

Complexity and the Amending Formula

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Thinking boldly about Senate reform means no longer relying on claims about Canada's constitutional amending formula as a crutch for stagnation. Despite rhetoric to the contrary, the amending formula is not responsible for stalled progress on Senate reform. To be sure, the formula is intricate, detailed, and sustains multiple reasonable interpretations. It was difficult to entrench and requires widespread support to be changed; it calls on political actors to reach some measure of consensus in order to achieve certain constitutional reforms. However, the amending formula is neither impenetrable nor incomprehensible. It is neither a Rubik's cube nor an instruction manual. And, it should not be cast as the scapegoat for the effects of partisanship or failures of leadership in implementing reform.

Canada's formal constitutional amending procedure is set out in Part V of the *Constitution Act, 1982*. Part V identifies the levels of legislative consent that are required in order to formally amend the constitutions of Canada and the provinces. The levels escalate, ranging from unilateral consent of Parliament or a provincial legislature at one end of the spectrum to unanimous consent of Parliament and all the provinces at the other.

Discussions of Part V often orient around two claims. The first is that Part V sets thresholds of multilateral consent that are politically impossible to satisfy. In this view, successfully amending the Constitution of Canada using the multilateral formulas "requires constitutional politics

to perform heroics."¹ I call this the "impossibility claim." The second claim concerning Part V is that it is complicated, confusing and/or unclear in its design and is therefore difficult to interpret, analyze and apply. This view starts from the observation that Part V is "probably the most complex [amending formula] in the world."² I call this the "complexity claim."

These two claims have framed discussions about Senate reform. We see a simple example of the complexity claim in the political discourse leading up to the *Senate Reform Reference*.³ The federal government argued that Parliament could unilaterally reform the Senate; many provinces and territories disagreed, arguing that multilateral agreement is required. The interpretive challenges of Part V were blamed for the disagreement and grounded repeated calls for a reference to the Supreme Court. After the Court released its opinion in the *Reference*, the Prime Minister invoked the impossibility claim. He announced that the Harper government would not pursue its Senate reform agenda because Part V's demands for consensus, as set out in the Court's opinion, were impossible to reach.⁴

In the months following the *Reference*, the impossibility claim has been undermined somewhat by insistent calls for the Prime Minister to meet with the provincial premiers on Senate reform and for the provincial premiers to negotiate on their own.⁵ In the meantime, there have been concessions to the impossibility claim that diminish its importance in the conversa-

tion about the future of the Senate, as the reform agenda shifts to proposals that do not trigger Part V. One such proposal came from the federal Liberal party, which expelled all senators from its caucus.⁶ Other proposals call for the Senate to implement change internally. For example, some imagine the Senate as a reflective body that draws on popular deliberation and consultation.⁷ Others argue that the Senate should change its approach to legislative review⁸ and/or implement rules that would reduce partisanship and enhance internal transparency.⁹

However, this short essay is about the complexity claim, how it too has suffered blows since the *Senate Reform Reference*, and why we should abandon the current iteration of it in our thinking about Part V. When we start from the position that Part V is unclear and difficult to apply, political actors can too easily avoid the hard work of negotiating multilateral reform. They can rely on interpretive uncertainties to feed claims about political impossibilities and to challenge alternative proposals. Further, when we frame our understanding of Part V in terms of complexity, the courts become the default site for resolving disputes about formal amending procedure. The courts' involvement has benefits. It ensures that the issues are canvassed in a public forum. It provides the opportunity for a range of perspectives to be heard. And, it can resolve disputes that stall reform, providing analytical frameworks for future deliberations. But there are downsides. A judge-centric approach to understanding Part V grounds constitutional legitimacy in judicial interpretation rather than in the effective action of government or the lived experience of the community. That is, it shifts beliefs about where governance happens. Moreover, when procedural issues are resolved judicially, the actors involved in the amending process miss out on the potential benefits of working through problems of procedure cooperatively before sitting down to negotiate the merits of particular reforms. The potential benefits include building collegiality, articulating common ends, narrowing issues, enhancing political investment in the amending process, learning others' positions, adjusting expectations, constructing frameworks for further negotiation, accommodating competing

interests, reconciling rights and responsibilities, suspending absolutes, agreeing to disagree, and so on.¹⁰

