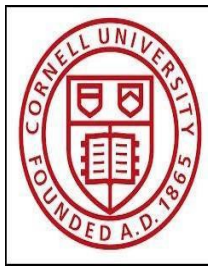
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The Origins and Implications of Canada's "Constructive Unamendabilty": A Comment on Richard Albert's *Four Unconstitutional Constitutions and Their Democratic Foundations*

Dennis Baker†

In his provocative article, Albert asks what might be the ultimate question of constitutional existentialism: can a constitution itself be unconstitutional? To do so, he builds on the literature discussing instances where a constitutional amendment is ruled unconstitutional—Gary Jeffrey Jacobsohn's extended discussion in *Constitutional Identity*[1] is the best account of that phenomena that I have come across—but Albert takes it further by exploring examples where an entire constitution might not be constitutional, in the sense that it did not conform to the existing legal framework. Albert's examples are compelling: America's "second founding" did not follow the procedures laid out for amendment by the Articles of Confederation; the South African Constitutional Court's 1996 decision that the new draft constitution was unconstitutional; and the fascinating provision in the Mexican Constitution that shields it from any new legal order that may arise from the "interruption" of a rebellion. Albert's analysis reminds us that constitutional enactments are not "big bangs" of creation but that what went before can be just as important as what emerges.

In this respect, I am puzzled by Albert's limited use of the Canadian experience, since the *Constitution Act, 1982* is a potentially "unconstitutional constitution" that itself might have been added to his case studies. Instead Albert uses—here and elsewhere[2]—Canada as the paradigmatic example of constructive amendability, which he describes as a condition where "the present political climate makes it practically unimaginable for constitutional actors to assemble the required supermajorities to pass a constitutional amendment." There is much to Albert's conceptualization and, as I will

† Associate Professor of Political Science at the University of Guelph.

1. GARY J. JACOBSOHN, CONSTITUTIONAL IDENTITY (Harvard University Press, 2010).

2. Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. 181 (2014).

discuss in Part II below, it is an accurate assessment of Canada's current constitutional stasis. A related question, and one that could further his discussion of political legitimacy and legal continuity, goes unasked: how did Canada arrive at this condition?[3] For the most part, Albert presents the Canadian case in a rather static, ahistorical manner, choosing instead to begin with the status quo emerging from the events of 1982. This is unfortunate because, as I describe in Part I below, the constitutional politics of 1981–82 show the relationship between political legitimacy and legal continuity under considerable stress.

I. How did Canada Get There? The Questionable Jurisprudence of the *Patriation* Sequence

The Supreme Court of Canada's 1981 decision in *Re: Resolution to amend the Constitution*[4] broke a half-century deadlock in Canadian constitutional negotiations. Since as early as 1931, Britain had been willing to "patriate" the Canadian Constitution by giving formal legal authority to domestic actors. This would reflect the informal understanding, already in place, that formal amendment of the Canadian constitution by the British Parliament would only be on the request of Canadians. For the remaining bit of formal authority to be transferred, however, Canadians would first have to agree to an amending formula for future changes. Such an agreement proved elusive, as negotiations between the Federal Government and the provinces failed repeatedly from 1931 to 1981. Prime Minister Pierre Trudeau, frustrated by his own "near-miss" failure to negotiate an agreement in 1971 and having promised a "renewed federalism" in the 1980 referendum on Quebec sovereignty, proposed that the Federal Government would simply make the request to Britain on its own. Several provinces objected and set in motion reference cases that ultimately arrived at the Supreme Court. As Peter Russell noted in the aftermath of the decision, it was one of those rare occasions "when the main stream of national political life flowed so relentlessly up to a Supreme Court decision," but wryly suggests that "[p]erhaps the *Dred Scott* case is a parallel."[5]

With the benefit of more recent comparators, the *Patriation Reference* looks more like Canada's *Bush v. Gore*: a results-oriented decision based on indefensible reasoning. Russell was slightly more charitable when he described the decision as "bold statescraft, questionable jurisprudence." The statescraft, as Rainer Knopff describes, can be attributed to a judicial preference for a constitutional process somewhere between the short-circuit

3. Albert takes a more historical approach in *The Conventions of Constitutional Amendment in Canada*, but this is in the context of arguing whether a referendum is now conventionally required for amendment. *See* Richard Albert, *The Conventions of Constitutional Amendment in Canada*, 53 OSGOODE HALL L.J. 399 (2016). My view is that the unconstitutionality questions here could also benefit from such treatment.

