

Canada's Amendment Rules: A Window into the Soul of a Constitution

REVIEW ESSAY

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

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I. INTRODUCTION

Many years ago, while watching returns from the Quebec secession referendum, Richard Albert fielded a telephone call from the Yale football coach who hoped to recruit him as a student-athlete.¹ As the yes and no sides traded leads on the TV screen, Albert and the coach shared thoughts about Quebec and the US experience of secession and civil war. The date was October 30, 1995, the night the

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¹ Tom Daly, "Author Interview: Constitutional Amendments: Making, Breaking, and Changing Constitutions" (15 October 2019), online (blog): *IACLAIDC* <blog-iac-laidc.org/just-published/2019/10/15/author-interview-constitutional-amendments-making-breaking-and-changing-constitutions> [perma.cc/TPN4-9EN2].

referendum failed by a razor-thin margin.² Fascination with that moment in time led Albert to scholarly prominence today, more than 25 years later.³ With his work spanning an encyclopedic range of historical, theoretical, doctrinal, and comparative themes, Albert may now be the world's leading scholar on constitutional amendment.⁴ Years in the making, *Constitutional Amendments* explains how amendment rules define a constitution's integrity, ensuring its longevity by allowing and even inviting formal changes to its text.⁵

Constitutional Amendments is prodigious and monumental, connecting abstract issues of textual design to the follies of constitutional amendment over diverse variables of time and place. Canada's story is there too, though only as part of a complex narrative on constitutional change in Japan, the United States, South Korea, Brazil, and countless nation-states whose amendment experiences are profiled. Albert's sweep of the subject is so complete that even if the Kingdom of Bhutan is not discussed, little else is overlooked.⁶

Albert's journey was driven by an intellectual curiosity and persistence that traces to home, the histrionics of Canada's constitutional patriation in 1982, and its aftershock reforms, the Meech Lake and Charlottetown

² The referendum question asked: "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?" The turnout for the referendum was 93.52%, and voters rejected the secession option, voting "no" by a margin of 50.58% to 49.42% for yes.

³ Daly, *supra* note 1. Albert reports being "riveted" by the comparisons and contrasts between the two countries.

⁴ Albert has countless scholarly articles, edited books, special law journal issues, and projects to his credit. His principal book publications include Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (New York: Cambridge University Press, 2018); Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019); Richard Albert, Xenophon Contiades & Alkmene Fotiadou, eds, *The Foundations and Traditions of Constitutional Amendment* (Oxford, UK: Hart Publishing, 2017).

⁵ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019) [Albert, *Constitutional Amendments*].

⁶ I have teased Albert about Bhutan, a constitutional monarchy with a constitution that was adopted in 2008.

Accords.⁷ These at times harrowing events generated a contemporaneous literature that is rich, but introspective in its focus on why constitutional reform failed so dramatically after 1982.⁸ With the passage of time, a renewal of interest in Canada's amendment constitutionalism, led principally by Albert, offers fresh perspective.⁹ In this, he is uniquely

⁷ The Constitution was "patriated" through statutory amendments to incorporate textual amendment rules; *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Canada Act 1982*]. Five years later, on April 30, 1987, the first ministers reached an agreement on the Meech Lake Accord (the "MLA"), which proposed amendments aimed at rectifying Quebec's exclusion from patriation (the "Quebec Round"). Following a difficult history, the MLA failed three years later, on June 23, 1990. It was followed by the Charlottetown Accord, also known as the "Canada Round" of constitutional reform, which addressed the deficiencies of the MLA by proposing a comprehensive package of constitutional amendments. After negotiations were completed on August 28, 1992, the Accord was voted down in a nationwide referendum held on October 26, 1992; see *infra* note 70.

⁸ See for example, Keith Banning & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen Publications, 1983); Roy Romanow, John Whyte & Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) [Romanow, Whyte & Leeson, *Canada ... Notwithstanding*]; Robert Sheppard & Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982); Edward McWhinney, *Canada and the Constitution, 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982); Ron Graham, *The Last Act: Pierre Trudeau, the Gang of Eight, and the Fight for Canada* (Toronto: Allen Lane Canada, 2011) [Graham, *The Last Act*]; Patrick Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991) [Monahan, *Inside Story*]; Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas & McIntyre, 1990); Kenneth McRoberts & Patrick Monahan, eds, *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993) [McRoberts & Monahan, *The Charlottetown Accord*]; Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed (Toronto: University of Toronto Press, 1993); Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) [Webber, *Reimagining Canada*].

⁹ See e.g. Albert, Daly & MacDonnell, *supra* note 4; Lois Harder & Steven Patten, eds, *Patriation and Its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015); Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 *Alta L Rev* 85 [Albert, "Difficulty of Constitutional Amendment"]; Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 *McGill LJ* 673; Richard Albert, "The Conventions of Constitutional Amendment in Canada" (2016) 53:2 *Osgoode Hall LJ* 399 (addressing aspects of Canadian amendment

positioned as an inside-outside observer: a Canadian who came of age at the time of the 1995 secession referendum and developed an abiding intellectual interest in amendment processes worldwide. Over the years, Albert developed a complex theory of amendment that is enriched by a variety of disciplinary perspectives. *Constitutional Amendments* thrives on the mysteries of constitutional change everywhere, including and especially in Albert's homeland.

Other reviews that linger on the author's theories and comparative perspectives may bypass the book's implications for Canadian amendment constitutionalism. This review takes a different approach, offering a form of patriation that brings Albert home and highlights the relationship between his conception and Canada's experience of constitutional amendment.

Mapping his amendment template onto domestic experience is no simple task, and the modest goal, for now, is to look selectively at concepts that offer insight into Canada's amendment narrative. Specifically, this review draws on Albert's work to suggest a simple but sharp insight linking the 1867 Constitution's failure to provide textual rules to the steadfast unamendability of the Canadian Constitution.¹⁰ More than twenty-five years after the Charlottetown Accord failed on October 26, 1992, the Constitution may be more "frozen" than ever.¹¹ Yet, in taking the country to the brink of dissolution, patriation and the Accords

constitutionalism); Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the Senate Reform Reference" (2014) 67 SCLR (2d) 221; and Kate Glover, "Complexity and the Amending Formula" (2015) 24:2 Const Forum 9 (exploring the relationship between constitutional interpretation and constitutional amendment).