All of these points might be necessary evils if Part V lived up to its reputation as complicated and mystifying, but the complexity claim is also inaccurate — Part V is simply not as difficult to interpret and apply as it is often made out to be. In the remainder of this essay, I focus on this last point. First, I assess the doctrinal status of Part V after the *Senate Reform Reference* and the *Supreme Court Act Reference*.¹¹ The Court's opinions provide much guidance on interpreting Part V and set out a solid framework for thinking about amendment going forward, while still leaving room for discussion. Second, I suggest that the complexity claim is difficult to sustain when we think about Part V as part of the bigger constitutional picture, as consistent with the principles and intuitions underlying the Canadian constitutional structure as a whole. Finally, I conclude by re-framing what *is* complex about Part V. Simply put, the richness and quandaries of Part V are found not in its rigidity, but in the elasticity it contemplates; not in its prescriptions, but in its possibilities.

The post-Reference legal terrain

What does Part V mean in today's constitutional landscape? What do we know about its interpretation and application? The short answer is that we know much more than the complexity claim gives credit for. The start of the longer answer can be found in the following few points, the collection of which show that while Part V is detailed, it need not be thought of as confusing or unclear.

First, Part V is a code of constitutional procedure. It is the "blueprint" for how to formally amend the Constitution of Canada.¹² It identifies levels of consent — unilateral, bilateral, and multilateral — that must be satisfied in order to formally amend the Constitution. It sets out a "general procedure" (the "7/50 rule")¹³ and a number of exceptions: a unanimous procedure,¹⁴ a special procedure for amendments relating to some but not all provinces,¹⁵ and unilateral procedures for both Parliament and the provin-

cial legislatures.¹⁶ Each procedure fulfills a particular purpose. The general rule ensures that any change to the Constitution of Canada that engages provincial interests will be implemented only with substantial provincial consent.¹⁷ The unanimity rule ensures that each federal unit agrees before the most foundational elements of the Constitution are changed.¹⁸ The special procedure ensures that provisions that apply to less than all the provinces can be altered only with the consent of those affected.¹⁹ Finally, the unilateral procedures ensure that legislative bodies have the authority to implement constitutional reform that relates to their own order of government, up to the point where the principle of federalism is engaged.²⁰

Second, in any particular case of amendment, determining which level of consent is required depends on the scope or subject matter of the amendment. In this way, Part V replicates the bread and butter of constitutional interpretation, the division of powers. Like sections 91 and 92 of the *Constitution Act, 1867*, Part V distributes constitutional authority to the federal and provincial legislatures. Some amending powers can be exercised independently. For example, with some exceptions, Parliament alone can amend the Constitution of Canada in relation to the executive, the Senate and the House of Commons.²¹ The exceptions call for joint action. For example, Parliament's unilateral authority cannot be used to alter the fundamental nature or role of constitutional institutions such as the Senate or the Supreme Court.²² Other amendments also require joint action. For example, amendments in relation to the composition of the Supreme Court require unanimous consent of Parliament and the provinces,²³ while amendments in relation to the "method of selecting senators" trigger the 7/50 rule.²⁴

Third, Part V is to be interpreted and applied like any other part of the Constitution, purposively and substantively.²⁵ This approach is intended to preclude political actors from doing indirectly what cannot be done directly. It follows that Part V can be triggered even if legislative or executive action does not change the text of the Constitution, but rather changes its mean-

ing or its architecture.²⁶ Once Part V is triggered, the proposed amendment should be held up against the criteria of the exceptional procedures (i.e. unanimity, special, unilateral). If it does not fall within any of the exceptions, the general rule applies.

