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Richard Albert. "The Difficulty of Constitutional Amendment in Canada." *Alberta Law Review* 39, (2015).

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THE DIFFICULTY OF CONSTITUTIONAL AMENDMENT IN CANADA

RICHARD ALBERT[†]

Scholars of comparative constitutional law would suggest that the United States Constitution is the world's most difficult democratic constitution to change by formal amendment. But in this paper I suggest that the Constitution of Canada may be even harder to amend. Modern Canadian political history has proven the textual requirements for major constitutional amendment so far impossible to satisfy, yet the extraordinary difficulty of formal amendment in Canada derives equally from sources external to the Constitution's formal amendment rules. Major constitutional amendment also requires conformity with extra-textual requirements imposed by Supreme Court decisions interpreting the Constitution of Canada, parliamentary and provincial as well as territorial statutes, and arguably also by constitutional conventions—additional rules that may well make major constitutional amendment impossible today in Canada. These as-yet underappreciated extra-textual sources of formal amendment difficulty raise important questions for Canadian constitutionalism, namely whether in making the Constitution virtually impossible to amend they weaken democracy and undermine the purpose of writtenness.

I.	INTRODUCTION	2
II.	FORMAL AMENDMENT RULES IN DEMOCRATIC CONSTITUTIONS	5
	A. Studies of Amendment Difficulty	6
	B. Rigid Constitutions and their Amendment Rules	8
	C. Formal Amendment Rules in Canada	9
III.	EXTRA-TEXTUAL AMENDMENT RULES IN CANADA	12
	A. Statutory Conditions	13
	B. Popular Expectations	16
	C. Judicial Standards	19
IV.	CANADIAN CONSTITUTIONALISM AND FORMAL AMENDMENT	22
	A. Democracy and Amendment	22
	B. The Weakening of Writtenness	23
	C. Formal Amendment Rules and the Value of Writtenness	26
V.	CONCLUSION	27

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I. INTRODUCTION

The United States Constitution is widely regarded as one of the world's most difficult democratic constitutions to change by a formal constitutional amendment.¹ Formal amendment in the United States requires two-thirds consent in both houses of Congress to propose an amendment and the approval of three-quarters of the states to ratify it.² As hard as it may have been at the founding to assemble those supermajorities among 59 Representatives, 20 Senators, 13 states and no political parties,³ it is much harder today with 435 Representatives, 100 Senators, 50 states and hyper-partisan political parties.⁴ Perhaps the best evidence of the difficulty of formal amendment in the United States is the historical rate of amendment failure. Of the more than 11,000 amendments proposed since 1789, only 27 have been ratified,⁵ an astonishingly low number by comparison with modern constitutional democracies.⁶ Scholars have therefore suggested that the United States Constitution may today very well be impossible to change by formal amendment.⁷

No one can deny the difficulty of amending the United States Constitution. But the Constitution of Canada may be even harder to amend. The principal source of amendment difficulty is the *Constitution Act, 1982*, which creates an onerous escalating structure of five formal amendment rules that impose increasingly demanding thresholds,⁸ each of which is keyed to specific constitutional commitments.⁹ Modern political history is an additional source of amendment difficulty. The failure of the Meech Lake and Charlottetown Accords have proven major constitutional amendments so far impossible to achieve,¹⁰ and the prevailing culture of amendment failure may dissuade political actors from undertaking similarly grand efforts at constitutional renewal.¹¹ But another source of amendment difficulty remains underappreciated.

¹ See, e.g., Sanford Levinson, *Our Undemocratic Constitution* (New York: Oxford University Press, 2006) at 21; Donald S. Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006) at 170; Dieter Grimm, "Types of Constitutions" in Michel Rosenfeld & András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) at 111; Mark Tushnet, "Marbury v. Madison Around the World" (2004) 71 Tenn. L. Rev. 251 at 260 n.36.

² U.S. Const., art. V (1789). The Constitution also authorizes amendment by constitutional convention in a special assembly convened for that purpose but this convention process has never been successfully used. See William B. Fisch, "Constitutional Referendum in the United States of America" (2006) 54 Am. J. Comp. L. 485 at 490.

³ Eric Posner, "The U.S. Constitution is Impossible to Amend" (2004) Slate.com, online: http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html (last accessed November 1, 2014).

⁴ See Richard Albert, "Constitutional Disuse or Desuetude: The Case of Article V" (2014) 94 B.U. L. Rev. 1029 at 1048-51.

⁵ Kathleen M. Sullivan, "Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever" (1996) 17 Cardozo L. Rev. 690 at 691.

⁶ For example, as of 2013, the Indian Constitution had been formally amended 98 times since its adoption in 1950 and the South African Constitution had already been formally amended 17 times since its adoption in 1996.

⁷ See, e.g., Richard H. Fallon, Jr., "American Constitutionalism, Almost (But Not Quite) Version 2.0" (2012) 65 Me. L. Rev. 77 at 92; H.B. Higgins, "The Rigid Constitution" (1905) 20 Pol. Sci. Q. 203 at 210; Miguel Schor, "Judicial Review and American Constitutional Exceptionalism" (2008) 46 Osgoode Hall L.J. 535 at 540.

⁸ Procedure for Amending Constitution of Canada, Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982, 1982, c. 11 (U.K.)* ("*Constitution Act, 1982*").

⁹ For a comparative analysis of Canada's escalating structure of formal amendment rules, see Richard Albert, "The Structure of Constitutional Amendment Rules" (2014) 49 Wake Forest L. Rev. 913.

¹⁰ See 1987 Constitutional Accord, Schedule to Constitutional Amendment, 1987, July 3, 1987 ("Meech Lake Accord"); Consensus Report on the Constitution, Charlottetown, August 28, 1992 ("Charlottetown Accord").

¹¹ Ronald L. Watts, "Canada: Three Decades of Periodic Federal Crises" (1996) 17 Int'l Pol. Sci. Rev. 353 at 368.

The extraordinary difficulty of formal amendment in Canada derives equally from sources external to the Constitution's formal amendment rules. The supermajority and federalist thresholds entrenched in the *Constitution Act, 1982* are demanding on their own, but major constitutional amendment now also requires conformity with extra-textual requirements imposed by Supreme Court decisions interpreting the Constitution of Canada, parliamentary and provincial as well as territorial statutes, and arguably by constitutional conventions, by which I mean the unwritten yet binding constitutional norms that develop in the course of constitutional politics. These extra-textual requirements for formal amendment appear nowhere in the text of the *Constitution Act, 1982* but they are perhaps just as significant as the ones that do. Uncodified though broadly recognized as valid, they so exceedingly complicate the process of formal amendment that we might more accurately speak of amendment impossibility rather than mere difficulty.

Canada is course not the only country whose formal amendment rules are susceptible to informal modification by judicial interpretation, legislative or executive action and constitutional convention. Indeed, I am currently completing a paper in which I identify and evaluate a global trend in the informal modification of formal amendment rules.¹² The most well-known manifestation of informal changes to formal amendment rules is the judicial creation of the basic structure doctrine, most commonly associated with the Indian Supreme Court.¹³ The Court has developed, in the course of its common law constitutional interpretation, a theory of the implicit unamendability of certain constitutive features of the "basic structure" of the Indian Constitution, namely federalism, the separation of powers and secularism.¹⁴ The consequence of the basic structure doctrine has been to impose court-created limits on the textually unlimited power of political actors to formally amend the Indian Constitution.¹⁵ India, then, demonstrates the phenomenon I explore in this Article. Nonetheless, this phenomenon—the development of extra-textual rules of formal amendment—is most apparent to me in its richness and complexity in Canada, where it derives not only from judicial interpretation but also from legislation, executive action and convention. Canada therefore offers a valuable case study to illustrate how it arises.

In this Article, I suggest that major constitutional amendment to the Constitution of Canada may today be impossible. Although I make some empirical comparisons, this paper is not principally an empirical inquiry in amendment difficulty largely because, as I will explain below,¹⁶ empirical studies of amendment difficulty pose analytical challenges that I or indeed others are not yet equipped to overcome. I instead draw from existing empirical studies to explore in comparative perspective the difficulty of major constitutional amendment in Canada in light of both the codified and uncodified rules of formal amendment. I begin, in Part II, by situating the difficulty of

¹² Richard Albert, "The Informal Amendment of Formal Amendment Rules" (draft on file with author).

¹³ For a description of the basic structure doctrine, see Richard Albert, "The Unamendable Core of the United States Constitution" in András Koltay, *Comparative Perspectives on the Fundamental Freedom of Expression* (forthcoming 2015), available at: <http://ssrn.com/abstract=2601646> (last accessed November 1, 2014); Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford, UK: Oxford University Press, 2009).

¹⁴ See Kesavananda Bharati Sripadagalvaru v. Kerala, 1973 SCC (4) 225, available at: <http://www.indiankanoon.org/doc/25786> (last accessed November 1, 2014) at para. 316. But the Court has been "deliberately vague about exactly what counts as part of that 'basic structure.'" Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty" (2007) 18 J. Democracy 70 at 76.

¹⁵ The Indian Constitution establishes no subject-matter constraints on formal amendment. See India Const., pt. XX, art. 36 (1950).

¹⁶ See *infra* Section II.A.

Canada's formal amendment rules among amendment rules in other democratic constitutions. In Part III, I explain and evaluate how political actors have created extra-textual amendment rules that now exacerbate the difficulty of Canada's already onerous formal amendment rules. In Part IV, I offer brief reflections on whether these extra-textual foundations of formal amendment difficulty are problematic for Canadian constitutionalism. I suggest that these extra-textual restrictions undermine the exercise of democracy and transform the written constitution into an incomplete code for the accomplishment of a task that is by definition rooted in textual authority.

First, however, by way of introduction, I define two important terms. I am concerned in this Article with the possibility of major reforms to the framework and identity of the state, what I refer to in this paper as *major constitutional amendments* to the Constitution of Canada. I define this to mean what Peter Russell understood as the kinds of changes achievable only through “mega constitutional politics,” which is to say those changes that “address the very nature of the political community on which the constitution is based,” that have a “tendency to touch citizens’ sense of identity and self-worth,” and that are “concerned with reaching agreement on the identity and fundamental principles of the body politic.”¹⁷ These kinds of amendments are possible only with the default multilateral and unanimity amendment procedures in the Constitution of Canada.¹⁸ These two onerous thresholds have been satisfied collectively only once since they came into force three decades ago.¹⁹ The rest of Canada's ten formal amendments—as of 2015, there have been a total of eleven—have occurred using the Constitution's other formal amendment procedures,²⁰ each of which demands considerably lower thresholds of political agreement for their successful use.²¹ Below, I discuss in detail the five formal amendment procedures open to political actors.²²

Second, my purpose in this Article is to explain why it is so difficult to *formally* amend the Constitution of Canada. Formal amendment refers to textual alterations to the Constitution. I do not inquire in this Article into the relative ease or difficulty of *informal* amendment, which occurs when the Constitution changes in meaning without a corresponding alteration to its text.²³ I have written elsewhere in detail about this phenomenon of informal amendment with particular respect

¹⁷ See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press 1992) at 75.

¹⁸ As I discuss below, the Constitution of Canada entrenches five formal amendment procedures. See *infra* Section II.C. Each may be used on its own to make important changes to the Constitution, and indeed most of the changes to the codified Constitution of Canada have occurred using neither the default multilateral amendment procedure nor the unanimity procedure. *Ibid.* Nonetheless, I focus in this Article on those two formal amendment because they are the ones that best reflect the Constitution of Canada's recognition of the possibility of *major constitutional amendment*.

