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## Amending Authors and Constitutional Discourse

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*The author surveys various theories related to the concept of constitutional amendment, reviewing the importance of the notion of authorship to the amending process, and the related theories about constitutional legitimacy and judicial activism. In seeking an alternative conceptualization of authorship that is applicable to constitutional amendment, she reviews Michel Foucault's essay on authorship, and specifically his notion of the transdiscursive author who originates a "return" to an original text, which she presents as a useful context in which to read the constitutional amendment process. Constitutional discourse, using Foucault's approach to discourse, occupies a significant cultural and social position. She then provides a reading of four Supreme Court of Canada judgments on the issue of constitutional amendment (The Senate Reference, the Patriation Reference, the Quebec Veto Reference, and the Secession Reference), arguing that the Court moves towards a discursive view of Canadian constitutionalism and amendment that conceptualizes the legitimate amending authors of the Canadian constitution as the Canadian people, recognizing the relevance of the Constitutional text itself, the nature of Canadian democracy, regionalism, and Charter values. Thus, the author argues, the Court's analysis of constitutional amendment provides a significant moment in nation building by constituting Canadian citizens as self-governing, self-constituting, and self-writing.*

*L'auteur passe en revue diverses théories relatives au concept de l'amendement de la Constitution et se penche en particulier sur la notion de paternité du processus d'amendement et les théories connexes de légitimité constitutionnelle et d'activisme judiciaire. Cherchant une autre conceptualisation de la paternité qui s'applique au processus d'amendement constitutionnel, l'auteure reprend l'analyse de Michel Foucault dans son essai sur la paternité et, en particulier, sa notion de l'auteur transdiscursif qui préconise un retour au texte d'origine. Elle estime que cette démarche fournit un contexte utile pour en arriver à une meilleure compréhension du processus d'amendement constitutionnel. Selon l'approche de Foucault, le discours constitutionnel occupe une place prépondérante sur le plan social et culturel. L'auteure propose ensuite une réflexion sur quatre décisions de la Cour suprême sur la question de l'amendement de la Constitution (le renvoi du Sénat, le renvoi relatif à la canadienisation de la constitution, le renvoi relatif au droit de veto du Québec et enfin le renvoi relatif au projet de sécession). Elle argue que la Cour gravite vers une vision discursive du constitutionnalisme canadien et de l'amendement de la Constitution qui confère au peuple canadien la paternité légitime de tout projet d'amendement constitutionnel. La Cour reconnaît ainsi la pertinence du texte de la Constitution, la nature de la démocratie et du régionalisme canadiens de même que les valeurs de la Charte. L'auteure conclut que l'analyse de l'amendement de la Constitution auquel s'est livrée la Cour suprême marque un tournant décisif dans l'affirmation du pays, car les citoyens canadiens en émergent doués de la capacité de se gouverner, de formuler leur propre constitution voire d'assumer la paternité des textes de loi qui les gouvernent.*

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Prime Minister Pierre Elliott Trudeau wrote in 1968 that “constitutions are made for men and not men for constitutions. However, one tends to forget that constitutions must also be made *by* men and not by force of brutal circumstance or blind disorder.”<sup>1</sup> At the same time that this quotation emphasizes the human activity of making and writing, it also points out — perhaps benignly, perhaps not — that the actors involved may be members of an exclusive constituency: did Trudeau mean that it was men and not women who make constitutions? Or is Trudeau using a synecdoche, taking “men” to mean “people”? Without actually knowing what “made *by* men” means, or lacking sufficient information to agree to overlook the terminology’s exclusionary propensity, we might be uncertain about the legitimacy or authority of the men, and maybe of Trudeau as well, as author of this statement. Is this quotation more (or less) meaningful to you because it is attributed to Trudeau and not someone else?

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1. Cited in Lorraine E. Weinrib, “Trudeau and the Canadian Charter of Rights and Freedoms: A Question of Constitutional Maturation” in Andrew Cohen & J.L. Granatstein, eds., *Trudeau’s Shadow: The Life and Legacy of Pierre Elliott Trudeau* (Toronto: Vintage Canada, 1998) 257 at 259.

