

The Unconstitutionality of Unconstitutional Constitutional Amendments

EMMETT MACFARLANE *

I. INTRODUCTION

The growing academic literature on comparative constitutional amendment offers considerable insights for recent developments in Canada. Scholars have increasingly recognized that courts in many countries have exercised judicial review to nullify proposed or enacted amendments. Unconstitutional constitutional amendments may result from explicit procedural or substantive limitations imposed on the amending power, including the designation of unamendable provisions, values, or features of a constitution. More controversially, courts in some jurisdictions have found uncodified or implicit limitations on amending authority, such as the basic structure doctrine, recognized perhaps most notably in India, that prevents use of the amending power to “abrogate or change the identity of the constitution or its basic features.”¹

Recent scholarship has engaged with the question of whether Canadian courts might someday claim the power to invalidate constitutional amendments on such grounds,² despite the fact that the

* Emmett Macfarlane is an associate professor of political science at the University of Waterloo. My thanks to Richard Albert, Erin Crandall, Jamie Cameron, Warren Newman, and Maxime St-Hilaire for fruitful discussions about these issues at the Constitutional Change conference, hosted at the University of Texas Austin in January, 2020.

¹ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017) at 43.

² Richard Albert, “The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada” (2015) 41:1 Queen’s LJ 143 [Albert, “Theory and Doctrine”].

domestic amending formula appears as a comprehensive code for formal changes to the constitution. A ground-breaking new work, Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, focuses, among other things, on an analysis of what makes an amendment an amendment.³ Within Albert's fascinating and important discussion of the various forms of unamendability that exist in constitutions across the world, Albert's book also elaborates on the difference between constitutional amendment and constitutional dismemberment, the latter of which "entails a fundamental transformation of one or more of the constitution's core commitments" and is thus "incompatible with the existing framework of the constitution because it seeks to achieve a conflicting purpose."⁴

Concepts like basic structure doctrine or constitutional dismemberment recognize the reality that not all amendments are alike. Some are minor revisions, others fundamental changes. As a conceptual distinction, Albert's description of constitutional dismemberment is clearly an important one. However, the concepts of basic structure or dismemberment also raise, directly or implicitly, a normative notion that there are limits on the amending power that are not evident from the constitutional text. This idea raises the spectre of inviting the courts (or indeed, the courts inviting themselves) into the mega-constitutional political sphere.

In what follows, I use Albert's nuanced and pathbreaking analysis of these various concepts as a springboard to argue that, in the Canadian context at least, judicial review of amendments on non-procedural grounds (that is, judicial review that goes beyond identifying which are the appropriate amending procedures for different subject matters or changes to the constitution) are illegitimate to the point of unconstitutionality. From a normative perspective, judicial interference in the constitutionally-designated authority to make amendments raises legitimate concerns beyond the traditional democratic and separation of powers arguments often raised in the context of ordinary debates about judicial review. Instead, it goes further: it would amount to a judicial usurpation of the constituent power to "make, break, and change" the constitution itself.

³ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, 2019) at 84 [Albert, *Constitutional Amendments*].

⁴ *Ibid.*

This argument is set out as follows. In Part II, I explore the purported distinctions between regular amendments to the constitution and dismemberments, as well as basic structure doctrine and its application. The section then examines the theoretical basis for limitations on the amending power that lead to uncodified unamendability. Part III critically analyzes the application of uncodified unamendability on the basis of these distinctions in the case of Canada. I argue that Canada's historical constitutional development in relation to amendment, as well as its amending formula as enacted, make Canada an inappropriate case for the application of basic structure doctrine or other substantive, uncodified limits on the amending power. Part IV assesses the unconstitutionality of unconstitutional constitutional amendments in the Canadian context. It addresses the normative arguments surrounding judicial review of uncodified unamendability, and why Canadian courts would usurp the constituent power for themselves if they adopted basic structure doctrine or other rationales for invalidating amendments on substantive grounds. Part V concludes with an assessment of the unconstitutional nature of judicial intervention in this context.

II. DISMEMBERMENT, BASIC STRUCTURE, AND UNCODIFIED UNAMENDABILITY: WHAT IS AND ISN'T AN AMENDMENT TO CANADA'S CONSTITUTION?

