FOUNDING FATHERS-IN-LAW: JUDICIAL AMENDMENT OF THE CANADIAN CONSTITUTION

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I
INTRODUCTION
Niccolo Machiavelli warned in *The Prince* about the perils of constitutional amendment:

> there is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through, than initiating changes in a state's constitution.¹

Machiavelli's words seem prophetic in relation to the persistent but ultimately star-crossed attempts by the governments of Canada and most provinces to amend the Canadian Constitution in conformity with the 1987 Meech Lake Accord.²

In one respect Machiavelli was wrong, however. There is a way, in Canada and in other countries that treat their courts of last resort as constitutional oracles, in which constitutional change can be achieved with a minimum of difficulty and a certainty of success. This is the way of judicial amendment: constitutional “interpretations” of the Constitution by the ultimate judicial tribunal (the Supreme Court of Canada in my country now; the Judicial Committee of the British Privy Council in the past) that have the result of nullifying or radically altering the constitutional text or its authoritatively accepted meaning. Such amendments, with consequences every bit as momentous as those that are brought about through formal political processes, can be accomplished swiftly and surely, and on the initiative, with no obligation of prior public notice or consultation, of the nine mellowing men and women (or a majority of them) who sit on the Supreme Court.

Some will disagree that judges can or do “amend” the Canadian Constitution. Critics will point to the fact that Part V of the Constitution Act, 1982, entitled “Procedure For Amending Constitution of Canada,” contains

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². 1987 Constitutional Accord (June 3, 1987).
no reference to judicial amendment, and that section 52(3) of the same Act stipulates that “[a]mendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.” It should be noted, however, that although section 52(3) limits the amendment process to techniques “in accordance with the authority contained in the Constitution of Canada,” the description of “Constitution of Canada” set out in the preceding subsection is not an exhaustive one. While section 52(2) lists a number of documents that the Constitution of Canada “includes,” it does not deny the possibility that other norms, judicially-invented ones among them, are also included.

Machiavelli mentioned that constitutional amendment is “dangerous to carry through.” Judicial amendment is as dangerous as formal amendment, though the danger lies chiefly in the consequences rather than in the implementation. No nine people, however wise and well informed, possess the individual or collective powers of imagination necessary to foresee fully the ramifications of major alterations to the constitutional norms upon which their nation’s legal and governmental structures are founded. Even if they did, they would lack the range of experience and the moral authority required for sound determinations as to the direction such alterations should take. This is not to say that the democratic process necessarily produces better results, but only that there is danger in entrusting constitutional change to the unaided judicial process.

The aim of this paper is to demonstrate and examine the phenomenon of judicial amendment of the Canadian Constitution, to contrast this process to other related exercises of judicial review, and to suggest a possible method of minimizing the dangers that accompany judicial amendment.

II
Some Illustrations

A. Rationing Equality

Section 15(1) of the Canadian Charter of Rights and Freedoms guarantees that “every individual”

is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada has stated in *Regina v. Turpin*⁴ that this vital constitutional right does not belong to every individual, but is instead

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3. Colleagues with whom I discussed my plans for this paper suggested that the phenomenon I wish to deal with is really just radical constitutional *interpretation*, and that if I insist on referring to it as “amendment,” I should at least place quotation marks around the term. The argument I am advancing is more extreme, however. The Supreme Court of Canada, and the Judicial Committee of the British Privy Council before it, have effected, on occasion, not just something akin to constitutional amendment, but changes so novel in their import and so unsupported by text as to constitute amendments for all practical, and perhaps even formal, purposes.

restricted, "in most but not perhaps all cases," to members of "groups suffering social, political and legal disadvantage" that "exists apart from and independent of the particular legal distinction being challenged."5 The groups of extraneously disadvantaged persons to which the right to legal equality is thus restricted have been labeled "discrete and insular minorities" by the Court, borrowing an infelicitous phrase coined by Justice Stone of the United States Supreme Court in a famous footnote to his opinion in United States v. Carolene Products Company.6

The facts of Turpin were so distinctive as virtually to render the case sui generis. Their uniqueness casts doubt, in fact, on the wisdom of the Supreme Court's decision to decide the case. The facts' distinctiveness may also help to explain the Court's ruling in the case. The Criminal Code of Canada contained an odd provision, repealed before the ruling, that permitted a certain category of accused persons to elect trial by judge without jury in Alberta, but not elsewhere in the country. Some accused persons outside Alberta, who would have been entitled to this option if they had resided in that province, contended that denial of the option to accused persons outside Alberta constituted geographic discrimination and therefore violated their right to legal equality in accordance with section 15(1) of the Charter. The Supreme Court of Canada held, unanimously, in a decision written by Justice Wilson, that the equality guarantee was not engaged by the uneven application of the Criminal Code of Canada to different parts of the country, because persons accused of criminal offenses outside Alberta "do not constitute a disadvantaged group in Canadian society within the contemplation of section 15."7 Not being members of "discrete and insular minorities," the defendants were not entitled to the protection of section 15(1).

Turpin was not the first case in which the term "discrete and insular minorities" was used by members of the Supreme Court of Canada. In the first section 15 case to reach the Court, Andrews v. Law Society of Alberta,8 the Carolene Products footnote was quoted by both Justice McIntyre,9 whose dissenting reasons were approved in this respect by the majority, and Justice Wilson,10 who concurred with the majority. In Andrews, unlike in Turpin, neither the expression nor the concept it was thought to encapsulate was crucial to the outcome of the case.

I have criticized Turpin and the "discrete and insular minorities" concept elsewhere.11 My purpose here is different: to advance the proposition that the decision amounted to a constitutional amendment.

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5. Id at 1332-33.
9. Id at 183.
10. Id at 132.
11. Dale Gibson, Equality for Some, 40 U New Brunswick L J 2 (1991). The purpose of restricting the equality guarantee to members of disadvantaged minorities is, of course, to prevent the
Picture a lawyer's office in Winmonton, the capital city of Altoba. An outraged client is explaining to his lawyer how he has been discriminated against by a provincial government agency on the basis of political affiliation. Altoba is currently ruled by a powerful Regressive Party government. The client, a reputable construction contractor and a known supporter of the Liberal Party, has conclusive proof that his tender to build a proposed public building, though the lowest received, was not even considered by Public Works Department officials because of his political associations. As we listen in, the lawyer is shaking his head sadly:

**Lawyer:** I'm sorry to say that the Human Rights Code of this province, which proscribes discrimination in the private sector, expressly excludes governmental actions from its ambit.

