Institutional Design and the Politics of Constitutional Modification: Understanding Amendment Failure in the United States and Canada

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This article examines the recent failure of formal constitutional amendments in the United States and Canada by closely analyzing the institutional environment in which constitutional modification takes place. I focus first on the instrumental objectives of constitutional reform to develop an institutional design model of constitutional modification and identify the structural factors that affect the level of controversy generated by proposed amendments. I then revisit the failed ratification of the Equal Rights Amendment to demonstrate more explicitly how these institutional factors affected the amendment's fate. Finally, I extend the analysis by undertaking a comparative case study of the recent politics of constitutional modification in Canada. In particular, I focus on the failure of comprehensive constitutional change between 1987 and 1992. I argue that the same institutional design model, which focuses on *institutional rigidity, interpretive flexibility,* and *litigation potential,* enhances our ability to understand both the U.S. and Canadian cases of amendment failure.

In her 1986 study of the unsuccessful effort to ratify the Equal Rights Amendment (ERA), Jane Mansbridge observed that "[n]o really controversial amendment has passed since Prohibition was repealed" (Mansbridge 1986:29). At first glance, this description of the ERA as a controversial amendment destined to fail is somewhat counterintuitive. To begin with, there was nothing particularly novel about the amendment. It had been on the political agenda since the 1920s, and during its long political gestation women's rights advocates had overcome initial opposition to build a supportive coalition that included labor unions, progressive organizations, and every president from Harry Truman to Jimmy Carter. In addition, there was nothing obviously radical about either the principle or the text of the ERA. It was broadly consistent with the Fourteenth Amendment's equal protection

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clause and with the prohibition of sex discrimination found in Title VII of the 1964 Civil Rights Act. Indeed, although not without its critics, even in the women's movement itself (Freeman 1975:80, 98, 171), the ERA passed both houses of Congress by large margins in 1972,[1] and it was ratified by 30 of the required 38 states within one year of having been proposed. Nevertheless, despite congressional extension of the deadline for ratification, the ERA died in 1982 and has not been resubmitted to the states in any form.

The rapid decline in the fortunes of the ERA poses an intriguing puzzle for analysts of constitutional politics. In this article I use this puzzle as a means of developing a systematic explanation for amendment failure that can be generalized to other cases both inside and outside the United States. Mansbridge's (1986) own solution to the ERA puzzle provides a starting point for the development of this explanation. In her view, the ERA became controversial when its opponents began to emphasize the possibility that federal judges, in their capacity as constitutional interpreters, might use the amendment to effect "major substantive changes" in public policy (pp. 27–29). An important implication of Mansbridge's explanation is that institutional factors, such as the fact that both formal amendment and judicial interpretation are important modes of constitutional modification in the United States, had as much to do with the ERA's failure as the political skills of the participants in the ratification debate or the general climate of opinion regarding gender equality claims.

I pursue this implication of Mansbridge's explanation of the ERA's failure here by closely examining the institutional environment of constitutional modification. First, by focusing on the instrumental objectives of constitutional reform, I develop an institutional design model of constitutional modification in order to identify the structural factors underlying the level of controversy generated by proposed amendments. Second, I revisit the ERA puzzle in order to demonstrate more explicitly the institutional factors that led to its failure. Finally, I extend the analysis by examining the recent politics of constitutional modification in Canada. In particular, I focus on the failure of comprehensive constitutional change between 1987 and 1992. I argue that the same institutional design model explains both the U.S. and Canadian cases of amendment failure, despite the obvious differences in the scope of these proposed amendments.

[1] The vote was 354–23 in the House of Representatives and 84-8 in the Senate.

An Institutional Design Model of Constitutional Modification

Constitutions provide the basic institutional framework of formal procedural and substantive rules within which political actors must operate. These rules impose constraints on political behavior, and these constraints operate systematically to favor particular sets of outcomes over others. In this sense, the politics of constitutional modification can be conceptualized as a competitive game of institutional design in which the objective is to alter the range of possible policy outcomes by modifying existing rules (Tsebelis 1990:92–118).[2] From this perspective, constitutional modification is an instrument for changing the dynamics of political power and altering the status of competing interests. Constitutional rules, in other words, can be conceptualized as valuable legal resources that state-based actors distribute, and for which society-based actors compete, to serve their broader objectives. In the politics of constitutional modification relevant actors must decide to pursue a strategy of constitutional modification, determine which rules to modify, and choose how to implement their strategies.

The primary objective here is to explain how the institutional structure of constitutional modification affects the level of policy uncertainty generated by amendment proposals. Three institutionally based variables form the core of this explanation: *institutional rigidity, interpretive flexibility,* and *litigation potential.* I argue that these variables operate together to reduce the capacity of political actors to predict and control the specific policy consequences of the constitutional rules contained in proposed amendments. The unpredictability and lack of control create uncertainty among these actors about the policy impact of constitutional modification, which serves to heighten the level of controversy surrounding amendment proposals. Before examining how these variables interact, it is necessary to discuss each of them in turn.

Institutional Rigidity

At the *macro* level, constitutional modification takes place through formal amendment, which is characterized by political bargaining conducted according to the constraints derived from the formal rules of the amending process. Institutional rigidity simply refers to the complexity of this formal amendment proc-

[2] To be sure, not all institutional design modification takes place at the constitutional level. For example, changes in the internal operating rules of decisionmaking bodies, like legislatures or courts, are also a form of institutional redesign. Constitutional-level institutional design is a particularly powerful form of rule modification because it is relatively difficult to reverse once accomplished, and its impact reverberates throughout lower-level (subconstitutional) rules.

ess. Lutz (1994), for example, suggests that formal amendment procedures can be arrayed along a spectrum ranging from a highly flexible rule of simple legislative majority to a very rigid and complex process involving multiple legislative paths and the requirement of ratification by popular referendum. Institutional rigidity affects the probability of successfully implementing formal constitutional amendments in two ways. First, and most obviously, the procedural complexity of an institutionally rigid amendment process makes the barriers to formal modification exceptionally high. In addition, however, institutional rigidity enhances policy uncertainty by increasing the costs of miscalculating the impact of proposed amendments. The difficulty of implementing amendments in the first instance means that it will also be difficult for either state- or society-based actors to remedy the unanticipated negative consequences of successful amendment through a formal "counter-amendment." As a result, the politics of formal constitutional modification becomes a set of discrete, zero-sum games. Institutional rigidity thus suppresses the incentive, which is common in the more fluid legislative process, of competing groups to compromise on their demands in order to form and maintain policy coalitions. This exacerbates the level of conflict over, and the controversy surrounding, formal amendment proposals. Moreover, institutional rigidity provides amendment opponents with the means to defeat the proposal.

