⁸ Bill C-7 therefore seeks to amend the *Constitution Act, 1867* in at least two ways. First, it expressly proposes to amend the *Constitution Act, 1867* by imposing term limits where none have existed before.¹⁷⁹ Second, it proposes implicitly to informally amend the *Constitution Act, 1867* by altering the subsidiary procedures by which the Governor General appoints senators. By convention, the Prime Minister currently enjoys discretion in selecting whom to recommend to the Governor General for a senatorial appointment.¹⁸⁰ Bill C-7 shrinks the Prime Minister's discretionary authority by requiring that the Prime Minister "must consider" those names appearing on provincial or territorial lists.¹⁸¹

The purported jurisdictional authority for Parliament to pass Bill C-7 relies on the unilateral federal amendment power in section 44 of the *Constitution Act, 1982*.¹⁸² Under section 44, Parliament may amend the Constitution of Canada "[s]ubject to sections 41 and 42 [of the *Constitution Act, 1982*] in relation to the executive government of Canada or the Senate and House of Commons".¹⁸³ This unilateral federal amendment power is best understood as an exception to an exception, specifically as an exception to section 41, which is itself an exception to section 38. Under section 38, the Constitution of Canada's default multilateral amendment procedure, all parts of the Constitution not otherwise assigned to formal amendment by another procedure must be amended by approval resolutions from both houses of Parliament as well as resolutions from the provincial legislatures of at least seven of Canada's 10 provinces, where the population of the ratifying provinces is

¹⁷⁷ Bill C-7, *supra*, note 175, Part 1, ss. 2-3.

¹⁷⁸ *Id.*, Part 2, s. 5.

¹⁷⁹ Senators currently enjoy tenure until reaching 75 years old. See *Constitution Act, 1867*, s. 29.

¹⁸⁰ The Governor General is authorized to "summon qualified Person to the Senate". See *id.*, s. 24. By convention, the Governor General summons those individuals recommended by the Prime Minister. See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1 (loose-leaf updated 2012, release 1) (Toronto: Carswell, 2007), at 9-11 n. 28, 9-39 n. 102 [hereinafter "Hogg, *Constitutional Law*"].

¹⁸¹ Bill C-7, *supra*, note 175, Part 1, s. 3.

¹⁸² *Constitution Act, 1982*, Part V, s. 44.

¹⁸³ *Id.*

at least one-half of the total population.¹⁸⁴ Section 42 makes this default procedure mandatory for specific items, including Senate powers and provincial representation as well as Senator selection and eligibility.¹⁸⁵ Section 41 operates as an exception to this default rule; it requires unanimity — approval resolutions from both the House of Commons and the Senate as well as approval resolutions from each of the provincial legislatures¹⁸⁶ — to formally amend five designated categories of items including a specific ratio of provincial representation in the House and the Senate.¹⁸⁷ The federal unilateral amendment procedure under section 44 is an exception to both sections 41 and 42, which qualify section 38.

Section 44 is a narrow power. It replaced the now-repealed section 91(1) of the *Constitution Act, 1867*, which gave Parliament limited powers of formal amendment.¹⁸⁸ Today, we understand sections 44 and 91(1) as equivalent in the scope of authority they now confer (in the case of section 44) or once conferred (in the case of section 91(1)) upon Parliament.¹⁸⁹ The Supreme Court has observed that although “s. 91(1) would permit some changes to be made by Parliament in respect of the Senate as now constituted, it is not open to Parliament to make alterations which 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”.¹⁹⁰ Matters subject to amendment under the federal unilateral power of section 44 — matters that would not change the Senate’s “essential characteristics” — include parliamentary privilege, legislative procedure and the number of Members of Parliament.¹⁹¹ Indeed, the three formal amendments effected using this procedure reflect the limited scope of section 44.¹⁹²

In invoking this unilateral federal amendment power to formally amend senator selection, the Government of Canada has either

¹⁸⁴ *Id.*, s. 38(1).

¹⁸⁵ *Id.*, s. 42(1).

¹⁸⁶ *Id.*, s. 41.