¹⁹ See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1 (loose-leaf updated 2012, release 1) (Toronto: Carswell, 2007) at 1-7—1-8 n.32.

²⁰ See Ian Greene, “Constitutional Amendment in Canada and the United States” in Stephen L. Newman, ed., *Constitutional Politics in Canada and the United States* (Albany, NY: State University of New York Press, 2004) at 254.

²¹ *Ibid.*

²² See *infra* Section II.C.

²³ Heather K. Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution” (2007) 55 Drake L. Rev. 925 at 929. For useful reflections on the challenge of identifying amendment-level changes, see Sanford Levinson, “How Many Times Has the United Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change” in Sanford Levinson, ed., *Responding to Imperfection* (Princeton: Princeton University Press, 1995) at 25-26.

to Canada,²⁴ where the Constitution has changed informally more frequently than formally.²⁵ Informal amendment is therefore at the core of constitutional change in Canada. But it is precisely because of the infrequency of formal amendment that it is important to separate formal from informal amendment—in order to understand why the former is today less likely than the latter, and indeed perhaps impossible under the current structure of formal amendment in Canada.

II. FORMAL AMENDMENT RULES IN DEMOCRATIC CONSTITUTIONS

The study of comparative amendment difficulty could conceivably lend itself well to empirical analysis. We could, for example, compare the number of amendments across jurisdictions, noting that the United States Constitution has been amended 27 times since its coming-into-force in 1789 as compared to 11 times in Canada since the entrenchment of its modern constitutional text in 1982.²⁶ But this comparative exercise would help us track amendment frequency, not necessarily amendment difficulty. We could alternatively compare thresholds for formal amendment. But it is not clear that the three-quarters threshold for state ratification in the United States is harder to satisfy than the default multilateral amendment procedure in Canada.²⁷

The point is that measuring amendment difficulty is itself a difficult task.²⁸ What may matter even more to the study of amendment difficulty than voting thresholds for proposing and ratifying a formal amendment is the amendment culture in a constitutional tradition, meaning how often and successfully amendment has been contemplated and ultimately pursued.²⁹ The national culture of amendment may also change over time as political actors, institutions and the people grow more or less amenable to the high costs of undertaking changes to their constitution. What is more, measuring amendment culture—if one can reliably identify it³⁰—is further complicated by variations in amendment cultures within federal systems,³¹ meaning that subnational states might differ among themselves and as between themselves and the national state in their inclination to

²⁴ See generally Richard Albert, “Constitutional Amendment by Stealth” (forthcoming 2015) 60 McGill L.J.; Richard Albert (evaluating constitutional amendment by convention); Richard Albert, “Amending Constitutional Amendment Rules” (forthcoming 2015) 13 Int’l J. Const. L. (discussing constitutional amendment by convention); Richard Albert, “Constitutional Amendment by Constitutional Desuetude” (2014) 62 Am. J. Comp. L. (theorizing constitutional amendment by convention); Richard Albert, “Constructive Unamendability in Canada and the United States” (2014) 67 Sup. Ct. L. Rev. (2d) 181 (examining the relationship between constitutional rigidity and constitutional amendment by constitutional convention). For a discussion of the forms of informal amendment in the United States, see Albert, *supra* note 4, at 1060-71.

²⁵ See Allan C. Hutchinson, “Constitutional Change and Constitutional Amendment: A Canadian Codundrum” in Xenophon Contiades, ed., *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abington, UK: Routledge 2013) 51 at 57-70.

²⁶ Hogg, *supra* note 19.

²⁷ Compare U.S. Const., art. V with *Constitution Act, 1982*, pt. V, s. 38. I explain in Section II.C, *infra*, what the default multilateral amendment procedure is and why we can properly describe it as Canada’s default amendment rule.

²⁸ Tom Ginsburg & James Melton, “Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty” (forthcoming 2014) 12 Int’l J. Const. L.

²⁹ *Ibid.*

³⁰ See Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge, MA: Harvard University Press, 2001) at 22.

³¹ Ginsburg & Melton, *supra* note 28.

undertake a national-scale amendment. It is therefore difficult to conclude with any confidence that one constitution is harder to amend than another where both appear rigid from experience.³²

A. Studies of Amendment Difficulty

What makes this comparative enterprise particularly challenging with respect to Canada is the difficulty of identifying what precisely constitutes an amendment. The definition of a formal amendment—an alteration to the constitutional text³³—maps comfortably onto a master-text constitutional regime governed under a codified constitution. But Canada does not have a master-text constitution. It has a partially written and unwritten constitution that operates differently from the conventional model of a master-text regime like the United States. Some parts of the Constitution of Canada are codified—making it seem like a master-text constitutional regime, others are written yet disaggregated, and still others are altogether unwritten. This makes it hard to identify the complete universe of the materials and principles that possess *constitutional* status, and in turn to identify when a change requires recourse to the procedures of formal amendment.³⁴

The codified Constitution of Canada both clarifies and complicates this conceptual challenge. It clarifies some questions by identifying what counts as “constitutional” in Canada. The *Constitution Act, 1982* entrenches a list of the items that comprise the Constitution of Canada.³⁵ But this clarification is also a complication because the very same list suggests that it is a non-exhaustive enumeration. The key word, reproduced below from the enumeration in the *Constitution Act, 1982* is “includes”, which suggests that other items qualify as part of the Constitution of Canada but are just not listed in the Constitution. Here is the relevant text:

- (2) The Constitution of Canada includes
 - (a) the *Canada Act 1982*, including this Act;
 - (b) the Acts and orders referred to in the schedule; and
 - (c) any amendment to any Act or order referred to in paragraph (a) or (b).³⁶

The “Constitution of Canada” of course also includes the preambular declarations of values and other commitments in the *Constitution Acts, 1867 to 1982*, namely the preambular statement in the *Constitution Act, 1867*, which states in part that Canada shall have “a Constitution similar in

³² For example, in his classification scheme, one scholar suggests though does not state that the Australian and Canadian Constitutions are similarly difficult to amend given that they both (sometimes) require a simple legislative vote followed by approval by provincial legislatures, and that both are easier as compared to the United States Constitution, which requires two-thirds legislative vote followed by three-quarters ratification by the states. See Edward Schneider, *Crafting Constitutional Democracies* (Maryland: Rowman & Littlefield, 2006) at 224-225. But how can we be certain that any of these three constitutions is harder or easier to amend than the South African Constitution, which (sometimes) requires a three-fourths legislative vote and majority approval by the provinces, or even the Eritrean Constitution, which requires a three-fourths legislative vote and a further four-fifth legislative vote one year later. *Ibid.* at 225. Knowing as a certainty requires some demonstrated insights drawn from analyses of several indicators, including political culture, legislative capacity, party politics, historical amendability, rates of popular participation and the effectiveness of the separation of powers.

³³ See *supra* Part I. Note furthermore that my focus in this Article is the difficulty of only *major* formal amendment.

³⁴ See Lutz, *supra* note 1, at 179 n.16.

³⁵ See *Constitution Act, 1982*, pt. VII, s. 52(2).

³⁶ *Ibid.* (emphasis added).

Principle to that of the United Kingdom”.³⁷ How are we to identify a formal amendment to this preambular value?³⁸ As I suggest in the pages below, the indeterminacy of the identity, scope and meaning of Canada’s unwritten constitutional principles is itself a source of formal amendment difficulty insofar as it shifts to the judiciary the responsibility to identify what is amendable and how, that is to say according to which of Canada’s five formal amendment procedures.³⁹ Notwithstanding this conceptual challenge as to formal amendment in Canada and in other states without a master-text constitution, the challenges of measuring amendment difficulty have not prevented scholars from venturing attempts to measure amendment difficulty across jurisdictions.

Donald Lutz has produced the leading study of comparative amendment difficulty.⁴⁰ Lutz endeavours to quantify the difficulty of each discrete step in an amendment process in order to estimate the relative difficulty of whole amendment processes. Lutz identifies 68 possible steps in an amendment process, for instance initiation by an executive or a specially appointed body, and ratification by referendum requiring an absolute majority.⁴¹ Aggregating the scores for each of 36 democratic countries in his study sample—Lutz does not rank Canada because of his stated difficulty in determining what has constitutional status⁴²—he concludes that the United States Constitution (5.10) ranks as the most rigid, followed by Switzerland (4.75) and Venezuela (4.75), then Australia (4.65), Costa Rica (4.10), Spain (3.60) and Italy (3.40).⁴³ Lutz finds that New Zealand (0.50) has the easiest “constitution” to amend,⁴⁴ which makes sense given that it is closest to a model of pure parliamentary sovereignty where changes occur by simple legislative vote.⁴⁵

There are other scholarly studies of amendment difficulty. Astrid Lorenz has designed her own scale to measure 39 stable democracies and concluded that Belgium (9.5) has the highest index of amendment difficulty, followed closely by the United States (9.0) and then the Netherlands (8.5).⁴⁶ The next three hardest-to-amend are tied: Australia (8.0), Denmark and Japan.⁴⁷ Canada (7.0) was next, tied with Chile and Switzerland. The easiest constitutions to amend on her scale are the constitutions of the United Kingdom (1.0) and New Zealand (1.0).⁴⁸ For his part, Arend Lijphart has evaluated how 36 democracies operationalize formal amendment in terms of their required majorities. Lijphart ranked five constitutions in the top group (4.0) of amendment difficulty given their requirement of super-majorities greater than two-thirds: Australia, Canada,

³⁷ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), prmb. (“*Constitution Act, 1867*”).

³⁸ The value commitment reflected in the “Similar-in-Principle” Clause was superseded at least in part when a majority of Canadian political actors agreed to the *Constitution Act, 1982*, in so doing transforming Canada into a model of constitutional sovereignty rooted in institutional roles inconsistent with the model of parliamentary sovereignty then-existing in the United Kingdom. See Richard Albert, “Advisory Review” (2008) 45 *Alta. L. Rev.* 1037 at 1048-50.

³⁹ A detailed discussion of these five amendment procedures follows below. See *infra* Section II.C.

⁴⁰ Lutz, *supra* note 1, at 166.

⁴¹ *Ibid.* at 166-67.

⁴² *Ibid.* at 179 n.16.

⁴³ *Ibid.* at 170.

⁴⁴ It is unusual to refer to the “New Zealand Constitution,” since it might suggest exclusive reference to the Constitution Act 1986, which forms only part of New Zealand’s “constitution,” much of which is both written and unwritten, and therefore certainly not codified in a master-text. Nonetheless, I refer to New Zealand as having an amendable constitution in order to track Lutz’s own study of amendability in New Zealand. See *ibid.* at 125, 170, 176.

⁴⁵ *Ibid.* at 170, 176.