Although institutional rigidity significantly reduces the frequency of formal amendment, it does not obviate the basic necessity of periodic modification in every constitutional system. In stable constitutional systems characterized by both institutional rigidity and the doctrine of constitutional supremacy, the most common alternative to formal amendment is modification through judicial interpretation (Lutz 1994:364). This mode of modification tends to reinforce constitutional supremacy because of the assumption that courts simply discover and reveal the previously hidden meaning of constitutional language. Consequently, judicial interpretation presents itself as less a modification or alteration of a constitution than as the perfection of constitutional understanding. At the *micro* level of constitutional politics, therefore, rule modification occurs through the interpretive practices triggered by constitutional litigation. This leads to a discussion of the second and third variables that influence policy uncertainty and amendment controversy.

Interpretive Flexibility

Interpretive flexibility refers to the capacity of a constitutional rule to support a wide range of meaning. This capacity is largely a function of constitutional language, which, according to

Griffin (1995:40), varies by rule type. Constitutive rules, which are "phrased in general terms and have the potential to influence a wide variety of policy outcomes," are the most interpretively flexible type of rule. The generality of the language used to formulate constitutive rules supports an indeterminate range of meaning and policy outcomes. By contrast, regulative rules, which are "generally indistinguishable in form from the rules contained in ordinary legislation," affect "a limited set of policy outcomes." Less ambiguity in language, in other words, provides less latitude for judicial interpretation. Finally, interpretive flexibility can be affected by interpretive rules, which provide instructions about the range of possible meanings that may be attached to constitutive or regulative rules.

Interpretive flexibility has a dual impact on the political dynamics of constitutional modification. On the one hand, it allows the proponents of constitutional change to conceal their ultimate policy objectives behind a veil of linguistic ambiguity. On the other hand, their opponents can exploit that ambiguity by exaggerating the likely policy impact of the rule. In the final analysis, however, interpretive flexibility contributes to uncertainty because ambiguous constitutional rules promote policy indeterminacy. Of course, interpretive flexibility matters most where constitutional litigation is a common practice.

Litigation Potential

The general objective of constitutional litigation is to institutionalize specific policy preferences by manipulating and transforming existing constitutional rules without the constraints imposed by the formal amendment process. The potential of any constitutional rule to generate litigation is a function of three factors. First, there is a close relationship between interpretive flexibility and litigation potential. The ambiguous nature of highly flexible constitutive rules virtually guarantees litigation will be necessary to clarify their meaning. Second, the potential to exploit constitutional litigation to institutionalize policy preferences is enhanced by the extent to which a rule provides opportunities for rights-based litigation. This type of constitutional litigation allows individuals and groups to articulate their policy demands in the language of a particularly powerful constitutional claim that can be deployed continuously in future legal and political confrontations. Indeed, successful rights-based constitutional claims require state actors to respond, and such claims are extremely difficult to reverse.

Finally, the litigation potential of a constitutional rule depends on the existence of political actors with the capacity to exploit rights-based litigation opportunities. There is, in other words, an important difference between constitutional litigation

for institutional design purposes and litigation in which constitutional issues are raised tactically to win specific disputes. Litigation potential thus depends on the existence of systematic litigants, who are distinguished by their interest in the long-term development of legal rules and their possession of significant political and legal resources (Galanter 1974; Olson 1990). These resources include diffuse financial support, access to legal expertise, and longevity (Scheppele & Walker 1991:161–68). The existence of systematic litigants in a policy area broadly affected by a proposed constitutional amendment contributes to uncertainty by increasing the probability that the rule will generate unexpected policy consequences as a result of litigation and judicial interpretation.

Institutional Structure and Amendment Controversy

How do the institutional variables outlined above increase the likelihood of amendment controversy? The combined impact of institutional rigidity, interpretive flexibility, and high litigation potential increases policy uncertainty by deeply entrenching constitutive rules whose future meaning and impact are subject to the dynamics of constitutional litigation. Indeed, the very features of a constitutional amendment that are attractive to its sponsors—indeterminate language that facilitates the use of litigation to generate a wide range of specific policies that will be difficult to reverse—are precisely what motivate the establishment of opposition. Under these conditions, political actors have a strong incentive to mobilize against proposed amendments in order to prevent unfavorable policy outcomes. At a minimum, this opposition will take the form of interpretive rule demands, which are designed to limit the maneuverability of judicial decisionmakers. These demands are likely to be contentious and to meet resistance from the initial sponsors of an amendment.

Thus, where constitutional actors are faced with an attempt to add an interpretively flexible amendment with high litigation potential to an institutionally rigid constitution, the likelihood increases that the politics of constitutional modification will generate a degree of controversy under which the process may collapse. In an important sense, this dynamic is a byproduct of the interaction between the macro-level constitutional politics of formal amendment and the micro-level constitutional politics of litigation and judicial interpretation. In the sections that follow, I employ this institutional design model to examine recent cases of amendment failure in the United States and Canada.

Institutional Design and the Constitutional Politics of the Equal Rights Amendment

The utility of an institutional design model for explaining the failure of the ERA rests on the less than self-evident proposition that the amendment represented an attempt to secure comprehensive policy change through constitutional modification. Indeed, one could easily characterize the ERA as simply an incremental supplement to existing constitutional and statutory guarantees of gender equality at the national and state levels. Although there is undoubtedly an element of truth in such a characterization, it understates the importance of a proposed amendment that represented the culmination of a 50-year struggle by the women's movement.