¹⁸⁷ *Id.*

¹⁸⁸ Hogg, *Constitutional Law*, *supra*, note 180, at 4-31–4-32.

¹⁸⁹ See *id.*, at 4-32.

¹⁹⁰ *Reference re Legislative Authority of the Parliament of Canada in relation to the Upper House*, [1979] S.C.J. No. 94, [1980] 1 S.C.R. 54, at 77-78 (S.C.C.).

¹⁹¹ Greene, *supra*, note 118.

¹⁹² See *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8 (amending *Constitution Act, 1867* with respect to the decennial census and electoral boundaries); *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2 (amending *Constitution Act, 1867*) at add one senator for Nunavut); *Fair Representation Act*, S.C. 2011, c. 26 (amending *Constitution Act, 1867* to readjust number of Members of Parliament and provincial representation in the House of Commons).

misunderstood Parliament's constitutional authority or attempted to achieve unilaterally what it is constitutionally required to pursue multilaterally. As referenced above, under section 42 of the *Constitution Act, 1982*, a formal amendment to "the method of selecting Senators" must be made using the default amendment procedure,¹⁹³ which requires approval resolutions from both houses of Parliament in addition to approval resolutions from at least seven provinces representing one-half of the total population.¹⁹⁴

The strongest counter-argument, advanced by the Attorney General for Canada, was that senator selection may be amended using section 44 because "a federal, provincial or territorial consultative process to choose potential candidates for Senate appointment is not among the matters listed in s. 42".¹⁹⁵ Yet this argument does not reflect the history of formal amendment design in Canada, as discussed above,¹⁹⁶ nor does it respect the spirit of both section 42 and section 44. For one, section 42 mandates the use of the default procedure for changes to the method of *selecting* senators — the actual choice of one nominee over another — not to the manner in which they are procedurally appointed by the Governor General. Moreover, section 44, as discussed in this section, is a narrow power that cannot be deployed to make prime ministerial discretion-restricting changes proposed by Bill C-7 or more broadly to change the way senators are chosen.

The Supreme Court's advisory opinion was consistent with these arguments, rejecting the government's use of section 44 on the basis of Canada's constitutional history, the constitutional text of section 44 in comparison with other amendment rules, and the broader architecture of the formal amendment rules entrenched in Part V.¹⁹⁷

The alternative explanation for the Government of Canada's choice to rely on section 44 instead of the required section 42 does not reflect well on the political actors attempting to amend senator selection: they intended to act unilaterally in a majority Parliament where the Constitution of Canada requires them to cooperate multilaterally through federal and provincial institutions. Observers can appreciate why they

¹⁹³ *Id.*, s. 42(1).

¹⁹⁴ *Id.*, s. 38(1).

¹⁹⁵ *In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26; In the Matter of a Reference by the Governor in Council concerning reform of the Senate, as set out in Order in Council P.C. 2013-70, dated February 1, 2013, July 29, 2013, Factum of the Attorney General of Canada*, at para. 136.

¹⁹⁶ See *supra*, Section III.3.

¹⁹⁷ *Senate Reference, supra*, note 12, at paras. 50-69.

would choose the unilateral federal amendment procedure over the default multilateral amendment procedure. History has shown that it is difficult to amend the Constitution of Canada using the default multilateral amendment procedure; it has been used successfully only once.¹⁹⁸ Not only is it politically unpalatable to risk near-certain amendment failure by deploying section 42 to formally amend one of the most contentious institutions in Canadian government, but it entails significant political cost even to propose using the default multilateral amendment procedure.¹⁹⁹

Modern Canadian history has left deep scars on political actors who have failed to effect significant reforms via multilateral formal amendment.²⁰⁰ Lusztig's model of mass input/legitimization predicts that attempts at multilateral formal amendment in Canada are doomed to failure.²⁰¹ One can therefore understand why political actors would circumvent the default multilateral amendment procedure, if in fact that is the reason they chose to rely on section 44 instead of section 42. But one can also understand the choice as politically motivated without accepting it as constitutionally legitimate. Using section 44 to amend senator selection was an effort to perpetrate "fraude à la Constitution", an effort that the Supreme Court wisely ruled unlawful.²⁰²

3. Constitutional Amendment by Stealth

This strategy of intraconstitutional circumvention — operating within the constitutional text to invoke as a basis for action one entrenched constitutional rule when another is required — appears to be one of the two approaches the Government of Canada has taken to achieve its Senate reform objectives. The other approach is equally problematic as a matter of constitutional law. It may be described as a contrasting strategy of extra-constitutional circumvention under which

¹⁹⁸ Hogg, *Constitutional Law*, *supra*, note 180, at 1-7-1-8 n.32.