A. Dismemberment

One of the many contributions of Albert's recent book is to examine when amendments are not amendments. The distinction between ordinary amendments and the creation of a new constitution is frequently made in the context of considering limits on amending authority. Albert suggests there is also a need to recognize a constitutional change that stands in between amendment and wholesale replacement of a constitution. In articulating the concept of dismemberment, however, it is clear that the distinction is more profound than merely reflecting a gradient from 'minor' to 'major' changes to the constitution (although the depth or breadth of change is certainly a factor). Albert writes that a constitutional amendment, properly understood, "keeps the altered

constitution coherent with its pre-change identity, rights, and structure.”⁵ By contrast, dismemberments have both the purpose and effect of unmaking a constitution:

These are transformative changes with consequences far greater than amendments. They do violence to the existing constitution, whether by remaking the constitution’s identity, repealing or reworking a fundamental right, or destroying and rebuilding a central structural pillar of the constitution. A constitutional dismemberment can both enhance and weaken democracy, depending on what in the existing constitution is dismembered.⁶

According to Albert, amendments have four purposes: they are corrective, elaborative, restorative, or reformative. Yet it is ultimately difficult to draw the line between a reformative amendment and what he refers to as a dismemberment of the constitution.

One Canadian example of dismemberment, in Albert’s view, might be the secession of Quebec, which “would require a total reconfiguration of national institutions.”⁷ Secession would necessitate changes to the seat distribution of Parliament, the composition of the Supreme Court, and “would entail enormous implications for citizenship, borders, national debt, the armed forces, commercial and economic relations, mobility and migration, the environment, currency and monetary policy, First Nations, and of course also for political relations between Quebec and Canada.”⁸ As a change not explicitly contemplated by the constitution, secession might be the best hypothetical example of a constitutional dismemberment in the Canadian context. Yet as Albert acknowledges, in *Reference re Secession of Quebec* the Court determined that secession could proceed as an ordinary amendment.⁹

As a conceptual or theoretical distinction, the idea of a constitutional dismemberment has utility. It forces us to consider the nature and scope of constitutional change, especially with regard to whether certain fundamental changes are consistent with a constitution’s identity. However, as a normative proposition—that certain changes, even if permissible under the clear text of the amending formula, should be

⁵ *Ibid.*

⁶ *Ibid* at 78.

⁷ *Ibid* at 64.

⁸ *Ibid* at 65.

⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec*].

treated as illegitimate or even subject to judicial invalidation—the concept of constitutional dismemberment becomes undesirable, even dangerous, at least in the Canadian context.

One of the most challenging aspects of the dismemberment concept is drawing a line between amendment and dismemberment. Albert offers an example of a successful dismemberment in the case of New Zealand's electoral reform.¹⁰ The problem with this example, however, is that it is difficult to see how the switch from the single member plurality system to a form of proportional representation is incompatible with the rest of the New Zealand constitution. Albert points to the transformative nature of the reform by describing its impact on governance, including the fact that no single political party has ever won a majority of seats in Parliament since the reform, and the fact that it has made the governing process more complex. Yet these are simply the political effects of the reform. Electoral reform does not change anything fundamental about New Zealand's status as a parliamentary system, the nature of responsible government, or the fundamental rights of New Zealanders. Electoral reform is simply a change to the method of counting votes. This seems to sit comfortably within the range of constitutional changes appropriately viewed as amendments.

A more fundamental issue, at least in the Canadian context, is that the amending formula explicitly contemplates deeply transformative changes by specifying certain subject matters within different procedures. Canada's amending formula, Part V of the *Constitution Act, 1982*,¹¹ contains five primary amending procedures. The general or default procedure set out in section 38 requires that, unless otherwise specified, all major amendments to the constitution be passed via resolutions by the House of Commons and the Senate, and at least two-thirds of the provincial legislative assemblies representing at least 50 percent of the population. For greater clarity, section 42 lists specific matters that must be passed using the general procedure, including the principle of proportionate representation of the provinces in the House of Commons, the powers of the Senate and the method of selecting senators, the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators, changes to the

¹⁰ Albert, *Constitutional Amendments*, *supra* note 3 at 88–89.

¹¹ *Constitution Act, 1982*, ss 38–49, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Supreme Court of Canada (other than its composition), the extension of existing provinces into the territories, and the establishment of new provinces. Section 41 sets out matters that require unanimous agreement of all provinces and the House and Senate. These include changes to the office of the Queen, the governor general and the lieutenant governor of a province, the right of a province to the number of members in the House not less than the number of senators by which the province is entitled to be represented at the time the amending formula came into force, the use of the English or French language (subject to the bilateral procedure in section 43), the composition of the Supreme Court, and amendments to the amending formula itself. The bilateral amending procedure of section 43 permits amendments of matters relating to some but not all provinces, including provincial boundaries or language policy within a province. Finally, section 44 permits Parliament to exclusively make laws effecting changes to the executive government of Canada or the Senate and the House, and section 45 permits individual provinces authority over changes to their own constitutions (such as enacting electoral reform).