### *Introduction*

This paper explores different ideas about constitutional authorship in general and specifically why the conceptualization of authorship is important in the context of constitutional amendments. By “authorship,” I mean the term to include not only the acts of individuals or groups of people, but the values and principles that also originate the making and amending of constitutions. My argument is that Canadian judicial review of the Constitution has tended to reject as an interpretive guide reliance on the idea that the constitutional text means what the original drafters intended; the original authors are *not* foremost authorities for Canadian courts. However, where the authorship of constitutional *amendments* is concerned, and specifically in considering who can legitimately author a Constitutional amendment in Canada, the Supreme Court of Canada has paradoxically demonstrated a reliance on a doctrine of original intent (an effort to interpret the text in accordance with the meanings attributed to it by those who originally wrote it).<sup>2</sup> Importantly, however, the Court has more recently moved away from a doctrine of original intent towards constructing a discourse of Canadian constitutionalism and constitutional amendment that establishes what bodies, according to the Court, can be legitimate amending authors and what procedures must direct their activities. By “discourse,” I mean “not a disembodied collection of statements, but groupings of utterances or sentences, statements which are enacted within a social context, which are determined by that social context and which contribute to the way that social context continues its existence.”<sup>3</sup> Such a “discursive” view of Canadian constitutional amendment does not focus on the text alone or the meaning of words contemporary to a given analysis of the Constitution, but instead casts a wider view as it seeks an interpretive base, encompassing articulations about Canadian history, political systems and structures, and broad issues of human rights. The Court designates as the truly legitimate amending authors the Canadian people, taken as a whole, and speaking through their representatives.

It is finally my argument that because the Court constructs a *discursive* view of authorship (rather than focussing strictly on a text-based analysis of what the Constitutional texts originally meant to drafters, or what the texts direct about the amending process), the Court creates a view of Canadian constitutional amendment that acknowledges historical origin,

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2. See Lamer J.’s judgment in *Reference Re Motor Vehicle Act (British Columbia)*, S. 94(2), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [*Reference Re B.C. Motor Vehicle Act* cited to S.C.R.].

3. Sara Mills, *Discourse* (London: Routledge, 1997) at 11.

changing values, and the citizenry as a whole. This is important, because the Court not only supplies a noticeable absence in the Canadian Constitution, a reference to the Canadian people, but constructs an idea of citizenship, legitimacy, and self-authorship. This is a significant movement in Canadian constitutional commentary, for the concept of who authored the foundational text of a country, and who can re-author it by amending it, is central to the capacity of a people to be self-governing and declare in their foundational legal documents not only who they are, but who they will allow themselves to become.

I begin by discussing why some constitutional theorists see the idea of authorship as important and how authorship as a concept relates to constitutional legitimacy, judicial review, and interpretive strategies. I next consider how interpretive strategies vary according to the different views taken of authorship and the importance attached to a discernable original author or authors. Then I will mention differences between American and Canadian interpretive approaches. I then examine how Michel Foucault's theory of authorship and discourse might inform constitutional legal theory. In discussing authorship and constitutional amendments, I will attempt to indicate how conceptions of authorship change when the process at issue is the amendment of an existing constitution rather than the initiation of one. Finally, I will survey four Supreme Court of Canada decisions regarding the authorship of amendments to the Canadian constitution, arguing that the Court's most recent position is to allow the legitimate constitutional amending author to emerge from a broad discourse about the Canadian constitutional system, rather than a particular element of the constitutional text itself.

### *I. The Importance of Authorship in Constitutional Theory*

The question of "who wrote?" or "what values originate?" a constitution is important to constitutional legal theorists and to interpreters of constitutions, although the extent to which an interpreter or theorist focuses on the "who" of constitution making, rather than the constitutional text itself, the process of constitution-making, or the substance of it, varies. The "who" of constitutional authorship may itself be variously conceptualized as a set of historically identifiable individuals (sometimes described as the "framers" of a constitution), or a set of people who are not necessarily important as identifiable historical figures, but whose importance derives from their participation in an original and, in hindsight, legitimate process of composition. Hereinafter, I refer to these actors, historically identifiable or not, as "original authors."