**Client:** Well what about the Charter of Rights, or whatever it's called. Doesn't that apply to governments?

**Lawyer:** Yes it does, but . . . .

**Client:** And doesn't it prohibit discrimination?

**Lawyer:** It certainly does. (Pulls a book from a shelf, leafs through it for a moment, and then hands it, opened, to the client.) Look at section 15(1).

**Client:** (After reading) I see the problem. Political discrimination isn't mentioned.

**Lawyer:** No, that's not the problem. The Supreme Court of Canada has ruled that grounds other than those listed are covered by the Charter, so long as they are "analogous" to the listed ones. And political discrimination might well be considered analogous to religious discrimination.

**Client:** So what is the problem?

**Lawyer:** The problem is that discrimination against Liberals doesn't qualify for Charter protection because Liberals, as a group, have never experienced historic disadvantage. They may not be in power here in Altoba just at the moment, but historically and generally Liberals can't claim to have been discriminated against.

**Client:** (Flabbergasted) What do you mean, "Liberals as a group," "historic disadvantage"?! I'm being discriminated against now! What do history and other Liberals have to do with it?

**Lawyer:** The protection of section 15(1) of the Charter is restricted to members of "groups suffering social, political and legal disadvantage . . . apart from and independent of the particular legal distinction being challenged . . . ."

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guarantee being used to challenge affirmative action programs in favour of such minorities, as has occurred in the United States. In Canada, however, it is an unnecessary precaution, since section 15(2) of the Charter explicitly permits affirmative action.
Client: Where does it say that? (Picks up and re-reads the Charter text.) There's nothing here about groups, or extraneous previous disadvantage. Not a word! What it says, as plain as bread, is that “every individual is equal.” I'm an individual; so the Charter gives me the right to be treated equally!

Lawyer: I'm afraid not. It's true that those are the words that were enacted back in 1982, but ever since a Supreme Court ruling in 1989 those words have to be read as if they said: “Every individual who belongs to a group whose members suffer disadvantage apart from and independent of the particular legal distinction being challenged is equal . . . etc.”

Client: So the Supreme Court has amended the Charter! I didn't know they had the power to do that.

Lawyer: Well it really wasn't an amendment—just a radical interpretation of the text.

Client: Not an amendment? In a pig’s eye! Only lawyers and maybe Lewis Carroll could deny that it's an amendment, and if Carroll were on the scene, he'd have trouble keeping a straight face!

It must in fairness be said that this fictitious lawyer might conceivably succeed on behalf of his client in a Charter challenge based on the contention that members of political minorities have suffered historically at the hands of community majorities, and that Liberals are a disadvantaged minority in that particular jurisdiction at this particular time. A claim founded on freedom of expression or freedom of association under section 2 of the Charter might also succeed. But the possibility that such arguments might possibly succeed does not alter the fact that the judicially created “discrete and insular minorities” gloss has removed from section 15(1) of the Charter much of the straightforward protection against inequality promised by its text.

The assertion that this is a consequence of interpretation, rather than a modification of the Constitution, is based on the presence of the word “discrimination” in the enacted text. Justice Wilson in Turpin and Justice McIntyre in Andrews linked their importation of the Carolene Products footnote to their view that proof of discrimination is essential to the success of any claim under section 15(1) of the Charter. The language of the provision is no doubt open to so restrictive a reading, even if it is not the only, or even the most plausible, reading possible. It is the next stage of the Wilson analysis—that “discrimination” requires a “threshold” group disadvantage extraneous to the situation complained about—which is impossible to classify as “interpretation.” Justice Wilson arrived at that conclusion after stating that the “indicia of discrimination” include “stereotyping, historical disadvantage or vulnerability to political and social prejudice.”

and "prejudice" are concerned, this assertion is hard to fault; one well-understood meaning of the term "discrimination" is certainly disadvantageous conduct motivated by preconceived stereotypes of the capacities or other characteristics of certain types of people, rather than by individuals' personal merits or demerits.

But there is an important, if subtle, difficulty with the other "indicia of discrimination" in Justice Wilson's catalogue. "Historical disadvantage" and "vulnerability" are not, like "stereotyping," elements of the act of discrimination. "Historical disadvantage" is one consequence of discrimination occurring over a period of time; "vulnerability" is a characteristic of those who are most frequently the victims of discrimination. It is a non sequitur to move from the observation that certain groups of persons are statistically most vulnerable to discrimination, with consequent historical disadvantage over time, to the conclusion that discrimination can be experienced only by members of those groups. It would make as much sense to "define" murder in the following manner:

- Murder involves unlawful premeditated homicide.
- Members of disadvantaged groups and persons residing in urban areas are statistically the most vulnerable to murder.
- Therefore, the unlawful premeditated homicide of persons who are not members of disadvantaged groups or who do not live in urban areas does not constitute murder.

Since no such conclusion is any more logically implicit in the term "discrimination" than it is in the term "murder," it is a mistake to look upon the Supreme Court's restriction of the section 15(1) protection to members of groups experiencing disadvantage "apart from and independent of" immediate complaints of unequal treatment as mere "interpretation." So fundamental a change in the meaning of the words enacted in 1982 can only be accurately described as "amendment."

B. Gutting the Commerce Power

Judicial amendment of the Canadian Constitution was not invented by the Supreme Court of Canada. Its predecessor as Canada's court of last resort, the Judicial Committee of the British Privy Council, began the process. One of the Privy Council's most audacious amendments concerned the power bestowed on the Parliament of Canada by section 91(2) of the Constitution Act, 1867, to make laws in relation to "the regulation of trade and commerce."

The fact that it was listed second among the enumerated heads of federal jurisdiction, immediately after "the public debt and property," and ahead of such vital matters as taxation, postal service, defence, navigation and shipping, currency, coinage, and banking, must say something about the significance of federal regulation of trade and commerce in the eyes of those who negotiated, drafted, and debated the 1867 Constitution. The fact that it was expressed in more expansive language than the equivalent provision to
the United States Constitution was certainly no accident. But a relentless progression of restrictive Privy Council rulings between the 1880s and the 1920s pared the power to the point where it could be described by Justice Idington of the Supreme Court of Canada as “the old forlorn hope, so many times tried, unsuccessfully.”