The inclusion of various thresholds of amendment as embodied by these different procedures means that the Canadian constitution explicitly contemplates fundamental reforms. For example, changes to language rights, the composition of the Supreme Court, or the office of the Queen, as noted above, are just some of the issues listed under the unanimity procedure. It is difficult to see how such changes—explicitly identified by the constitutional text as potential matters for amendment—are somehow incompatible with the constitution. The office of the Queen’s entrenchment under the unanimity procedure is particularly noteworthy in the context of this analysis. The provision’s inclusion in section 41(a) followed a failed effort by the federal government in 1978 to pass Bill C-60, which would have made the governor general the head of state and executive power, retaining the Queen but without any formal constitutional role.¹² Recognition of the office of the Queen was meant to entrench the monarchy short of the unanimous agreement of the Parliament and all ten provincial legislative assemblies. In short, the constitution contains an explicit provision for ending the established monarchy in Canada. Such a constitutional reform clearly falls under the

¹² Philippe Lagassé, “Royal Succession and the Constitutional Politics of the Canadian Crown, 1936-2013” (2018) 107:4 Round Table 451 at 456.

ambit of Albert's dismemberment concept, but its legal legitimacy as an amendment under the Canadian constitution is unquestionable.

Canada's amending procedures are explicitly developed on the basis of thresholds, such that some matters are treated as more fundamental than others. Even the way the amending formula makes these substantive distinctions complicates Albert's amendment versus dismemberment distinction. An amendment to legally change the method of appointment for lieutenant governors, for example, would likely be regarded as an ordinary amendment under Albert's distinction, but under the amending formula it would require the unanimous approval of the provinces (the highest threshold). By contrast, electoral reform along the lines of New Zealand's—which Albert would consider constitutional dismemberment—can almost certainly be effected by Parliament alone under the unilateral procedure of section 44.¹³ Drawing the line is a difficult conceptual task. The normative and legitimacy implications of allowing courts to do so are addressed more fully in the next sections.

B. Basic Structure Doctrine

Where Albert's elaboration of constitutional dismemberment only implicitly raises the spectre of judicial invalidation of amendments, the development of basic structure doctrine by courts in several jurisdictions asserts it explicitly. Basic structure doctrine took hold perhaps most notably in India, where the Supreme Court would eventually limit the amending formula by rejecting or invalidating amendments that altered or removed core features of the constitution. The amending formula in the Indian constitution permits most amendments to the constitution via a vote of a simple majority of the two houses of Parliament (provided that at least two-thirds of the members of each house is present). Changes pertaining to certain matters must also be ratified by at least half the state legislatures. Notably, nothing in the constitutional text indicates that any of its provisions are unamendable.

¹³ Emmett Macfarlane, "Constitutional Constraints on Electoral Reform in Canada: Why Parliament is (Mostly) Free to Implement a New Voting System" (2016) 76 SCLR (2d) 399. For an alternative view, see Michael Pal, "Constitutional Amendment After the *Senate Reference* and the Prospects for Electoral Reform" (2016) 76 SCLR (2d) 377.

India's Supreme Court ruled in the 1967 case *Golaknath v. State of Punjab*¹⁴ that Parliament could not repeal any of the fundamental rights in the constitution. In response, Parliament introduced the Twenty-fourth Amendment, inserting a provision explicitly permitting Parliament to amend or repeal any provision of the constitution by way of the amending procedure. When inevitably challenged, a majority of the Court's justices determined that while Parliament was free to make amendments to any provision of the constitution, an amendment could not include changes to its basic structure or framework. Application of this doctrine in subsequent cases led the Court to rejecting and invalidating amendments, including the Twenty-fourth Amendment.

Albert writes that India's:

constitutional text conferred plenary amendment power on Parliament and the states, but the Court chose to restrict that power in its judgments. And the Constituent Assembly that created the constitution had chosen not to codify any unamendable rules but the Court has in its judgments imposed several unamendable norms, with no constitutionally codified referent for reformers to identify what is off limits.¹⁵

In effect, "the country's amendment rules have been altered without a formal amendment."¹⁶ It is difficult to see the developments in India as anything other than amendment of the constitution by judicial fiat.¹⁷ Variants of the basic structure doctrine have been applied in countries from Bangladesh to Belize,¹⁸ and Colombia to Taiwan,¹⁹ although it has been rejected in other jurisdictions, including France, Georgia, and Turkey.²⁰

¹⁴ *Golaknath v State of Punjab* (1967) AIR 1967 SC 1643, 1967 (2) SCR 762 (Supreme Court, India).