⁴⁶ Astrid Lorenz, “How to Measure Constitutional Rigidity” (2005) 17 *J. Theoretical Pol.* 339 at 358-59.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

Japan, Switzerland and the United States.⁴⁹ Germany (3.5) ranks immediately behind, followed by 16 countries tied below (3.0) in light of their two-thirds requirement or its equivalent.⁵⁰ The next group of eight countries (2.0) requires something between an ordinary majority and two-thirds majorities. The last group, requiring only ordinary majorities (1.0), includes six countries.⁵¹

B. Rigid Constitutions and their Amendment Rules

In their comparative studies of amendment difficulty, scholars have identified certain features associated with greater rigidity than flexibility.⁵² Lutz, for example, assigns the highest level of amendment difficulty to procedures that require a petition signed by more than 500,000 voters to initiate an amendment or those that condition ratification on unanimous approval by subnational governments.⁵³ The next-most difficult amendment feature conditions ratification on a majority of voters *and* a majority of states.⁵⁴ Lutz also assigns high measures of difficulty to procedures requiring two separate two-thirds votes in a bicameral legislature in order to either initiate or ratify an amendment, three-quarters votes among subnational legislatures or conventions to initiate or ratify an amendment, and a petition signed by 250,000-500,000 voters to initiate an amendment.⁵⁵ In contrast, Lutz assigns the lowest level of difficulty to amendment procedures requiring executive action alone to initiate an amendment, one-third or fewer votes in a specially constituted body to ratify an amendment, one-third majority or less in a unicameral legislature to ratify an amendment, or an election between two votes to either initiate or ratify an amendment.⁵⁶

We can calculate how Lutz arrived at the specific scores for the constitutions in his study sample. Take, for example, the United States Constitution, which scored 5.10, the highest score, for constitutional rigidity. Under Article V, the amending clause in the United States, the bicameral Congress must vote by two-thirds to initiate an amendment,⁵⁷ a process that is worth 1.60 points toward the entire score. Next, a successful Article V amendment requires at least three-quarters of the states to ratify the initiated amendment in, a step that counts for 3.50 points. The sum of both parts of the Article V process is therefore 5.10.⁵⁸ We can work through the same calculation for Japan, for instance,⁵⁹ which scored 3.10 on Lutz's index of amendment difficulty. This score is the

⁴⁹ Arend Lijphart, *Patterns of Democracy* (New Haven, CT: Yale University Press, 1999) at 220.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Lijphart focuses his own analysis on the quantum of legislative agreement—ranging from super- to ordinary majorities—required to approve an amendment. See text accompanying notes 46-48.

⁵³ Lutz, *supra* note 1, at 167-68.

⁵⁴ *Ibid.* at 168.

⁵⁵ *Ibid.* at 167-68.

⁵⁶ *Ibid.* at 167-68. See text accompanying notes 37-42.

⁵⁷ U.S. Const., art. V (1789):

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

⁵⁸ Lutz, *supra* note 1, at 169.

⁵⁹ Japan Const., ch. IX, art. 96 (1947):

sum of the value assigned to initiating an amendment by two-thirds majority in the bicameral Diet (1.60) and ratifying it in a referendum requiring a majority vote (1.50).⁶⁰ Similarly, the process of amending the New Zealand constitution, whose score on his index of amendment difficulty is 0.50, requires only a majority vote in the unicameral legislature, a procedure Lutz values at 0.50.⁶¹

C. Formal Amendment Rules in Canada

The formal amendment rules entrenched in the Constitution of Canada reflect many of the features that, either by causation or correlation, are associated with amendment difficulty. Although Lutz does not include Canada in his study sample, he might have found that it ranks near or above the United States in constitutional rigidity had he measured its amendment difficulty. The problem, however, would be where to start, since the Constitution of Canada entrenches five formal amendment procedures, each useable only in connection with specific items.⁶²

Consider first the *default multilateral amendment procedure* in Section 38.⁶³ This procedure has been successfully used only once.⁶⁴ It requires approval from both houses of Parliament as well as from at least two-thirds of the provinces representing at least half of the total provincial population.⁶⁵ This procedure is expressly identified as the “general” default procedure to amend all provisions and principles not otherwise entrenched under one of Canada’s four other amendment thresholds, and it also serves as the designated threshold for specifically enumerated items, including provincial representation in the Senate, senatorial powers and elections, and the creation of new provinces.⁶⁶ Under Lutz’s index, Canada’s default multilateral amendment procedure would score 4.50, the sum of 1.00 for parliamentary approval and 3.50 for provincial approval,⁶⁷ good for fourth on his ranking of amendment difficulty.

Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

⁶⁰ Lutz, *supra* note 1, at 167-68.

⁶¹ *Ibid.* at 168.

⁶² *See Constitution Act, 1982*, pt. V, ss. 38-49.

⁶³ *Ibid.* at s. 38(1):

An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by (a) resolutions of the Senate and House of Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Note that a province may in certain circumstances opt-out of an amendment adopted using the general procedure. *See ibid.* at s. 38(3).

⁶⁴ *See Constitutional Amendment Proclamation, 1983*, R.S.C. 1985; *see also* Hogg, *supra* note 19 (cataloguing all constitutional amendments).

⁶⁵ *Ibid.* at s. 38(1).

⁶⁶ *Ibid.* at s. 42(1).

⁶⁷ It is important to note that the default multilateral amendment procedure may be initiated by either of the two houses of Parliament or by the legislative assembly of a province. *See Constitution Act, 1982*, pt. V, s. 46(1).

But Lutz's index does not account for alternative amendment thresholds nor does it incorporate escalating amendment thresholds. The United States Constitution, for instance, entrenches an alternative amendment threshold requiring two-thirds of state legislatures to petition Congress to call a constitutional convention where amendments will be proposed and thereafter ratified by two-thirds of state legislatures.⁶⁸ This alternative amendment threshold would score 6.50 on Lutz's scale, by far the highest of all national constitutions in his sample.⁶⁹ Yet because the United States has never used this procedure,⁷⁰ Lutz does not measure it. He instead determines that "we can use the lower figure unless or until the more difficulty procedure is used."⁷¹ This choice obscures the possibility that the non-use of this alternative amendment threshold may itself be the consequence of its perceived amendment difficulty rather than simply its objective non-use.

The choice to exclude alternative amendment thresholds has implications for measuring amendment difficulty in Canada. Like the United States, Canada entrenches alternative amendment thresholds, though it does so in a larger structure of escalating amendment rules, which assigns thresholds of increasing difficulty according to the importance of the entrenched constitutional provision or principle.⁷² Thus alongside the default multilateral amendment threshold, which is itself difficult to satisfy, Canada entrenches an even harder threshold requiring approval in both houses of Parliament and from each provincial legislature.⁷³ This *unanimity procedure* has not once been successfully used since it was entrenched in the *Constitution Act, 1982*. Political actors must satisfy this procedure to amend the most important provisions and principles in the Constitution of Canada, including the structure of formal amendment rules in Canada; the monarchy; as well as provincial representation in the House of Commons and the Senate, the use of English or French, and the composition of the Supreme Court of Canada, all three of these subject to related but lesser matters amendable by another specially designated lower threshold.⁷⁴ On Lutz's scale, this unanimity threshold would score 5.00 for amendment difficulty: the sum of 1.00 for parliamentary approval and 4.00 for unanimous provincial approval. This would place Canada at a very close second to the United States on Lutz's index of difficulty.

Yet the structure of Canada's formal amendment rules is even more complicated than the default multilateral and unanimity procedures suggest. The escalating structure of formal amendment creates three more amendment thresholds, for a total of five. The Constitution of Canada entrenches a narrow *federal unilateral amendment procedure* in Section 44 authorizing

⁶⁸ U.S. Const., art. V.

⁶⁹ Lutz, *supra* note 1, at 169.

⁷⁰ See Fisch, *supra* note 2, at 490.

⁷¹ Lutz, *supra* note 1, at 169.

⁷² For an analysis of the expressive purpose of escalating amendment thresholds in Canada, see Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59 McGill L.J. 225 at 247-51.

⁷³ *Constitution Act, 1982*, pt. V, s. 41:

An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province; (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force; (c) subject to section 43, the use of the English or the French language; (d) the composition of the Supreme Court of Canada; and (e) an amendment to this Part.

⁷⁴ *Ibid.*

Parliament to amend its internal constitution and matters of federal executive government.⁷⁵ Political actors may not use this procedure to amend matters expressly assigned to another, more difficult, amendment procedure.⁷⁶ Since the entrenchment of the *Constitution Act, 1982*, this federal unilateral amendment procedure has been used three times.⁷⁷

The Constitution also entrenches a *parliamentary-provincial procedure*, which requires both houses of Parliament and the legislatures of one or more provinces affected by a given amendment each to agree by majority resolution to the amendment.⁷⁸ This procedure may be used only for regional matters whose subject concerns “one or more, but not all, provinces,” for example an amendment relating to provincial boundaries.⁷⁹ It has been used seven times, more than any other amendment procedure,⁸⁰ and not necessarily for insignificant matters. The final amendment procedure authorizes provinces to use the *unilateral provincial amendment procedure* to formally amend their own constitutions, though this requires only a simple majority in the provincial legislature.⁸¹ Provinces may use this procedure to amend all matters related to provincial government that are not otherwise expressly assigned a higher amendment threshold.⁸²

It would misunderstand the study of amendment difficulty to insist that the scores of all five amendment thresholds must be aggregated in order to arrive at the true measure of Canada’s amendment difficulty. But it would also misunderstand amendment difficulty to measure only the highest threshold that is ever actually used in order to quantify constitutional rigidity. This approach would neglect the possibility that Canada’s escalating amendment thresholds are less complementary than competing, and that the uncertainty they generate as to which amendment threshold ought to be used for a particular constitutional change is itself a feature that aggravates amendment difficulty. Indeed, we have recently seen evidence of political actors exploiting the Constitution’s uncertainty as to which amendment rule applies for amendments to senatorial selection, choosing ultimately to pursue the lower federal unilateral amendment threshold instead

⁷⁵ *Ibid.* at 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.”).

⁷⁶ *Ibid.*

⁷⁷ See Fair Representation Act, S.C. 2011, c. 26; Constitution Act, 1999 (Nunavut), S.C. 1998, c. 15; Constitution Act, 1985 (Representation), R.S.C. 1985; see also Hogg, *supra* note 19 (cataloguing all constitutional amendments).

⁷⁸ *Ibid.* at s. 43:

An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including (a) any alteration to boundaries between provinces, and (b) any amendment to any provision that relates to the use of the English or the French language within a province, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

⁷⁹ *Ibid.* at s. 43.

⁸⁰ See Constitution Amendment, 2001 (Newfoundland and Labrador), Can. Stat. Instruments SI 2002-117; Constitution Amendment Proclamation, 1998 (Newfoundland Act), Can. Stat. Instruments, SI 98-25; Constitution Amendment Proclamation, 1997 (Quebec), Can. Stat. Instruments, SI 97-141; Constitution Amendment Proclamation, 1993 (Prince Edward Island), Can. Stat. Instruments, SI 94-50; Constitution Amendment Proclamation, 1993 (New Brunswick Act), Can. Stat. Instruments, SI 93-54; Constitution Amendment, 1987 (Newfoundland Act), Can. Stat. Instruments, SI 88-11; see also Hogg, *supra* note 19 (cataloguing all constitutional amendments).

⁸¹ *Ibid.* at s. 45 (“Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.”).

⁸² *Ibid.*

of the more onerous default multilateral amendment threshold.⁸³ The very design of Canada's formal amendment rules may therefore itself discourage political actors from pursuing constitutional change through the normal channels of formal amendment and instead drive them to seek unconventional and irregular methods of informal amendment to update the Constitution.⁸⁴ If, as I suspect, this is true, amendment complexity is a significant yet unquantifiable source of amendment difficulty that cannot be reflected in comparative studies of constitutional rigidity.