4. Reference re Resolution to Amend the Constitution (Patriation Reference) [1981] 1 S.C.R. 753.

5. Peter Russell, *Bold Statescraft, Questionable Jurisprudence in* AND NO ONE CHEERED: FEDERALISM, DEMOCRACY & THE CONSTITUTION ACT 210 (Methuen Publications, 1983).

unilateralism favored by the Federal Government and the (apparently) unachievable unanimity favored by some of the provinces.[6] While the Court ruled that the Federal Government could act alone as a matter of law, it also identified a constitutional convention[7] that required the provinces to agree to the request. Seizing upon a formulation advanced only in Saskatchewan's factum, the threshold for agreement was to be a "substantial degree of provincial consent." The clear objective was to bring the players back to the table to find a political settlement. In the subsequent negotiations, the "bold statescraft" led to a breakthrough and Canada's Constitution finally came under home rule in April of 1982.

Unfortunately, the deal was reached without the agreement of the Québec Government, an absence that opened a constitutional wound that remains unhealed. In response to being left out of the final agreement, the Québec Government decreed that "it has always been recognized that no change of this kind could be made without the consent of Québec."[8] To advance their claim, Québec launched a new reference case—commonly called the *Québec Veto Reference*[9]—asking of the *Constitution Act, 1982* the very same question Albert poses: is this an "unconstitutional constitution"?

As a matter of doctrine—if we were to take the earlier *Patriation Reference* seriously—Québec's case is very strong. The evidence in both cases before the Court of pre-1982 constitutional change consisted of five "positive precedents" of successful constitutional amendments agreed to by all provinces.[10] While these precedents point toward a *unanimity* rule, there was also evidence that the Federal Government saw unanimity for some of these amendments as desirable but not necessary. More telling, in this respect, were the "negative precedents" of unsuccessful constitutional amendments and constitutional conferences in 1951, 1960, 1964 and 1971, each of which failed because of the objections of one or more provinces.[11] In two instances, the historical record was perfectly clear that all political actors were operating under the assumption that a constitutional amendment could not move forward without the agreement of Québec: the successful 1964 amendment had the support of the other nine provinces as early as 1962, but Québec stood alone in delaying it until it "finally gave its consent" in 1964; in 1971, Prime Minister Pierre Trudeau thought he had achieved the agreement of all the provinces, but Québec Premier Bourassa withdrew Québec's consent a few weeks later, resulting in the abandonment of the

6. Rainer Knopff, *U2: Unanimity versus Unilateralism in Canada's Politics of Constitutional Amendment* in CONSTITUTIONAL AMENDMENT IN CANADA (Emmett Macfarlane, ed., Univ. Toronto Press, 2016).

7. The Court's decision to provide guidance on the content of a constitutional convention itself is controversial, given that conventions are expressly not legal. For more on the *Patriation Reference* see Carissima Mathen, *"The question calls for an answer, and I propose to answer it": The Patriation Reference as Constitutional Method*, 54 SUP. CT. L. REV. 143 (2011).

8. Decree No. 3214-81.

9. *Re: Objection to a Resolution to Amend the Constitution* [1982] 2 S.C.R. 793 [hereinafter *Québec Veto Reference*].

10. *Québec Veto Reference*, 803.

11. *Id.*

Victoria Charter. As Donald Smiley notes, "[a]fter the Québec Government had given notice of its dissent from those changes, there was no serious discussion to the effect that the Charter should [go forward]" and, moreover, "major political actors showed at least a tacit acceptance of the principle that Quebec's assent to amendments altering federal-provincial powers was by convention required."[12] As Smiley argues, "[o]ne is not required to accept a thorough-going two-nations view of Canada to believe that *some* considerable constitutional recognition of cultural duality is essential to the continuing stability, if not the existence of Confederation."[13] Peter Russell agrees and notes that "a stronger case would be based on the contention that the requirement of substantial provincial consent has not only a quantitative dimension but also a qualitative, dualistic dimension which requires the consent of the province in which most of Canada's French-speaking citizens reside."[14]