¹⁵ Albert, *Constitutional Amendments*, *supra* note 3 at 21.

¹⁶ *Ibid.*

¹⁷ Emmett Macfarlane, "Judicial Amendment of the Constitution" (2021) 19:5 Intl J Const L1894 [Macfarlane, "Judicial Amendment"].

¹⁸ Roznai, *supra* note 1 at 47–69.

¹⁹ Albert, *Constitutional Amendments*, *supra* note 3 at 153–56.

²⁰ Richard Albert, Malkhaz Nakashidze & Tarik Olcay, "The Formalist Resistance to Unconstitutional Constitutional Amendments" (2019) 70:3 Hastings LJ 639.

C. The Constituent Power

Limits on the amending power are justified largely on the basis of distinguishing between the constituent power to create or establish constitutions and the constituted power that confers or delegates the authority of amendment. In short, the assertion is that the amending power cannot be unlimited because the delegated power to amend usually rests with some institutional authority (be it the legislative or executive institutions and actors) rather than with the constituent power itself: the people. Even when the people themselves have a role to play in amendment procedures (for example, via a referendum), the amending power may not be completely unlimited. As Yaniv Roznai writes, the “notion that all powers originate from the people is now explicitly stated in various constitutions.”²¹ Roznai describes the core distinction between constituent and constituted power as follows:

Constituent power is the extraordinary power to form a constitution. In other words, it is the immediate expression of the nation, and thus its representative. It is independent of any constitutional forms and restrictions. On the other hand, constituted power is the power created by the constitution and is an ordinary, limited power, which functions according to the forms and mode that the nation grants it in positive law.²²

The place of the amending formula itself in relation to this distinction is highly contested. It is possible to conceive of the amending power as expressing the constituent power rather than framing it as an ordinary delegated one (as discussed below, Roznai refers to the constitution-making power as the primary constituent power and the amending power as a secondary constituent power). In a representative democracy, the people ultimately have control over amendments because the actors normally granted amending power by the constitution are themselves elected, thus:

amending a constitution, like constitution-making, is part of the people’s constituent power. Viewed in that respect, the amendment process serves as a mechanism for constitution-makers to share part of their authority with future generations so that every generation holds a part of this constituent power.²³

²¹ Roznai, *supra* note 1 at 106.

²² *Ibid.*

²³ *Ibid* at 111 [emphasis in original].

By contrast, theorists who view the amendment power as a constituted power may acknowledge it as a unique (*sui generis*) power, but one that is nonetheless limited by the constitution itself:

[i]f all power derives from the constitution, the amendment power is a constituted power just like the legislative, judicial, or executive powers. It is a constituted power with a special capability, but still a defined and limited one. For the reason that it is a legally defined power originating in the constitution, it cannot *ipso facto* be a genuine constituent power.²⁴

To some extent, this logic borders on tautology. Nonetheless, the distinction is certainly a conceptually valid one, and at the very least helps elucidate why a people are not ultimately and forever bound by an existing constitution – they have the power to tear it up and start anew.

The nuanced account of the constituent power posited by Roznai is particularly helpful in describing an amending formula's resemblance to the constituent power as along a spectrum. In Roznai's account, amendment procedures that incorporate popular input, whether through the establishment of special constituent assemblies or the use of referenda or special elections (as a deliberative supplement to institutionalized amendment processes) are closer to 'the people's' constituent power.²⁵

Nonetheless, the distinction is far more controversial when it is used to justify judicial enforcement of uncodified unamendability on substantive grounds. I explore these arguments in Part IV. First, any assessment of whether the constituent versus constituted power distinction translates into uncodified limits on constitutional amendment in practice as opposed to theory requires a contextual assessment of constitutional development in a given country. I turn to this task in Part III.

III. THE CONSTITUENT POWER IN CANADA AND THE RELEVANCE OF CONSTITUTIONAL PRACTICE AND HISTORY

It is no coincidence that the idea of uncodified unamendability first emerged in the context of revolutionary democracies like the United States and France. If the creation of a new constitution can only be authorized by the people, it should not be possible for actors with delegated constitutional authority to pass amendments altering the foundational

²⁴ *Ibid* at 112.