¹⁹⁹ See C.E.S. Franks, "A Continuing Canadian Conundrum: The Role of Parliament in Questions of National Unity and the Processes of Amending the Constitution" in J. Peter Meekison *et al.*, eds., *Reconsidering the Institutions of Canadian Federalism* (Montreal & Kingston: McGill-Queen's University Press, 2004) 35, at 44; see also Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42 U.T.L.J. 139, at 167-68 (arguing that formal amendment should now incorporate greater citizen participation).

²⁰⁰ See David McLaughlin, *Poisoned Chalice: The Last Campaign of the Progressive Conservative Party?* (Toronto, Canada: Dundurn Press Ltd., 1994), at 5-36.

²⁰¹ See Lusztig, *supra*, note 131, at 770.

²⁰² *Senate Reference*, *supra*, note 12, at para. 69.

political actors deploy unwritten norms to displace an entrenched constitutional rule. It is illustrated by Bill C-20, proposed by the Government of Canada in 2007, creating a framework for administering consultative elections at the provincial level to identify nominees for prime ministerial appointments to the Senate.²⁰³ The framework establishes detailed procedures for running as a candidate,²⁰⁴ voting and counting ballots in elections,²⁰⁵ advertising during the elections,²⁰⁶ financing electoral campaigns,²⁰⁷ among others. The Prime Minister has himself described Bill C-20 as a “step in fulfilling our commitment to make the Senate more effective and more democratic,” and as “creat[ing] a process to choose elected senators”.²⁰⁸ The Government of Canada has therefore consciously undertaken to materially change senator selection with this bill. In the *Senate Reference*, the Supreme Court repudiated this second strategy just as it did the first.²⁰⁹

The Government of Canada’s bid to achieve Senate reform through Bill C-20 suggests that it was trying to pursue an unusual method of constitutional change: constitutional amendment by stealth. Whereas formal amendment ordinarily channels public deliberation through transparent and predictable procedures designed to express the informed aggregated choices of political and private actors, here on Senate reform the Government of Canada chose another route. It appears to have calculated that the difficulty of formal amendment in Canada made its Senate reform objectives best achievable through opaque and irregular procedures designed both to obscure its intention to affect a material change to the Constitution of Canada and to convey the impression that no such constitutional change is actually occurring. Constitutional amendment by stealth occurs when political actors consciously establish a new political practice whose repetition is intended to bind successors to conform their conduct to it. Over time, this new political practice

²⁰³ Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess., 39th Parl., 56 Elizabeth II, 2007 (First reading: November 13, 2007).

²⁰⁴ *Id.*, Part 3.

²⁰⁵ *Id.*, Parts 4-5.

²⁰⁶ *Id.*, Part 7.

²⁰⁷ *Id.*, Part 8.

²⁰⁸ The Rt. Hon. Stephen Harper, P.C., M.P., *Proceedings of the Special Senate Committee on Senate Reform*, September 7, 2006, available online: <<http://www.parl.gc.ca/Content/SEN/Committee/391/refo/02ev-e.htm?Language=EParl>>.

²⁰⁹ See *Senate Reference*, *supra*, note 12, at paras. 50-69.

matures into a constitutional convention which, though unwritten, effectively becomes entrenched in the constitution.