The key to understanding the ERA's comprehensiveness is the fact that it would have transformed gender equality from a mere policy interest into a regime principle similar, if not equivalent, to racial equality. More precisely, the ERA would have conferred constitutional status on women as a group, which would have permitted them to "stake preferential claims on the political resources of the state or on the political process itself" (Brodie 1996:253). In operational terms, this new constitutional status would have strengthened the women's movement's claim that gender classifications—like those based on race—should be considered inherently suspect and reviewable under the virtually fatal strict scrutiny standard. Consequently, as the U.S. Supreme Court recognized in *Frontiero v. Richardson* (1973), one important objective of the ERA was to overturn an existing principle of constitutional law. In this sense, the ERA would have effected a substantive change to the United States' institutional framework, and may thus be reasonably characterized as comprehensive.

Similarly, to the extent that supporters of an equal rights amendment were motivated historically by a desire to reverse public policies considered detrimental to the interests of women, they could be said to be pursuing a dynamic change in the political power and status of women (Berry 1986; Boles 1979; Steiner 1985). Moreover, given women's disadvantages in the ordinary political process, especially during the early years of the ERA campaign, constitutional modification was a logical strategy for women's rights advocates. In the early 1920s, this strategy focused on attacking protective labor legislation that shielded women from allegedly deleterious working conditions and thereby excluded them from many jobs and professions. For almost two decades, a coalition of unions, progressive organizations, and social conservatives blocked proposed amendments, despite the willingness of equal rights advocates to attach regulative and interpretive rules to those proposals that would have limited the rules' impact on special benefits for women workers. Neverthe-

less, concerns about the policy implications of these proposed amendments proved to be the principal barrier to adoption.

In the 1960s, judicial interpretation of the 1964 Civil Rights Act mitigated these early concerns by rendering the question of gender-specific protective measures moot (Mansbridge 1986:10). Although this allowed the National Organization for Women (NOW) to enlist the support of unions and other liberal political organizations for the 1972 ERA, it did not alter the amendment's objectives. While Mansbridge (p. 36) has argued that the ERA would not have produced real, short-term changes in women's lives, this did not prevent NOW from articulating several benefits that could flow from the ERA. The most significant material benefit stressed by NOW was a reduction in the wage gap between men and women. More plausibly, as suggested above, ERA supporters argued that it would redistribute constitutional status in a way that would support ongoing constitutional litigation. Third, as Laurence Tribe argued in 1978, the ERA would have enhanced the position of gender issues on the national political agenda by removing any doubts about the extent of Congress's power "to proscribe various forms of sex discrimination" (Tribe 1978:1975). Finally, and perhaps most imprudently, NOW suggested that the ERA would alter defense policy and reduce differences between male and female roles in the U.S. military.

The ERA thus entered the ratification process with at least the pretense that it would provide a comprehensive change in the power and status of women. Indeed, this was a significant element of the amendment's symbolic value, which played an important role in mobilizing activists who were unwilling to expend energy on anything less than fundamental constitutional reform. Unfortunately for ERA supporters, these characteristics also served eventually to mobilize opponents, who were able to exploit the institutional structure of the amendment ratification process to defeat the proposal.

Institutional Design and the Failure of the ERA

The most obvious starting point for any institutional account of the ERA's failure is the fact that the United States has one of the most rigid formal amendment processes of any national constitution (Lutz 1994:363–64). The most common and frequently used amendment strategy of the two established by Article V of the U.S. Constitution relies on a process characterized by legislative complexity (in which amendments must be proposed by two-thirds of both houses of Congress) and ratification through a device similar in principle to approval by popular referendum (in which amendments can be defeated by a negative vote in only 12 of 99 state legislative chambers). This institutional rigidity is evident in Lutz's finding that the United States had the third lowest

formal amendment rate (0.13 amendments per year) among the 32 nations in his 1994 study. In addition, Lutz also found that the mean annual amendment rate of the more institutionally flexible U.S. state constitutions (1.23 amendments per year) was almost 10 times that for the national constitution (Lutz 1994:367). Moreover, Lutz's finding may actually understate the institutional rigidity of the amendment process, since it counts separately each of the 26 amendments that had been ratified by the time of his study. However, if the 10-amendment package approved in 1791 and the 3 Reconstruction amendments added between 1865 and 1870 are considered as 2 rather than 12 amendments, the formal amendment rate drops to 0.07 per year.

The institutional rigidity of the U.S. national constitution clearly sets high barriers to the adoption of even the most incremental and policy-neutral amendments. These barriers become even higher, however, when comprehensive and potentially redistributive proposals are at issue. This is because institutional rigidity makes it extremely difficult, if not entirely impossible, to reverse the policy consequences of particular amendments through subsequent formal counter-amendments. Indeed, formal amendment has not been a particularly practical response to perceived judicial misinterpretation and misapplication of constitutional provisions, having been successful on only four occasions, including once during the special circumstances provided by Reconstruction (O'Brien 1990:362–63). More significantly, the repeal of Prohibition in 1933 is the only occasion on which the adverse policy consequences of one amendment were directly reversed by a subsequent amendment. By making it difficult formally to correct inaccurate judgments about an amendment's policy impact, institutional rigidity heightens the uncertainty surrounding amendments to the national constitution. This has the effect of mobilizing latent opposition by providing an incentive, as well as the institutional means, to prevent ratification in the first instance. This is clearly what occurred in the case of the ERA.

Institutional rigidity is not, however, an absolute impediment to formal amendment. Indeed, only one year before Congress proposed the ERA, the states took only four months to ratify the Twenty-Sixth Amendment, which extended the franchise to a new group of young, and generally more liberal, potential voters. The ERA faced not only the institutional rigidity barrier but also the burden imposed by the degree to which it shared a second institutional feature of American constitutionalism: interpretive flexibility. This characteristic, which is undoubtedly a logical consequence of institutional rigidity, stems from both a tendency to write constitutional provisions in broad, indeterminate language and from the willingness of courts to exercise judicial review actively to generate policy-specific rules from those provisions. In-

terpretive flexibility in this second sense has increased markedly since the U.S. Supreme Court decided the landmark *Brown v. Board of Education* (1954) case. Indeed, between 1803 and 1953, the Court overturned, on average, fewer than 1 act of Congress and 3 state laws each year. By contrast, since 1954 the Supreme Court's judicial nullification rate has increased about three-fold to almost 2 acts of Congress and 11 state laws per year (O'Brien 1990:60). Thus, beginning in the 1960s, litigants have taken advantage of judicial openness to the interpretive flexibility of the Constitution's text to persuade federal courts to participate actively in shaping and administering policy in areas such as zoning and land-use planning, housing, social welfare, transportation, education, and the operation of complex institutions like prisons and mental health facilities (Yarborough 1985:660).