The culmination of this line of decisions was a pronouncement in *Toronto Electric Commissioners v. Snider*, which left little doubt that the federal commerce power had been effectively and substantially amended by judicial action. The Judicial Committee’s ruling on the question immediately at issue—that national labour relations legislation purporting to apply even to local enterprises that did not fall operationally under federal jurisdiction could not be supported by either the federal commerce power or any other constitutional responsibility of the Parliament of Canada—was not at all surprising in the light of earlier jurisprudence. What was surprising, startlingly so, was Viscount Haldane’s frank admission, on behalf of his Privy Council colleagues, of how drastically their decisions had modified federal jurisdiction to regulate trade and commerce:

> It is, in their Lordship’s opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in section 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.

This is breathtaking. Section 91 of the Constitution Act, 1867 bestows twenty-nine heads of legislative jurisdiction on the Parliament of Canada. Several of these—banking, bills of exchange and promissory notes, interest, bankruptcy, and insolvency, for example—relate to commercial matters, but none so sweepingly as head number two: “the regulation of trade and commerce.” There is nothing about head number two, apart from its breadth and the prominence it was given near the top of the list of federal powers, that sets it apart from the other heads of section 91. There is nothing in the legislative history of the 1867 Constitution to indicate that the federal commerce power was intended to play a role subordinate to other items of federal jurisdiction, or to bear some special relationship to the powers of provincial legislatures. If that had been the intention, surely the commerce power would not have been expressed as a regular subsection of section 91, but would have been treated distinctively, as, for example, the federal power to make special “remedial laws” relating to the ordinarily provincial topic of education was treated in section 93(4). Yet, in the absence of even a scintilla of textual support, the Judicial Committee of the Privy Council acknowledged

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13. See generally, Alexander Smith, *The Commerce Power in Canada and the United States* 14-27, 29 (Butterworths, 1963). Justice Gwynne commented in 1880 that the Canadian provision was “deliberately designed specially as to have no doubt, with the view of avoiding what was believed to be a weakness and defect in the Constitution of the United States . . . .” *City of Fredericton v The Queen*, 3 SCR 505, 564 (1880).
14. *In Re Board of Commerce*, 60 SCR 456, 488 (1920). The story of the Canadian commerce power up to the 1900s is told well in Smith, *Commerce Power* (cited in note 13).
16. Id at 410.
in *Snider* that it had decided to accord section 91(2) less independent significance than any other head of federal jurisdiction.

It is true, of course, that the *Snider* pronouncement related only to Parliament’s authority to “regulate civil rights in the Provinces.” This did not soften its impact, however, since the Privy Council confirmed the ability of federal legislation to affect such rights (presumably as a consequence of federal “paramountcy”) if enacted “under other words in section 91.” Section 91(2) had thus been relegated to a constitutional status inferior to, or at least redundant with, that of all the other, narrower, commercially-related subsections of section 91.

The Privy Council did not admit that it was “amending” the Constitution. In a rather smug introduction to the reasons for judgment in *Snider*, Viscount Haldane claimed that the Judicial Committee’s duty, “now as always, is simply to interpret the British North America Act [as the Constitution Act, 1867 was then called].” He was at least candid enough to concede that in performing this function he and his colleagues “[f]ound” themselves compelled, alike by the structure of section 91 and by the interpretation of its terms that has now been established by a series of authorities.” The “series of authorities” consisted of the Privy Council’s own previous rulings. To classify an “interpretation” of section 91(2) that lacked any textual support, and deprived the provision of any independent application in relation to matters to which narrower provisions with the identical formal status applied, as anything less than outright amendment serves only to obfuscate constitutional realities.

C. Expanding Provincial Taxation Powers

Section 92(2) of the Constitution Act, 1867 restricts the taxation power of provincial governments to “direct taxation within the Province.” While this was originally sufficient to provide the tax revenues needed to finance the relatively inexpensive responsibilities imposed on the provinces in 1867, the growth of those responsibilities, in both importance and cost, over the ensuing years eventually resulted in a situation in which the provinces’ governmental functions were utterly inappropriate to their ability to fund them. The Canadian government, whose tax powers under section 91(3) of the Constitution are virtually limitless, filled the gap with equalization payments to the provinces, conditional grants, and the like; but the constitutionality of some of those expedients was open to doubt, and, in any event, they placed the autonomy of provincial governments in considerable jeopardy.

17. Id.
18. Id.
19. Id at 400.
20. Id at 401.
The problem of enlarging provincial access to tax revenues was finally solved by means of provincial sales taxes. Currently, a huge sum of money is raised by provincial sales taxes in every province but Alberta. That would not have been possible if the letter of section 92(2) had been respected, since that section restricts the provinces to "direct" taxation, and sales taxes are classic instances of indirect taxes. The Privy Council held long ago, relying on well-known writings of political economist John Stuart Mill, that a direct tax is "one which is demanded from the very persons who it is intended or desired should pay it," rather than one which is collected from someone likely to pass it on to others in the form of, for example, higher prices. Sales taxes are clearly indirect by this test; they are collected from merchants with the expectation that the merchants will in most circumstances increase their prices correspondingly, leaving consumers to bear the ultimate brunt of the tax. Although all provinces are prohibited from levying indirect taxes, all but one now impose a tax of this nature. They are able to impose such a tax because of a Privy Council ruling in Atlantic Smoke Shops Limited v. Conlon that effectively amended section 92(2) to make an exception to the "direct" requirement in the case of sales taxes.

Those who are familiar with Atlantic Smoke Shops may take issue with my characterization of its gist as a constitutional amendment. They might point out that the levy in question was not in form a sales tax at all. On paper it was a tax charged to the purchaser, not to the merchant; the legislation merely designated the merchant as tax "collector," with an obligation to ensure that each purchaser paid the tax at the time of purchase, and to account to the provincial government for the taxes thus "collected." Therefore, the Privy Council held, this was not an indirect sales tax; it was a direct purchase or consumer tax. "How," one might accordingly ask, "can the decision be justifiably described as an amendment?" It was an amendment because it could not have been reached on the basis of accepted principles of constitutional interpretation. In particular, it flew in the face of the long-standing "colourability" principle.