While my interest here is in how ideas about authors play themselves out in constitutional legal theory, I hasten to note that authorship is by no means important to all constitutional legal theory and there are other explanations for where constitutions find their legitimacy, besides who wrote them. These include that constitutions receive their legitimacy from the very fact of their acceptance, what Frank Michelman refers to as the “existential possibility,” or because the constitution accords with a person’s sense of morality, or because it is a “dictate — of right reason.”<sup>4</sup> Jürgen Habermas proposes that “[p]opular sovereignty and human rights provide the two normative perspectives from which an enacted, changeable law is supposed to be legitimated as a means to secure both the private and civic autonomy of the individual.”<sup>5</sup>

### 1. *Legitimacy and Authorship*

Recognizing that there are other explanations for constitutional legitimacy, still, as Joseph Raz writes, “[i]t is tempting to think that the authority of law, of any law, derives from the authority of its maker ... the identity of the lawmaker is material to the validity of the law, at least in the case of enacted law.”<sup>6</sup> One narrative of constitutional legitimacy in which original authors figure prominently emphasizes the authors’ identity as representatives of a populace and their participation in a consultative and deliberative procedure; hence, the resulting documents these authors produce and their procedure itself merit our respect and adherence. Why does this matter so much? The central idea is that in constitutional democracies, *people govern themselves* and, as Jed Rubenfeld notes, the process of self-writing is key: “[A]utonomy is therefore always autobiography ... Every exercise of human freedom is an exercise in self-life-writing ... We must give our lives, in two words, a text.”<sup>7</sup> For Rubenfeld, written constitutionalism “embraces the struggle for self-government *over time*” which is “democracy as demo-graphy.”<sup>8</sup> He produces a thesis to describe this idea:

A people attains self-government not by perfecting a politics of popular voice, but by way of an inscriptive politics, through which the people struggles to memorialize in foundational law, and to live out over time, its own foundational commitments.

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4. Frank I. Michelman, “Constitutional Authorship” in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 64 at 65.

5. Jürgen Habermas, “Remarks on Legitimation through Human Rights” (1998) 24 *Philosophy and Social Criticism* 157 at 159.

6. Joseph Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries” in Alexander, *supra* note 4, 152 at 157-58.

7. Jed Rubenfeld, “Legitimacy and Interpretation” in Alexander, *supra* note 4, 194 at 214.

8. *Ibid.*

For a people to be self-governing, there must be more than a politics permitting citizens to give voice to their will. There must be an inscriptive politics at the foundation of the legal order. This inscriptive politics would include institutions through which the policy could memorialize, preserve, interpret, enforce, and rewrite its fundamental political commitments over time. *The first freedom of a self-governing people is not, therefore, the freedom of speech. It is the freedom to write: to give oneself a text. A fully self-governing people must be the author of its own constitution.*<sup>9</sup>

This is a remarkably important idea, that part of nation-building is nation-writing. The legal and national order must be permitted to not only arise through time, but to sustain itself over time, through written documents that can connect interpreters across time.

Michelman explores the idea that a “political-institutional constitution has always ... the character of a law expressly and designedly laid down by politically circumstanced human agents, which gains its bindingness on us at least in part by force of its reputed intentionality as a product of their express political exertion.”<sup>10</sup> This is the case, despite the fact that, as Michelman observes, there is no inherent necessity for constitutional documents to have authors: they can be attributed value because they accord with general constitutional ideas or theories of government or law.<sup>11</sup> He writes about the persistent belief of many that a constitution is a “historical product of episodes of authorship.”<sup>12</sup> People draw a connection “between perceived historical facts of the textual ‘Constitution’s’ authorship and the current normative authority for us, as law, of a body of practical political principles that we take this text to express or represent.”<sup>13</sup> Michelman labels this connection the “authority—authorship syndrome.”<sup>14</sup> What plagues this idea of authorship for Michelman is that in order for original authors to claim an authority to be constitution makers, they must rely on “some preconstitutional ground of the authority-to-make-something-be-law-by-legislating-it of whoever is supposed to have made the Constitution be law by legislating *it*,”<sup>15</sup> which establishes an infinite regress of authority. From where does the legitimacy arise?