III. EXTRA-TEXTUAL AMENDMENT RULES IN CANADA

As onerous as Canada's formal amendment rules may be—and history has shown just how difficult they are to satisfy⁸⁵—the difficulty of formal amendment in Canada derives equally from sources external to those textual rules. Major constitutional amendments to fundamental features of the polity or Canadian identity, or to the framework of government or federal-provincial relations, all matters that Peter Russell defines generally as “mega constitutional politics,”⁸⁶ also require conformity with extra-textual requirements imposed by Supreme Court decisions, parliamentary and provincial statutes, and arguably also by constitutional convention. Many though not all of these extra-textual rules for formally amending the Constitution of Canada trace their impetus to legitimate concerns for protecting minority rights in connection with Quebec.⁸⁷ When layered onto the existing formal amendment rules, these additional non-textual rules may well make major constitutional amendment impossible today in Canada.

⁸³ See Albert, “Constructive Unamendability in Canada and the United States”, *supra* note 24, at 211-15.

⁸⁴ See Albert, “Constitutional Amendment by Stealth”, *supra* note 24 (arguing that political actors have sought to circumvent the onerous formal amendment rules by creating a constitutional convention that will bind their successors functionally in much the same way as a formal amendment). A Supreme Court reference finally clarified which amendment threshold applies. See *Reference re Senate Reform*, 2014 SCC 32 (2014) [“Senate Reference”].

⁸⁵ For a discussion of the failures of the Meech Lake and Charlottetown Accords, see Michael B. Stein, “Improving the Process of Constitutional Reform in Canada: Lessons from the Meech Lake and Charlottetown Constitutional Rounds” (1997) 30 Can. J. Pol. Sci. 307 at 315-29. We should not attribute the failure of the Meech Lake and Charlottetown Accords only to the difficulty of formal amendment in Canada. This is certainly a principal reason for the failure of both efforts. But we must distinguish the difficulty of formal amendment from the design of the amendment proposals themselves. The failure of both the Meech Lake and Charlottetown Accords is equally attributable to the choice of political actors to present their proposed amendments in an omnibus package for wholesale constitutional renewal. The many components in each of the Accords made it difficult to secure widespread agreement from the various political actors across the country whose support was required under the rules of formal amendment. Here is one of the most useful explanations for the failure of the Charlottetown Accord:

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

Richard Johnston, “An Inverted Logroll: The Charlottetown Accord and the Referendum” (1993) 26 Pol. Sci. & Pol. 43 at 43.

⁸⁶ See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press 1992) 75.

⁸⁷ Indeed, the protection of minority rights is also in many instances the reason why this phenomenon arises elsewhere in the democratic world. I am grateful to Jim Repetti for drawing my attention to this important point.

A. Statutory Conditions

Parliamentary and provincial statutes have exacerbated formal amendment difficulty.⁸⁸ At the federal level, Parliament passed the Regional Veto law in 1996.⁸⁹ The law, just an ordinary statute passed without recourse to the rules of formal amendment, made good on a federal promise to grant Quebec more powers, including a veto in major constitutional amendment. The promise was conditioned on Quebec rejecting secession in the 1995 referendum,⁹⁰ which it did, though only by a slight margin.⁹¹ Under the Regional Veto law, Quebec possesses a veto on major constitutional amendments proposed pursuant to the default multilateral amendment procedure in Section 38. But the veto is not exclusive: the law grants the same veto power to the other regions of Canada, some of which are defined as provinces and others as provincial groupings: the Atlantic and Prairie provinces, Ontario, and British Columbia.⁹²

The Regional Veto Law applies narrowly only to major amendment proposals under Section 38. The reason why is that among the five constitutionally-entrenched amendment thresholds, Section 38 is the only one implicating federal-provincial relations that does not currently authorize a provincial veto.⁹³ The key to the Regional Veto Law is that it constrains the conduct of only federal cabinet ministers. The law does not expressly grant the designated regions a formal veto but it does give them a special protection that amounts to a functional veto: federal cabinet ministers may not propose a constitutional amendment under Section 38 without first securing the consent of a majority of provinces—a majority that must include Quebec, Ontario, British Columbia and at least two each of the Atlantic and Prairie provinces representing at least half of the regional population.⁹⁴ Scholars have calculated that the provincial population distribution in the Prairie provinces results in granting an effective veto to Alberta as well.⁹⁵ All other provinces beyond Quebec, Ontario British Columbia and Alberta may exercise a veto over major constitutional amendment proposals, but only in tandem with other regional allies that can combine with them to achieve a statutorily-required population threshold.⁹⁶

The Regional Veto law is an ordinary statute but its effect is extraordinary. It appears only to require federal-provincial consultation but it actually creates a significant barrier to formal amendment that now makes it even more unlikely that a major amendment will ever succeed. The

⁸⁸ Below, in connection with the Secession Reference, I also discuss the Clarity Act as an example of a parliamentary statute that has exacerbated amendment difficulty. *See infra* Section III.C.

⁸⁹ An Act Respecting Constitutional Amendments, S.C. 1996, c. 1 (1996) [“Regional Veto law”].

⁹⁰ *See* Robert A. Young, “Jean Chretien’s Quebec Legacy: Coasting then Stickhandling Hard” (2004) 9 *Rev. Const. Stud.* 31 at 38-39.

⁹¹ The result of the referendum was close, with 2,362,648 voting to reject secession and 2,308,360 voting in favour. The participation rate was 93.52%. *See* Elections Quebec, “R  f  rendums au Qu  bec” online: <http://www.electionsequbec.qc.ca/francais/tableaux/referendums-quebec-8484.php> (last accessed November 1, 2014).

⁹² Regional Veto Law, *supra* note 88, at s. 1(1).

⁹³ Section 41 (requiring unanimous provincial agreement) and section 43 (requiring the agreement of affected province(s)) both effectively grant provinces a veto. Neither section 44 nor section 45 concern federal-provincial matters.

⁹⁴ *Ibid.*

⁹⁵ Andrew Heard & Tim Swartz, “The Regional Veto Formula and its Effects on Canada’s Constitutional Amendment Process” (1997) 30 *Can. J. Pol. Sci.* 339 at 342-43.

⁹⁶ *See* Greene, *supra* note 20, at 263-64.

prohibition on cabinet ministers proposing a Section 38 amendment without provincial consent establishes a prior restraint not otherwise contemplated by the Constitution of Canada.⁹⁷ In the past, the federal government could have introduced an amendment proposal in Parliament, and perhaps through debate and deliberation could have cobbled together the requisite parliamentary majority, and in doing so could have drawn provincial allies to its side as the amendment project grew in popularity. Now, however, the federal government must recruit provincial allies prior to even proposing an amendment in Parliament, reversing the order envisioned by the formal amendment rules and short-circuiting the amendment process before it ever begins. This statutory complication to the Constitution's formal amendment process has given rise, correctly in my view, to a non-trivial argument that the Regional Veto Law is unconstitutional.⁹⁸

Provinces have likewise adopted their own laws that further constrain major constitutional amendment. These provincial laws now require either a binding or advisory province-wide referendum on any formal amendment for which provincial ratification is required.⁹⁹ For example, Alberta requires a binding provincial referendum before the provincial legislature votes to ratify a major amendment requiring provincial ratification.¹⁰⁰ British Columbia similarly prevents the provincial legislature from ratifying a formal amendment unless a binding province-wide referendum first authorizes the legislature to ratify it.¹⁰¹ Other provinces and territories, including New Brunswick, Saskatchewan and Yukon, authorize but do not require their governments to hold binding referenda before voting to ratify or reject an amendment.¹⁰² Still others, like the Northwest Territories, Nunavut, Quebec, Prince Edward Island and Newfoundland & Labrador, authorize but do not require an advisory referendum or plebiscite prior to a legislative vote on ratification.¹⁰³

These provincial referenda laws are problematic for formal amendment in Canada.¹⁰⁴ They too operate as a prior restraint to legislative decision-making. Under Canada's formal amendment rules, provinces are authorized to vote to ratify major amendments proposed by Parliament. The Constitution requires no intervening decision or action between parliamentary proposal and

⁹⁷ See David E. Smith, "The Canadian Senate: What is to be Done?" in Peter H. Russell, ed., *Essential Readings in Canadian Constitutional Politics* (Toronto, Canada: University of Toronto Press, 2011) at 43.

⁹⁸ See Heard & Swartz, *supra* note 95, at 340-41.

⁹⁹ 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 Institution of Canadian Federalism* (Montreal & Kingston: McGill-Queen's University Press, 2004) 35 at 44.

¹⁰⁰ Rev. Stat. Alb. 2000, C-25, ss. 2(1), 4.

¹⁰¹ Rev. Stat. B.C. 1996, C-67, s. 1; Rev. Stat. B.C. 1996, C-400, s. 4.

¹⁰² See *Referendum Act*, S.N.B. 2011, c. 23, ss. 12-13 (New Brunswick) (establishing quorum requirement for vote to bind government); *The Referendum and Plebiscite Act*, Stat. Sask. 1990-91, c R-8.01, s. 4 (Saskatchewan) (establishing quorum and threshold requirements for vote to bind government); *Public Government Act*, Stat. Yuk. 1992, c-10, s. 7 (Yukon) (authoring legislature to decide *ex ante* whether referendum vote will bind government).

¹⁰³ See, e.g., *Consolidation of Plebiscite Act*, R.S.N.W.T. 1998, c. P-8, s. 5 (Nunavut); *Elections and Plebiscites Act*, S.N.W.T. 2006, c. 15, s. 48 (Northwest Territories); *La Loi sur la consultation populaire*, L.R.Q. 2000, c. C-64.1, s. 7 (Quebec); *Plebiscites Act*, R.S.P.E.I. 1991, c.32, s. 1 (Prince Edward Island); see also *Elections Act*, S.N.L. 1992, c. E-3.1, s. 218 (Newfoundland & Labrador) (authorizing non-binding plebiscite on federal amendment).

¹⁰⁴ Citizens in the United States have tried unsuccessfully to exercise the power to instruct their legislators how to vote on a formal amendment proposal. Courts have ruled these efforts unconstitutional for encroaching on the power of elected representatives to deliberate on the fate of an amendment. See Keith P. Miller, *Direct Democracy and the Courts* (Cambridge, UK: Cambridge University Press, 2009) at 171-72; Kris W. Kobach, "May 'We the People' Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution" (1999) 33 U.C. Davis L. Rev. 1 at 7-9.

provincial legislative vote. Yet many provinces have chosen to insert a provincial referendum, either binding or advisory, before their legislature is even authorized to vote on a parliamentary proposal to amend the Constitution. On one hand, it is politically prudent for provincial political actors to consult their constituents on a major amendment proposal before they take action on it. On the other, the Constitution of Canada does not require this step, and it further delays the provincial decision on a proposal which is subject to a strict three-year time limit for ratification.¹⁰⁵

Both of these extra-textual statutory conditions—conformity with the Regional Veto law and with provincial referendum laws—impose formal amendment conditions over and above those required by Canada’s formal amendment rules. None of the constitutionally-entrenched rules suggests a veto power for any province. (Indeed, Canada rejected an explicit provincial veto power over constitutional amendment in both the Meech Lake and Charlottetown Accords.¹⁰⁶) Nor do any of Canada’s formal amendment rules recognize the validity of a referendum at any level of government, whether federal or provincial, in the amendment process. Although Canada has a long history of provincial referenda, none of the five formal amendment thresholds requires nor suggests a provincial referendum in either the proposal or ratification of a major constitutional amendment. Yet today many provincial referendum laws are now binding as a matter of statutory law on provincial political actors. The consequence of the Regional Veto law and provincial referendum laws is that federal and provincial political actors must now govern themselves according to statutory rules beyond those the constitution imposes on them.