²⁵ *Ibid* at 175.

premises of the constitution. Nonetheless, early American thinkers were just as divided over this idea as contemporary scholars.²⁶

However theoretically relevant a distinction between the constituent and constituted powers might be—especially the idea that a populace unsatisfied with a constitution as established can rip it up and start over—as a practical matter it quite obviously does not resonate with the actual history and evolution of most constitutions. Indeed, the people as a distinct entity are never directly involved in constitution-making. At best, there may be assemblies or direct democracy initiatives designed to ensure their input is at the forefront. The experiences in some countries suggest that the constituent versus constituted power distinction is, in practice, virtually meaningless. This, I argue, is the case with Canada.

Canada's constitutional development is inextricably tied to its early colonial status. Elements of the Canadian constitution, from the Royal Proclamation of 1763 to the convention of responsible government, emerged prior to Confederation, and are directly inherited as products of the North American colonies' ties to the British Crown and Parliament. Confederation itself was hardly a grassroots democratic process. Representatives from the colonies of Canada, Nova Scotia, and New Brunswick ultimately agreed on a compact, in the form of the *British North America Act, 1867*.²⁷

Nova Scotia's entry into Confederation was particularly egregious from a constituent power perspective. There was overwhelming opposition among Nova Scotians to the union. As Donald Savoie writes, the Fathers of Confederation knew that their maritime counterparts had little choice but to agree to a deal. At the London Conference in 1866,

Macdonald insisted on few changes to the Quebec Resolutions and wanted to close the deal before Nova Scotia went to the polls. He knew that, failing this, it would kill Confederation. There were no minutes taken at the London Conference, and the media were deliberately kept in the dark... Anti-Confederation sentiments did not die in the Maritime region. They became widespread in Nova Scotia after the London Conference.²⁸

²⁶ *Ibid* at 39–42.

²⁷ *British North America Act, 1867* (UK), 30 & 31 Vict, c 3.

²⁸ Donald J Savoie, *Democracy in Canada: The Disintegration of Our Institutions* (Montreal & Kingston: McGill-Queen's University Press, 2019) at 59.

The Colonial Office in Britain had even replaced Nova Scotia's anti-Confederation lieutenant-governor with one who "knew how to execute orders."²⁹ In the first election after Confederation, Nova Scotians sent 19 members to Parliament, and all but one were anti-Confederation.³⁰

The creation of Canada is not a tale of constitution-making by the people. Nor, for that matter, is the story of the eventual entrenchment of the amending formula itself in the *Constitution Act, 1982*. The ultimate agreement in 1982 was the product of executive federalism and closed-door negotiations, including the famous "kitchen accord" that convinced seven of eight hold-out provinces to assent to the major constitutional reform.³¹ Indeed, as a final act of 'patriating' the Canadian constitution, entrenching a domestic amending formula, like most of the written components of the constitution before it, was the product of agreements by elected representatives.

To the extent that the constituent power is reflected in the creation of Canada's core constitutional documents, it is due to the fact that they were drafted by elected representatives. Yet this is equally true of the amending power, which the constitution vests in elected legislatures. The constituent power as a distinct entity is nowhere to be found in Canada's constitutional creation, or its continued evolution. Put differently, there is no practical difference between the constituent power and the constituted power in Canadian constitutional development. The amending formula empowers Parliament and the provincial legislative assemblies with the ability to make changes to the constitution. As noted in the previous section, the amending formula appears as a complete code for making changes. And it explicitly contemplates changes that are fundamental to the basic structure of the constitution, something that makes the introduction of basic structure doctrine contrary to the constitutional text itself.

The historical facts of Canada's constitutional development may be irrelevant for advocates of uncodified unamendability or its judicial enforcement. Importantly, as Albert notes,

²⁹ *Ibid* at 49.

³⁰ *Ibid* at 59.

³¹ Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004).

Constituent power is a sociological concept, neither a legal nor a moral one. In the eyes of constituent power – setting aside for now how we identify its exercise – the formal trappings of law are less important than political effectiveness and social acceptance. Where the political class recognizes the validity of a constitutional change and the people approve or acquiesce to it, that change may have a claim to legitimacy.³²

As noted, in some respects the 1867 compact in Canada fails to even meet this low bar. The appropriateness of invoking the concept of constituent power to justify judicial enforcement of uncodified unamendability is deeply questionable.

Nonetheless, the defences of judicial review of amendments on substantive grounds, where not explicitly provided for in the constitutional text, ultimately rests only in part on the theoretical distinction between the constituent and constituted power. Normative arguments in favour of judicial review, as explored in the next section, ultimately replicate the classic defences of judicial review in ordinary constitutional interpretation (such as in the context of federalism disputes or bills of rights). I argue that the extra-constitutional nature of judicial enforcement of uncodified unamendability cannot withstand normative scrutiny on such grounds. Where uncodified unamendability suggests that the constituted power, having been delegated the amending authority, can sometimes usurp the constituent power by passing amendments altering the fundamental nature of a constitution, I argue, to the contrary, that the adoption of a basic structure doctrine in the Canadian context would instead constitute a usurpation of the constituent power by the judiciary.