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9. *Ibid.* at 217-18 [emphasis added].

10. Michelman, “Constitutional Authorship”, *supra* note 4 at 65.

11. *Ibid.* at 68.

12. *Ibid.* at 67.

13. *Ibid.*

14. *Ibid.*

15. *Ibid.* at 72 [emphasis in original].

The further question is, where is there room for change and who has *both* the ability and the authority to change a memorializing text? If a people have actually “memorialized” themselves, as Rubenfeld observes, or create normative authority in writing, as Michelman observes, how can change occur? How can we be both “constituted” by something, and continue to constitute anew? Raz considers this conundrum: if one constitutional value is that a people is to be always-already self-governing, “[n]o one, the argument goes, can have authority over future generations. Therefore, the authority of a constitution cannot rest on the authority of its makers.”<sup>16</sup> In Michelman’s words, to submit to the authority of a prior generation is to cease to be self-governing: “The charterers ... seem to stand, then, on a different plane of rulership from the chartered ... as creators to creatures.”<sup>17</sup> In other words, are people not equally self-writing? Are the first writers more authoritative than those who follow? Why?

Michelman’s resolution to this problem is to seek recourse to a set of *values* that govern the authorial process. He argues that we seek a “normative like-mindedness”<sup>18</sup> between us-now, adhering to a constitution, and us-then (“We the People”) who wrote it, discovered in the idea that “constitutional framers can be *our* framers — their history can be our history, their word can command observance from us now on popular-sovereignty grounds — only because and insofar as they, in our eyes now, were already on what we judge to be the track of true constitutional reason.”<sup>19</sup> And so we in the present “read the words of the framers with the interpretive charity of the living.”<sup>20</sup> Michelman argues elsewhere that some belief in the legitimacy of the *process* is important, a process of deliberation and participation that is “in force ... and [that] ... we judge to be reasonably defensible as justice-seeking,”<sup>21</sup> a matter of belief. He thus concludes that, in a sense, the belief in an author satisfies a sort of psycho-legal need: we “produce an author because we have to”<sup>22</sup> and project upon original authors an authority that allows us to be morally bound to what they produced.

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16. Raz, *supra* note 6 at 164.

17. Michelman, “Constitutional Authorship”, *supra* note 4 at 80.

18. *Ibid.*

19. *Ibid.* at 81.

20. *Ibid.*

21. Frank I. Michelman, “How Can the People Ever Make the Laws? A Critique of Deliberative Democracy” in James Bohman & William Rehg, eds., *Deliberative Democracy* (Cambridge, Mass.: MIT Press, 1997) 145 at 166.

22. Michelman, “Constitutional Authorship”, *supra* note 4 at 92.



## 2. *Illegitimacy and Authorship*

But what if you do not feel morally bound? The idea of authorship is also significant for commentators who are critical of how public ideals have been constructed by original authors *illegitimately*. For example, Iris Marion Young writes:

The white male bourgeoisie conceived republican virtue as rational, restrained, and chaste, not yielding to passion or desire for luxury, and thus able to rise above desire and need to a concern for the common good. This implied excluding poor people and wage workers from citizenship on the grounds that they were too motivated by need to adopt a general perspective. The designers of the American Constitution were no more egalitarian than their European brethren in this respect; they specifically intended to restrict access of the laboring classes to the public, because they feared disruption of commitment to the general interest.<sup>23</sup>