Fourth, Part V is the only entrenched procedure for amending the Constitution of Canada, but it is not a complete account of constitutional amending procedure. We know from Canada's constitutional history with patriation, the Charlottetown Accord and Meech Lake (and so on) that the road to formal constitutional amendment is never as ordered or coherent as the Part V algorithm suggests. The actors involved in amendment processes bear additional constitutional obligations, both legal and political.²⁷ Moreover, Part V has not been — and never will be — the only way by which the Constitution changes. Formal amendment is one of many mechanisms of constitutional evolution. It is an important one. But so too are convention, legislation, judicial decision, civic action, intergovernmental agreement,²⁸ societal attitude, and so on. Acknowledging this variety does not render Part V irrelevant, but rather puts in perspective the range of ways to impact constitutional life and the range of concerns to attend to when thinking about Canada's constitutional future.

Finally, even though the *Senate Reform Reference* and the *Supreme Court Act Reference* opinions provide guidance on how to interpret Part V, much remains uncertain. Of course, we do not know what issues of amendment will arise in the future. Such uncertainty is persistent and inevitable. Moreover, in the post-*Reference* legal terrain, we do not have an exhaustive definition of "Constitution of Canada" for the purposes of Part V or a clear idea of the ways by which an institution, architectural feature or text becomes part of the Constitution. We also do not have an authoritative statement on the types of conduct that can count as amendments. Is legislative action required or is ministerial conduct sufficient? Nor do we know the limits of Part V. Is Part V designed to deal with amendments that constitute constitutional revolutions? Is the abolition of a foundational constitutional institu-

tion a revolution? Further, many would say that “constitutional architecture” is too vague and ambiguous to sustain a mode of reasoning or a claim of amendment. We still have to work out the proper interpretation of most of the subject matters listed in Part V and determine what obligations outside of Part V bind officials engaged in processes of constitutional amendment.

Alongside all these lingering matters, we know that the Court’s opinions in the *References* and the explanations of Part V that I have provided are more sterile and serene than any experience of constitutional amendment will be in practice. “Changing a constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual and of cultural groups to one another and to the state.”²⁹ It will be, as it often has been in the past, messy.

But even with the messiness, the doctrinal questions about Part V that linger after the *References* are questions with which the law deals on a regular basis — questions of interpretation, conceptualization, allocation, increment, and limits. The questions endure because law is a human endeavor. They will get worked out, as constitutional matters do, in the future conduct, processes, disputes and judgments of citizens, scholars, officials and institutions.³⁰ They are, in other words, not sufficient to sustain a unique or particularly troubling complexity claim.

The amending formula in the bigger constitutional picture

The complexity claim is also difficult to sustain when Part V is considered as part of the bigger constitutional picture, as consistent with themes, interests and intuitions that animate the Canadian constitutional structure as a whole.

According to the Supreme Court in the *Senate Reform Reference*, the operative starting point of Part V is federal equality and the idea that each province and Parliament are equal stakeholders in Canada’s constitutional design.³¹ In the Court’s view, it follows that Part V entails

that neither order of government can act alone to alter the fundamental nature and role of basic constitutional institutions.³² Instead, any constitutional change that engages provincial interests and implicates the federalism principle requires the consent of Parliament and a significant measure of the provinces.³³

Jeremy Webber describes Canada’s constitutional order as agnostic, animated not by certainties or comprehensive theories, but by a series of themes and conversations on which there are contending positions.³⁴ He identifies six themes: territory, institutional structure of the democratic state, federalism, human rights, the encounter between Aboriginal and non-Aboriginal peoples, and “Canada’s association with political institutions beyond the level of the Canadian state.”³⁵ The Supreme Court of Canada usually frames the foundations of the constitution in different terms, as principles and architecture that give life and shape to the constitution.³⁶ The principles have become familiar — democracy, federalism, the rule of law, constitutionalism, respect for minorities, judicial independence, constitutional integrity, and so on.³⁷

Agnosticism is a resonant frame for thinking about the amending formulas. Part V is designed to accommodate the contending positions that make up the Canadian constitutional order, acknowledging the competing interests, cultures, languages, histories and narratives that inevitably shape the motivations of participants in constitutional amendment processes. At the same time, Part V is also intended to facilitate the encounter of the contending positions and provide a mechanism for closure such that “decisions to adopt a particular way forward can be made.”³⁸ Such closure is important in the context of Part V; the constitution cannot be amended without it. At present, the courts are often needed to resolve disputes about the interpretation of Part V because non-judicial means have been insufficient to overcome the politics of competing constitutional visions. Whether recent judicial opinions will strengthen parties’ confidence in proceeding with amendment without the courts, even in moments of destabilizing change, remains a possibility.