¹⁰ This review deals with "multilateral" amendment under the 7/50 and unanimity provisions of the Constitution, and not forms of amendment that do not require the participation and agreement of the provinces, collectively, and federal government. *Canada Act 1982*, *supra* note 7, Part V, ss 38-49. The provinces and federal government can make unilateral amendments under ss. 44 and 45, and bilateral amendments relating to some but not all provinces are governed by s. 43. Sections 38-40 and 42 address the general amending formula, or 7/50 requirement, and s. 41 specifies five amendments that require the unanimous consent of Parliament and all provinces.

¹¹ Richard Albert, "The Frozen Constitution" (Runnymede Society, Summer Speaker Series, 9 July 2020) [unpublished] (explaining how and why constitutional amendment in Canada is "frozen").

overshadowed the longitudinal history of constitutional change. Canada's amendment dilemma is not only a by-product of patriation, but traces to the genesis of the Constitution in 1867 and its primal failure to provide textual rules for change.

Albert offers a conceptual framework for placing Canada's amendment constitutionalism in perspective. Of primary importance in *Constitutional Amendments* is Albert's profound regard for rules and conviction that amendment rules are a "window into the soul of a constitution."¹² If a constitutional text that lacks amendment rules is essentially unamendable, it is difficult to fathom how Canada's Constitution functioned for about 115 years without such rules. At the least, how that oversight or congenital defect affected its constitutional "soul" raises intriguing and unsettling questions. In addition, "amendment rigidity" and "constructive unamendability" are two of Albert's focal concepts that also have salience for Canada. While the study of rigidity focuses on the relative threshold of amendment difficulty and whether textual rules can make constitutions too difficult to amend, "constructive unamendability" incorporates the organic variables outside of text—the synergies of amendment culture—that can frustrate and undermine a text's prescriptions for amendment.¹³

In the process of transformative change, Canada learned that manipulating amendment's legality, or rules, could not close a legitimacy gap that did not arise for the first time during patriation and the Accords. Historic in nature, this gap was already ingrained in amendment culture; as such, it illustrates how the synergy of rules and Albert's forms of unamendability reflect core concepts of legality and legitimacy. Accordingly, his concept of a constitution's soul is not limited to the legal or formal rules for change but, in fundamental terms, must include their legitimacy as well. As Canada's history demonstrates, a process of amendment that lacks legitimacy can compromise and even jeopardize a constitution's soul.¹⁴

¹² Albert, *Constitutional Amendments*, *supra* note 5 at 2.

¹³ See generally *ibid* at 95–172 (Part Two: Flexibility and Rigidity).

¹⁴ On legitimacy, see generally Richard H Fallon Jr, "Legitimacy and the Constitution" (2005) 118:6 Harv L Rev 1787 (categorizing and describing three conceptions of a constitution's legitimacy, including its sociological authority or acceptance by the democratic community). See also Jamie Cameron, "Legality, Legitimacy and

II. AMENDMENT MATTERS¹⁵

Without more, Albert's command of his subject, worldwide and from every analytical vantage, is a feat of scholarly and intellectual magnitude. Notably, his diligence is in furtherance of a deeper quest for order in the processes of constitutional amendment, which stems from his faith in text, and belief that "[n]o part of a constitution is more important than its rules of change."¹⁶ No wide-eyed idealist, Albert is well aware of sham constitutions and "authoritarian commandeering," both of which subvert a constitution's lofty aims for unprincipled or nefarious purposes. Stating that examples "abound" of "suspicious amendment design," he explains that exploiting the amendment process to consolidate authoritarian powers or establish dynasties perverts the essential morality of a constitution.¹⁷ Parenthetically, a case in point is the referendum of June 2020, which approved amendments to the Russian Constitution empowering current President Vladimir Putin potentially to remain in office up until 2036.¹⁸ Aware of those dynamics and the myriad ways a constitution's morality can be compromised, *Constitutional Amendments* seeks to ennoble the amendment process, enfolded in a framework of principled design. Though a nation's ambient constitutional culture may pose challenges, Albert has at least provided a blueprint to follow in making, breaking, or changing its constitution.

Constitutional Amendment in Canada" in Albert & Cameron, eds, *Canada in the World*, *supra* note 4 at 98 (discussing the relationship between legality and legitimacy in Canada's history of constitutional amendment) [Cameron, "Legality, Legitimacy"].

¹⁵ Albert, *Constitutional Amendments*, *supra* note 5 at 2 (stating, "I show in this book how amendment works and why it often fails, what we can learn from various designs around the world, and why amendment matters in constitutionalism") [emphasis added].

¹⁶ *Ibid* at 261.

¹⁷ *Ibid* at 49–51.

¹⁸ "Russia Plans July 1 Vote on Putin's Constitutional Amendments after Coronavirus Delay", *The Moscow Times* (1 June 2020); online: <www.themoscowtimes.com/2020/06/01/russia-plans-july-1-vote-on-putins-constitutional-amendments-after-coronavirus-delay-a70447> [perma.cc/4MJ74KLA]; Andrew Higgins, "The Theatrical Method in Putin's Vote Madness", *The New York Times* (1 July 2020), online: <www.nytimes.com/2020/07/01/world/europe/putin-referendum-vote-russia.html> [perma.cc/GRB5-XCXQ].

Chapter by chapter, *Constitutional Amendments* builds toward a high-level, structural template that can guide the design and implementation of textual amendment rules. The work-up culminates in a chapter titled “The rules of law,” which pivots around four matrices that address the foundations, pathways, specifications, and codification of amendment rules.¹⁹ Whether in making or amending constitutional text, the goal is to align design variables with the prerogatives of an amendment culture, and fashion a text that finds resonance with, and expresses a community’s constitutional soul. In Albert’s words, the “prime objective” is to create rules of change that “keep the constitution stable and true to popular values yet always changeable when necessary.”²⁰ As suggested above, a constitution’s soul should be understood holistically to embrace its sociological legitimacy as well as the formal legality of the rules for change. A constitution’s supreme or sovereign status is its soul and the source of its legitimacy in the community.