While interpretive flexibility may mitigate the effects of institutional rigidity by broadening the opportunity for constitutional modification outside the formal amendment process, it also enhances policy uncertainty by allowing courts to extend formal rules in unexpected directions. The ERA's proponents faced this obstacle because the amendment emerged from Congress against the background of a relatively active federal judiciary and with an indeterminate text ("Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex") unconstrained by regulative or interpretive rules. Indeed, ERA supporters rejected several attempts in Congress—during both the proposal stage and ratification period—to exclude certain policy consequences through the application of such rules.[3]

This interpretive flexibility proved to be a key factor in the mobilization of ERA opposition following the Supreme Court's abortion decision (*Roe v. Wade*) in late January of 1973. For abortion opponents, the ERA became particularly problematic after *Roe* because the amendment might have been interpreted as providing a more solid constitutional foundation for the right to abortion, which would have hampered legislative efforts by the pro-life movement to limit the impact of *Roe* (Steiner 1985:63–66). In addition, the ERA made further "feminist" constitutional gains possible: If the Court could extract a right to abortion from existing constitutional language, ERA opponents asked, what will it do with an amendment that directly entrenches the vision of gender equality embraced by the National Organization for Women? The interpretive flexibility of the

[3] It is possible, of course, that courts might have used the *Congressional Record* of 1971–72 to discern implicit limitations on the range of acceptable interpretations of the ERA. However, this would have required that ERA supporters accept, and opponents put their faith in, judicial interpretation according to framers' and/or ratifiers' intent. Given how controversial this theory of interpretation was in the mid-1980s, it is difficult to believe that it would have had much impact on assessments of the ERA's potential meaning in the early 1970s.

ERA's text, along with the general atmosphere of judicial activism epitomized by *Roe*, made the amendment's policy impact uncertain indeed.

The final institutional factor that accounts for the ERA's failure is its litigation potential. Characterized by an interpretively flexible text, the ERA articulated a potentially powerful individual right at a time when the proportion of the Supreme Court's docket dedicated to rights-based litigation had almost quadrupled from 10% to 36% (O'Brien 1990:246). It was also a period during which the women's movement had begun to deploy litigation strategically to advance its policy agenda (O'Connor 1980). As indicated above, a principal objective of this strategy was to define sex as a "suspect classification" under the Fourteenth Amendment's equal protection clause. The ERA could have advanced this strategy, the effect of which would have been to ensure that gender classifications could only be upheld if *necessary* to achieve a *compelling* state interest. At a minimum, as Laurence Tribe pointed out in the midst of the ratification struggle, the ERA "would add to our fundamental law a principle under which the judiciary would be encouraged to develop a more coherent pattern of gender-discrimination doctrines" (Tribe 1978:1075). The ERA's utility in achieving the policy objectives of the women's movement had also been outlined in some important law review articles (Brown et al. 1971; Yale Law Journal 1973), which is a common tactic in interest group litigation campaigns (Vose 1959:68–71, 161; Kluger 1977:315–21). However, rather than clarify the ERA's future policy impact, the general link between the amendment and feminist legal activism strengthened opponents' arguments about its potentially radical policy implications in the eyes of some state legislators.

Although Tribe correctly argued that uncertainty about the precise policy impact of the ERA was insufficient to "negate the case for the amendment" (Tribe 1978:1076), this uncertainty *was* sufficient to render the positive case less persuasive over time. The uncertainty itself derived from the general institutional rigidity of the national amendment process and from the interpretive flexibility and litigation potential of the ERA itself. As a result, a proposed amendment broadly consistent with the U.S. tradition of rights-based discourse generated a controversial debate about abortion, women in combat, and unisex toilets. As a constitutive rule, there was nothing particularly controversial about the principles underlying the ERA. The controversy was really about the regulative policy rules the ERA might generate, rules that institutional factors made difficult to predict and virtually impossible to reverse. This combination of forces caused risk-averse legislators to oppose ratification in sufficient numbers that certain approval ultimately collapsed into final rejection.

The ERA thus became fatally controversial because the institutional design of the constitutional modification process generated significant policy uncertainty and provided ERA opponents with the means to exploit that uncertainty. In the next section, I explore the generalizability of this explanation by examining whether similar institutional design factors can account for recent amendment failures in Canada. The reasons for selecting this case are both methodological and empirical. First, although obviously different in several important respects, Canada and the United States are liberal-democratic, federal political systems that share similar legal regimes.[4] Consequently, the Canadian case narrows the range of system-level differences that might affect the application of the institutional design model. Second, gender equality was an integral part of the politics of constitutional modification in Canada during the period of failure under consideration. In particular, equality rights provisions were a key element of the 1980–81 constitutional modification package, and it was a perceived threat to the substantive policy gains provided by those provisions that motivated a significant element of opposition to the 1987 and 1992 packages. Thus, although the failed amendment packages that constitute the Canadian case were broad-ranging sets of proposals about the division of political power in Canada, it is possible to focus on gender equality to reach a more general understanding of the institutional factors affecting constitutional politics.

The Politics of Amendment Failure in Canada

More than any other advanced, liberal-democratic regime, Canada's recent history has been dominated by the politics of comprehensive constitutional modification. Indeed, between 1980 and 1992, Canada undertook three successive attempts to reconfigure its institutional framework through formal constitutional amendment. Although characterized by acrimonious intergovernmental negotiations, lengthy parliamentary hearings, a controversial Supreme Court decision, and profound opposition in Quebec, the first attempt succeeded in 1982 in modifying Canada's constitution to include a domestically controlled amending formula and a judicially enforceable Charter of Rights and Freedoms (Romanow, Whyte, & Leeson 1984). The second effort produced the 1987 Meech Lake Accord, which attempted to ameliorate the perceived shortcomings of the 1982 modifications by recognizing Quebec as a distinct society and including a revised amending formula and important provisions concerning immigration policy, Supreme Court appointments, and federal spend-

[4] There are, of course, differences in the legal regimes of the respective countries. However, the evidence suggests that these differences are narrowing (Manfredi 1997).

ing powers. Despite initial public support (56% approval), unequivocal ratification by the federal House of Commons (242–16), and ratification by 8 of 10 provinces within the first 12 months of the ratification process, the Meech Lake Accord could not be ratified by its June 1990 deadline (Monahan 1991:290–92).