Reading Part V as part of the larger constitutional picture imagined by Webber and found within the Constitution's underlying principles is a normative exercise, one in which Part V becomes more familiar. On this reading, Part V's commitments are consistent with, and reflective of, the constitutional intuition. It is a manifestation of core constitutional principles including fidelity, federalism, democratic institutionalism, and the rule of law and it brings to life principles of federal equality and inter-governmental dialogue that bind officials and shape citizens' expectations in times of constitutional change. Ultimately, within the grander constitutional conscience, Part V is aspirational. It is designed to foster dialogue between the federal government and the provinces on matters of qualitative constitutional change and to protect the constitutional *status quo* until such dialogue leads to consensus.³⁹

Examining Part V against the background of the bigger constitutional picture encourages us to recall that Part V is the culmination of a set of choices, made in the throes of political bargaining. Its design and complexities could easily have been different, although still bound by the constraints of constitutional intuition, tradition and architecture. Remembering that the design of Part V was not inevitable is an opportunity to reflect on what is missing from its formal demands: commitments of diversity and minority participation, guarantees of meaningful roles for Aboriginal people in negotiations, inclusion of the Territories in Part V, and so on. As above, these absences do not sustain the complexity claim. However, reminders of alternatives and absences signal the types of complexity with which we should be concerned when it comes to Part V. To this, I now turn.

The complexity claim, amended

In challenging the accuracy of the current complexity claim, the point is not that Part V has one correct interpretation corresponding to what the Supreme Court says. Constitutional constituencies will always disagree on how Part V should be applied in particular cases and the meaning of Part V will continue to ebb and flow over time,

despite (and in light of) the Court's *Reference* opinions.

Rather, in challenging the complexity claim, the point is that Part V is not as difficult to interpret and apply as has often been said. The text of Part V offers reasonable possible interpretations; it can be read as consistent with the themes and conversations that sustain the constitutional order more broadly; we have well-coordinated institutions that participate in and provide provisional answers to interpretive disputes in particular cases; those institutions also offer forward-looking guidance; and, Canada has a long history of thinking through the procedural dimensions of constitutional amendment. Within this constitutional culture, the interpretive demands of Part V are simply not as complicated as those committed to the impossibility claim might want them to be.

That said, it does not follow that Part V is shallow. The current complexity claim is inaccurate not because Part V is enduringly simple, but because the traditional claim points to the wrong kind of complexity. Our constitutional experience is inconsistent with a thin articulation of the complexity of Part V. However, it leaves room for understanding Part V as complex in other ways. Indeed, when we think about complexity in terms of richness of principle and communicative potential, there is no reason why we wouldn't want Part V to be complex and no reason not to explore the quandaries of those complexities.

Let me point to one example of Part V's complexity that does not render it difficult to interpret or apply, but which instead speaks to the possibilities it cultivates.

Citizens of any society likely agree on more than they think they do,⁴⁰ but are apt to disagree about fundamental principles — what they are and how to put them into operation.⁴¹ As a result, according to Webber, the “most important dimensions of any constitution” are those that “deal with how decisions are made, by whom, and the mechanisms by which deliberation is sustained.”⁴² Part V is one such part of Canada's Constitution. In setting out the “Procedure for Amending [the] Constitution of Canada” and

establishing multiple thresholds of consent for different types of amendments, Part V is not just a listing of subject matters or heads of powers. Rather, Part V offers a framework for decision-making and a lexicon for sustaining conversations about amendment. It proposes one way of thinking through issues of constitutional change, a way that calls on participants to engage in dialogue, to cooperate, and to pursue consensus or else act ruthlessly⁴³ in resisting the moral demands of the amending formulas. Part V proposes a language for formulating claims about how to pursue reform and a logic for how to reason through them. In addition, it offers a baseline of expectations against which official conduct can be assessed and popular reform movements can be mobilized.