Professor Peter Hogg's textbook, Constitutional Law of Canada, explains the colourability doctrine as follows:

The courts are, of course, concerned with the substance of the legislation to be characterized and not merely its form. The 'colourability' doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction. In the Alberta Taxation Reference [Attorney General Alberta v. Attorney General Canada, AC 117 (PC) (1939)], for example, the Privy Council held that the legislation, although ostensibly designed as a taxation measure, was in reality directed to banking.

The tax scheme challenged in Atlantic Smoke Shops presented the Privy Council with a legislative device every bit as colourable as that which they had struck down four years earlier in the Alberta Taxation Reference. Rarely have courts...

22. Bank of Toronto v Lambe, 12 AC 575, 582 (PC 1887).
confronted a more blatant example of legislators attempting to do indirectly that which they cannot do directly. Yet this time the colourability doctrine was not even mentioned in the reasons for judgment. Had it been applied as it ought, the "interpretation" of this kind of levy as "direct taxation" would have been impossible.

Since the words of section 92(2) cannot, when interpreted by accepted principles, support the decision in Atlantic Smokeshops, that decision must be considered to have been either a judicial error or a constitutional amendment. Having been rendered almost fifty years ago, and never having been corrected, it makes no sense to treat the ruling as an error. Having become the basis for a revolutionary change in the tax position of the provinces (provincial purchase or consumption taxes—universally referred to as "sales taxes" by an undeceived public—being in force throughout most of Canada), it ought to be obvious that the ruling wrought a constitutional amendment of major proportions.

D. And So On

This catalogue of judicial amendments to the Canadian Constitution could be trebled in length with no difficulty. An extended study would include, for example:

— The long, tidal, line of Privy Council and Supreme Court decisions relating to the Canadian Parliament’s residual power under the opening clause of section 91 to make laws for the "peace, order and good government of Canada," which has sometimes been held to confer federal jurisdiction over matters as minor as uniform national temperance laws or beautification of the national capital, and has on other occasions been found not to authorize federal laws needed to cope with problems as nationally momentous as the Great Depression of the 1930s.

— The Patriation Reference, in which the Supreme Court of Canada gave itself, with historic consequences, the power to pronounce on non-legal matters (political conventions of the Constitution), despite the fact that section 101 of the Constitution Act, 1867,
under which the Court was created, seems to contemplate that, as a “court,” its task is to administer “laws.”

— The *Anti-Inflation Act Reference*, 29 which contained prophetic pronouncements by Justice Beetz (subsequently adopted by a majority of his colleagues despite the fact that he dissented in the result), confining “national dimension” uses of the federal “peace, order and good government” power to a radically-circumscribed range of circumstances, and bestowing on the Parliament of Canada the “unilateral” power, nowhere articulated in the text of the Constitution Acts, to make a “temporary pro tanto amendment” to the Constitution in times of national emergency. 30

— The *Manitoba Language Reference*, 31 in which the Court decreed that it had the authority, again nowhere to be found in the Constitution Acts, to grant temporary validity, in the interests of preserving civil order, to laws that it had found to be constitutionally invalid.

Enough has already been said, however, without examining these and similar constitutional landmarks at greater length, to demonstrate my thesis that, in Canada at least, the judiciary has been responsible for constitutional amendments of great import.

III

AMENDMENT LOOK-ALIKES

I do not contend that every major constitutional ruling by the courts involves amendment. The amending decisions with which this article is concerned are relatively rare. It may be useful, therefore, before going on to consider the consequences of judicial amendment, to distinguish amendment from other judicial solutions to constitutional problems.

The judicial decisions I classify as amendments to the Constitution are those that, whatever the sweep of their impact, are not capable of having been products of a fair construction of the Constitution Acts or of other documents

30. The authority for this temporary amendment power of Parliament was explained as follows by Justice Beetz, drawing upon an earlier dictum of Viscount Haldane:

The legitimacy of that power is derived from the Constitution: when the security and continuation of the Constitution and of the nation are at stake, the kind of power commensurate with the situation “is only to be found in that part of the Constitution which establishes power in the state as a whole.”

Id at 528.
31. 19 DLR (4th) 1 (SCC 1985). The Court explained this extraordinary power as a necessary consequence, in these circumstances, of the “rule of law” principle, which it held to be silently present (explicitly so in the case of the Charter) in all constitutional norms. I have contended elsewhere that the ruling really represented an application of the rule of order, rather than the rule of law. Dale Gibson, *The Rule of Non-Law: Implications of the Manitoba Language Reference*, 1986 Transactions of the Royal Society of Canada. But even on its own terms, the Court’s addition to Canada’s Constitution of a principle of “rule of law” that permits constitutional law to be temporarily ignored for reasons the Court deems advisable must surely qualify as a constitutional amendment.
of the Canadian Constitution. In "fair construction," I include not just obvious interpretations, but also imaginative rulings that, while perhaps unexpected, can be shown to flow logically from words or implications in the text.

It has been argued that the notion of fair construction is a fiction because the inherent richness and ambiguity of language prevents constitutional text from having a "plain meaning." While it is true that a given expression is rarely capable of meaning only one thing, even when the limiting effect of context is taken into account, there are limits to what it is capable of meaning. "Elephant" cannot mean "mouse"; "banana" cannot mean "apple." "Direct tax" cannot mean "indirect tax." Judicial rulings that go beyond those outer limits cannot be fairly considered to be interpretive exercises. To include indirect taxation within the concept of "direct taxation" is not to interpret the latter term; it is to alter it, to amend it.

Others argue that to be properly interpretive, a judicial construction of constitutional language must cleave to the meaning intended by those who originally drafted the language. This view is unfounded as well. The courts' task, in my estimation, is to determine what the language should mean now. The thoughts and intentions of persons involved in the formulation and enactment of the provision in question may be of assistance, but they can never be conclusive. The creation of constitutional norms is a collective endeavour, involving scores, perhaps hundreds, of politicians, consultants, draftspersons, and others, many of whom often hold mutually opposing views, and relatively few of whom express themselves publicly about the meaning of those norms. In addition, the interpretational question the courts are now asked to determine may not have occurred to any of those involved in the creative process, and even if it did, the context in which the question now arises is likely to be sharply different. Language has a life of its own, and it cannot serve us as it should if not allowed to grow and mature over time like all other life forms, especially if it is part of a Constitution expected to meet the needs of the unpredictable future as well as those of the era in which it was formulated. I once heard Robert Frost explain to an audience that a poem of his had been interpreted to mean something other than he had intended. He expressed great pleasure that his creation had grown beyond its creator's expectations. Constitutions resemble poems in their pithiness, the richness of their language, their intended longevity, and their reliance on interpretive processes to develop their full potential.