Her response to the process of exclusion is to posit a new way to author new laws and policies: by changing *who* does the authoring: “Where some groups are privileged and others oppressed, the formulation of law, policy, and the rules of private institutions tend to be biased in favor of the privileged groups, because their particular experience implicitly sets the norm.”<sup>24</sup> She envisions instead an inclusive, “heterogeneous public” “where participants discuss the issues before them and are supposed to come to a decision that they determine is best or most just.”<sup>25</sup>

Thus, on a fundamental level, for many constitutional commentators, coming to grips with an idea about authorship is part of the process of finding reasons to agree to be bound by a constitution, or equally, to find explanations for a constitution’s lack of authority. Like the oath in a courtroom which must seize one’s conscience,<sup>26</sup> similarly constitutions must seize the conscience of citizens to be binding, and the identification of original authors may provide this bindingness or, just as importantly, explain its absence.

## 3. *Judicial Review and Authorship*

Another area of constitutional legal theory in which the notion of authorship gives rise to considerations about illegitimacy is the area of judicial

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23. Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship” in Iris Marion Young, ed., *Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory* (Bloomington: Indiana University Press, 1990) 114 at 118.

24. *Ibid.* at 131.

25. *Ibid.* at 129.

26. *R. v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92.

review, which is related to issues of authorship because for some commentators, judicial review, when undertaken illegitimately, transforms judges from constitutional *interpreters* of text into constitutional *authors* themselves, which runs contrary to the notion of the people being self-governing through their legislative representatives. As Peter W. Hogg writes, when judges are perceived to be inappropriately interpreting constitutional provisions, “non-elected judges” gain “‘a veto over the politics of the nation,’ forbidding its legislatures to reach decisions that the judges believe are wrong. Such a veto is as unacceptable, and for the same reasons, as a veto by the Queen or the Governor-General — a veto that existed in colonial times but has now been discarded as incompatible with democracy.”<sup>27</sup> The problem is, where does interpretation end and authorship begin? How do you tell the dancer from the dance? Here American and Canadian practice of and theory on judicial review diverge widely. As Hogg writes, “[t]he problem of the legitimacy of judicial review is ... a much less serious problem in Canada than it is in the United States. First of all, Canada adopted the *Charter* in full knowledge that the application of the *Charter* by non-elected, non-accountable judges would nullify the acts of elected legislative bodies and accountable officials, and would occasionally do so in unpredictable ways” and because the Canadian *Charter* includes the section 33 override clause enabling judicial decisions “to be overridden by the competent legislative body.”<sup>28</sup>

#### a. *Judicial Review in America*

American discussions of judicial review of the American Constitution diverge on the relevance or necessity of positing an original author or authors. Some commentators advocate the centrality of the original constitutional words; where such texts prove ambiguous, recourse to the intent of the original authors is considered the *only* legitimate way to interpret constitutional provisions. Other theorists argue that because original intent is lost to us, or may no longer be relevant, judges quite legitimately should refer to *extra-textual* values to supplement their construction of constitutional provisions. The former approach has been labelled interpretivism, the latter noninterpretivism.

#### b. *Interpretivism*

As Christopher P. Manfredi writes, “[i]nterpretivist theories hold that judges deciding constitutional issues should confine themselves to enforcing norms

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27. Peter W. Hogg, “The Charter Rights and American Theories of Interpretation” (1987) 25 Osgoode Hall L.J. 87 at 93-94.

28. *Ibid.* at 88-89.

that are stated or clearly implicit in the written Constitution.”<sup>29</sup> Manfredi cites the position of Edwin Meese III, then United States Attorney-General, who argues that the American Supreme Court should “[g]round its constitutional jurisprudence in the meaning that the Constitution’s framers originally attached to the language used in the document.”<sup>30</sup> Robert Bork is another prominent advocate for interpretivism. In *The Tempting of America*, he writes, “[o]nly the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”<sup>31</sup> “What the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean,”<sup>32</sup> rather than the subjective view of a judge who makes “unguided value judgments of his own.”<sup>33</sup> He states that “[t]he interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people.”<sup>34</sup> Raoul Berger advocates reading the “Constitution of the United States” as being “frozen in the sense intended at the time of its adoption. That sense may be derived from the plain words of the text, or where the text is ambiguous, from evidence of the intention of the framers.”<sup>35</sup>