This reading recognizes that Part V makes substantive claims by virtue of its form. Part V sets the end goals of the formal amending process (i.e. unanimous consent, significant multi-lateral consent, bilateral consent, or unilateral consent) and some other procedural conditions, but leaves many decisions to the actors involved in the amending process. The end goals set by Part V will limit the range of choices available to those participants and will bear on which choices are made and how the participants conduct themselves. Indeed, when the end goal is some measure of consensus, then the means by which amendment is sought must be directed towards achieving that goal. In this way, even though Part V does not prescribe the means by which consensus must be secured, it will have a facilitative or coordinating impact on the participants' decisions about procedural design. That said, this facilitative impact is not determinative. The participants involved in the amending process are free to configure the ways by which dialogue and consensus are pursued. This includes the freedom to design processes and incorporate practices that reflect what – and who – is missing from the express requirements of Part V. In this sense, the participants have a wide range of options to consider and a lot of constitutional work to do when making procedural decisions in pursuit of constitutional amendment. The failure to consider the options or do the work is not a fault of the amending formula, but of politi-

cal actors and the limits of their constitutional imaginations.

When we frame the complexity of Part V in this way, the focus turns to the richness of Part V as a legal form and its communicative and facilitating effects in constitutional practice. The theoretical and empirical inquiries for constitutionalists going forward would aim to determine what work Part V does, not only in the instrumental sense of prescribing how to secure formal amendments to the constitution, but also in “shaping the lives, roles, expectations, [imagininations] and agency of those participating within [the amending process].”⁴⁴

It is in these inquiries that the complexity of Part V is found: where the rigidity of the thresholds of consent gives way to the variety of means by which that consent can be negotiated and secured; where the constraints set by Part V become the conditions in which legal actors are free to pursue creative amendments in creative ways; and, where the formalities of Part V serve coordinating and expressive functions, providing a mechanism by which participants can discern the ends they seek and communicate reasons for caring about and pursuing those ends.⁴⁵ In this revised view, the complexity claim is about discovering what is possible in light of Part V, rather than lamenting the (allegedly) impossible. It is from within this view, where amending formulas offer more than just thresholds of consent and where we find optimism in Part V rather than doom, that thinking boldly about Senate reform could unfold.