It is axiomatic in Albert’s conception that amendment rules stand “atop a constitution’s hierarchy of norms and sit at the base of its architecture.”²¹ He is passionate that rules of this stature cannot be taken for granted, but must be thoughtfully designed. When “carefully constructed and deployed with deliberation,” amendment procedures “translate popular preferences into law while balancing these preferences against the most fundamental values of the polity.”²² Amendment rules are legitimizing because they separate constitutional text from ordinary legislation, presenting a concept of constitutionalism, creating a framework of structural and institutional confidence, and defining a sovereign community’s relationship with change over time. Formal rules “telegraph when and how a constitution changes,” producing “legislatively or popularly validated changes that are accepted as authoritative.”²³ The stakes in defining a constitution’s mechanism for adaptive change are

¹⁹ Albert, *Constitutional Amendments*, *supra* note 5 at 261–71 (“Conclusion: The Rules of Law”).

²⁰ *Ibid* at 271.

²¹ *Ibid* at 2.

²² *Ibid* at 39.

²³ *Ibid* at 269.

high, because amendment rules expose a constitution's "deepest vulnerabilities" and reveal its "greatest strengths."²⁴

No constitutional text is perfect or immutable, and rules are time- and culture-bound, often malleable, and frequently fallible. Moreover, history's pageant is far too undependable to make textual calculations impervious to the interventions of chance. *Constitutional Amendments* illustrates how unpredictable constitutional change can be, and how communities adapt, managing imperfect texts and dysfunctional systems of amendment. In this pageant, Canada's amendment history is at least idiosyncratic and even bizarre. To begin, the 1867 Constitution's failure to provide for its own amendment is a phenomenon of constitutionalism that invites ongoing pause and reflection.²⁵ From Albert's perspective, a text without amendment rules is "not a reasonable option in the modern world."²⁶ As Edmund Burke notably observed, "a state without the means of some change is without the means of its own conservation."²⁷ Against that backdrop, it is difficult not to view this congenital defect as one of the Canadian Constitution's "greatest vulnerabilities."

Contrary to expectations, the Constitution remained unamendable even after the entrenchment of amendment rules in 1982. Rather than liberate the process from the anomalies of surrogate legality by the UK Parliament, Part V's amendment rules were less than authoritative after patriation, when both Accords set standards for validation that were not constitutionally required. Failed reform led to the present, in which constitutional amendment is subject, both formally and informally, to a bewildering cacophony of textual, statutory, and unwritten rules.²⁸ To recap, in the space of about twenty years, Canada swung wildly from a protracted history of no rules for change to a status quo of too many rules.²⁹

²⁴ *Ibid* at 2.

²⁵ The focus is the written Constitution and its failure to prescribe rules for amendment of the text, and not the unwritten Constitution, defined in the main though not exclusively by the Westminster tradition of parliamentary government, including the principles of responsible government and unwritten constitutional conventions.

²⁶ Albert, *Constitutional Amendments*, *supra* note 5 at 271.

²⁷ Quoted, *ibid*.

²⁸ See *infra* note 72 (providing a list of extra-textual requirements).

²⁹ Cameron, "Legality, Legitimacy", *supra* note 14 (stating that "[e]xtra-textual constraints

Amendment rigidity has been a constant in Canadian constitutionalism, before and after patriation, and with or without rules. As noted, amendment rules must both pause and permit change, calibrating a balance aimed at a form of adaptive continuity that can preserve a constitution's legitimacy over time. Amendment standards must be rigid enough to protect the integrity of the founding text, and sufficiently flexible to preserve its vitality. A text that is amended simply and frequently as a matter of routine might struggle to establish its status and legitimacy as a constitutional instrument.³⁰ Otherwise, however, onerous amendment rules can valorize the original text, risking dissonance between the imperatives for change and a static, unresponsive, master text.³¹ The scholarship on amendment rigidity measures the relative difficulty of constitutional amendment across variables but, as Albert explains, presents methodological issues and challenges.³² Because it does not easily fit the model, Canada has not been included and plotted on the rigidity spectrum, in part because—at least historically—unamendability was grounded in the absence, not the presence, of rules.³³

Albert privileges the role of text and formal rules without overlooking the dynamics of constitutional and political culture. Specifically, he recognizes that rules are only part of the narrative, because the formalities of amendment legality sit within a culture that can exacerbate or relax the process of change.³⁴ Countless in scope and variety, the variables and contingencies that affect amendment's chances can accelerate, redirect, or

aimed at enhancing the legitimacy of amendment complicate and obscure the process, and delegitimize the textual rules for change" at 119, n 85). See also Albert, "Difficulty of Constitutional Amendment", *supra* note 9 (explaining that in making the Constitution impossible to amend, extra-textual restrictions weaken democracy and undermine the purpose of "writtenness" at 107-110).

³⁰ Albert, *Constitutional Amendments*, *supra* note 5 (noting that "hyper flexibility" is inadvisable because it erodes the distinction between a constitution and a statute at 271).

³¹ *Ibid* (noting that "[t]he text never appears in any other way but perfected" at 255 and stating that unamendability exposes the "exaggerated self-assurance the authoring generation has in itself" at 271).

³² *Ibid* at 95-105.

³³ *Ibid* at 105-10 ("The Missing Case of Canada"); see also Albert, "Difficulty of Constitutional Amendment", *supra* note 9.

³⁴ Albert, *Constitutional Amendments*, *supra* note 5 at 110-19.

incapacitate constitutional change. Outside the limits of text, uncodified factors can be at work, undermining and incapacitating constitutional amendment. In this way, ambient constitutional politics can place added pressure on reformers to perform “impossible heroics” for amendment to succeed.³⁵ As noted above, the dynamics of amendment culture describe a vital relationship between the rules or legality, and the legitimacy of constitutional change. Legality works in tandem with legitimacy, and though the two typically align, gaps may be present at the moment of constitution making, or may surface over the life of a constitution. These gaps and deficits can embed in the constitutional politics, conditioning cultural responses to change.

Shortfalls in amendment legitimacy were at least nascent in 1867 when Canada adopted a constitution that did not address the legality of textual change. Though not inevitable, those shortfalls or gaps deepened with the evolution of federalism and widened to a point of unamendability after Canada achieved formal independence in 1931. The lack of rules led to a stalemate that rendered Canada’s Constitution impossible to amend, at least until the heroics of patriation intervened. That is when the pattern was broken a single time in 1982, before deeper and more tenacious forms of unamendability surfaced, despite and even because of the newly entrenched rules.