The value of this approach for those who advocate it is that it “confines the Court to its proper role,” leaving constitution making to “the People” rather than to judges who amend the constitution unconstitutionally.<sup>36</sup> Richard S. Kay writes that

What commands obedience is not a mere set of words, but the expression of an intentional historical-political act. Any attempt to apply the Constitution’s terms in a sense not intended by the human beings participating in that historical-political act, therefore, fails to invoke the only phenomenon that marks the Constitution off as worthy of obedience. Treating the Constitution as composed of meanings unrelated to

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29. Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Norman: University of Oklahoma Press, 1993) at 40. For additional sources regarding American views of interpretation, see William F. Harris II, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993).

30. Manfredi, *ibid.* at 41.

31. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990) at 143.

32. *Ibid.* at 144.

33. *Ibid.* at 146.

34. *Ibid.* at 159.

35. Raoul Berger, *Government by Judiciary* (Cambridge, Mass.: Harvard University Press, 1971), cited in Hogg, *supra* note 27 at 94.

36. Hogg, *ibid.* at 95.

its history makes it a different text, one no more legitimate for the purpose of limiting government than the constitution of another state or the rules of major league baseball.<sup>37</sup>

The interpretivist approach is seen to maintain constitutional integrity by binding judges to original intent rather than other values of their own devising that may be hard to discern, or are not associated with any form of consensus or test of time, especially where a particular interpretation has withstood scrutiny over time (unlike interpretations that would uphold racial segregation, for instance).

There are numerous arguments against this approach, however. They include the question about whether an original intent can be ascertained at all; about whether it is appropriate to govern a country according to often centuries-old values rather than contemporary ones, given that times change; and the question of whether the original framers intended their words to be frozen, or if, instead, “they were content to leave the detailed application of the constitution to the courts of the future.”<sup>38</sup>

### c. *Noninterpretivism*

According to Hogg, noninterpretivism

is the theory that holds that the text is so vague and indeterminate that the courts are inevitably driven to apply standards that are not found in the text. Once having rejected the text as the source of the standards of judicial review, the noninterpretists have to explain where the standards of judicial review come from, and a variety of sources have been suggested: for example, the moral values of the judge, the moral values of society, or some variant of natural law, usually in the form of a theory of justice, democracy, or morality.<sup>39</sup>

Like interpretivism, this model has an important notion of the original author, but here the judge is seen as legitimately acting the role of author. This is not to indicate that a judge is free to “authorize” his or her views of what a constitution sanctions and then to impose that view on a public. Ronald Dworkin, for instance, would not be as quick as Hogg to suggest a constitution is “so vague and indeterminate.” Rather, as Dworkin phrases it in describing what he calls a “moral reading” of the American Constitution, the interpreter’s role is to recognize that “we all — judges, lawyers,

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37. Richard S. Kay, “American Constitutionalism” in Alexander, *supra* note 4, 16 at 31.

38. Hogg, *supra* note 27 at 96. For other critiques of interpretivism, see Bork, *supra* note 31.

39. Hogg, *ibid.* at 91.

citizens — interpret and apply these abstract [constitutional] clauses [declaring individual rights] on the understanding that they invoke moral principles about political decency and justice.”<sup>40</sup> The noninterpretivist approach Dworkin endorses begins the process of constitutional interpretation by understanding “what the framers said” and the historical context in which they said it, and then produces an interpretation that preserves “constitutional integrity”:

Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest. (I have elsewhere said that judges are like authors jointly creating a chain novel in which each writes a chapter that makes sense as party of the story as a whole.)<sup>41</sup>

A critic of the approach, Manfredi notes that this approach “view[s] ... the task of constitutional interpretation as a creative one of identifying and applying novel rights to determine the validity of legislation.”<sup>42</sup> Critics of noninterpretivism thus may seize upon the notion of a judge bestowing, inappropriately, “novel” rights on citizens. However, the advantage of non-interpretivism is that it permits incremental constitutional change via interpretation, whereas adherence to original intent of the drafters may in some situations bind a country to values it later finds abhorrent. For example, commentators such as Raoul Berger argue that the original framers did not intend to end racial segregation of schools; however, for the United States to continue to adhere to this intent would be to swallow “a difficult pill,”<sup>43</sup> according to Hogg.