Several forms of constitutional decisionmaking fall short of amendments yet remain within the scope of fair construction. While categories overlap, and particular classifications may be disputable, at least the following general distinctions seem evident.

A. Interpretation

Many constitutional decisions simply clarify the meaning of expressions used in constitutional texts. The Supreme Court of Canada has ruled, for
instance, that the term "principles of fundamental justice" in section 7 of the Canadian Charter of Rights and Freedoms includes questions of substantial justice as well as of mere procedural fairness,\(^3\) and that the right under section 6(2)(b) of the Charter "to pursue the gaining of a livelihood in any province" applies only with respect to interprovincial impediments to employment, not to non-territorial restrictions.\(^3\) Neither of these conclusions was obvious from the face of the text, but they were both arrived at as a result of legitimate interpretive inferences found within the text.

B. Application

The courts are often called upon to apply well-understood constitutional concepts to new fact situations. Is an arbitration board, for example, a "court of competent jurisdiction" within the meaning of section 24(1) of the Charter, and therefore empowered to award the remedies for Charter violations authorized by that provision? Is a Human Rights Tribunal a "superior, district, [or] county court" as contemplated by section 96 of the Constitution Act, 1867, which requires the members of such courts to be federally appointed? Although questions like these are often difficult to answer, their solution does not call for anything like the creativity involved in amendment.

C. Elaboration

In some instances, the drafters delegate to the courts the authority to flesh out a constitutional norm that takes only skeletal form in the text. Construction of the previously mentioned term, "principles of fundamental justice," in section 7 of the Charter, perhaps falls into this category. An even more generous invitation to the courts to elaborate upon incomplete constitutional language occurs in section 23 of the Charter, which creates a right to be educated in the minority official language of a province (French or English) where the number of persons entitled to exercise that right "is sufficient to warrant" providing minority language instruction and educational facilities out of public funds.

While this task is unavoidably creative, it cannot be regarded as amendment, since it is intended that the courts will carry out the purpose of the original constitutional norm, rather than alter it.

D. Reconciliation

Occasionally, courts are obliged to give a more limited interpretation or application to a constitutional phrase than its wording would grammatically permit because an expansive reading would be impossible to reconcile with some other constitutional norm. Since all provisions of the Constitution are entitled to respect, narrower interpretations are necessary in situations where a liberal construction of two or more provisions would result in mutual

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\(^3\) Motor Vehicle Act of British Columbia § 94(2) Reference, 24 DLR (4th) 536 (SCC 1985).
incompatibility. Thus, where section 91(26) grants the Parliament of Canada "exclusive" jurisdiction over "marriage," and section 92(12) provides that provincial legislatures may "exclusively" make laws in relation to "solemnization of marriage in the province," the courts have had little alternative but to construe the term "marriage" in section 91(26) as excluding questions of solemnization within any province.34 And the fact that section 92(15) confers on the provinces exclusive competence over "the imposition by fine, penalty, or imprisonment for enforcing any law of the province" demands a narrower definition of the federal Parliament's exclusive "criminal law" power than the standard English definition of that term, which embraces all legislative prohibitions with accompanying penalties.35 Again, the exercise is deductive rather than creative.

E. Extension by Inference

Some exercises of judicial review do involve a very high order of creativity and ingenuity, of course, but not even they can be classified as amendments if they remain within the bounds of fair interpretation. Quite surprising inferential extensions of meaning (the converse of the "reconciliation" exercise) can remain interpretive in character.

Consider section 96, which states that judges of superior, district, and county courts in each province must be appointed by the federal Governor General. On its face, this provision relates only to the appointment powers of the federal government, but it has been judicially extended to impose limitations on the substantive functions that may validly be exercised by provincial courts and tribunals. The reasoning proceeds as follows:

— Only federal authorities may appoint judges to certain categories of courts.
— To avoid having this constitutional restriction defeated by subterfuge, it must be applied not just to bodies known officially as "superior, district, and county courts," but also to any tribunal carrying out functions substantially the same as the functions performed by such courts.
— This means that provincial authorities cannot bestow on courts or other tribunals whose members are provincially appointed any of the functions normally associated with "section 96 courts."36

While that conclusion might have surprised those who were responsible for the drafting of section 96, it is a fair extension by inference of the meaning of the provision.

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36. The case law on this question is voluminous. For a relatively recent and illuminating illustration of the extended interpretation of section 96 in practice, see Reference Re Residential Tenancies Act, 123 DLR (3d) 554 (SCC 1981).
A highly debatable instance of extension by inference was the famous "implied Bill of Rights" dictum of Chief Justice Sir Lyman Duff and some of his colleagues in the Alberta Statutes Reference. In 1937, the Alberta Legislative Assembly (Third Session) enacted the Accurate News and Information Act ("Press Act"), which seriously constrained the ability of the news media to criticize the new economic measures or the government that was advancing them. The Constitution of Canada did not expressly guarantee either the freedom of speech or the press at that time. When the constitutionality of Alberta's legislative package was disputed by the federal government and others, the question was referred to the Supreme Court of Canada, which struck down the legislation. The Press Act invalidation was based primarily on its association with the economic statutes, which were found to interfere with the monetary and banking powers of the Parliament of Canada, as well as on the contention that such a legislative interference with freedom of speech constituted "criminal law," another of the federal Parliament's exclusive domains. The latter conclusion—that because of federal responsibility for criminal law the provinces may not infringe on freedom of speech—was in itself an important example of judicial extension of constitutional norms by inference.

Chief Justice Duff came up with an alternative rationale for striking down the Press Act, involving an even more dramatic extension by inference. The 1867 Constitution called for the existence of a federal "Parliament," and the Preamble states that Canada is to have a Constitution "similar in principle to that of the United Kingdom." Since the United Kingdom's Parliament operates in an atmosphere of free speech, the Canadian Constitution should be read as requiring a similar atmosphere of free speech to exist throughout Canada. Therefore, Duff and two colleagues concluded, the Alberta Press Act was invalid for the additional reason that it offended this implicit constitutional guarantee of free expression. Although this inferential extension of the Constitution, labelled the "Implied Bill of Rights" by subsequent commentators, never won the support of a majority of the Supreme Court, it was approved by a number of judges and academic writers. It was considered a partial substitute for an express constitutional guarantee of rights and freedoms in the years before any such express guarantee was enacted. If it had ever attracted majority allegiance, it might, because of its inferential linkage to the text of the Constitution, have escaped being considered an amendment. This escape would have been narrow, however; it was certainly a very extended inference.