IV. JUDICIAL REVIEW ON BASIC STRUCTURE OR SIMILAR GROUNDS: JUDICIAL USURPATION OF THE CONSTITUENT POWER

In this section, I examine the normative defences for judicial enforcement of uncodified unamendability. I analyze a number of arguments stemming from Roznai's excellent account of unconstitutional constitutional amendments, including the separation of powers, rule and supremacy of the constitution, and political process failure. I then turn to potential responses to criticisms directed at judicial review of

³² Albert, *Constitutional Amendments*, *supra* note 3 at 72.

amendments. The section concludes with a very brief analysis of the Canadian jurisprudence on amendment and the likelihood of the courts adopting an approach to uncodified unamendability. It is worth noting that Roznai refers to uncodified unamendability as ‘implicit unamendability.’ Following Albert, I use the term uncodified unamendability throughout, as the more accurate of the two because, as I argue, no authority, not least of all the Canadian constitution, actually implies the existence of unamendable rules.

A. Normative Debates about Judicial Review and Uncodified Unamendability

Roznai argues that the separation of powers supports judicial review of constitutional amendment. Despite the fact that constitutions normally delegate amending authority to elected actors and institutions, there needs to be “a mechanism for determining if the amending authority surpassed its limits.”³³ He similarly notes that this is in keeping with the judicial role.³⁴ This is true, so far as a constitution itself lays out limits on the amending power. The Supreme Court of Canada has exercised its review function in the context of changes to its own eligibility rules³⁵ and potential amendments to the Senate³⁶. Yet this was properly limited to identifying which of the amending formula’s various procedures could bring into effect changes to these matters. In other words, thus far the Court has limited itself to enforcing the process requirements established explicitly by the constitution. While identifying which amending procedure is applicable for a particular change necessarily involves the courts in identifying the substantive matters addressed—and thus the distinction between procedure and substance is not so clear as some might suggest—what matters is the basis for judicial review of amendments. Is the court relying on textually-mandated limits according to proscribed procedures or is it wading into the content of the amendments based on some notion of implicit ‘fit’ with the existing constitution?

³³ Roznai, *supra* note 1 at 181.

³⁴ *Ibid* at 181–82.

³⁵ *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21.

³⁶ *Reference re Senate Reform*, 2014 SCC 32 [*Senate Reference*]. See also Emmett Macfarlane, *Constitutional Pariah: Reference re Senate Reform and the Future of Parliament* (Vancouver: UBC Press, 2021).

Thus, where Roznai's separation of powers argument may hold in the context of constitutionally-proscribed limits on the amending power, it cannot hold in the context of uncodified unamendability, which requires the invention of new doctrines to add substantive limits to the amending power that do not appear in the constitution. This is especially true in the context of an amending formula like Canada's, which explicitly contemplates amendments that might otherwise be considered 'contrary' to the existing constitutional identity. Roznai's assertion that "the existence of judicial review in order to control the constitutionality of amendments is essential for an effective distinction between primary and secondary constituent powers"³⁷ only serves to put the premise of an argument as its conclusion. If the Canadian courts were to justify intrusion into the substantive amending authority on this particular ground, they would be asserting a power based on a distinction that is simply not evident in historical or contemporary practice.

Arguments predicated on the rule and supremacy of the constitution are similarly unconvincing. While the initial logic—that government activities, including amendment activities, must be in accordance with the constitution³⁸—is immediately and intuitively compelling to legal ears, it is important to remember that uncodified unamendability is an extra-constitutional rule. Indeed, the enforcement of basic structure doctrine specifically requires courts to go beyond the constitution itself, as it rests on norms about the distinction between constitutional reform and constitution-making that the Canadian constitution, at least, does not contemplate. Judicial review of amendment processes or explicit substantive limits on the amending power are consistent with the rule and supremacy of the constitution, but judicial enforcement of uncodified unamendability actually runs contrary to it for this reason.

One the most important arguments against judicial review of constitutional amendments pertains to the subordination dilemma: courts, having been created and empowered by the constitution, should not be empowered to rule upon the validity of the constitution itself. To do so would be to assume control over the very authority to which they are subordinate. Roznai's answer to this particular challenge is to simply assert

³⁷ Roznai, *supra* note 1 at 181.