Convinced that Meech Lake failed because it emerged from a closed negotiation process that focused too narrowly on Quebec's concerns, Canadian political leaders changed tactics by making the process of framing constitutional amendments more participatory and by providing for ratification by popular referendum. The federal government issued a new set of constitutional reform proposals in September 1991. Containing 28 separate recommendations, these proposals covered 8 principal subjects: the nature of Canada, Quebec as a distinct society, changes to the Charter, aboriginal self-government, senate reform, the Supreme Court, economic union, and the division of powers. The task of gathering public reaction to the proposals was delegated to a committee supplemented by five constitutional conferences. The committee met for two weeks in closed-door session to produce a 125-page report recommending changes to all the federal proposals.

The final step in the process was a meeting of First Ministers and Territorial and Aboriginal leaders at Charlottetown in August 1992. The *Consensus Report of the Constitution* issued after that meeting dealt with six issues: unity and diversity, social and economic union, parliamentary reform, the federal division of powers, aboriginal self-government, and the constitutional amendment process. Despite the efforts at public consultation, and the Charlottetown Accord's attempt to address concerns raised by a wide range of political actors, Canadian voters rejected it by a significant margin.[5]

Although the amendment failures of 1987–92 have been the subject of important analyses (Simeon 1990; Monahan 1991; Breton 1992; McRoberts & Monahan 1993; Cook 1994; Lusztig 1994), the institutional design model provides two additional insights into this unsuccessful period of constitutional modification. First, it supplies a useful way of analyzing the general changes in institutional design that made it difficult for Canada to replicate the relative success of 1980–82. Second, by examining the effect of these changes through the lens provided by the constitutional politics of gender equality, the model provides insights into the specific political dynamics that led to the demise of the Meech Lake and Charlottetown Accords. I turn now to these two tasks.

[5] Voters in 7 of 12 provinces and territories rejected the Accord. Overall, 55.1% of voters rejected the Accord.

Institutional Change and Amendment Failure

Before 1982, the absence of specific, written rules made the formal amendment process in Canada quite flexible institutionally. Indeed, the process was so flexible that it took a series of three Supreme Court decisions in the early 1980s to establish even the basic legal framework governing formal amendment.[6] As a result, despite the inability of political leaders to agree on a domestic amending formula, Canada formally amended its constitution several times between 1870 and 1982 (Manfredi & Lusztig 1996). Moreover, the constitution continuously evolved through the emergence and development of various informal constitutional conventions (Heard 1991). The key to this institutional flexibility was the practice of negotiating amendments among federal and provincial government leaders through a closed process of elite accommodation known as executive federalism. Indeed, although not without its contentious moments, this process ultimately produced the successful constitutional agreement of 1982.

As in the United States, the indeterminate language of constitutive rules and the practice of judicial review combined to generate interpretive flexibility. The most explicit statement of this flexibility is found in a 1930 decision by the Judicial Committee of the Privy Council (JCPC) that "the B[ritish] N[orth] A[merica] Act planted in Canada a living tree capable of growth and expansion within its natural limits" (*Edwards v. A.-G. Canada* 1930:136). Canadian judges also found sufficient flexibility in these constitutive rules to extract an "implicit" bill of rights from the constitution even in the absence of specific protection for individual rights like freedom of speech and the press (Hogg 1992:774–77). Although interpretive flexibility did produce some unexpected policy consequences, especially with respect to federal and provincial powers, its political impact was mitigated by the institutional flexibility of the amendment process. Indeed, the available evidence suggests that federal and provincial governments have been reasonably adept at adapting to adverse constitutional interpretations, as they did in 1940 by amending the constitution to transfer jurisdiction over unemployment insurance to the federal government (Monahan 1987:221–44).

The political impact of interpretive flexibility was also constrained by the relatively low litigation potential of pre-1982 constitutive rules. With constitutional litigation focused on federalism issues, the most that interest groups could achieve from litigation was the indirect, and often temporary, benefit of a redistribution of power between levels of government. The low political utility of constitutional litigation is reflected in the fact

[6] *Reference re Legislative Authority of Parliament to Alter or Replace the Senate* 1980; *A.-G. Manitoba v. A.-G. Canada* 1981; *A.-G. Quebec v. A.-G. Canada* 1982.

that constitutional cases represented only 2.4% of the Supreme Court's decisions from 1962 to 1971, a proportion that increased to a still low 5.5% between 1972 and 1981 (Monahan 1987:21). Nor was litigation potential enhanced by the adoption of a quasi-constitutional Bill of Rights in 1960. Indeed, between 1960 and 1981 only 34 Bill of Rights cases reached the Supreme Court, and only 5 of these were successful (Russell 1987:343).

The litigation utility of the Bill of Rights was diminished by two key factors. First, and most obviously, the bill lacked constitutional status, which weakened any claim that it could be used legitimately to nullify legislation or impose policy obligations on government. Second, its recognition of rights and freedoms that "have existed and continue to exist" discouraged judicial creativity in the definition and enforcement of civil liberties. This second factor, in particular, signaled to potential litigants that the bill would not be an effective tool for altering policy (Manfredi 1993:32–33).

The comprehensive constitutional modification project of 1980–82 thus took place against an institutional background in which two of the determinants of policy uncertainty (institutional rigidity and litigation potential) were in large measure absent. Nevertheless, the package of reform proposals contained in this project was sufficiently controversial that eight provinces engaged for more than one year in political and legal maneuvering to block the project. The principal source of controversy was the policy uncertainty generated by the proposed Charter of Rights and Freedoms, which was the subject of parliamentary hearings in early 1981. During those hearings, the federal government sought to generate societal support for its efforts by inviting key interest groups to participate in the construction of the Charter, and these groups responded by pressing for "a charter with terms which were as broad and potent as they could be" (Romanow et al. 1984:248). This demand proved politically easy to satisfy, and the result was a new set of interpretively flexible substantive rights that created an unprecedented opportunity for interest groups to pursue their policy objectives in the micro-constitutional arena of Charter-based litigation. Indeed, had the constitutional modification project of 1980–82 been subject to a ratification process any less flexible than that ultimately specified by the Supreme Court in September 1981, it is possible that it might not have survived the policy uncertainty it generated.