The Supreme Court chose the weaker case. A unanimous bench held that Quebec possessed no veto over constitutional change because there was an insufficient record of statements made by federal authorities "recognizing either explicitly or by necessary implication that Quebec had a constitutional power of veto"[15] (despite, the Court concedes, "an abundance of material, speeches made in the course of Parliamentary debates, reports of royal commissions, opinions of historians, political scientists, constitutional experts which endorse in one way or another the principle of duality . . . and there can be no doubt that many Canadian statesmen, politicians and experts favored this principle"[16]). Leaving aside the clear precedent of 1971 that establishes the "necessary implication" the Court sought, this high standard for recognizing the agreement of the actors would mean that the "substantial agreement" formulation in the earlier case would also fail as a convention. As a novel articulation found only in one party's factum in that case, the Court's own formulation in the *Patriation Reference* has even *less* of a pedigree than the case for a Québec Veto. It is hard to avoid the conclusion that the Court's opinion was torqued to arrive at a specific result: to avoid invalidating the freshly enacted *Constitution Act, 1982*. Once the Queen had arrived at the signing ceremony in April 1982, it would have been politically difficult for English Canada to accept a judicial unpatriation. One can also see, however, how unsatisfying—infuriating!—for Quebeckers to see its strong legal case, with its clear precedents and better logic, to be defeated by events.

Canada's *Patriation* saga informs Albert's argument in several important aspects. First, it illustrates that the question of political legitimacy is seldom binary and uniform: the *Constitution Act, 1982* was politically legitimate in most of the country, but its status in Quebec is controversial at

12. Donald Smiley, *A Dangerous Deed: The Constitution Act*, 1982, in AND NO ONE CHEERED: FEDERALISM, DEMOCRACY & THE CONSTITUTION ACT 77 (1983).

13. *Id.*

14. Peter Russell, *Bold Statescraft, Questionable Jurisprudence* in AND NO ONE CHEERED: FEDERALISM, DEMOCRACY & THE CONSTITUTION ACT 225–26 (1983).

15. *Québec Veto Reference*, 814.

16. *Id.*

best. (In addition, as largely an act of executive federalism—requiring simply the consent of the First Ministers—its democratic credentials might also be questioned.) Second, we see in this sequence how legal continuity and political legitimacy might influence each other. There is unquestionably legal continuity here—the Supreme Court made its decisions and they are legally binding on Québec, who are no less affected by the *Constitution Act, 1982* than any other province—but it is legal continuity of the shallowest variety and only possible because the jurisprudence was deformed to accommodate political reality. Combining these two points—the complexity of political legitimacy and its interrelation with legal continuity—yields a third: the relationship between political legitimacy and legal continuity is dynamic and it can be aggravated and mended over time, even if it is not completely severed. Albert notes that, with respect to the "unconstitutionality" of the US Constitution, "the new constitution shed all taint of illegitimacy when the people later ratified it in extraordinary constitutional conventions."[17] By contrast, Canada failed twice to remedy its constitutionally questionable exclusion of Quebec (with the Meech Lake and Charlottetown Accords), but, as François Cardinal, editor of *La Presse* notes, "the absence of Quebec's signature on the 1982 constitution [is] a major embarrassment that we don't even try to fix any more."[18] For some, the legal continuity, stretched over a long enough period of time (35 years in this case) may cure the defect; others will, of course, disagree.

Finally, the *Patriation* sequence contextualizes Canada's constructive unamendability. In truth, with respect to the parts of the constitution affecting all provinces, the Canadian constitution has been constructively unamendable since 1964. The only exception was the opening in 1982 (and a subsequent minor procedural amendment in 1983), made possible by this most questionable jurisprudence. When Albert praises the "democratic foundations" of constructive unamendability, where "the difficulty of political agreement" is "what protects the Constitution" and suggests that "[b]argain-transforming changes are instead possible only with the approval and legitimation of a particular configuration of political consensus that cuts across the many nations that constitute Canada,"[19] he is implicitly challenging the democratic credentials of the *Constitution Act, 1982*. Perhaps, then, he might have explicitly answered the question of whether it might be also considered an "unconstitutional constitution."

II. Constructive Unamendability in Post-1982 Canada

As Albert recognizes, "constructive unamendability" in Canada is very different from the *intentional* unamendability found in the French, Brazilian

17. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 197 (2017).

18. François Cardinal, *Dear Canada, we need to talk. Sincerely, Québec*, GLOBE & MAIL (June 15, 2017), https://beta.theglobeandmail.com/opinion/dear-canada-we-need-to-talk-sincerely-quebec/article35308545/?ref=http://www.theglobeandmail.com& [https://perma.cc/HE8X-VWUS].