In a forthcoming paper entitled “Constitutional Amendment by Stealth”, I theorize this phenomenon using the incumbent Government of Canada’s Senate reform efforts as the principal case study. I also show that this constitutional reform strategy is reflected elsewhere in the Government of Canada’s actions, most notably in its recently developed judicial nomination procedures and its more recent rule changes to prime ministerial succession. These three changes have so far progressed to different stages of political entrenchment: one has grown firmly rooted in Canadian political culture; one is established but has not yet been invoked; and the other has only recently been proposed and has been repudiated by the Supreme Court.²¹⁰ These three changes moreover demonstrate the constitutionally questionable strategy of constitutional amendment by stealth that Canadian political actors have innovated to reshape Canadian political institutions and practices, and indeed the Constitution of Canada, without actually formally amending the Constitution of Canada. For now, I highlight this forthcoming paper only to stress that we have yet to appreciate the extent to which the incumbent Government of Canada is committed to reforming the Senate of Canada through either formal or informal amendment.

V. CONCLUSION

The relationship between legality and legitimacy is complex.²¹¹ What is legal is not always legitimate, and what is illegal is not always illegitimate. The American founding experience is perhaps the best expositor of this fascinating duality in law: although the United States Constitution was illegal in both its creation and ratification, its legitimacy is no longer in doubt.²¹² The illegalities of the Philadelphia Convention, and later of the Reconstruction Amendments and the New Deal, may be said retrospectively to have been authorized by the legitimacy-conferring procedures of higher law-making in which American political actors engaged creatively and self-consciously to

²¹⁰ *Id.*

²¹¹ See generally Carl Schmitt (Jeffrey Seitzer, ed.) *Legality and Legitimacy* (Durham, NC: Duke University Press, 2004).

²¹² Richard S. Kay, “The Illegality of the Constitution” (1987) 4 *Const. Commentary* 57, at 77-79.

update the Constitution.²¹³ Even the concept of legitimacy itself is contestable, or at the very least multifarious in meaning, comprising as it does legal, sociological and moral dimensions.²¹⁴ It is therefore problematic to presuppose that legality entails legitimacy.

In this paper, I have argued that the Government of Canada's effort to formally amend senator selection using the unilateral federal amendment procedure under section 44 reflects a disjuncture between legality and legitimacy. It is undoubtedly legal for the Government of Canada to deploy the rules of formal amendment in Part V of the *Constitution Act, 1982* to formally amend senator selection, and it was once arguably legal as a formal matter — before the Supreme Court issued its advisory opinion in the *Senate Reference* — for the Government of Canada to use section 44, given that it authorizes Parliament to make a formal amendment “to the executive government of Canada or the Senate and House of Commons”.²¹⁵ But the escalating and federalist structure of formal amendment entrenched in the architecture of Canada's formal amendment rules suggests that it was illegitimate to use section 44 to make a formal amendment to an element of Canadian democracy as significant as senator selection. Using the default multilateral amendment rule in section 38 is more consistent with Canadian history, the evolution of the design of formal amendment rules in Canada, and the centrality of federalism to democratic self-government. That the constitutional text itself states that an amendment to “the method of selecting Senators” may be achieved “only in accordance with subsection 38(1)”²¹⁶ only strengthens the point.

It is no longer a question whether formally amending senator selection using section 44 is legal and legitimate. The Supreme Court of Canada has repudiated the Government of Canada's intended use of section 44 to effect a fundamental change to the Canadian polity with recourse to the federal unilateral amendment procedure in section 44 instead of the required multilateral amendment procedure in section 38. Nevertheless, faced with the constructive unamendability of senator selection in Canada, political actors could resort by necessity to innovating an unconventional method of constitutional change in order to

²¹³ Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), at 41-50.

²¹⁴ See Richard H. Fallon, Jr., “Legitimacy and the Constitution” (2005) 118 Harv. L. Rev. 1787, at 1794-1801

²¹⁵ *Constitution Act, 1982*, Part V, s. 44.

²¹⁶ *Id.*, s. 42.

achieve their desired reforms. The Supreme Court may have levelled the most recent blow to the incumbent Government of Canada's plans to amend senator selection, but it is the Canadian electorate that will make the final judgment on the legitimacy of Senate reform. In a constitutional democracy where political actors are bound by the rules entrenched in a written constitution and the norms anchored in unwritten conventions, there can be no other way, nor indeed a better one.