This threatens to erode the distinction between the Constitution of Canada and a statute that is supposed to be inferior to it. What makes the Constitution a constitution is that it enjoys a higher status relative to a statute, that it is more difficult to amend than a statute, and that a statute is derivative of the Constitution.¹⁰⁷ These parliamentary and provincial statutes on constitutional amendment have effectively modified the Constitution’s rules for formal amendment. They moreover aspire to constitutional or quasi-constitutional status insofar as they are meant to bind political actors in the process of constitutional amendment in the same way the Constitution does. The problem, however, is that these parliamentary and provincial statutes have not earned their special status through the channels the Constitution requires for achieving constitutional status. They are mere statutes that purport to bind political actors as authoritatively as the Constitution, when really the opposite is true: the Constitution requires these statutes first to be valid constraints.

Returning to Lutz’s index of amendment difficulty, it is hard to quantify how much more difficult the Regional Veto law and the provincial laws make formal amendment in Canada. Lutz does not provide specifically for the kind of pre-initiation approval the Regional Veto law requires, nor does he contemplate the possibility of pre-ratification provincial referenda, whether binding or consultative. But we may nonetheless approximate the relative value of each of these additional steps using Lutz’s index of 68 possible actions that may in some combination be deployed in constitutional amendment. On his scale, the pre-initiation approval required by the Regional Veto law is comparable to the requirement of multiple state legislative approval, which counts for

¹⁰⁵ See *Constitution Act, 1982*, pt. V, s. 39(2) (creating a three-year time limit to ratify an amendment proposal).

¹⁰⁶ See Meech Lake Accord, *supra* note 10; Charlottetown Accord, *supra* note 10.

¹⁰⁷ Donald S. Lutz, “Toward a Theory of Constitutional Amendment” in Sanford Levinson, ed., *supra* note 22, 237 at 240; András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest, Hungary: Central University Press, 1999) at 39-40; Schneier, *supra* note 31, at 222.

2.00.¹⁰⁸ The pre-ratification provincial referenda are comparable to a series of popular referenda, valued on Lutz's scale at 1.50.¹⁰⁹ When added to the score for amendment difficulty assigned to Canada's general amendment threshold (4.50), these two new requirements raise Canada's score to 8.00, which exceeds the score for even the as-yet unused national convention path (6.50) assigned to the United States Constitution.¹¹⁰

B. Popular Expectations

Quite apart from these legislative constraints on constitutional change, formal amendment must now arguably also conform to popular expectations of increased participation.¹¹¹ It is possible, though far from clear,¹¹² that there now exists a constitutional convention requiring a national consultative referendum before ratifying any major constitutional amendment. This convention derives from the decision to submit the 1992 Charlottetown Accord to a national referendum, even though the text of Canada's formal amendment rules did not then, nor do they now, require a referendum as a condition of successfully ratifying a constitutional amendment.¹¹³

Here, I am using "constitutional convention" in contrast to its use elsewhere in this Article in connection with the as-yet unused procedure for amending the United States Constitution by "constitutional convention," a reference to an assembly of political actors that convenes to write or amend a constitution. In the sense in which I refer to the concept in connection with Canada, constitutional conventions are the body of understandings and norms that regulate the conduct of political actors.¹¹⁴ Common law courts generally do not enforce constitutional conventions but they do recognize them, as the Supreme Court of Canada did in the Patriation Reference when it recognized the existence of a convention of substantial provincial consent for major constitutional amendments.¹¹⁵ A constitutional convention is not a legal rule since it does not emerge from either the judicial or lawmaking process; it is better described as a rule of political morality because its content is determined by the action, agreement and/or the acquiescence of political actors.¹¹⁶ At bottom, a constitutional convention "ultimately reflect[s] what people do."¹¹⁷ Constitutional conventions bind political actors only inasmuch as they can neither arise nor change by unilateral action; they require multilateral and cross-party ratification in order to arise and survive.¹¹⁸

¹⁰⁸ Lutz, *supra* note 1, at 167.

¹⁰⁹ *Ibid.* at 168.

¹¹⁰ *See supra* text accompanying notes 68-71.

¹¹¹ *See* Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42 U. Toronto L.J. 139 at 167-68.

¹¹² I have elsewhere taken the position that we do not yet know whether such a constitutional convention has taken root. *See* Richard Albert, "The Conventions of Constitutional Amendment in Canada: Is There a Convention of Federal Referendal Consultation?," Conference Paper, Trinity College Dublin (paper on file with author).

¹¹³ *Constitution Act, 1982*, pt. V, ss. 38-49.

¹¹⁴ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund 1982, reprinting 8th ed. 1915) at cxli.

¹¹⁵ *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ["Patriation Reference"].

¹¹⁶ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) at 216-17.

¹¹⁷ *Ibid.* at 217.

¹¹⁸ *Ibid.*

The Charlottetown Accord was Canada's second major attempt, following the failed Meech Lake Accord in 1987, to address the matters left unresolved in the *Constitution Act, 1982*, such as the special status of Quebec, the rights of First Nations, and the modernization of national institutions.¹¹⁹ In response to the perception and indeed the reality that the Meech Lake Accord had been the result of a closed-door, back-room and elite-driven drafting process,¹²⁰ political actors chose to open the Charlottetown process to public input, transparent deliberation, and ultimately national referendal consultation as a way to signal their commitment to make the new document Canadians' own.¹²¹ The national referendal consultation was authorized by a parliamentary law, the *Referendum Act* which made it legally permissible and administratively possible to survey Canadians on "any question relating to the Constitution of Canada."¹²² The referendum question was straightforward: "Do you agree that the Constitution of Canada should be renewed on the basis of the [Charlottetown Accord]?"¹²³ Voters rejected the Accord by 54.3 to 45.7 percent.¹²⁴

The extraordinary use of a national referendum in the Charlottetown process has prompted observers to suggest that future similar efforts should also incorporate a national referendum.¹²⁵ The theory here is that the Charlottetown referendum has matured into a constitutional convention. The dominant view is that the Charlottetown referendum has set a "binding precedent"¹²⁶ that is "a fact of constitutional reform in Canada now" requiring public ratification for major, though not minor, constitutional reforms.¹²⁷ The failure to enlist voters in a referendum on any future constitutional reform on the scale of the Charlottetown Accord "is likely to be perceived as illegitimate."¹²⁸ The prevailing view is that the days of closed-door, back-room and elite-driven constitution-making and -change are gone, and political actors must now attend to public inclusion

¹¹⁹ See Ronald L. Watts, "Three Decades of Periodic Federal Crises" (1996) 17 Int'l Pol. Sci. Rev. 353 at 357.

¹²⁰ See Peter H. Russell, "Can the Canadians Be a Sovereign People?" (1991) 24 Can. J. Pol. Sci. 691 at 705-06.

¹²¹ See Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012) 57 McGill L.J. 955 at 983.

¹²² Referendum Act, s.3(1), S.C. 1992, c.30.

¹²³ Proclamation Directing a Referendum Relating to the Constitution of Canada, SI/92-180, Registered on 1992-10-07, online: <http://laws.justice.gc.ca/eng/regulations/SI-92-180/page-1.html> (last accessed November 1, 2014).

¹²⁴ See The 1992 Federal Referendum—A Challenge Met: Report of the Chief Electoral Office of Canada, at 58, January 17, 1994, online: http://www.elections.ca/res/rep/off/1992/1992_Referendum_Part_2_E.pdf (last accessed November 1, 2014).

¹²⁵ See, e.g., Dawson, *supra* note 121, at 997; Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec" (1999) 29 Publius 135, 142; Kenneth McRoberts, "After the Referendum: Canada With or Without Quebec" in Kenneth McRoberts, ed., *Beyond Quebec: Taking Stock of Canada* (Montreal-Kingston: McGill-Queen's University Press, 1995) at 413; Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" (2000) 33 Can. J. Pol. Sci. 245 at 251; Christa Scholtz, "Aboriginal People and the Charlottetown Accord: Political Mobilization and Aboriginal Support for Constitutional Change" (June 2008) Paper presented to the Canadian Political Science Association Annual Meetings, 14, online: <http://www.cpsa-acsp.ca/papers-2008/Scholtz.pdf> (last accessed November 1, 2014); Jeffrey Simpson, "The Referendum and its Aftermath" in Kenneth McRoberts and Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 193; Robert C. Vipond, "Seeing Canada Through the Referendum: Still a House Divided" (1993) 23 Publius 39 at 54; José Woehrling, "La modification par convention constitutionnelle du mode de designation des sénateurs canadiens" (2008-09) 39 Revue de droit de l'Université de Sherbrooke 115 at 125.

¹²⁶ Roger Gibbins & David Thomas, "Ten Lessons from the Referendum" (1992) 15 Can. Parl. Rev. 3 at 3.

¹²⁷ Kathy L. Brock, "Learning from Failure: Lessons from Charlottetown" (1993) 4 Const. Forum 29 at 32.

¹²⁸ R. Kent Weaver, "Political Institutions and Conflict Management in Canada" (1995) 538 Annals Am. Acad. Pol. & Soc. Sci. 54 at 65.

through consultation and ratification when engaging in major efforts for constitutional renewal.¹²⁹ There are some arguments to the contrary but they are squarely within the minority camp. For example, one scholar has argued that the lesson of the 1992 Charlottetown referendum is that it will be important to provide for popular involvement in some fashion in future efforts at major constitutional renewal though not necessarily in the form of referendal consultation.¹³⁰ Another has suggested that the referendum may have created a precedent but that this precedent has not yet, nor might it ever become, a constitutional convention.¹³¹

Referendal consultation is of course not formally a condition of successful amendment in Canada.¹³² But if it is true that a convention has taken root now requiring a national referendum before a major amendment to the Constitution of Canada becomes valid, this will significantly increase Canada's formal amendment difficulty. Procedurally, this would mean that a major formal amendment pursuant to the unanimity threshold in Section 41 would now require the following steps: (1) majority resolutions in both houses of Parliament; (2) separate referenda in the provinces and territories;¹³³ and (3) unanimous legislative ratification by each of the provinces and territories. Under Lutz's index of amendment difficulty, this amendment procedure would score 6.50, the sum of the value of Canada's unanimity threshold (5.00) and the use of a popular referendum for ratification (1.50).¹³⁴ This score of amendment difficulty exceeds the score assigned to the United States Constitution (5.10) and matches its score under the unused convention process (6.50).

There is a further point worth noting in connection with the new popular expectations of participation in constitutional amendment. In the aftermath of the Charlottetown referendum, the territories may now expect to play a formal role in a future major constitutional amendment. There were only two territories at the time of the Charlottetown referendum: the Northwest Territories and Yukon. Both participated in the referendum as partners equal to the provinces.¹³⁵ The Referendum Act pursuant to which the national referendal consultation on the Charlottetown Accord had been organized authorized voters in all of Canada's electoral districts, whether in a province or a territory, to cast a ballot.¹³⁶ Yet Canada's formal amendment rules made no provision then for territorial participation in constitutional amendment, nor do they now. Today, as of 1999, Nunavut is Canada's third territory.¹³⁷ The 1992 Charlottetown referendum, in which Canada's territories occupied a role equal to the provinces' own in the referendal consultation, may be seen as a precedent that will in the future compel a continuing role for Canada's three territories in major constitutional amendments. This, too, will further complicate formal amendment in Canada.

¹²⁹ Michael Adams, "The October 1992 Canadian Constitutional Referendum: The Socio-Political Context" in McRoberts & Monahan, *supra* note 83, at 192.