19. Albert, *supra* note 17, at 188.

and German Constitutions. The Canadian variant, as Albert notes, is not by conscious design, but rather a fallout from the mega-constitutional events of the 1980s and early 1990s. With the "near death" result in the 1995 referendum on Quebec secession, Canadians welcomed a "pause" in the constitutional wrangling. While there have been minor constitutional amendments (in cases which effect only one province), this constitutional fatigue has apparently ossified for some into a refusal to ever return to negotiations. Albert's claim of constructive unamendability has been confirmed by recent events in Canada, particularly Québec's recent attempt to reengage the constitutional question. Pierre Couillard's provincial government produced a 177-page document on "Our Way of Being Canadian," which announced a new "policy on Québec Affirmation and Canadian Relations"[20] While clearly intended to be an opening for a renewed constitutional conversation, the invitation was quickly rebuffed by the Prime Minister (in a "curt and scornful manner," according to one commentator[21]) and even Couillard's Minister for Canadian Relations retreated by saying "We never asked for [opening the constitutional table]"[22] (but, in the document's forward, Minister Fournier announced its goal as "breaking down the taboo surrounding discussions about our future relations with Canada. . . including its constitutional aspects"). Given the negative reaction to even the prospect of discussing constitutional change, it is safe to say that Albert's assessment of Canadian constitutional stasis holds true.

An earlier incident was perhaps even more revealing. When the Commonwealth nations agreed to eliminate the gender bias in the succession of the Crown (in the face of the possibility that Prince William's first-born heir might have been female), some member nations did so by constitutional amendment or multi-level agreement. In Canada, the situation was more difficult since even this innocuous change—there were no Canadian defenders of male primogeniture!—could be the thin wedge to open a larger conversation about the constitutional role of the monarch or, more worryingly for the Federal Government, a beginning of the horse-trading negotiations that characterized Meech Lake and Charlottetown. On the other hand, the desired change would best be enacted with the unanimous agreement of the provinces (s.41 requires unanimity to change "The Office of the Queen").[23] This legally-necessary but politically-impossible change put the Government in a bind and demonstrated the unworkability of the post-1982 Canadian Constitution. If even uncontroversial, technical "housekeeping" amendments of this sort are avoided, then formal amendment of any sort is unlikely.

20. GOVERNMENT OF QUÉBEC, *Quebecers: Our Way of Being Canadian: Policy on Québec Affirmation and Canadian Relations* (June 2017), https://www.saic.gouv.qc.ca/documents/relations-canadiennes/politique-affirmation-en.pdf.

21. Cardinal, *supra* note 18.

22. Paul Wells, *What Québec wants: To be a little closer to Canada*, MACLEANS (June 7, 2017), http://www.macleans.ca/politics/ottawa/what-quebec-wants-to-be-a-little-closer-to-canada/ [https://perma.cc/8K9X-2RJT].

23. Philippe Lagassé & Patrick Baud, *The Crown and Constitutional Amendment after the Senate Reform and Supreme Court References* in CONSTITUTIONAL AMENDMENT IN CANADA, (Emmett Macfarlane, ed., 2016).

Before Prince George arrived and made the issue moot, the Canadian Government responded with ordinary legislation (*The Succession to the Throne Act*[24]) that purported to effect the necessary change without amending the constitution. The constitutionality of that statute remains controversial despite a recent Quebec judgment affirming it.[25]

The *Succession to the Throne Act* suggests a potential way out of the "constructive unamemdability" trap. Mark D. Jarvis and I have identified several "informal" means of constitutional change in our chapter in Emmett Macfarlane's *Constitutional Amendment in Canada* (2016).[26] Albert argues against such informal measures and finds them inferior to formal amendment in the sense that the latter "telegraphs when and how constitutional change occurs, and it generates agreed-upon textual alterations to which the people and political actors can point as a referent for debate and action."[27] whereas informal amendment "can happen without public notice that it is occurring at all, or indeed that it has occurred in the past, thereby undermining the connection between the people and their constitution in its codified and also uncodified forms."[28] While these deficiencies might apply to more subtle forms of informal change, I find them unconvincing when applied to statutory enactments that complement constitutional provisions. Surely the open legislative process and concrete specificity of a written statute answers some of Albert's concerns about public awareness.

A larger problem with the usage of ordinary statutes to modify the constitution is obvious: such "workarounds" can amount to "formula-shopping" where the lower threshold of a statutory enactment (a majority in the legislature) could deter a Government from ever seeking formal amendment.[29] In what sense would a constitution be permanent—or a "higher law"—if it could be altered by mere statutory enactment? For this reason, statutes in direct conflict with the constitutional text are rightly unconstitutional. If we approach this only in the strictest sense, there is still some considerable latitude for amendments-by-statute. While it is true that a statutory amendment that said "not x" when the constitution says "x" would be out-of-bounds, what about a statutory amendment that says "y", perhaps complementing or contextualizing the constitutionally entrenched "x"? A Canadian example of such legislation is the *Regional Veto Act*.[30]

Enacted in 1996 by the Chrétien Government, the *Regional Veto Act* was an attempt to reestablish Quebec's veto over constitutional change while

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24. *Succession to the Throne Act, 2013* (S.C. 2013, c.6).