The culture of amendment, its evolution over time, and engagement with the legitimacy of change are critical features of Canada’s amendment history. The Constitution’s unamendability describes a complex interaction, in which the standards for amendment continued to shift, without success, to accommodate ongoing legitimacy deficits. In principle, when the legality and legitimacy of constitutional amendment are aligned, heroics should not be necessary. Canada’s Constitution is unamendable at present because there are no more heroics and, in the meantime, these core elements remain misaligned.

III. AMENDMENT RULES: THE SOUL OF A CONSTITUTION

Stalled for more than 50 years after Canada’s independence in 1931, the impasse on constitutional amendment ended with the brinkmanship

³⁵ *Ibid* at 95, 158–59.

of patriation.³⁶ Though Canada is not now at risk of dissolution, as it was in the 1990s, its chronic unamendability may be the Constitution's deepest vulnerability. Largely untested to this point, Part V may offer Canada its best chance of addressing and resolving its amendment dilemma. For that to happen, Canada must re-consider the status quo of extra-textual, supplementary burdens on constitutional reform, and accept the legitimacy of Part V's amending formulas.

C. Amendment without rules: 1867-1982

In its own pragmatic way, Canada straddled the line between British and American tradition, adopting a constitution "similar in Principle to that of the United Kingdom" that mimicked some of the structural features of its US counterpart.³⁷ The fledgling dominion of Canada united four colonies under a written constitutional text that incorporated the unwritten rules and principles of British constitutionalism. The *British North America Act*, or *BNA Act*, borrowed the concept of federal union from the United States, but edged it toward unitary features, enriching the federal government's powers and pronouncing it paramount over the provinces.³⁸ Meanwhile, parliamentary supremacy, the mainstay of Westminster constitutionalism, co-existed with a written constitution, a textual division of powers, and a system of judicial review and constitutional interpretation.³⁹

On the surface, Canada's pre-textual amendment history was relatively quiet. Prior to independence under the *Statute of Westminster*, amending the Constitution was an exercise in cordiality, because it was carried out, at one remove, through a process of statutory legality by the UK Parliament. At Confederation, there was little awareness that the lack of

³⁶ *Ibid* at 210-13 ("Time and Brinkmanship").

³⁷ Preamble, *British North America Act 1867* (UK), 30 & 31 Vict, c 3. The 1867 Constitution is referred to as the *BNA Act* here, for historical purposes.

³⁸ Textual elements of the federal government's paramount status include the power to disallow provincial legislation and appoint the lieutenant governors of the provinces (ss. 58, 90, and 55-57), as well as the peace, order and good government power, the 27 heads of enumerated power, and the deeming clause of s. 91. *Ibid*.

³⁹ Judicial review by the Judicial Committee of the Privy Council evolved under the *Colonial Laws Validity Act* (UK), 1865, 28 & 29 Vict, c 63, which prohibited conflict between domestic and imperial legislation.

textual rules posed an obstacle, because imperial sovereignty provided a solution. The *BNA Act* was a constitutional text, but also an imperial statute that was subject to parliamentary supremacy and amendment by the UK Parliament.⁴⁰ Under the principle of legislative sovereignty, the British Parliament could amend or repeal any statute, including the *BNA Act*. Rather than exercise its power to amend the *BNA Act* unilaterally, the UK Parliament recognized Canada's autonomy to amend the Constitution. Not long after 1867, unwritten conventions of imperial governance crystallized; these conventions established that the UK Parliament would only amend the Constitution at Canada's request and would enact amendments sought by the federal government.⁴¹

In hindsight, the Constitution's failure to prescribe rules for change was not merely an unfortunate omission but, more fundamentally, a primal flaw in the *BNA Act's* structure and text.⁴² Not surprisingly, it became progressively more difficult, and then impossible, for Canada to legitimize constitutional reform in the absence of formal rules, or any framework of constitutional legality. Though the 1867 Constitution was amended more than twenty times prior to patriation, the proxy of statutory UK legality was not sustainable.⁴³ In the first instance, the process bypassed the provinces, whose interests were engaged by any amendment that affected their jurisdiction or powers.⁴⁴ As Canada evolved, the provinces flourished and a robust view of provincial autonomy was instantiated in the jurisprudence.⁴⁵ Whatever was intended

⁴⁰ *Colonial Laws Validity Act*, *ibid.*

⁴¹ Patrick Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2013) at 174.

⁴² Note that some amendments could be undertaken domestically. See e.g. ss 55, 52, 40, 51, 35, 18 (pertaining to "housekeeping" matters in the House of Commons and Senate); s 92(1) (provincial constitutions); and s 91(1) (the admission of new provinces).

⁴³ Monahan & Shaw, *supra* note 41 at 165.

⁴⁴ The UK convention considered requests for amendment by the federal government as legitimate, and the lack of rules in the *BNA Act* meant that the provinces had no legal authority to prevent the federal government from proceeding unilaterally. Cameron, "Legality, Legitimacy", *supra* note 14 at 108.

⁴⁵ See e.g. *Hodge v the Queen*, (1883) 9 App Cas 117 at 132 (declaring that the provinces are "supreme" and have authority that is as "plenary and ample" under s 92 as the federal government's under s 91).

at the point of Confederation, excluding the provinces from the amendment process increasingly posed an affront to federalism.

In addition, the lack of amendment rules bizarrely prevented Canada from achieving sovereignty under the *Statute of Westminster*, which in 1931 released Canada and other Commonwealth dominions from the vestiges of imperial rule.⁴⁶ The dilemma for Canada was that, by definition, independence would terminate the practice of surrogate amendment by the UK Parliament. Absent that legality or any other form of amendment rules, the *BNA Act* was at risk of being altered by ordinary statutes enacted either by the federal government or any of the provinces. Because there would be no legal rule to prevent or prohibit it, a lack of amendment legality prevented Canada from achieving full independence.⁴⁷ To address that defect and protect the integrity of the Constitution, the *BNA Act* was excepted from provisions in the *Statute of Westminster* granting Canada its independence.⁴⁸ The anomalous lack of textual rules meant that Canada could only achieve amendment sovereignty by entrenching a process of legality, or textual rules, in the Constitution. In the meantime, the UK Parliament would continue to act as a “bare legislative trustee,” amending the Constitution indefinitely, until Canada settled its domestic rules for constitutional change.⁴⁹

Though a combination of imperial sovereignty and statutory legality spared Canada the ignominy of being legally unable to change its Constitution, seeking amendments through a surrogate foreign legislature was more demeaning after 1931. The federal government followed the colonial amendment process for the last time in 1949, and no amendments were attempted between 1964 and 1982.⁵⁰ Meanwhile, the first ministers, comprising the prime minister and premiers of the

⁴⁶ *Statute of Westminster 1931* (UK), 22 & 23 Geo V, c 4, s 4 [*Statute of Westminster*].