³⁸ *Ibid* at 182.

that the subordination dilemma “only arises if one conceives amendment powers as equivalent to primary constituent powers.”³⁹ He elaborates:

An analogy illustrating the distinction between constituent power and legislative power may elucidate this: in the ordinary exercise of judicial review, the acts of the ordinary lawmaker operating under the constitution are reviewed against the background provided by the constitution-maker. Similarly, a constitutional amendment adopted by the secondary constituent power may be reviewed against the background provided by the primary constituent power. In acknowledging the distinction between the primary and secondary constituent powers, it is possible to grasp that by exercise of the judicial review of constitutional amendments, the judiciary does not act in contradiction of the constitution, but as its preserver.⁴⁰

Yet the distinction elaborated this way misses a fundamental coinciding difference: the constitution explicitly provides for judicial review of ordinary legislative power. By contrast, judicial review of constitutional amendment in the context of uncodified unamendability or the basic structure doctrine manifests as the usurpation of a power the constitution does not confer. It requires the courts to deign to speak on behalf of the primary constituent power even when that very constitution-making authority grants control over amendments to other actors. In the Canadian context, where the amending formula appears as a comprehensive and complete code for amendments, from those minor in scope to those large and foundational, the courts’ enforcement of uncodified unamendability rests not just on extra-constitutional norms but results in their assuming the very role of the primary constituent power they would claim to be protecting.

This goes beyond the more simplistic criticism that judicial invalidation of amendments on the basis of uncodified unamendability is “undemocratic,” although it certainly would be. Indeed, Roznai’s response to more basic democratic arguments is that “[a]rguably, when the courts review amendments vis-à-vis the constitution’s unamendable principles, they are not acting in a completely counter-majoritarian manner, for they have the support of the high authority of the primary constituent power.”⁴¹

³⁹ *Ibid* at 187.

⁴⁰ *Ibid* at 188.

⁴¹ *Ibid* at 193.

Yet there is nothing to demonstrate this alleged support. Advocates of judicial review in the context of uncodified unamendability are simply asserting the courts can claim the position of the primary constituent power, even in the face of super-majoritarian support for amendments by elected representatives and institutions! In the context of ordinary judicial review, the fact that constitutions (usually) explicitly empower courts to exercise judicial review is at least a partial answer to the counter-majoritarian difficulty. In the context of uncodified unamendability in the Canadian case, the justification rests on an extra-constitutional, deeply theoretical, and ahistorical assertion that courts should speak for the primary constituent power. Roznai's nuanced account recognizes this, noting that, "facing silence regarding unamendability, a court's decision regarding a limited amendment power may only derive from judicial activism or daring."⁴² I suggest that this understates the judicial usurpation of power at stake, at least in the Canadian context. Indeed, the application of this sort of judicial power would amount to judicial amendment of the constitution.⁴³

B. Uncodified Unamendability in Canada?

How concerned should we be about the Canadian courts moving towards judicial review in the context of uncodified unamendability? There are two potential warning signs in the extant jurisprudence. First, the Court has elaborated on the concept of Canada having a 'constitutional architecture' or basic structure, although this concept is distinct from the basic structure doctrine already discussed. The Court's reference to the constitutional architecture concept is most fully articulated in its 2014 *Reference re Senate Reform* decision, where it notes that the "notion of architecture expresses the principle that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."⁴⁴ The architecture concept, according to the Court, means that amendments to the constitution are not limited to changes to the constitutional text. In the context of Senate reform, the Court applies the

⁴² *Ibid* at 209.

⁴³ Macfarlane, "Judicial Amendment", *supra* note 17.

⁴⁴ *Senate Reference*, *supra* note 6 at para 26, citing *Quebec*, *supra* note 9 at para 50.

architecture concept in a way that means any amendments altering the role of the Senate itself necessitate provincial consent under the general amending procedure (thus Parliament could not unilaterally introduce senatorial term limits or consultative elections under section 44 of the amending formula).

It is conceivable that the Court could one day extend the architecture concept to apply to proposed amendments that it perceives as striking at the core of the constitution's basic identity. Yet this would require a future Court to confront its own statement in the same decision that the amending formula is "the blueprint for how to amend" the constitution because it "tells us what changes Parliament and the provincial legislatures can make unilaterally, what changes require substantial federal and provincial consent, and what changes require unanimous agreement."⁴⁵ Even more importantly, the Court explicitly states that "amendments to the Constitution are not confined to textual changes. They [amendments] include changes to the Constitution's architecture."⁴⁶ In other words, the Court has explicitly recognized that structural or architectural changes to the constitution are indeed amendments, and that these amendments are made via the amending formula.