25. *Motard & Tallon v. Canada (Attorney General)* (Quebec Superior Court, Bochard J., 2016).

26. Dennis Baker & Mark D. Jarvis, *The End of Informal Constitutional Change in Canada?* in CONSTITUTIONAL AMENDMENT IN CANADA, (Emmett Macfarlane, ed., 2016); We also suggest that some of the Supreme Court's most recent jurisprudence (in *Reference re: Supreme Court Act* and *Senate Reference*) may signal a rejection of such informal amendments.

27. Albert, *supra* note 17 at 187.

28. *Id*.

29. *See also*, Robert E. Hawkins, *Constitutional Workarounds*, 89 CANADIAN BAR REV. 513 (2010).

30. *An Act respecting Constitutional Amendments*, S.C. 1996, c.1.

making it more palatable to the rest of Canada by broadening it to include other regions. The *Act* specified that the Federal Government would not introduce a resolution to authorize a constitutional amendment without the consent of all five regions of Canada, with those regions being defined as Quebec, Ontario, B.C., two or more of the Atlantic provinces with 50% of that population, and two or more of the Prairie provinces with 50% of that population. In effect, the Federal Government would "loan" its veto to the regions, ensuring that future constitutional amendments would proceed not just with the "seven provinces representing 50% of the population" formulation found in s.38 of the 1982 *Act* but with something approaching near unanimity. It is a better version of the Court's "substantial consent of the provinces": smaller provinces would not be able to exert undue influence over negotiations, but a constitutional amendment unpopular in any of the five regions would be impossible.

Much of the commentary surrounding the *Regional Veto Act* argues that the enactment is unconstitutional because it attempts to supplant the textual provision for amendments in s. 38 of the *Constitution Act, 1982*.[31] I am not so sure. The *Act* leaves the formal provision clearly in place (note that the Government is only legally binding itself—and future Governments— to not *introducing* an amendment and its *enactment* would still meet the lower threshold required by s.38). Moreover, the *Act* simply codifies what has become political reality and provides explicit guidance for what would otherwise be a completely discretionary decision.[32] Even without the law, there is nothing to prevent a federal government from reserving their consent until there was unanimous agreement. Indeed, they might reserve their agreement for *any* reason and it could be made contingent on all sorts of mechanisms—a public opinion poll, the personal whim of the prime minister, or even a coin flip. Unlike a statutory enactment, these measures could be unpredictable, kept secret and might occur without public debate (in other words, the criticisms Albert holds against informal change generally). Conversely, legislation "telegraphs" to the public and political elites the actual framework for negotiations. As a statute, of course, it is subject to repeal whenever the Government chooses to do so, so long as it commands the confidence of the legislature (and, if it does not, it is probably not the time for constitutional negotiations). As simply a constraint on the Federal Government's own discretionary power, the *Regional Veto Act* offers clarity and certainty in a manner that complements the formal amendment power instead of offending it.

By committing to a higher standard for constitutional amendment, the *Regional Veto Act* supplies a legislative correction to the "questionable jurisprudence" of the *Québec Veto* case. In effect, the statutory enactment concedes the error made in 1981-82 and restores what should have *always*

31. Knopff, *supra* note 6.

32. There may be "separation of powers" concerns here, but legislation restricting executive discretion is fairly common in Canada. It would be difficult—but perhaps not impossible—to suggest that the *Act* runs afoul of section 9 of the *Constitution Act, 1867*, but, if so, a number of other enactments would be unconstitutional as well.

been one of the constitutional amendment rules for Canada: a formal constitutional change affecting all the provinces must not be enacted without the consent of the province of Québec. This threshold is difficult to achieve but it is the only one that makes sense considering Canada's foundation and history. If Albert is right about Canada's "constructive unamendabilty"—and I think he is—and Canadians need some mechanism for "updat[ing] their constitution to reflect their contemporary values in it," then two primary options are left: changes through judicial interpretation and changes via ordinary statutes. While the decisions of the Court may provide a "release valve" to relieve pressure for necessary constitutional change, informal amendments-by-statute provide not only another more democratic means of doing so, but also a potential check on judicial errors. The *Regional Veto Act* illustrates this potential for constitutional correction. Assuming the political realities of constructive unamendability remain fixed, the combination of a generous approach to informal statutory amendments with a unanimity rule for formal change might offer the only legitimate pathway of constitutional progress for Canada.