¹³⁰ See Benoît Pelletier, "Reinventing Canada: The Challenges that Canada Faces in the Twenty-First Century" (2010) 4 J. Parl. & Pol. L. 133 at 142.

¹³¹ See J. Peter Meekison, "Canada's Quest for Constitutional Perfection" (1993) 4 Const. Forum 55 at 56.

¹³² *Constitution Act, 1982*, pt. V, ss.38-49.

¹³³ It is not clear whether the referendum would be a single national one or a series of separate provincial and territorial ones.

¹³⁴ Lutz, *supra* note 1, at 168.

¹³⁵ See *The 1992 Federal Referendum—A Challenge Met: Report of the Chief Electoral Officer of Canada*, at 58, January 17, 1994, online: http://www.elections.ca/res/rep/off/1992/1992_Referendum_Part_2_E.pdf (last accessed November 1, 2014).

¹³⁶ Referendum Act, s. 3(1), S.C. 1992, c. 30, s. 6(1).

¹³⁷ See *Constitution Act, 1999 (Nunavut)*, 46-47 Elizabeth II, 1997-98, c. 15.

C. Judicial Standards

In addition to new restrictions on formal amendment established by statute and possibly also by constitutional convention, the Supreme Court of Canada has further exacerbated formal amendment difficulty in its interpretation of the Constitution of Canada.¹³⁸ In both the Supreme Court Act¹³⁹ and Secession References,¹⁴⁰ the Court informally modified the textually entrenched requirements to amend the Constitution, and in so doing has not only made it more difficult to amend certain elements of the Constitution of Canada but, even more controversially, it may have also reserved to itself the power to resolve questions on the constitutionality of future amendments.

Begin with the Supreme Court Act Reference, a matter concerning which amendment threshold applies to amendments to the Supreme Court of Canada. The Court declared that its own essential features—specifically “the Court’s jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence”¹⁴¹—cannot be amended outside of the unanimity procedure.¹⁴² On one hand, the Court’s interpretation clarifies an uncertainty in the text: whether the Court’s essential features are amendable pursuant either to the default multilateral amendment procedure or the unanimity procedure. On the other, the Court’s interpretation is not mandated by the constitutional text, which states only that amendments to “the composition of the Supreme Court of Canada”¹⁴³ shall require conformity with the unanimity threshold and that most other amendments to the Court must satisfy the lower default multilateral amendment procedure.¹⁴⁴

In terms of amendment difficulty, the skeptical reading of the Supreme Court Act Reference suggests that the Court has made it even harder for political actors to make amendments to the Court’s essential features. The strongest evidence of this newly-imposed hyper-difficulty of formal amendment is apparent in the Supreme Court Act Reference itself, where the Court chose against to defining these essential features with any precision, but rather only to say what they include “at the very least,”¹⁴⁵ and thereby reserve to itself the power to define further elements of its essential features in future matters. On this view, the Court has not only insulated itself from future formal amendments to features beyond only its “composition,” but also to its very nature as

¹³⁸ In contrast, the Supreme Court of the United States has interpreted Article V to make its rules potentially more permissive. In *Coleman v. Miller*, (1939) 307 U.S. 433 at 452-55, the Court held that only Congress may determine what amounts to a reasonable time for states to ratify a duly proposed amendment and also that Congress’ determination is a nonjusticiable political question. Whether the ruling is permissive or constraining turns on what period of time Congress understands to be “reasonable” for ratification. *Coleman* refined the Court’s earlier judgment that states must ratify an amendment within a reasonable time after it is proposed by Congress, even though Article V does not specify any temporal limitation for ratification. See *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

¹³⁹ Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, at paras. 90-105 [“Supreme Court Act Reference”].

¹⁴⁰ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [“Secession Reference”].

¹⁴¹ *Supreme Court Act Reference*, ss. 5 and 6, *supra* note 139, at para. 94.

¹⁴² *Ibid.* at paras. 90-105.

¹⁴³ *Constitution Act, 1982*, pt. V, s. 41(d).

¹⁴⁴ *Ibid.* at s. 42(d). A narrow class of amendments is still open to Parliament to make as ordinary legislation under its authority under section 101, which states that “The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.” *Constitution Act, 1867*, pt. VII, s. 101.

¹⁴⁵ *Supreme Court Act Reference*, ss. 5 and 6, *supra* note 139, at para. 94.

a judicial body. And where disputes arise as to whether an amendment concerns something requiring either the unanimity or default multilateral amendment procedure, the Court will be the one to decide which rule governs. As any institution would do in the interest of its self-preservation, the Court is likely to choose the harder amendment procedure for political actors to make changes to it.

The Secession Reference is similar in the sense that the Court reached beyond the text of the Constitution to uncover limitations on the power of formal amendment. The Court held that a formal amendment in connection with a provincial secession from Canada must be governed by the duty to negotiate as well as “underlying constitutional principles,” including federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.¹⁴⁶ These principles are not stated in the text of Canada’s formal amendment rules, nor are they expressly identified anywhere but in the Court’s Reference as the principles that must govern secession. Whether they correctly reflect Canada’s constitutional traditions, and they very well might, is not the relevant question.¹⁴⁷ It is rather that the Court departed from the Constitution’s complete codification of formal amendment rules to entrench previously unwritten rules for formal amendment. A formal amendment in connection with secession must now respect these rules.¹⁴⁸

Formal amendment in connection with secession must now also respect the terms of the Clarity Act, which Parliament passed in 2000, two years after the Court’s Secession Reference.¹⁴⁹ In its preamble, the Clarity Act conveys Parliament’s interpretation of the Secession Reference, specifically that the Court “confirmed that, in Canada, the secession of a province, to be lawful would require an amendment to the Constitution of Canada” and that the negotiations leading to formalizing the secession of a province “would be governed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities”.¹⁵⁰ The Clarity Act creates rules for Parliament to deliberate on the clarity of a referendum question to be posed to voters in a province. Those rules concern many aspects of a referendal vote on secession, including the timing of parliamentary deliberations,¹⁵¹ the types of questions to be posed in the

¹⁴⁶ *Secession Reference*, *supra* note 140, at paras. 88-105.

¹⁴⁷ There is an important body of scholarship on Canada’s unwritten constitutional principles. *See, e.g.*, Sujit Choudhry & Robert Howse, “Constitutional Theory and the Quebec Secession Reference” (2000) 13 *Can. J. L. & Jurisprudence* 143; Jean LeClair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 *Queen’s L.J.* 389; Mark D. Walters, “The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law” (2001) 51 *U. Toronto L.J.* 91.

¹⁴⁸ It is possible to read the Court in the *Secession Reference* as stating that political actors should respect the duty to negotiate and the underlying constitutional principles, but that the resolution of any dispute as to respecting these rules must occur in the political forum. For example, the Court wrote that “to the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.” *Secession Reference*, *supra* note 140, at para. 153. But since Canada does not adhere to a political question, and since in any event it is difficult to separate law from politics, it is unlikely that the Court will not have a role in resolving disputes as to the constitutionality of a possible future secession. Indeed, the recent Senate Reference demonstrates the extent to which the Court will be involved, partly as a matter of necessity, in interpreting the scope and meaning of Canada’s formal amendment rules. *See Senate Reference*, *supra* note 84.

¹⁴⁹ An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26 (“Clarity Act”).

¹⁵⁰ *Ibid.* prml.

¹⁵¹ *Ibid.* at s. 1(1)-(2).

referendum,¹⁵² the need to consider views in the province apart from those of the party proposing the referendum,¹⁵³ and the criteria for evaluating the sufficiency of the expressed will to secede.¹⁵⁴

Like the Regional Veto Law, the Clarity Act is an ordinary statute passed without recourse to the rules of formal amendment. Yet its effect extends further than an ordinary statute because it is designed to impose constraints on constitutional amendment beyond those entrenched in the constitutional text. The most important constraint in this respect is the Clarity Act's prohibition on any Minister of the Crown proposing a constitutional amendment to effect the secession of a province unless the Government of Canada has first negotiated a number of items in connection with the secession, including the division of assets and liabilities, provincial borders, the interests and claims of First Nations, and the protection of minority rights.¹⁵⁵ These are of course reasonable expectations from political actors engaged in negotiating a provincial secession. But it is important to recognize that these momentous changes to the Constitution of Canada—how it can be amended, who can amend it and when, and what rules limit the amendment process itself—were made by an ordinary statute. The Clarity Act must be understood for what it is: an ordinary statute that has informally modified the Constitution's formal amendment rules, as did the Regional Veto Law.¹⁵⁶

There is no verifiable way to quantify the difficulty that these new interpretive standards now add to the larger scheme of formal amendment in Canada. They will certainly make it more difficult to amend matters related to the Court and to provincial secession. The suitability of the amendment procedures and the constitutionality of an amendment itself will now be judged by the Court as the ultimate arbiter of the constitutionality of amendments in these domains, and perhaps in others still to be identified by the Court itself.¹⁵⁷ It is of course not unusual in a constitutional democracy for a court to possess the power to invalidate a constitutional amendment as unconstitutional. We have seen courts in Germany, India, South Africa and Turkey among others assert variations on this power,¹⁵⁸ and courts around the world are trending toward adopting a doctrine of unconstitutional constitutional amendment.¹⁵⁹ But this immense power nonetheless raises questions of democratic legitimacy where the Court strikes down an amendment that has satisfied the formal strictures entrenched in the Constitution on the basis of unwritten principles that can be identified and interpreted only by the reviewing Court.¹⁶⁰

¹⁵² *Ibid.* at s. 1(4).

¹⁵³ *Ibid.* at ss. 1(5), 2(3).

¹⁵⁴ *Ibid.* at s. 2(1)-(2).

¹⁵⁵ *Ibid.* at s. 3(2).

¹⁵⁶ One could argue that the Regional Veto Law and the Clarity Act are examples of a "superstatute," a law that has been passed through the ordinary lawmaking process but that has achieved quasi-constitutional status in light of its high salience in public life or its importance to the framework of government. The effect of a superstatute is to informally modify the rules and expectations set by the master-text constitution. *See* William N. Eskridge, Jr., & John Ferejohn, "Super-Statutes" (2001) 50 *Duke L.J.* 1215 at 1230-31.

¹⁵⁷ For an effort at explaining how Canadian courts could review the constitutionality of constitutional amendments, *see* Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (currently under review).

¹⁵⁸ *See* Richard Albert, "Nonconstitutional Amendments" (2009) 22 *Can. J. L. & Juris.* 5 at 21-31.

¹⁵⁹ *See* Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea" (2013) 61 *Am. J. Comp. L.* 657 at 676-713.

¹⁶⁰ *See* Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Abington: Routledge, 2012) at 67.

IV. CANADIAN CONSTITUTIONALISM AND FORMAL AMENDMENT

Amending the Constitution of Canada is therefore much harder than its text suggests. The dialogic interactions of Canadian political actors have given rise to extra-textual rules over and above the already onerous formal amendment rules entrenched in the *Constitution Act, 1982*.¹⁶¹ These formal and extra-textual rules make the Constitution exceedingly rigid, perhaps even more resistant to alteration than the United States Constitution, long believed by scholars to be among the world's most difficult democratic constitutions to amend.¹⁶² The near-impossibility of formal amendment raises serious problems related both to participatory democracy as well as the legitimacy of extra-textual limitations on the amendment power. In this Part, I will suggest that extreme amendment difficulty is problematic because it burdens the democratic and deliberative purposes of formal amendment. I will also suggest that the extra-textual foundations of Canada's extreme amendment difficulty risk undermining Canadian constitutionalism and the rule of law.