The relative absence of interpretive rigidity permitted the project to succeed, however, for several reasons. First, by declaring that the *legal* rules of formal amendment in Canada were so flexible that the federal government could proceed unilaterally, the Supreme Court diluted any veto power that the blocking coalition of provinces might expect to exercise. Second, by also declaring that the *conventional* rules of formal amendment required

substantial provincial consent, the Court negated the political legitimacy of any unilateral move by the federal government. The overall impact of this definition of the formal rules of amendment was to force the parties back to the bargaining table, where institutional flexibility permitted the entrenchment of a regulative rule that would allow governments to control the policy impact of Charter litigation.[7] Ultimately, only Quebec refused to agree to the comprehensive constitutional modification embodied in the Constitution Act, 1982.

Although the litigation potential inherent in the Charter of Rights and Freedoms enhanced the policy uncertainty of the modifications proposed between 1980 and 1982, the institutional flexibility of the formal amendment process provided an instrument for managing the conflict generated by that uncertainty. Thus, in the final analysis, the flexible rules and process of executive federalism produced comprehensive constitutional modification in 1982. Consequently, this was the process adopted during the 1987–90 period, and it functioned reasonably well in generating the Meech Lake Accord and in securing quick ratification by the federal parliament and most provincial legislatures. However, the elite-level negotiators of the Meech Lake Accord failed to understand the single most important institutional consequence of the 1982 modification: The adoption of specific ratification rules increased the institutional rigidity of the amendment process by replacing the closed process of executive negotiation with an open process of legislative ratification. The ratification of the Meech Lake Accord thus took place in an institutional environment characterized by each of the determinants of policy uncertainty. One means of understanding the precise impact of this institutional change on the political dynamics of constitutional modification is to focus on the particular issue of gender equality and the activities of its principal advocates.

Amendment Failure and the Politics of Gender Equality

Like their counterparts in the United States, Canadian feminists were concerned with how the principle of gender equality would be constitutionally entrenched in the Charter. Their concern was magnified by the narrow manner in which the Canadian Supreme Court had defined "equality before the law" in two 1970s cases under the quasi-constitutional Bill of Rights: *Lavell v. A.-G. Canada* (1974) and *Bliss v. A.-G. Canada* (1979). In *Lavell*, the Court upheld a provision of the federal Indian Act stipulating that Indian women who married non-Indians surrendered their Indian status, while similarly situated Indian men did not

[7] That rule is contained in section 33 of the Charter, which allows the federal and provincial governments to declare that legislation shall operate "notwithstanding" the fundamental freedoms, legal rights, and equality rights entrenched through the Charter.

lose their status. The Court defined "equality before the law" as meaning "equality of treatment in the enforcement and application of the laws." Since the impugned provision was enforced and applied equally against all Indian women, the Court reasoned, it did not conflict with this definition of equality. At issue in *Bliss* was a provision of the Unemployment Insurance Act that denied regular benefits to women who interrupted their employment because of pregnancy. The Court rejected Bliss's claim that the denial constituted discrimination on the basis of sex and asserted that "any inequality between the sexes in this area is not created by legislation but by nature" (p. 190).

Not surprisingly, women's groups were determined to reverse this restrictive understanding of equality through their participation in the framing of the Charter. Although the various issues on the constitutional agenda during 1980–82, including the federal government's threat to proceed unilaterally, generated conflict within Canada's principal feminist organization (National Action Committee on the Status of Women [NAC]), an ad hoc committee of NAC activists lobbied the federal government hard on the Charter's equality provisions (Vickers, Rankin, & Appelle 1993:104–19; Pal 1993:231). Although it failed to have those provisions (sec. 15) exempted from the "notwithstanding" clause (sec. 33), or to have special status granted to gender equality, the committee's efforts were, on the whole, successful. For example, it succeeded in adding "equality under the law" and "equal benefit of the law" to the rights protected by section 15. Moreover, women's groups also succeeded (albeit after a struggle) in adding a separate interpretive section to the document, exempt from the "notwithstanding" clause, that guarantees the equal application of the Charter to men and women.[8] Finally, women were instrumental in ensuring that the Charter's guarantee of equality would not suddenly "de-constitutionalize" affirmative action programs. With the U.S. experience as background, feminists successfully persuaded the Charter's drafters to provide explicit constitutional protection for such programs in section 15 itself. In the end, despite their initial distrust of the federal government's constitutional agenda, women's organizations became important federal allies in the federal-provincial dispute over the general principle of entrenching the Charter (Pal 1993:143).

It soon became apparent that this success represented only the first stage in the effort of Canadian feminists to affect public policy through constitutional modification. In 1984, the Canadian Advisory Council on the Status of Women (CACSW) published a report on how women could take advantage of the unique opportunity provided by the Charter to pursue social

[8] Section 28 of the Charter provides that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." See Kome (1983).

change through litigation (Atcheson, Eberts, & Symes 1984). The report recommended "the establishment of a single national fund, the direct sponsorship of (preferably winnable) cases, and a complementary strategy of education and lobbying" (Razack 1991:47). This report served as the founding document for the Women's Legal Education and Action Fund (LEAF). As LEAF's name suggests, its objective is not merely to defend women's legal rights but to use legal action as a way of advancing a favorable policy agenda. In the micro-level constitutional arena of Charter litigation, this meant occupying the equality rights field and persuading courts that equality must be given a substantive, rather than purely formal, meaning (Eberts 1986:417). The problem with formal equality, LEAF argued, is that its emphasis on equality of opportunity and the neutral application of the law does nothing to compensate women for the accumulated disadvantages of past exclusion. To be "truly" equal, the law must be sensitive to the substantive differences in the economic, social, and political status of various groups. The doctrine of substantive equality prohibits facially neutral laws whose impact on women is unfavorable and protects (perhaps even mandates) differential treatment of individuals where that treatment is part of a remedy for past disadvantage.

