

# Constitutional Politics In Canada After The Charter: Liberalism, Communitarianism, And Systemism

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with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.<sup>276</sup> The Court has ruled that Congress is the authoritative interpreter and enforcer of the Guarantee Clause, stating that "the right to decide is placed there, and not in the courts."<sup>277</sup> Although the Guarantee Clause raises non-justiciable political questions, it is still binding and enforceable.

Constitutional desuetude cannot occur from the transfer of enforcement responsibility from the judiciary to the legislature since the non-justiciable constitutional text retains its meaning and remains enforceable. The locus of authority has changed, here from the judiciary to the legislature, but the binding force of the text remains unchanged. The Guarantee Clause therefore fails most of the criteria for identifying constitutional desuetude: in the absence of a new norm-generative standard exercising binding effect on political actors, there has been no constitutional reordering as a result of sustained nonuse, political actors have not self-consciously followed a new rule after having repudiated the Guarantee Clause, there has not been a new rule to replace the Guarantee Clause, and the elite conventional understanding of the constitution remains unchanged insofar as the rule has long been that the Guarantee Clause is non-justiciable but still enforceable by Congress. The Guarantee Clause is therefore not a good example of desuetude despite its non-enforcement by courts.

#### 4. Superseding Amendments and Constitutional Battlegrounds

We must also distinguish constitutional desuetude from formal amendments that supersede an existing constitutional provision yet leave that superseded provision textually entrenched. The practice of adding formal amendments to the constitutional text but keeping the existing text unaltered is a peculiar feature of the United States Constitution.<sup>278</sup> In contrast to modern constitutions that interweave new formal amendments into the existing text, the United States Constitution remains unchanged as formal amendments are appended chronologically to it.<sup>279</sup> For example, although Eighteenth Amendment remains textually entrenched, it has been repealed by the

<sup>276</sup> *Luther*, *supra* note 271, at 42.  
<sup>277</sup> *Id.*  
<sup>278</sup> Akhil Amar interprets this phenomenon as an effort to both preserve the past and track democratic progress. Akhil Reed Amar, *Architecture*, 77 *IND. L.J.* 671, 685 (2002).  
<sup>279</sup> Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 *BYU J. PUB. L.* 87, 88 (2011).

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