⁴⁷ Peter W Hogg, “Constitutional Reform in Canada – a Comment on the Canadian Constitutional Crisis” (1980) 6:2 *Yale Stud World Pub Order* 285 at 286, 289 (acknowledging this risk).

⁴⁸ *Statute of Westminster*, *supra* note 46, s 7 (stating that nothing in the Act applies to the repeal, amendment, or alternation of the *BNA Act*).

⁴⁹ Justice Ivan C Rand, “Some Aspects of Canadian Constitutionalism” (1960) 38:2 *Can Bar Rev* 135 at 145 (describing Canada’s unique situation and the UK’s role in “effecting the will of Canada”).

⁵⁰ Cameron, “Legality, Legitimacy”, *supra* note 14 at 113.

provinces, negotiated without success on a process for domestic constitutional amendment.⁵¹ Two core challenges could not be overcome. Agreement on the formal rules for amendment was one obstacle, but the partners to Confederation also had to decide what threshold of agreement was required to endorse those rules.⁵² Once those issues were resolved, Canada could invite the UK Parliament to work “the old machinery” one more time and “patriate” the Constitution.⁵³

If it was not the objective, negotiations at the level of executive federalism tended to point toward a standard of unanimity, either as a default expectation or imperative—the *realpolitik*—of federalism.⁵⁴ Short of unanimity, formulas that would advantage some regions or provinces in the amendment process, at the expense of others, threatened the equal status of all.⁵⁵ Proposals along such lines were untenable because they could not satisfy the demands of Canada’s evolving system of federalism.

From the perspective of *Constitutional Amendments*, a written constitution’s failure to anticipate its own amendment is a source of deep vulnerability. Even as the UK Parliament’s role as a surrogate had diminishing legitimacy, there was a vacuum on the legality of amendment. The years stretched to decades and the vacuum could not be overcome because no form of amendment legality could succeed without aligning with the demands of legitimacy which, at the time, were focused on the constitutional politics of Canadian federalism. The impasse could not be

⁵¹ *Ibid* at 111. Over the course of fourteen high-level meetings between 1931 and 1982, the process of executive federalism failed to produce agreement on an amending formula. See generally James Ross Hurley, *Amending Canada’s Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communication Group, 1996).

⁵² The two thresholds might not necessarily mesh; negotiations could require or expect all first ministers to agree on rules for change that did not require unanimity for all amendments.

⁵³ Sir William Jowitt, quoted in *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 795 [*Patriation Reference*].

⁵⁴ According to Prime Minister Pierre Trudeau, “we took the idea of unanimity and made it a tyrant.... We were led by the dictates of unanimity to bargain freedom against fish, fundamental rights against oil, the independence of our country against long-distance telephone rates.” Quoted in Graham, *The Last Act*, *supra* note 8 at 68.

⁵⁵ The *Victoria Charter*, 1971 failed because Ontario and Quebec were the only provinces granted a veto on amendments. Cameron, “Legality, Legitimacy”, *supra* note 14 at 112.

broken without heroics that achieved amendment legality, but did so at the expense of its legitimacy.

D. Amendment rules and impossible heroics: patriation and the Accords

Canada's version of constitutional "heroics" prompted forms of brinkmanship that exacerbated existing gaps and generated additional deficits of amendment legitimacy. Although patriation may have been a constitutional "miracle," the "night of the long knives" gambled Canada's future on the decision to isolate Quebec.⁵⁶ Whether Quebec's perceived exclusion from constitutional reform made a remedial process necessary or inevitable remains a matter of debate and opinion. Amid Quebec's self-proclaimed alienation from the "rest of Canada" (ROC) and a rising focus on separation, the "Quebec Round" of reform and the Meech Lake Accord (MLA) was celebrated in 1987 as a nation-saving miracle.⁵⁷ Consequently, it is difficult to overstate how serious the fallout was, not only in the moment but for the course of constitutional amendment, when the Accord faltered three years later, on the final day of the ratification period.

Thirty years ago, on June 23, 1990, the MLA expired after two provinces, Manitoba and Newfoundland, failed to ratify. During the countdown, the MLA's prospects for ratification did not improve when then-Prime Minister Mulroney put out a boast that he called the last-minute first ministers meeting to roll the constitutional dice.⁵⁸ The

⁵⁶ This is a legendary part of the patriation saga and the catalyst for the MLA. See generally Graham, *The Last Act*, *supra* note 8 at 190–98, 201–11 (chapters 14 "The Kitchen Accord" and 15 "The Night of the Long Knives").

⁵⁷ The MLA proposed amendments that recognized Quebec as a distinct society; required the federal government to grant provinces a greater role in immigration and to select Supreme Court of Canada judges from lists of names from the provinces; entrenched Quebec's right to three judges on the Court; allowed the provinces to opt out of share cost programs under certain conditions; and granted all provinces a veto on s 42 amendments. See Monahan, *Inside Story*, *supra* note 8, at 297–305 (Appendix 3, text of the MLA), 306–14 (Appendix 4, 1990 Constitutional Agreement).

⁵⁸ In an interview, the Prime Minister stated, in an attempt to pressure hold-out premiers to ratify the MLA, that "It's like an election campaign. You've got to work backwards. You've got to pick your dates and you work backward from it.... I said (to my aides) that's the day that I'm going to roll all the dice. It's the only way to handle it" [emphasis added]. Cited in, "'A Long Day for Canada': On the Death of the

suggestion that reluctant premiers were pressured and manipulated further undercut a fragile agreement—one that emerged from a dinner meeting that famously lasted seven days—to ratify the Accord in exchange for a promise to address other issues on the reform agenda, forthwith.⁵⁹ The MLA’s failure meant that Canada had said “no” to Quebec for the second time, and led to Quebec’s ultimatum setting October 26, 1992 as the deadline for constitutional reform or the alternative of a secession referendum.⁶⁰ The Charlottetown Accord was valiant but flawed; remarkably, the Accord was reached within an impossible deadline that averted the threatened referendum on separation. Yet, as explained below, the Accord’s package of reforms was too bloated to pass muster in a nationwide referendum.