Although LEAF has expressed some dissatisfaction with various aspects of equality rights decisions by Canadian courts (Brodsky & Day 1989), the overall level of success of its post-1982 litigation campaign has been impressive. This success is evident on two levels. First, the campaign succeeded in leading courts toward a broad, progressive interpretation of human rights (antidiscrimination) legislation that provided a model for judicial interpretation of section 15 of the Charter (Brodsky & Day 1989:34–35, 190). Second, it has been able to influence the development of Charter-based equality jurisprudence in important ways.

Perhaps LEAF's most important Charter intervention occurred in the Supreme Court's first equality rights decision. At issue in this case—*Law Society of British Columbia v. Andrews* (1989)—were both regulative and interpretive rules. The regulative rule issue, which was of principal concern to the appellant, was whether citizenship could be used as a criterion for admission to the practice of law. However, neither LEAF nor the other systematic, repeat-player litigants in the case (including governments) devoted much attention to this issue. Their concern was whether the Court would generate an interpretive rule of substantive equality. LEAF's intervention on this issue was successful, as the Court rejected a similarly situated test of formal equality and adopted instead a substantive, effects-oriented test under section 15. In essence, LEAF succeeded in persuading the Court to adopt three interrelated equality rules: (1) impact and intent

are equally relevant in equality cases; (2) equality must be evaluated in substantive terms; (3) courts may extend equality rights protection to individuals and groups other than those explicitly mentioned in section 15.

LEAF has exploited the Court's receptivity to its theory of equality in several important cases. In *Brooks v. Canada Safeway* (1989), for example, it persuaded the Court to take the rare step of expressly overruling one of its own judgments by declaring that "pregnancy-based discrimination" constitutes sex discrimination. In the *Borowski* (1989) and *Daigle* (*Tremblay v. Daigle* 1989) decisions, LEAF succeeded in blocking pro-life activists from using the Charter to reimpose restrictions on abortion that the Court had removed one year earlier (*Morgentaler, Smoling & Scott v. R.* 1988). LEAF has also been successful in advocating broad judicial remedy powers under the Charter (*Schacter v. Canada* 1992), and in defending criminal code regulation of pornography from a feminist perspective (*R. v. Butler* 1992). Thus, despite some noteworthy setbacks in the areas of criminal procedure (*Seaboyer v. R.* 1991; *R. v. O'Connor* 1995) and taxation policy (*Symes v. Canada* 1993; *Thibaudeau v. Canada* 1995), the overall impact of Charter litigation has been positive from LEAF's perspective.[9] Indeed, two recent studies suggest that LEAF, and feminist causes more generally, have enjoyed a success rate in the Supreme Court of more than 60%, compared with about 35% for other groups (Hausegger & Knopff 1994; Morton & Allen 1996).

The Charter advanced the constitutional status of women's rights in Canada for several obvious reasons. First, despite their initial opposition to the federal government's plan to proceed unilaterally, women were able to make themselves part of the coalition that would benefit from the Charter's policy impact. Second, women were able to use their position in this coalition to broaden the equality rights language of the Charter and to ensure that the only interpretive rule attached to that language (which exempts affirmative action programs from the general equality requirements) worked to their advantage. Finally, they were able to establish an active litigation campaign to exploit the unprecedented litigation potential created by the Charter. These accomplishments thus gave Canadian feminists something to protect in any subsequent constitutional modification project.

In the case of the Meech Lake Accord project, the women's movement's concern stemmed from the distinct society clause, which it perceived as a new interpretive rule that could dilute the meaning of equality contained in the Charter and advanced through litigation (Eberts 1989:313). The concern, which a broad spectrum of minority rights advocates expressed, was that

[9] In addition, two key LEAF legal defeats—*Seaboyer* and *Thibaudeau*—became political victories as the result of legislative changes made in direct response to the Court's decisions.

the distinct society clause would affect judicial interpretation of what constitutes a "reasonable limit" on rights. More specifically, various groups suggested that Quebec might be permitted to restrict rights in ways that were prohibited to the federal government and other provinces, thereby undermining the establishment of a *national* standard of individual rights. The First Ministers fueled this perception by adding an interpretive clause to the Accord that protected the rights of aboriginal Canadians and multicultural groups from potentially negative judicial interpretations of the distinct society clause.

To the women's movement, this action confirmed that recently entrenched rights were threatened. As Doris Anderson, former head of CACSW, wrote: "As far as women are concerned, the wording in Meech Lake is muddy and unclear, and all our hard won gains under the Charter are threatened" (Behiels 1989:283). In particular, the movement was concerned that the pursuit of equality would be sacrificed to provincial demands for greater power (Eberts 1989:304). Led by a coalition of five organizations—NAC, CACSW, LEAF, the National Association of Women and the Law, and NAC's Ad Hoc Committee on the Constitution—the movement demanded that section 28 of the Charter be transformed into an interpretive rule that would safeguard equality rights from any negative consequences of the Meech Lake Accord (Vickers et al. 1993:276). When this demand was not met, women's organizations played a pivotal role in buttressing anti-Meech sentiment in both New Brunswick and Manitoba (Monahan 1991:146, 157, 181).

Two years after the demise of the Meech Lake Accord, the story was similar. Although the Charlottetown Accord affirmed in its preamble that "Canadians are committed to the equality of female and male persons," this affirmation was only one among eight similar commitments, including the commitment to recognize Quebec as a distinct society. Moreover, the gender equality commitment referred only to "Canadians," while other commitments, for example to the "vitality and development of official language minority communities," included references to "Canadians and their *governments*" (emphasis added). In addition, the chairperson of NAC argued that the Charlottetown Accord's emphasis on provincial equality represented a return to notions of formal equality and to the primacy of male-dominated governments in the political process (McRoberts & Monahan 1993:104). NAC also opposed the Accord's dilution of the federal spending power and sought a formula for Senate representation that would improve women's representation in that legislative body (ibid., pp. 106, 58). Finally, the failure to ensure that the Charter would apply to native women in the provisions for aboriginal self-government intensified NAC's opposition (Vickers et al. 1993:277–78). In the final analysis, NAC opposed the

Charlottetown Accord because of its belief that the Accord negatively affected the constitutional status that the women's movement had succeeded in acquiring in 1982 (Lusztig 1994:767).