Notes

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- 1 Richard Albert, "Constitutional Amendment by Stealth" (2015) 60 McGill LJ [forthcoming].
 - 2 Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49 UTLJ 519 at 520.
 - 3 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reform Reference*].
 - 4 Leslie MacKinnon, "Stephen Harper says Senate reform is off the table", *CBC News* (25 April 2014), online: <<http://www.cbc.ca/news/politics/stephen-harper-says-senate-reform-is-off-the-table-1.2622053>>.
 - 5 See e.g. Mia Rabson, "Sit down with the premiers on Senate", *Winnipeg Free Press* (10 April 2015), online: <<http://www.winnipegfreepress.com/opinion/analysis/sit-down-with-the-premiers-on-senate-299297291.html>>.
 - 6 CBC News, "Justin Trudeau statement: 'Senate is broken, and needs to be fixed'", *CBC News* (29 January 2014), online: <<http://www.cbc.ca/news/politics/justin-trudeau-statement-senate-is-broken-and-needs-to-be-fixed-1.2515374>>.
 - 7 Kate Glover & Hoi Kong, "The Canadian Senate & the (Im)Possibilities of Reform", (12 October 2014), Online Symposium on Bicameralism, *Verfassungsblog* (blog), online: <<http://www.verfassungsblog.de/en/>>.
 - 8 Andrew Heard, "Andrew Heard: Let the Senate reform itself", Full Comment, *National Post* (16 March 2015), online: <<http://news.nationalpost.com/full-comment/andrew-heard-let-the-senate-reform-itself>>.
 - 9 Adam Dodek, "Adam Dodek: How the Senate can fix itself", Full Comment, *National Post* (7 April 2015), online: <<http://news.nationalpost.com/full-comment/adam-dodek-how-the-senate-can-fix-itself>>.
 - 10 These types of benefits might have informed the Supreme Court's decision in the *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*], which was framed in terms of a constitutional obligation to negotiate rather than in terms of the amending formula.
 - 11 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Supreme Court Act Reference*]
 - 12 *Senate Reform Reference*, *supra* note 3 at para 28.
 - 13 *Constitution Act, 1982*, ss 38(1), 42(1).
 - 14 *Ibid*, s 41.
 - 15 *Ibid*, s 43.
 - 16 *Ibid*, ss 44, 45.
 - 17 *Senate Reform Reference*, *supra* note 3 at paras 34-35.
 - 18 *Ibid* at para 41.
 - 19 *Ibid* at para 44.
 - 20 *Ibid* at para 48.
 - 21 *Constitution Act, 1982*, s 44.
 - 22 *Ibid*; *Senate Reform Reference*, *supra* note 3; *Supreme Court Act Reference*, *supra* note 11.
 - 23 *Constitution Act, 1982*, s 41(d), (e).
 - 24 *Ibid*, s 42(1)(b).
 - 25 *Senate Reform Reference*, *supra* note 3 at paras 25-26.
 - 26 *Ibid* at para 27; *Supreme Court Act Reference*, *supra* note 11 at paras 72-106.
 - 27 See e.g. *Secession Reference*, *supra* note 10; *Constitution Act, 1982*, s 35.1; *An Act respecting constitutional amendments*, S.C. 1996, c. 1.
 - 28 For example, NAFTA and treaties between the Crown and Aboriginal peoples.
 - 29 Frank R Scott, *Essays on the Constitution: Aspects of Canadian law and politics* (Toronto: University of Toronto Press, 1977) at ix.
 - 30 See e.g. Kate Glover, "The Supreme Court in a Pluralistic World: Four Readings of a Reference" (2015) 60:3 McGill LJ 1, under the heading "The Contextual" [forthcoming].
 - 31 *Senate Reform Reference*, *supra* note 3 at paras 31, 48.
 - 32 *Ibid* at para 48.
 - 33 *Ibid* at para 29.
 - 34 Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015).
 - 35 *Ibid* at 2-4.
 - 36 See e.g. *Secession Reference*, *supra* note 10.
 - 37 See e.g. Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67.
 - 38 Webber, *supra* note 34 at 265.
 - 39 *Senate Reform Reference*, *supra* note 3 at para 31.
 - 40 Lon L Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1; Roderick A Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press, 2002).
 - 41 Webber, *supra* note 34 at 264-65.
 - 42 *Ibid* at 265.

- 43 This is a reference to Carissima Mathen, “Constitutional Ruthlessness” (Paper delivered at the Symposium on Constitution-Making and Constitutional Design, Clough Centre for Constitutional Democracy, Boston College, 31 October 2014) [unpublished].
- 44 This passage comes from Kristen Rundle, “Reply” (2014) 5(1) *Jurisprudence* 133 at 134, in which she describes the main thrust of Lon Fuller’s legal philosophy, a philosophy preoccupied by the nature and implications of law’s forms: see e.g. the essays collected in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller, Rev’d Ed* (Oxford: Hart Publishing, 2001) and Kristen Rundle, *Forms Liberate: Reclaiming*

the Jurisprudence of Lon L Fuller (Oxford: Hart Publishing, 2013).

- 45 On the last point, see Hoi Kong, “The Unbounded Public Law Imagination of Roderick A Macdonald” in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, *The Unbounded Level of the Mind: Rod Macdonald’s Legal Imagination* (Montreal: McGill-Queen’s University Press, 2015), in which Kong describes Macdonald’s understanding of the purposes of legal forms. On the moral reading of law’s forms alluded to here, see the essays collected in Winston, *ibid*, in particular “Means and Ends”, “The Lawyer as an Architect of Social Structures” and “The Case Against Freedom”.