A. Democracy and Amendment

Where a constitution is difficult to amend, the consequence is to barricade the provisions entrenched by the authoring generation. Amendment difficulty privileges the status quo and reinforces the values and vision of those whose voice prevailed in creating the constitution. Constitutional designers that are either too sure of themselves or too distrusting of their successors therefore sometimes choose to entrench provisions against formal amendment altogether, making them formally unamendable.¹⁶³ A constitutional provision is unamendable where no measure of legislative or popular agreement, not even unanimity, is sufficient to authorize a formal amendment to it.¹⁶⁴ For example, the German Basic Law makes "human dignity" formally unamendable,¹⁶⁵ the Italian Constitution declares that republicanism "shall not be a matter for constitutional amendment,"¹⁶⁶ and the Turkish Constitution states that secularism "shall not be amended, nor shall [its] amendment be proposed."¹⁶⁷ Constitutional designers entrench unamendable provisions like these often to commit their successors to respecting the values they have chosen to privilege with this design strategy.¹⁶⁸

Unamendability has become an increasingly common feature in modern constitutions. Over half of the world's new constitutions from 1989 to 2013 entrenched an unamendable provision, as compared to roughly one quarter of those constitutions enacted between 1945 and 1988, and fewer than 1 in 5 of all constitutions created between 1789 and 1944.¹⁶⁹ But unamendability need not be formalized in the constitutional text. It can arise informally where the

¹⁶¹ For a discussion of what these rules require, see *supra* Section I.C.

¹⁶² See *supra* text accompanying notes 1-7.

¹⁶³ Sanford Levinson, "Designing an Amendment Process" in John Ferejohn et al., eds., *Constitutional Culture and Democratic Rule* (Cambridge, UK: Cambridge University Press, 2011) 271 at 276.

¹⁶⁴ Formal unamendability is of course not resistant to revolution or the design of a new constitutional order altogether. See John R. Vile, "Limitations on the Constitutional Amending Process" (1985) 2 Const. Commentary 373 at 375.

¹⁶⁵ German Basic Law, pt. I, art. 1(1) (1949); *ibid.* at pt. VII, art. 79(3).

¹⁶⁶ Italy Const., tit. VI, sec. II, art. 139 (1947).

¹⁶⁷ Turkey Const., pt. I, art. 4 (1982).

¹⁶⁸ See Richard Albert, "Constitutional Handcuffs" (2010) 42 Ariz. St. L.J. 663 at 678-85.

¹⁶⁹ See Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, Chapter 2, at 28 (unpublished dissertation on file with author).

political climate makes it practically impossible, though nonetheless always theoretically possible, to gather the required supermajorities necessary to formally amend the constitution. This kind of “constructive” unamendability derives from deep divisions among political actors, an inhospitable political climate for formal amendment, and alternatively or in addition from the structural design of the constitution, each of which can lead to stalemate in formal amendment.¹⁷⁰ Even without the extra-textual restrictions imposed on formal amendment, the Constitution of Canada as written is today constructively unamendable on matters requiring the default or unanimity procedure, scholars having described formal amendment as virtually impossible for those reasons.¹⁷¹ The constructive unamendability of the Constitution of Canada now entrenches the vision of the Constitution’s authors more rigidly than even the authors themselves had imagined possible.

The same critiques apply equally to formal as to constructive unamendability. The result in either case is to take a given constitutional provision off the amendment table, and to thereby place it beyond the reach of formal amendment. This has more than theoretical costs. Disabling the formal amendment process has real consequences for political actors and the people they represent because it prevents anyone but the drafting generation from seeing its values reflected in the text of the constitution. This manifests itself in several ways. Unamendability denies political actors and the people the capacity for deliberative engagement with the constitutional text and the possibility of adapting the text to modern sensibilities.¹⁷² Unamendability as a constitutional form moreover overlooks the possibility that the constitution as designed and as interpreted may be imperfect and even unjust.¹⁷³ No Constitution illustrates this point more clearly than the United States Constitution, which originally entrenched the slave trade as formally unamendable until 1808, twenty years after the Constitution’s coming-into-force in 1789.¹⁷⁴ Had the slave trade been indefinitely formally unamendable, American history may have unfolded differently.

B. The Weakening of Writtenness

Unamendability has undermined the democratic foundations of formal amendment. When formal amendment rules first appeared in constitutions, their purpose was to make possible an informed and deliberative judgment to improve the text when time and experience revealed faults.¹⁷⁵ The very nature of a mature polity governed by a written document required then and still today that political actors have the capacity to keep the constitutional text aligned with the evolving norms and views of the people it is intended to govern.¹⁷⁶ Unamendability has since eroded some of the envisioned virtue of formal amendment rules, disabling them, if even as to only a discrete range of constitutional provisions, and denying them their intended function.

¹⁷⁰ See Albert, “Constructive Unamendability in Canada and the United States”, *supra* note 24, at 194-96.

¹⁷¹ See, e.g., 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, UK: Oxford University Press, 2013) 297 at 316; Christopher P. Manfredi & Michael Lusztig, “Why do Formal Amendments Fail? An Institutional Analysis” (1998) 50 *World Politics* 377 at 380; Michael Lusztig, “Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail” (1994) 27 *Can. J. Pol. Sci.* 747 at 748.

¹⁷² Melissa Schwartzberg, *Democracy and Legal Change* (New York: Cambridge University Press, 2007) at 204-05.

¹⁷³ *Ibid.* at 202-03.

¹⁷⁴ U.S. Const., art V.

¹⁷⁵ See John R. Vile, *The Constitutional Amending Process in American Political Thought* (New York: Praeger, 1992) at 23-38.

¹⁷⁶ Lester Bernhardt Orfield, *The Amending of the Federal Constitution* (Ann Arbor: The University of Michigan Press, 1942) at 1.

But there is another more important sense in which amendment difficulty specifically in Canada has weakened writtenness. Beyond the constructive unamendability of the Constitution of Canada as a result of the difficulty of satisfying its formal amendment rules for major changes, the extra-textual restrictions imposed by parliamentary and provincial statutes, judicial decisions and constitutional conventions have transformed the written constitution into an incomplete code for the accomplishment of a task that is by definition rooted in textual authority. Yet Canada's formal amendment rules were entrenched as a complete code for altering the constitutional text, with each of the five amendment thresholds designed to occupy the entire field of amendment possibilities.

Inquiring into the history of the design of Canada's formal amendment rules illuminates their intended purpose. Of course, we should not today feel bound by the motivations of the authoring generation but it is nonetheless important to understand the objectives for which Canada's formal amendment rules were created to begin with. At Confederation, the *British North America Act, 1867* (since renamed the *Constitution Act, 1867*),¹⁷⁷ authorized only the Parliament of the United Kingdom to formally amend the Constitution of Canada,¹⁷⁸ with the exception that an individual province could amend its own provincial constitution.¹⁷⁹ The Parliament of Canada was ultimately given a narrow amendment power comparable to the narrow provincial authority in formal amendment: Parliament became authorized to amend only those purely federal subjects under Parliament's purview,¹⁸⁰ a power analogous to a province's authority to amend only those subjects of purely provincial concern within its jurisdiction. Over time, there developed an expectation that all other amendments were possible only by recourse to the Parliament of the United Kingdom at the request of a joint resolution of the House of Commons and the Senate.¹⁸¹

An important question arose, however, as to what degree of provincial consent was needed for an amendment affecting federal-provincial relations. Political actors disagreed on this question, and it was not until the Patriation Reference that the Supreme Court helped accelerate a resolution to the impasse. The Court recognized that a convention of substantial provincial consent to amendments on federal-provincial relations had matured over the many decades of constitutional practice without any textual referent that had established any particular amendment rule.¹⁸² An evaluation of prior constitutional practice had shown that, between Confederation and 1964, there had been sixteen instances of formal amendment to the Constitution of Canada, ten of which had been exclusively federal in nature.¹⁸³ As to the remaining six, each affected federal-provincial relations, and in each case the federal government had consulted with the concerned provinces and secured unanimous provincial consent in all but one instance.¹⁸⁴ The Court therefore held that political actors were bound by this convention, which did not hold the force of law, to respect the established norms of constitutional practice to make a major constitutional amendment.¹⁸⁵

¹⁷⁷ *Constitution Act, 1867*.

¹⁷⁸ Peter W. Hogg, "A Comment on the Canadian Constitutional Crisis" (1980) 6 *Yale Stud. World Pub. Ord.* 285 at 287-88.

¹⁷⁹ *Constitution Act, 1867*, pt. VI, s. 92.

¹⁸⁰ *British North America (No. 2) Act*, ch. 81, 12, 13 & 14 *Geo. 6* (1949).

¹⁸¹ William R. Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 *Am. J. Comp. L.* 339 at 340.

¹⁸² *Patriation Reference*, *supra* note 115, at 875.

¹⁸³ Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer 1965) at 16.

¹⁸⁴ *Ibid.* at 12-16.

¹⁸⁵ *Patriation Reference*, *supra* note 115, at 905.

When political actors ultimately agreed to the formal amendment rules entrenched in the *Constitution Act, 1982*, they had been repeating an old exercise, which had failed each time before, to create procedures for formal amendments that would concern neither the provinces nor the federal government alone. A study of the interprovincial and parliamentary conference debates on the design of Canada's formal amendment rules from the 1920s through their eventual entrenchment in 1982 demonstrates that the objective in creating a home-grown framework of formal amendment rules was to create amendment procedures that would cover every aspect of formal constitutional change. From procedures for amendments to only intraprovincial matters, to those for matters purely internal to the operation of Parliament, and to procedures requiring varying degrees of interprovincial negotiation, a central purpose for creating the escalating structure of formal amendment in Canada was to provide that every conceivable category of amendment would be assigned to a specific formal amendment procedure. The reason was plain: to in the future avert the possibility of ambiguity and stalemate that had led to the Patriation Reference.¹⁸⁶ I am currently developing a more detailed study of the history of the design of Canada's formal amendment rules in which I will demonstrate this point with reference to archival records of the interprovincial and parliamentary conference debates through which the formal amendment rules were developed.¹⁸⁷

When read in light of the history of the design of Canada's formal amendment rules, these new extra-textual restrictions imposed by judicial interpretation, by parliamentary and provincial as well as territorial laws and by constitutional convention undermine the entrenchment of Canada's escalating structure of formal amendment rules and indeed the very purpose of writtenness. It is of course true that no constitution is itself as a matter of fact nor does it purport as a matter of reasonable self-description to be an exhaustive catalogue of all applicable rules.¹⁸⁸ Written constitutions must be supplemented by unwritten constitutional norms that fill some of the gaps in the constitutional text or that are so fundamental that they need not be entrenched in writing.¹⁸⁹ These norms operate as an obligation to act in a way unreflected in the constitutional text but nonetheless still valid. Conventional obligations develop where there are precedents that validate the obligation, political actors feel themselves bound by those precedents, and where there is a valid reason motivating political actors to respect the precedent.¹⁹⁰ This much is uncontroversial, and it explains why political actors obey rules outside the master-text constitution.

¹⁸⁶ Ironically, of course, the design of Canada's formal amendment rules has not resolved all disagreement. Political actors continue to disagree about the meaning and proper use of the various procedures for formal amendment. The controversy leading to the Senate Reference, and its aftermath, is a case in point. See *Senate Reference*, *supra* note 84.