In combination, patriation and the Accords marked a period of unprecedented histrionics in amendment history. Both Accords were undercut by the relentless pressures and complex dynamics of constitutional politics that were put in motion by patriation. An unstable amendment culture was pivotal in sealing the fate of each. Then-Premier Bourassa may have captured the mood well when he stated—on being pressured to re-open the MLA to a wider reform agenda—“I can’t accept a compromise on a compromise on a compromise.”⁶¹ That sentiment was shared widely, at the level of executive federalism and by Canadian voters who considered the Charlottetown Accord a massive exercise in crass, unacceptable compromise.⁶²

Looking past the prevailing political environment, the central point in this discussion is Part V, and what went wrong with the textual rules.

Meech Lake Accord”, *Los Angeles Times* (26 June 1990), online: <www.latimes.com/archives/la-xpm-1990-06-26-wr-662-story.html> [perma.cc/Z7AS-9UNM].

⁵⁹ Monahan, *Inside Story*, *supra* note 8 at 198–237 (chapter 8, “This Dinner Has Seven Days”).

⁶⁰ Quebec announced that with or without a constitutional overture from the rest of Canada there would be a referendum on separation no later than October 26, 1992.

⁶¹ Quoted in Monahan, *Inside Story*, *supra* note 8 at 209.

⁶² The Accord included a distinct society clause for Quebec as well as a Canada clause for the ROC; it addressed the division of powers, institutions of the federal government, linguistic rights, and rules for amendment. It has been described as “a set of largely ad hoc trade-offs, unsupported by a clear vision of the country as a whole.” Webber, *Reimagining Canada*, *supra* note 8 at 175.

Rather than enable amendment, embedding a series of amending formulas failed to lead the Constitution through the high-stakes processes that followed patriation. In bypassing Part V and its requirements, the two Accords deflected attention from patriation's singular achievement, which was the entrenchment of textual amendment rules.⁶³ Instead, both Accords raised or changed the threshold of agreement required by Part V. While only some of its provisions were subject to that threshold, the MLA set unanimity as the holistic standard of ratification.⁶⁴ Likewise, the Charlottetown Accord's wide-ranging mixture of reforms was subject to different Part V rules, which do not include a process or requirement of popular confirmation. Though Part V does not mention or even contemplate a referendum as part of the process, a nationwide referendum asked voters to take or leave the Charlottetown Accord's disparate reforms on an all-or-nothing basis.

An onlooker, such as the notional reader of *Constitutional Amendments*, could readily wonder why Canada did not apply the 1982 rules to the Accords. Generally, reform processes do not proactively seek riskier and more onerous approaches to change than what is prescribed by the constitution. For Canada, the difficulty was that patriation, including Part V, achieved the long-awaited goal of constitutional legality, but lacked legitimacy. Rules that were elusive for most of Canada's history, and which in 1982 were intended to anchor the Constitution, lacked authority because they were not legitimate in Quebec. This was the most immediate deficit, but not the only one. More profoundly, the prevailing politics of amendment reflected a chronic but shifting condition of Canadian constitutionalism—after patriation, the gap branched out from its roots in amendment federalism to embrace tensions and expectations arising from a perception of reform as an exercise in popular democracy. Part V's requirements were supplemented, but cross-cutting dynamics that were not, or could not, be managed nonetheless felled both Accords.

Rather than resolve issues, patriation served to aggravate pre-existing questions about the legitimacy of amendment. Emblematic of the vacuum

⁶³ Patriation's other achievements include the incorporation of Aboriginal rights and the *Charter of Rights and Freedoms*.

⁶⁴ Packaging amendments subject to the general amending formula and the requirement of unanimity introduced another obstacle in the form of a 3-year ratification period for all parts of the MLA. Albert, *Constitutional Amendments*, *supra* note 5 at 209.

on amendment constitutionality was the Supreme Court's curious 1981 ruling that unilateral patriation by the federal government was legal, but unconstitutional.⁶⁵ Stepping back, it is difficult to imagine a more stunning admission of the disconnect between the concepts of legality and legitimacy: formal legality was inadequate to confer constitutional legitimacy. The gap between concepts revolved around the status of provincial consent, and although the Supreme Court found unilateral patriation unconstitutional, it refused to specify what quantum of provincial consent was required. Against decades of negotiations that at least gestured toward unanimity, albeit without attaining it, that omission essentially granted the federal government permission to proceed with the "substantial" consent of the provinces.⁶⁶ After the Court's decision, a final round of negotiations in November 1981 culminated in the betrayal of Quebec and patriation over its objection and perceived exclusion from the agreement.⁶⁷

As a matter of legality, Quebec was not entitled to veto the patriation amendments.⁶⁸ Even so, the perception and claim that the 1982 Constitution would not be legitimate in Quebec unless the province became a signatory was compelling. By restoring Quebec's constitutional status and standing, the MLA would legitimize patriation, including Part V's amendment rules, once and for all. A ratification standard of unanimity served to boost the legitimacy of the Accord by demonstrating the ROC's goodwill toward Quebec. The MLA's underlying logic was

⁶⁵ *Patriation Reference*, *supra* note 53. Seven of the Court's nine judges agreed, with two in dissent, that that the federal government had the legal power to amend the Constitution unilaterally; a differently constituted majority of six judges also found that the federal government's unilateral patriation plan was unconstitutional because it would violate a constitutional convention requiring an indeterminate but "substantial" level of provincial agreement.

⁶⁶ *Ibid* (stating that a substantial degree of provincial consent was required and that "[n]othing more should be said about this" at 905). Significantly, the Court found that the rule of unanimity "under which past constitutional conferences labored and ultimately failed" was not a conventional—or constitutional—requirement. Romanow, Whyte & Leeson, *Canada ... Notwithstanding*, *supra* note 8 at 188.

⁶⁷ The "Night of the Long Knives" was the critical moment in the negotiations that took place after the *Patriation Reference*. Graham, *The Last Act*, *supra* note 8 at 190–98, 201–11 (chapters 14 "The Kitchen Accord" and 15 "The Night of the Long Knives").

⁶⁸ *Re: Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793 [*Quebec Veto Reference*].

somewhat unconventional. The 1982 amendments that were both legal and constitutional under the Supreme Court jurisprudence would be legitimized after the fact by the MLA, which reverted to unanimity and essentially bypassed Part V. Without expressly granting Quebec a veto, the MLA validated unanimity as the standard of amendment.