37. [1938] 1 SCR 100.
38. This case was included in the Alberta Statutes Reference. Id at 145-47.
39. Id at 100.
F. Supplement

There are times when courts are called upon to remedy gaps in the Constitution. The Constitution Act, 1867 confers on the Parliament of Canada jurisdiction over patents (section 91(22)) and copyrights (section 91(23)), for example, but says nothing about trademarks. Similarly, it makes the legislatures of the provinces responsible for certain forms of licensing for revenue-raising purposes (section 92(9)), and for "the incorporation of companies with provincial objects" (section 92(11)); but it is silent as to licensing for regulatory purposes and as to the incorporation of companies with federal objects.

When attempting to fill such gaps, the courts play a supplementary role that approaches, in the creativity called for, the function I call judicial amendment. As long as they base their conclusions on inferential reasoning rooted in the text, however, I would not consider the process to involve amendment. For example, jurisdiction over trademarks has been held to reside in the federal "trade and commerce" power. This makes good sense in light of the fact that patents and copyrights are both federal responsibilities. Control over the incorporation of federal companies has also been ascribed to the federal Parliament (as an aspect of its residual "peace, order and good government" power), which also seems to be a fair inference from the explicit distribution of powers under sections 91 and 92. Finally, regulatory licensing seems to fall, as it logically should, to the order of government having operational control over the activity in question.

It would be difficult to characterize any of these rulings as amendments because the interpretations are reasonably derived from the text of the Constitution. When the courts, however, fashion constitutional supplements from whole cloth, as I believe the Supreme Court of Canada did in the Manitoba Language Reference, it seems fair to say that they have surpassed the role of constitutional interpreters and have become amenders.

IV

Ramifications

A. Judicial Amendments Are Not All Bad

It should not be supposed that I necessarily object to judicial amendments of the Constitution. The point of the earlier examples was not to criticize substance but to illustrate process. To some of the particular amendments highlighted earlier, such as the "discrete and insular minority" gloss on equality rights, I do indeed take strong exception. With others, such as the sales tax/purchase tax masquerade, I am quite content. Nor do I find fault in

43. La Forest, Allocation of Taxation Power at 134 (cited in note 21).
44. See note 31.
general with the fact that major constitutional amendments are made by courts. Observers of a more populist persuasion than I may consider it inappropriate for judicial appointees, lacking a democratic mandate, to engage in outright alteration of the country's most fundamental legal and political document. I do not—not absolutely, at any rate. There are, indeed, compelling reasons to believe that occasional judicial amendment of the Constitution is positively beneficial, and sometimes unavoidable.

The formal process for amending the Constitution of Canada, set out in sections 38 to 49 of the Constitution Act, 1982, is exceedingly cumbersome. As the lengthy debate over the Meech Lake Accord demonstrated,\textsuperscript{45} that process can consume prodigious quantities of time, energy, money, and political will, without necessarily producing change. Even in situations far less politically charged than the Meech Lake imbroglio, constitutional amendments are usually hard to achieve by the formal route. The reasons for this are several. Politicians are often too preoccupied with more immediate concerns to be much interested in the future health of the Constitution. Moreover, they are reluctant to be associated with proposals (such as suggestions to expand the constitutional rights of religious or linguistic minorities\textsuperscript{46}) that would risk alienating significant segments of the electorate. On certain matters (such as the consequences of restricting "fundamental justice" in section 7 of the Charter to purely procedural matters), judges are simply better qualified than politicians to decide. On others (the narrowing of the federal commerce power is a good example\textsuperscript{47}), the existence in the formal process of a veto power on the part of the affected government all but precludes any change by legislators. Finally, some situations (the need for a device to prevent chaos resulting from the wholesale invalidation of provincial legislation in the Manitoba Language Reference, for instance\textsuperscript{48}) call for a more rapid response than formal procedures permit. In circumstances like these, necessary constitutional amendments might never be made if they were not fashioned by judicial hands.


\textsuperscript{46} It is very unlikely that the constitutional about-face that occurred in \textit{Reference Re: Ontario Separate Secondary Schools}, 40 DLR (4th) 18 (SCC 1987), as to the application of Roman Catholic separate school rights under section 93 to the secondary school level could have been achieved by formal constitutional amendment.

\textsuperscript{47} See notes 13-20 and accompanying text. It is true, of course, that the federal authorities had no formal veto power at that stage of Canada's constitutional development, when the amendment power resided with the British Parliament. There can be no doubt, however, that a \textit{de facto} power of constitutional veto had by that time been bestowed on the Government of Canada by constitutional convention.

\textsuperscript{48} 19 DLR (4th) 1 (SCC 1985). In my view, swift legislative remedial measures would have been possible in that situation and would have been preferable to the spurious invocation of the "rule of law" to which the Court felt driven. On the other hand, the Court may well have been aware of some sub-surface impediment to effective legislative action. The point is that when crisis looms, a judicial response may offer the only sure solution.
The fact that judges amend the Constitution is not, therefore, always a
problem in itself. It is inevitable in some circumstances, and at times
beneficial. The undemocratic nature of the process is a legitimate cause for
concern, however. Some think that it is dangerous even to acknowledge
publicly that courts sometimes amend constitutions. They seem to fear that
the electorate will then insist that the power be taken away. In my view, that is
a misplaced concern. The public already knows what the courts are doing,
and I think its respect for the judiciary is less likely to be damaged by an open
acknowledgement of the truth than by a transparent denial that the courts are
going beyond mere "interpretation."

It is nevertheless anomalous that a democratic constitution should be
capable of outright amendment by an undemocratic institution and
undemocratic procedures. Therefore, courts should exercise self-restraint in
these matters, permitting themselves to engage in constitutional amendment
only when it is either inevitable that they do so, or when it would clearly be
detrimental to the nation to leave the matter to the formal amendment
process. In all other circumstances, judges should restrict their interpretation
to the (rather generous, after all) forms of judicial review that fall within the
scope of fair construction.