¹⁸⁷ My research relies on a series of historical documents including Précis of Discussions: Dominion-Provincial Conference, Nov. 3-10, 1927, at 11, *Sessional Paper No. 3*, 18 George V (King's Printer, Ottawa 1928); Order of Reference, Jan. 28, 1935, *Proceedings and Evidence and Report: Special Committee on British North America Act*, at iv (King's Printer, Ottawa 1935); Remarks of Louis St. Laurent, *Proceedings of the Constitutional Conference of Federal and Provincial Governments*, Ottawa, Jan. 10-12, 1950, at 10 (King's Printer, Ottawa, 1950); Guy Favreau, *supra* note 183, at 38-39; Statement of Conclusions, Third Working Session, *Federal-Provincial Conference of 1971* at 2, Feb. 9, 1971; *Secretariat of the Constitutional Conference, Constitutional Conference*, Victoria, British Columbia, June 14-16, 1971; *Federal-Provincial Conference of First Ministers on the Constitution* (Ottawa 1981).

¹⁸⁸ See generally John Gardner, "Can There be a Written Constitution" in Leslie Green & Brian Leiter, eds., *Oxford Studies in Philosophy of Law, Volume 1* (Oxford: Oxford University Press, 2011) (exploring the limits of writtenness).

¹⁸⁹ See Albert, "Constitutional Amendment by Constitutional Desuetude", *supra* note 24, at 654-56.

¹⁹⁰ Ivor Jennings, *The Law and The Constitution* (University of London Press, 5th ed. 1967) at 136.

C. Formal Amendment Rules and the Value of Writtenness

But formal amendment rules are different from other entrenched constitutional rules. Formal amendment rules constitute the “supreme criterion of law” in regimes where a new provision adopted according to formal procedures and subsequently entrenched in the master-text constitution takes priority over all prior law to the extent of any discovered or intended incompatibility.¹⁹¹ As the gatekeepers to the constitutional text, formal amendment rules police both the “rules of the game in a society” as well as the “rules for *changing* the rules.”¹⁹² No part of a constitution is more important than formal amendment rules,¹⁹³ largely because they “define the conditions under which all other constitutional norms may be legally displaced.”¹⁹⁴ The very entrenchment and authorized use of formal amendment rules reflect the core democratic values we associate with the rule of law, namely transparency, predictability and accountability.¹⁹⁵ Only where the law and the rules by which it is changed are known and publicized, stable and precise, and moreover created in a monitorable process according to pre-established rules may we cultivate a constitutional culture where the text actually matters and is also perceived as mattering.¹⁹⁶

On this view, extra-textual restrictions on formal amendment in Canada are problematic for the rule of law. Their effect, functionally though not in form, is to alter the requirements to formally amend the Constitution of Canada. This is problematic in two principal ways. First, it creates uncertainty where none once existed: the five detailed rules of formal amendment are now revealed as stating only the necessary but insufficient conditions to amend the Constitution, contrary to the very purpose of entrenching formal amendment rules to begin with. They are supposed to constitute a complete code for altering the constitutional text. Yet they have been modified extra-textually to require criteria unknown and unspecified in the constitutional text, thereby changing the terms of the bargain struck among the parties to the *Constitution Act, 1982* in defiance of our expectation of transparent and collective authorship that writtleness entails.¹⁹⁷ That today these extra-textual restrictions have changed the rules of formal amendment suggests that more, fewer or different restrictions may be established by the future judgments of political actors, thereby breeding doubt about the text and whether it may be read as expressing a reliable standard for the conduct of political actors in the process of formal amendment.

Second, these extra-textual limits on formal amendment result in changing Canada’s formal amendment rules themselves without meeting the required threshold for their amendment. Section 41 of the *Constitution Act, 1982* mandates that “any amendment” to the requirements of

¹⁹¹ Kent Greenawalt, “The Rule of Recognition and the Constitution” (1987) 85 Mich. L. Rev. 621 at 632.

¹⁹² Bjørn Erik Rasch & Roger D. Congleton, “Amendment Procedures and Constitutional Stability” in Roger D. Congleton & Birgitta Swedenborg, eds., *Democratic Constitutional Design and Public Policy* (Cambridge: MIT Press, 2006) at 319, 321 (emphasis added).

¹⁹³ See Albert, “Amending Constitutional Amendment Rules”, *supra* note 24.

¹⁹⁴ Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V” (1994) 94 Colum. L. Rev. 457 at 461.

¹⁹⁵ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, UK: Oxford University Press, 2009) at 214-19.

¹⁹⁶ Brannon P. Denning, “Means to Amend: Theories of Constitutional Change” (1997) 65 Tenn. L. Rev. 155 at 237.

¹⁹⁷ See Reva Siegel, “Text in Contest: Gender and the Constitution from a Social Movement Perspective” (2001) 150 U. Pa. L. Rev. 297 at 314-15.

formal amendment must fulfill the requirements of the unanimity procedure.¹⁹⁸ One could certainly argue that these extra-textual restrictions do not constitute an “amendment” to Canada’s formal amendment rules insofar as they do not alter the text of the Constitution. On narrow textualist grounds, this would defeat the claim that validating these new extra-textual limits requires a formal amendment. But it would fail to appreciate the extent to which political actors may perceive these new extra-textual restrictions as binding upon them and their successors, in which case the difference between formal and informal amendment matters very little on functional grounds.

The better argument, in my view, is that these extra-textual restrictions constitute modifications to Canada’s formal amendment rules. The democratic values of the rule of law—transparency, predictability and accountability—counsel that political actors should either incorporate these restrictions into the constitutional text by validating them through the procedures required by Section 41 or alternatively declare that those extra-textual rules are not binding upon them or their successors in future attempts to formally amend the Constitution of Canada. Both options are suboptimal, the former with respect to the reality of formal amendment and the latter because political actors are unlikely to find it profitable to declare those rules non-binding. Formal amendment in Canada is difficult if not impossible, so it is unlikely that Canada’s formal amendment rules will be formally amended to reflect the new extra-textual restrictions.

The alternative, then, may be to treat the new extra-textual restrictions as either inapplicable or illegitimate. This would mean interpreting the Charlottetown referendal experience as informing future efforts at major constitutional amendment though not as binding. It would also mean rethinking the validity of the Regional Veto Law, the Clarity Act, as well as the provincial and territorial laws on referenda or plebiscites. The Court’s recent Senate Reference actually suggests that these laws are impermissible: if, as the Court held, Parliament cannot change the method of senatorial selection by ordinary legislation,¹⁹⁹ then on what basis may Parliament or a provincial or territorial legislature change the law governing formal amendment in Canada by ordinary legislation? The reasonable answer is that ordinary legislative attempts to circumvent the formal amendment rules entrenched in the Constitution of Canada should be treated as equally invalid. As to the Court’s own new restrictive interpretation of Canada’s formal amendment rules, it is unclear what recourse political actors have short of questioning the legitimacy of the Court’s role in informally modifying the textually-entrenched standard required for formal amendment.

V. CONCLUSION

The entrenchment of formal amendment rules should reflect the necessary and sufficient conditions for modifying the constitutional text. Yet in Canada the already onerous formal amendment rules have been modified extra-textually by judicial interpretation, parliamentary and provincial as well as territorial law, and arguably also by constitutional convention. The result has been to make a rigid constitution even more rigid, and perhaps even to elevate the Constitution of Canada above the United States Constitution on the scale of amendment difficulty for major constitutional amendments. But measuring amendment difficulty is itself a difficult task that, if it is to be done correctly, should include a variable to measure the culture of amendment in a given

¹⁹⁸ *Constitution Act, 1982*, pt. V, s. 41.

¹⁹⁹ *Senate Reference*, *supra* note 84, at paras. 49-70.

regime, something that is hard not only to measure but also to identify.²⁰⁰ What is perhaps most difficult of all, however, is to deny that formal amendment pursuant to the default or unanimity procedure for major constitutional reform in Canada has today become virtually impossible.

But we should not view constitutional rigidity as a flaw. Perhaps it is feature of the Constitution of Canada. The authors of the *Constitution Act, 1982* made it difficult to achieve the necessary majorities for a formal amendment with good reason: to protect the institutions of government from the vagaries of the political process. By requiring that certain constitutional changes occur only with recourse to the high threshold of the default multilateral amendment procedure or the higher threshold of the unanimity procedure, we ensure that the changes we make reflect the considered judgment of the democratic community. The difficulty of formal amendment may therefore be a way to verify the commitment of political actors to make the required effort, and also to incur the political risk that amendment failure entails, to transform the Constitution of Canada into something other than what the authoring generation envisioned.

The problem, however, arises where political actors change the rules of formal amendment in ways other than the formal amendment rules authorize. Whether these informal changes to formal amendment rules make the Constitution of Canada harder or easier to amend is not the point: it is that these informal changes to formal amendment rules do not play by the rules of the game for constitutional change. It is no justification of extra-textual restrictions on formal amendment to defend them as innovative mechanisms that help political actors overcome the intransigence of the formal amendment process. Political actors are bound by the constitutional text to work within its established framework, not to find ways to circumvent it.

It is true that the Constitution of Canada is different in an important respect from the United States Constitution: it is not a master-text constitution. The Constitution of Canada is a partially codified and uncodified document that admits of many idiosyncrasies.²⁰¹ Perhaps none better reflects the uniqueness of the Constitution of Canada than the phenomenon of constitutional desuetude, an informal method of constitutional change that occurs where an entrenched provision over time becomes unuseable as a matter of political reality, though not as a matter of law, for instance the textually entrenched disallowance and reservation powers, and perhaps also the legislative override.²⁰² One might well argue that it is therefore not problematic for the theory and practice of constitutionalism in Canada to graft conceptually onto the constitutional text the kinds of extra-textual restrictions on the amendment power that have occurred by judicial interpretation, statute and convention. After all, as Hans Kelsen wrote about constitutional change, “there is no legal possibility of preventing a constitution from being modified by way of custom, even if the constitution has the character of statutory law, if it is a so-called ‘written’ constitution”.²⁰³

²⁰⁰ The best effort thus far to begin to identify “amendment culture” and its consequences in Canada appears in Jamie Cameron “Rules, Legitimacy and Amendment Constitutionalism in Canada” (working paper).

²⁰¹ Nonetheless, the written parts of the constitutions of Canada and the United States have both changed informally, without a new writing in the constitutional text, as a result of changes in constitutional convention. I explore and evaluate these unwritten constitutional change elsewhere. See Richard Albert, “How Unwritten Constitutional Norms Change Written Constitutions” (forthcoming 2015) 38 *Dublin U. L.J.*

²⁰² Albert, “Constitutional Amendment by Constitutional Desuetude”, *supra* note 24, at 656-73.

²⁰³ Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, Anders Wedberg transl 1945) at 259.

But what is ultimately lost in leaving these extra-textual restrictions uncodified is the core promise of written constitutionalism: fair notice to the people about the rules by which their representatives are to exercise official authority, a textual referent for the people to hold accountable their representatives and for the political class to hold itself to account, and symmetry between the expectations the constitutional text creates and the outcomes it generates. Codified constitutions of course have many functions: they structure the framework of government, they entrench rights and freedoms, and they express values. The principal function of a codified constitution, in my view, is to create rules by which political actors discharge their official duties. Those rules are of course changeable, but they must change according to the rules prescribed for that purpose. Where those rules change in ways not prescribed—and consequently unannounced to either the people or their representatives—the risk is to undermine the legal, political and indeed the moral force of the constitutional text to structure and constrain the conduct of political actors.