In the hurry to include Quebec in the Constitution, the MLA marginalized the textual amendment rules, rendering them dispensable and secondary to the goal of celebrating Quebec's re-entry to Confederation. At the same time, unanimity raised the stakes in the ROC, where asymmetric arrangements for Quebec demanded patience while other promises and expectations for constitutional reform were placed on hold.⁶⁹ The legitimacy of the MLA, which was fragile from the outset, declined in the three-year ratification period from 1987 to 1990. In the end, it was not only the MLA that failed in this process, but Part V as well.

The next miracle was that much more difficult to achieve. One lesson from the MLA was that the ROC's pent-up demands for constitutional reform could not be ignored and were therefore added to the urgent task of achieving reconciliation with Quebec. Against insurmountable odds and while straining against the clock, the Charlottetown Accord set out a bulky proposal for monumental change across institutions and issues. The "Canada Round" gambled that a package offering placatory reforms across a spectrum of issues, to a host of constitutional stakeholders, would be difficult to refuse. The other lesson from the MLA, that the democratic community could not be excluded from the process, did not save the Canada Round. The Charlottetown Accord lacked legitimacy in the democratic community and was punctured in a nationwide referendum rejecting the package.⁷⁰ That defeat set Canada and Quebec on the path to the 1995 secession referendum, which was the starting point of this

⁶⁹ The need for reform was not lessened by "the limited success of 1982," because there were other unresolved constitutional dilemmas including, in addition to Quebec, issues relating to Aboriginal peoples, the Senate, the Supreme Court of Canada, and economic union. Romanow, Whyte & Leeson, *Canada ... Notwithstanding*, *supra* note 8 at 276-78.

⁷⁰ The Accord passed muster in four of ten provinces and was defeated, in the popular vote, by a margin of 54.3% against and 45.7% in favour. McRoberts & Monahan, *The Charlottetown Accord*, *supra* note 8 at 363-66 (Appendix 3, "Official Voting Results, by Province 26 October 1992").

review. With constitutional heroics falling short a second time, it was once again not just the Accord that failed, but Part V as well.

Not long after the patriation negotiations of Fall 1981, when asked whether he considered the agreement a success, Prime Minister Pierre Trudeau replied, “No, I consider it an abject failure.”⁷¹ From an amendment perspective, the rules incorporated in Part V achieved constitutional legality but left in place a legitimacy gap that widened over the course of the two Accords. Quebec’s exclusion created a dangerous gap in legitimacy that was compounded by the MLA, which lacked legitimacy in the ROC, both on matters of substance and process. At a time of profound distrust and pessimism it became impossible for the Charlottetown Accord to mitigate the damage or generate the confidence and goodwill needed to legitimize a reform package that asked too much of the democratic community.

After 1982, the dynamics unleashed by patriation made it difficult for the Accords to ground Part V’s rules in an amendment culture that, essentially, had been re-set. Nor did their failure, under more onerous requirements for ratification, restore or generate confidence in the textual rules. Instead, Canada continued its search for proxies of legitimacy. At present, constitutional amendment is governed by a complex combination of Part V rules, federal and provincial statutes, constitutional jurisprudence, and conventional requirements.⁷²

⁷¹ Quoted in Monahan, *Inside Story*, *supra* note 8 at 14.

⁷² Albert, *Constitutional Amendments*, *supra* note 5 at 128–31 (“Statutory Conditions on Codified Amendment Rules”). See e.g. *An Act representing constitutional amendments*, SC 1996, c 1, s 1(1) [*Regional Veto Act*] (prohibiting constitutional amendments from being proposed unless certain provinces have consented, namely Ontario; Quebec; British Columbia; at least two Atlantic provinces representing at least 50% of the population; and at least two of the three prairie provinces having at least 50% of the population). While Alberta and British Columbia require a binding referendum before their legislatures can approve constitutional amendments, other provinces and territories authorize but do not require their government to call a binding or advisory referendum to validate constitutional change. It is widely thought that legitimacy demands a national referendum to validate Part V amendments to the Constitution. In addition, Supreme Court of Canada decisions constrain the amendment process: see the *Reference re Secession of Quebec*, [1998] 2 SCR 217; and the *Clarity Act*, SC 2000, c 26; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21; and *Reference re Senate Reform 2014 SCC 32* (placing judge-made caveats and qualifications on the substance and process of constitutional amendment). Albert, *Constitutional Amendments*, *ibid* at 223–27 (“Pre-ratification Review in Canada”).

One of the misfortunes of Canada's amendment history is that the Accords disrupted and undermined Part V's functionality as the text's prescribed mechanism for constitutional change. As Albert has observed, the statutory conditions "now exercise a constitution-level constraint on the constitution's rules for formal amendment," despite "not earning their special status through the channels the constitution requires for achieving constitutional status."⁷³

Today, Canada's amendment constitutionalism suffers from a form of hyper rigidity, which emanates from multiple sources inside and outside the constitutional text. Both because and in spite of the multiplicity of rules, it remains unclear what amendment legality requires. Textual change is also in a state of paralysis due to constructive unamendability, because Canada's constitutional culture has not articulated and might not know what a legitimate process of constitutional reform looks like. It is an experience that remains outside its amendment narrative.

On their face, Part V's amending formulas are strict enough to ensure a rigorous process of constitutional amendment. In combination, the rules facilitate constitutional change that falls within the sole jurisdiction of the federal government or provinces, or is bilateral in nature.⁷⁴ Otherwise, the threshold rises for amendments that engage the interests of federalism or implicate national institutions, such as the head of state. Under ss. 38 and 41, constitutional amendment proceeds only when high levels of agreement can be reached.⁷⁵ These requirements are difficult to meet but are generally consistent with the types of proposals that were widely discussed and negotiated prior to patriation.

Part V's textual rules should be accepted and engaged as the governing standard for constitutional amendment. Pausing a moment, the need to make an appeal to the formal rules is in itself an interesting comment on the state of amendment constitutionalism in Canada. The 1982 solution to a history of amendment incapacity may not be perfect, but balances the competing interests in regulating the content and pace of change. The framework is sufficiently demanding to deter amendments that lack sufficient support, as a matter of federalism, because it sets a workable

⁷³ Albert, *Constitutional Amendments*, *supra* note 5 at 131.