Even in the circumstances where it is appropriate, judicial amendment of
the Constitution involves certain serious difficulties. These difficulties
concern how judges perform the task. The remainder of this article will
address factors that impair the ability of the Supreme Court of Canada to
perform the amendment function as effectively as it should.

B. Insufficient Representation

Supreme Court judges are selected from members of Canada's elite. Most
of them know little, from personal experience, about some of the most trying
problems ordinary citizens are commonly confronted with in the course of
their daily lives. Was it a mere coincidence that the Supreme Court of Canada
was more sympathetic to the inequality complaint of a non-citizen deprived
by citizenship of the right to be a lawyer in British Columbia (in Andrews 49)
than to that of accused persons deprived by geography of procedural rights
they would have in another part of the country (in Turpin 50)? I do not think so.

In all of its work, whether constitutional or not, the Court would function
more satisfactorily, in my view, if its membership better reflected the diversity
of the country's population. While this concern is not exclusively relevant to
the problem of judicial amendment of the Constitution, it deserves special
emphasis in the context of the Court's role as an occasional amender of
Canada's most fundamental law. The proposal with which this article

49. [1989] 1 SCR 143.
concludes would ameliorate some of the consequences of the Supreme Court’s inadequate representation of the people of Canada.

C. Lack of Information and Expertise

Even if it were possible for any nine individuals to ever be reasonably representative of a country’s population, those nine people could not be expected to appreciate fully all the factors involved in, or all the interests affected by, a major amendment to the country’s constitution. Such amendments can have a profound influence on economic growth, political power, or cultural development; they usually affect matters having deep historical roots, and they often draw upon foreign constitutional experience. They also may have an impact upon policing, education, health care, immigration, agriculture, transportation, and many other aspects of life. No nine lawyers, however learned and wise, could ever possess the experience or the expertise necessary to understand the full future implications of major constitutional amendments.

The most significant difference between the formal constitutional amendment procedures established by the Constitution Act, 1982, and the process by which the Supreme Court of Canada amends the Constitution is that the formal route entails greater opportunities for the expression of pertinent points of view and for taking advantage of relevant expertise. Even the simplest types of amendment (such as unilateral modifications by the Parliament of Canada or by provincial legislatures to their own internal constitutions in accordance with sections 44 and 45) call at least for debates in the responsible legislative assemblies in the bright light of news media scrutiny. Other types of amendments require much more public involvement: debates in the legislatures of all affected jurisdictions (section 43); or in the federal Parliament and at least seven provincial legislatures (section 38); or, for amendments concerning the most important matters, in all federal and provincial legislative bodies (section 41). Moreover, the governments in question customarily supplement these legislative debates concerning proposed constitutional changes with public hearings, technical studies performed by staff and commissioned experts, interminable intergovernmental discussions and negotiations, and investigations by special legislative committees. First, second, and third drafts are circulated, criticized, revised, published, editorially supported and attacked, lobbied for and against, modified, rescrutinized, renegotiated, debated in one legislative chamber after another, and eventually, months or years after the proposal was conceived, adopted or rejected.

In the case of judicial amendment, by contrast, the alteration has usually been made, in its final form, before the general public is even aware that a change is in prospect. Sometimes the amendment does not even receive much publicity at that point. Canadians are still generally unaware of the radical judicial restriction of their equality rights that occurred in Turpin. It is true that judicial amendments are likely to have been preceded by intense
research, discussion, debate, and perhaps even negotiation, on the part of the Supreme Court judges themselves (although the unanimity of *Turpin* suggests that this is not always the case). These studies and exchanges are necessarily constrained, however, by the severe limitation of time and research resources available to the nine judges; they cannot be considered to approximate the opportunities that the formal amendment process presents for informed consideration of all factors and consequences.

It is also true that the Court has the benefit of both written and oral arguments by skilled counsel representing opposing points of view, as well as judgments prepared by lower level judges in the same case. If evidence was presented at the lower levels, that is available also. The fact that all attorney generals, federal and provincial, are entitled to be notified of, and to intervene in, all Supreme Court of Canada litigation involving constitutional issues, and the possibility of other relevant interest groups also being accorded intervenor status, reduce the likelihood that major considerations will escape the Court's notice. If they should be overlooked or dealt with in a manner considered inappropriate, there is certain to be astringent criticism from both the academic community and the public media.

These factors are not entirely satisfactory substitutes, however, for the full-tilt negotiation and public debate that usually animates the formal process of constitutional amendment. The points of view expressed in argument, and the evidence by which they are supported, are restricted in scope by the factual issues in dispute, and by the Court's limited tolerance for intervenor briefs. Time and resource pressures are severe. Public acceptance of constitutional amendments brought about in this manner is difficult to win in a democratic society. Also, *ex post facto* criticism by academics and others comes too late to prevent errors from being made. Admittedly, the relative ease with which judicial amendments can be enacted permits the Court to make future adjustments in the light of criticisms, but only at the cost of much confusion and inconvenience for those individuals, organizations, businesses, and governmental agencies whose activities are affected by constitutional considerations. It would be better if the Court, possessed of all pertinent data, got it right the first time.

V

A Proposal

Having contended that the Supreme Court of Canada effects major constitutional amendments from time to time and that the process by which it occurs is subject to serious shortcomings, it is incumbent on me to suggest a

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51. SCC Rule 32, SOR 87-292.
53. There is an indication in the Court's decision in *R. v Hess* and *R. v Nguyen*, [1990] 2 SCR 906 (companion cases), that it may be willing to modify its "discrete and insular minority" ruling. See Gibson, 40 U New Brunswick L J 2 (cited in note 11).
way in which these shortcomings might be eliminated or ameliorated. Such a suggestion will now be advanced, though tentatively and with the expectation that its examination by other constitutionalists will result in its improvement or, perhaps, its rejection in favour of a more satisfactory solution.

The proposal is to create a permanent Constitutional Advisory Commission to assist the Supreme Court of Canada in situations where there is a prospect that a forthcoming ruling of the Court will effect an amendment to the Constitution or will bring about a constitutional revolution equivalent to an amendment. The Commission could, incidentally, also prove to be a valuable adjunct to the formal amendment process.