The negative reaction of the women's movement to the Meech Lake and Charlottetown Accords stemmed from the "possibility that the Charter's equality rights, fought for so recently and with such tenacity by English-Canadian feminists, could in any way be diminished by the accords" (Vickers et al. 1993:275). In neither instance would Canadian feminists, after struggling so hard in the political arenas of formal amendment and constitutional litigation, accept a set of constitutional rules that appeared to provide the worst of all possible outcomes. These rules failed to entrench feminist policy preferences further in the constitution and simultaneously appeared to reduce the value of the constitutional resources the women's movement had acquired in 1982. Women thus had a strong incentive to safeguard their position in any future attempt at constitutional modification, transforming a group that was once an important ally in the federal government's constitutional reform efforts into an opponent.

To put these political dynamics in terms of the institutional design model, in the Meech Lake and Charlottetown Accord periods, governments proposed comprehensive constitutional modification against a post-1982 background of institutional rigidity in which formal amendment was no longer a simple matter of agreement among government leaders. This meant that it would be that much more difficult to reverse the consequences of modification and that political actors concerned about those consequences would have both the incentive and the opportunity to prevent ratification. For example, the interpretive flexibility and litigation potential of Meech Lake's "distinct society" clause made its policy impact uncertain. The federal government attempted to deal with some of the controversy generated by this uncertainty by attaching interpretive rules to the distinct society clause that were designed to address the concerns of aboriginal and multicultural Canadians. The clause remained controversial from the perspective of women's groups, however, and they took advantage of the more rigid amendment process to support nonratification.[10] A similar dynamic contributed to the collapse of the Charlottetown Accord. In both cases, the institutional environment of the formal amendment process, which had changed significantly as a result of the modification of 1982, fueled controversy over the uncertain policy impact of proposed comprehensive modification, making successful ratification difficult.

[10] It must be noted that the Meech Lake Accord also remained controversial from the perspective of aboriginal Canadians.

Conclusion: Understanding Amendment Failure

Between 1972 and 1992, both the United States and Canada experienced unsuccessful efforts to implement comprehensive constitutional modification. To be sure, these efforts differed in significant ways. Most obviously, Canada's Meech Lake and Charlottetown Accords were much more broad-ranging proposals than the U.S. Equal Rights Amendment, since they concerned the identity, nature, and fundamental principles of the Canadian political community (Russell 1993:75). In addition, while the ERA's failure constituted a defeat for U.S. gender equality activists, the defeats of the Meech Lake and Charlottetown Accords can be attributed to a significant degree to the opposition of Canadian feminists. However, despite these differences, these failed attempts at constitutional modification share several common features. First, all three proposals initially enjoyed the support of important political elites and began the ratification process with relatively high levels of public approval. Second, especially in the cases of the ERA and Meech Lake, the initial support of both elites and the public translated into strong early momentum in favor of ratification, with close to the necessary levels of approval reached within about 12 months in both cases. Finally, opponents of all three proposals eventually halted, and to some degree reversed,[11] the momentum toward ratification, leading ultimately to the rejection of each proposal. Amendment proposals that once seemed certain to succeed went down to ignominious defeat.

My objective in this article has been to develop and apply a common framework of analysis with which to understand these instances of amendment failure. This framework, which attempts to explain why proposed amendments become too controversial to survive ratification, focuses on the institutional factors that make the policy impact of comprehensive amendments uncertain. The framework identifies three such factors: institutional rigidity, interpretive flexibility, and litigation potential. The strong presence of these variables in the institutional design of a regime's process of constitutional modification renders it difficult to predict, control, or reverse the specific policy consequences of a formal amendment. Opponents of a proposal are able to exploit this situation to make amendments controversial from the perspective of undecided and risk-averse ratifiers. What makes amendments controversial is not necessarily opposition to the principles they embody but uncertainty about the specific policy consequences that may flow from those principles. Interpretive flexibility and litigation potential increase the likelihood that

[11] Several states actually revoked their initial ratification of the ERA, and the province of Newfoundland revoked its ratification of the Meech Lake Accord.

constitutive rules will generate constitutionally entrenched policies, which institutional rigidity will make exceedingly difficult, if not impossible, to reverse through future formal amendment.

Mansbridge's observation that the ERA was too controversial for ratification can thus be traced back to the institutional rigidity, interpretive flexibility, and litigation potential that permeates the institutional design of constitutional modification in the United States. The institutional context of constitutional modification generated a level of policy uncertainty that ERA supporters were unwilling to quell by attaching regulative or interpretive rules to the amendment. Similarly, the post-1982 formal amendment failures in Canada can, ironically, be attributed to the successful comprehensive modification of 1980–81, which brought the institutional design of constitutional change in Canada much closer to the U.S. model. As a result, the slow death of the Meech Lake Accord and the unequivocal rejection of the Charlottetown Accord were the product of the same political dynamic that undermined the ERA campaign. Gender equality activists in Canada were able to take advantage of this political dynamic to protect the gains they had made in pre-1982 macro-constitutional politics and in post-1982 micro-constitutional politics.

The key question, of course, is whether this institutional design model of constitutional modification has a broader application to other cases or regimes. Two possible applications suggest themselves. First, the United States has experienced two recent cases in which seemingly innocuous, and broadly supported in the abstract, proposals—balancing the federal budget and protecting the integrity of the flag—became extremely controversial when transformed into concrete proposals for constitutional amendment. In both instances, concerns about the impact of such amendments in the micro-level arena of constitutional litigation fueled opposition. A second possible application of the model stems from observations made by Stephen Holmes and Cass Sunstein (1995:294–301) about constitutional engineering in Eastern Europe. Based on their experiences, Holmes and Sunstein argue that "lax procedures" dominated by legislative assemblies may be the most effective amendment process for these struggling democracies (i.e., institutional flexibility). Moreover, they are less than enthusiastic about the benefits of constitutionally entrenching individual rights and encouraging judicial review for constitutional development in Eastern Europe (i.e., interpretive flexibility and litigation potential). What these observations suggest is that there may be a common institutional design that makes comprehensive constitutional modification exceptionally difficult to achieve.

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