⁷⁴ *Canada Act 1982*, *supra* note 7, Part V, ss 38-49. For further analysis see the text accompanying note 10.

⁷⁵ *Ibid.*

threshold for agreement. Put another way, Part V's calibrations are pragmatic and reflective of the reality of Canadian federalism.

Part V's rules should govern any reform process in the future, albeit with these comments and caveats. First, and in large part because of Canada's failed reform initiatives, Albert expresses skepticism about the viability of omnibus amendment bills, proposing instead a "single subject" approach requiring every amendment be addressed and ratified as a discrete constitutional change.⁷⁶ At the least, it is clear that the Charlottetown Accord's omnibus package, which was attempted under conditions of constitutional duress, was deeply flawed. Without necessarily endorsing Albert's single-subject approach, constitutional change going forward should at least match proposed amendments up with the requirements of Part V. Packaging a mix of reforms together that are subject to differing and upgraded ratification requirements is unnecessary and decreases the chances of success in constitutional amendment.

Second, the status of popular confirmation or ratification as a functional requirement of reform is an open question. To the extent it is a *de facto* requirement, a referendum process would be more effective if implemented through co-operative arrangements between the federal government and the provinces. Complex and overlapping statutory requirements clutter and confuse the process, once again limiting the hope of successful reform. At minimum, there should be a co-ordinated and transparent referendum and single vote across the nation.

Meanwhile, it is unlikely in the extreme that the current impasse on amendment will be broken or resolved by superimposing overarching forms of extra-textual legality onto Part V. Such gestures deepen the rigidity and unamendability of the Constitution without shoring up its legitimacy. To that point, such means are counterproductive, because they diffuse and confuse the core question of what makes constitutional change legitimate. Requirements that supplement Part V are the product of constitutional politics and an amendment culture rendered dysfunctional by the lack—over most of Canada's history—of any concrete sense of amendment legality, or constitutional sovereignty. Filling the vacuum by proliferating and escalating the threshold for amendment cannot circumvent or resolve the core issue: that the legitimacy of constitutional amendment remains unsettled. A surfeit of overlapping and onerous

⁷⁶ Albert, *Constitutional Amendments*, *supra* note 5 at 186–88.

requirements serves more to impossibilize the amendment process than to find and voice the missing legitimacy.

IV. RULES: A CONSTITUTION'S DEEPEST VULNERABILITIES AND GREATEST STRENGTHS

My own experience of both Accords has affected my response to Albert's intense focus on the formalities of textual amendment rules. While I have much admired him for undertaking a project of such great intellectual challenge, my lingering question was whether an exclusive focus on text could offer sufficient or penetrating insight on the challenges surrounding constitutional change. In candid terms, my bias was that static rules did not seem like the most interesting or critical element in any process of amendment and reform. That view was informed by my own moment in time, when I was placed in the midst of highly charged and unpredictable events that disregarded and marginalized Part V's rules.⁷⁷

Much later, I have learned from Albert's cumulative scholarship, including *Constitutional Amendments*, that Canada's amendment constitutionalism has much to learn from his work on the formal legalities of constitutional change. It is clearer to me now that the noise, the crises of patriation and the Accords, the Constitution's chronic unamendability, and the intense dynamics of amendment culture are, at their heart, a function of longstanding and unresolved issues with amendment rules. The lack of textual rules, Part V's defeasible authority after patriation, and the superimposition of more and more rules after the Accords validate Albert's central claim that "[n]o part of a constitution is more important than its rules of change."⁷⁸ As argued above, with the events of patriation and the Accords in the distance, it is time to revisit the question of amendment rules and do so from the perspective that Part V's framework for change is both legal and should also be regarded as legitimate.

⁷⁷ Specifically, I was part of a team of expert advisors who accompanied the premier of Ontario to the first minister's dinner and 7-day meeting in June 1990, and signed the MLA's "distinct society" letter; in addition to appearing before parliamentary committees and attending and speaking at the Renewal of Canada Conferences, I was appointed to the National "Yes" Committee during the Charlottetown Accord referendum campaign. Due to COVID-19, I have not had access to my office and to my personal archives and library, and was unable to use those materials in this review.

⁷⁸ Albert, *Constitutional Amendments*, *supra* note 5 at 261.

Writing on the 30th anniversary of the MLA's failure, it is tempting to imagine what might have happened had the Accord been ratified. Constitutional reform would not have been over but, in light of the promises and expectations on hold, would only just have begun. The regional divisions and lack of generosity in the pervasive amendment culture suggest that achieving further reforms would present a mighty challenge. It is difficult to know whether Part V's rules would have been followed in any subsequent round of reform, whether unanimity would have become the norm, or whether a referendum might have been added. In other words, it is unclear what the legitimacy of constitutional amendment might have looked like had the MLA been ratified. Still, it is unlikely that the overlapping and sequential requirements now in place would have become necessary. Contentious as it was, the MLA offered an opportunity to correct the patriation process with constitutional grace and at relatively low constitutional cost, given what followed. Its failure catalyzed a further trajectory that complicated, defeated, and demoralized the prospects for change. That demoralization includes Part V's rules for change.

Albert cites Edmund Burke's observation that a state without the means of change is a state without the means of its own conservation.⁷⁹ Canada has mishandled the amendment file throughout its constitutional history. Dramatically, and despite the self-inflicted wounds of the Accords, the Constitution and nation survived the turmoil surrounding the incorporation of textual rules. Ironically and paradoxically, this history shows strength as well as vulnerability. The protracted unamendability of the Constitution is a clear source of vulnerability that moved decisively in the wrong direction after patriation. As suggested, Canada's ongoing amendment vulnerability can be ameliorated, at least in part, by accepting that Part V's rules govern the process of constitutional reform. Whether that is realistic in the foreseeable future remains to be seen.

There is strength, too, in Canada's untidy history of amendment, including the colossal failure of two Accords. Contrary to what Albert might hope, its constitutional resilience does not rest, principally, in a commitment to textualism and the formality of rules. It is found, instead, in an uncanny capacity, over time and through difficult challenges in effecting change, for pragmatic adaptability. This adaptability does not

⁷⁹ *Ibid* at 271.

conform to principle and is quite unpredictable but does, in a way, define Canada's as yet unformed and still emerging relationship with amendment rules and that part of its constitutional soul.