The second, and I argue more likely, path the Court might take to adopt judicial review in the context of uncodified unamendability is via application of the unwritten principles of the constitution. In fact, as noted above, the Court has already effectively altered the amendment rules by imposing a "duty to negotiate" on the partners of Confederation in the event a clear majority vote in favour of a clear question on provincial secession.⁴⁷ Albert writes that the Court "has positioned itself to invalidate an amendment that violates an unwritten principle of Canadian constitutional law."⁴⁸ The unwritten principles, which include federalism, democracy, constitutionalism and the rule of law, and the protection of minorities, might serve as independent constraints on amendments, allowing the Court to "judge the validity of any future amendment against

⁴⁵ *Ibid* at para 28.

⁴⁶ *Ibid* at para 27 [emphasis added].

⁴⁷ *Quebec*, *supra* note 9.

⁴⁸ Albert, "Theory and Doctrine", *supra* note 2 at 191.

the standards they set – and what satisfies the standards would be a matter for judicial determination.”⁴⁹

The Court’s specific application of the unwritten principles in the *Secession Reference*, however, does not automatically lead to uncodified unamendability. The reference should be read as heavily enmeshed in the specific issue of secession. Further, as Albert correctly notes, the duty to negotiate merely requires negotiations to take place in the event of a clear referendum result.⁵⁰ The negotiations themselves may not result in secession, and the Court emphasizes that it has “no supervisory role over the political aspects of constitutional negotiations.”⁵¹ More importantly, if secession did occur it could only occur via the amending formula, and the only pertinent question at that point is whether the general amending procedure or the unanimity procedure would be required.⁵² While one of the main outcomes of the reference was the Court’s ruling that Quebec could not secede unilaterally, this is a function of the amending formula itself rather than an argument from implicit norms or unwritten principle. The Court notes that a referendum process itself would have no legal effect. Instead, it would simply “confer legitimacy on the efforts of the government of Quebec to initiate the Constitution’s amendment process in order to secede by constitutional means.”⁵³

It would therefore take a further leap in judicial creativity—in fact, an unprecedented judicial power grab—to transform what the Court has already done with unwritten principles into formal recognition of uncodified unamendability. As I have argued here, I believe such a move would constitute an affront to the constitution as structured as well as to existing constitutional practice.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at 171.

⁵¹ *Quebec*, *supra* note 9 at para 100.

⁵² Kate Puddister, “The Most Radical Amendment of All’: The Power to Secede and the Secession Reference” in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016).

⁵³ *Quebec*, *supra* note 9 at para 87.

V. CONCLUSION

The preceding argument can be boiled down to this: judicial enforcement of uncodified limits on the amending power are contrary to the constitution itself and would represent judicial usurpation of the constituent power, the very power the courts would claim to be defending. Whatever theoretical and conceptual utility the distinction between constituent and constituted power might possess, it has neither any relevance for the law nor any meaningful role to play in Canada's historical or contemporary constitutional evolution.

As a result, the only way to characterize a potential future move by Canadian courts to enforce uncodified unamendability in any of the ways described in this analysis is as an unconstitutional act by the judiciary. This will sound odd—perhaps even impossible—to some legal thinkers. The judiciary's role is to interpret and uphold the constitution. How can doing so be unconstitutional? The answer presented in the preceding analysis is that the invocation of uncodified unamendability is not an act of interpretation. It is not a power the courts enjoy under the Canadian constitution. It is perhaps judicial amendment of the constitution itself, although even that notion is one that is difficult to distinguish from ordinary judicial interpretation of the constitution,⁵⁴ something beyond the scope of this paper. The term unconstitutional is fitting because judicial usurpation of the amending authority runs directly counter to the constitution as entrenched.

This is a much deeper institutional problem than those reflected in ordinary debates about “judicial activism” or judicial power in relation to the established role of courts in constitutional matters. One of the primary responses to the counter-majoritarian difficulty created by judicial review is that ultimately, while courts may be perceived as having the final word on matters of interpretation, they do not have the final word on the constitution itself. If there is a deep and broad enough consensus that the courts have misinterpreted or misapplied the constitution, the political community can amend the constitutional text and assert the constitutional values, processes, institutions, or meaning that society desires. Uncodified unamendability upends this crucial, foundational idea. Rather than being justified as protecting the constituent power, the power to declare

⁵⁴ Macfarlane, “Judicial Amendment”, *supra* note 17.

constitutional amendments unconstitutional on such grounds in fact represents an attack against it.