A. The Commission

The name is of no significance, of course. "Constitutional Advisory Commission" is proposed simply because it is convenient to have a label by which to identify the body for discussion purposes. The words "advisory" and "commission" suggest desirable characteristics for such a body to possess: a purely recommendatory role, independence, and permanence. The titular similarity to the Constitutional Advisory Committee established under the U.S.S.R. Constitution in its final years is not entirely accidental. I had occasion to examine the Soviet Committee under the tutelage of Dr. Alexandre Yakovlev, director of the U.S.S.R. (now Russian) Institute of State and Law, and was struck by certain of its characteristics. Another source of inspiration was a proposal by Professor Kenneth Culp Davis for a research service to assist the Supreme Court of the United States.

The Commission would consist of a manageable number of persons (between five and eleven, the latter perhaps being a convenient number), appointed for substantial terms (approximately six years) by federal and provincial governments (perhaps each jurisdiction appointing one member). These appointed individuals, with the assistance of an adequate research staff, would study and report upon constitutional questions referred to them by the Supreme Court of Canada and the governments of Canada or of any of the provinces.

There should be an approximately equal number of men and women on the Commission, and an attempt should also be made to have its composition reflect the ethnic, religious, and cultural diversity of the country. A high level of professional competence should also be a sine qua non for each member, though this does not necessarily mean the legal competence we expect from Supreme Court justices. On the contrary, while it would be desirable that some members of the Commission be legally trained, it would probably be undesirable if a majority of them were. Expertise in economics, political science, sociology, and history would also be sought, as would experience in

business (large and small), labour unions, government, and the helping professions. It would not be possible to meet all these criteria in any single panel of commissioners, of course, but the effort should be made to come as close to doing so as possible. Designing a technique that would ensure adequate representation and professional competence, while permitting each jurisdiction to select a member, would be challenging, but not impossible.

Funding for the Commission would come from all federal and provincial governments, perhaps in proportion to each government's share of total Canadian tax revenues. This funding, an annual appropriation, could be guaranteed by requiring the approval of some informed and impartial authority such as the Chief Justice of Canada.

B. Initiating Commission Studies

The Constitutional Advisory Commission could be called upon to study and report on prospective constitutional alterations in two distinct circumstances: judicial and governmental. Although the potential usefulness of the Commission as a supplement to the formal political amendment process should not be overlooked, it is the former to which the present article is chiefly addressed.

Judicial references could be initiated by the request of a single judge of the Supreme Court of Canada (two if there were a fear of an occasional loose judicial cannon). This request would occur when a judge reached the conclusion, after the close of oral arguments in a case, that there was a reasonable likelihood that the Court would determine an issue in the case in a manner that would be tantamount to a constitutional amendment, or that would involve a major new direction in constitutional interpretation. The Commission would analyze the question, report to the Court on the probable consequences of the proposed amendment or change of direction, and suggest possible alternative responses that might be open. The Commission would have a designated time period to report its findings (six months might be generally appropriate). During this time period, the Court would be precluded from issuing reasons for judgment in the case.

Governments that wished to have the Commission's opinion about possible constitutional amendments would also be free to refer questions to it. This could be in lieu of legislative inquiries, but it is probably not realistic to expect that Parliament or the provincial legislatures would often wish to circumvent their own committees. A more likely role for the Commission would be to provide technical data relative to amendment proposals under study by legislative committees. Because governments have alternative resources open to them that are not available to the Court, however, it would probably be wise to give judicial references priority over governmental references in time-pressed situations.

It might not be easy to ensure continuous employment for the Commission if judicial and governmental references were its sole source of projects. Therefore, it could be given the authority to launch initiative studies
of its own concerning the effectiveness or ineffectiveness of particular aspects of the Constitution, and possible future improvements. Of course, these self-initiated projects would yield priority to judicial or governmental references.

C. Modus Operandi

The Commission's methods would be chiefly of its own design, and they would probably vary considerably in accordance with the needs of particular projects. The methods would certainly include extensive socio-political-legal research by in-house staff and, if necessary, by commissioned scholars. Sole responsibility for the content of research reports would lie with the authors of the reports. All research would be publicly accessible, with its authors identified, after the release of the Commission's final report. Consultations with organizations and groups likely to be affected would probably be a normal procedure. In addition, public hearings or a call for the submission of briefs by members of the public might sometimes also be appropriate.

Although the Commission's deliberations would be secret, its final report on any matter, containing fully reasoned arguments in support of its conclusions, would be published. Dissenting opinions would also be included and their authors identified. This final report would be available for purchase by members of the public. It would probably be reasonable to permit a brief delay (no more than a month) between the submission of a Commission report to the referring authority and its release to the public.

D. Significance of Commission Recommendations

Recommendations of the Commission would not be binding on the Court or on governments. The Court would be obligated, however, to give the Commission's report due consideration before reaching a final decision in any case involving that issue. Governments would be free to ignore Commission recommendations altogether, but they would be answerable, of course, to the court of public opinion for having done so.

VI

Conclusion

It is reassuring to be able to state one's conclusions in the words of others. The basic premise of this article has been the need for what Professor Paul Weiler long ago referred to as "frank recognition of judicial responsibility for constitutional change." Although I am more convinced than Professor Weiler and certain other commentators of the general desirability of constitutional amendment by the courts, I share Weiler's concern about whether the Supreme Court of Canada is "institutionally equipped to make the judgments required for national policy-making." Professor Patrick

57. Id.
Monahan has said that “the exercise of power should be subject to collective debate and deliberation.”

It is for these reasons that I have borrowed and extended the proposal of Professor Kenneth Culp Davis that courts of last resort need a “research service” to assist them with the arduous task of “judicial lawmaking.” If such a resource is desirable in ordinary instances of judicial lawmaking, how much more is it needed in the case of judicial amendments to the Constitution, the “supreme law of Canada”? It is often remarked that war is too important to be left to generals alone, and it is equally true that amendment of the Constitution is too important to be left to judges alone.

58. Patrick S. Monahan, Judicial Review and Democracy: A Theory of Judicial Review, 21 U British Colum L Rev 87 (1987). I should add, however, that I do not travel with Professor Monahan all the way to his destination. Whereas he is not willing to bypass the democratic process even “in the name of the right answers,” my sole concern is with getting the answers right. My desire to see the Court have greater access to the fruits of “collective debate and deliberation” is to help it find the right answers, rather than to enrich the democratic process for its own sake.


60. Constitutional Act, 1982, pt I (Canadian Charter of Rights and Freedoms), § 52(1).