Judicial creativity, however, may also be a difficult pill for some to swallow, and the argument against noninterpretivism is the counterpart of the argument in favour of interpretivism, that allowing for extra-textual and more importantly, non-accountable judge’s values to influence deci-

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40. R.M. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996) at 2.

41. *Ibid.* at 10.

42. Manfredi, *supra* note 29 at 41.

43. Hogg, *supra* note 27 at 95.

sions about the constitutionality of legislative provisions, for instance, means that a people cease to be bound by the constitution and thus cease therefore to be self-governing.

#### d. *Middle Ground and the Canadian Position*

There are also theories of interpretation that fall between these two poles. John H. Ely's position is that "the Constitution itself illuminates the external meaning that can legitimately be injected into [the Constitution]." <sup>44</sup> His aim is to "restrict [judicial] activism to its proper sphere" <sup>45</sup> of process, and one such sphere is to repair defects in a country's "representative institutions of pluralist democracy." <sup>46</sup> Arguments against Ely, however, are that a Court reviewing only matters of process would not make important substantive changes in areas like human rights. <sup>47</sup> Hogg defends Ely's position by arguing that Ely "is not advocating that the judges apply values drawn from some source outside the constitution: he finds the governing values in the structure of the constitution itself." <sup>48</sup>

While there are Canadian theorists who embrace the idea of interpretivism, <sup>49</sup> other commentators write that the Canadian judicial position on interpretation has been to "enthusiastically embrace ... non-interpretivism." <sup>50</sup> Mahmud Jamal and Matthew Taylor note that the Supreme Court "usually rejected 'drafters' intention' as an interpretative approach." <sup>51</sup> Instead, the Court is said to advocate a "purposive method" towards "the interests which the Charter provision was designed to protect and to interpret the provision in accordance with those purposes" which has resulted in "broad and liberal interpretations being given to the various provisions." <sup>52</sup>

Patrick Monahan also argues a version of the middle ground associated with Ely above, arguing "that judges should restrict their evaluation to the consistency of [legislative] ... policies with values explicitly con-

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44. Manfredi, *supra* note 29 at 43, citing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980). Lawrence H. Tribe & Michael C. Dorf, *On Reading the Constitution* (Cambridge, Mass.: Harvard University Press, 1991) at 6, write that the American Constitution is "a framework; it is not a blueprint."

45. Manfredi, *ibid.* at 44.

46. *Ibid.*

47. *Ibid.*

48. Hogg, *supra* note 27 at 102.

49. See Ranier Knopff & F.L.Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992).

50. Manfredi, *supra* note 29 at 52.

51. Mahmud Jamal & Matthew Taylor, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada*, vol. 1, looseleaf (Aurora, Ont.: Canada Law Book, 2003) at 1-9.

52. *Ibid.* at 5-2.

tained in the constitutional document"<sup>53</sup> such as representative democracy and communal values that distinguish the Canadian from the American constitution.

Hogg describes the Canadian position as "progressive interpretation" which is not author-oriented in its "principle of minimal reliance on legislative history" and its rejection of any freezing of constitutional language in "the sense in which it would have been understood in 1867."<sup>54</sup> True to what seems to have become a stereotype of Canadian reconciliation, however, Hogg suggests that this position actually does accord with original intent by perceiving in the framers "the *interpretive intent* that would permit progressive interpretation."<sup>55</sup> He argues that the original language of the text is central, but is not to be frozen according to the framers' intent; rather "the words of the text are given a meaning that seems natural to contemporary eyes, not a meaning that has been distilled from historical records extrinsic to the actual text."<sup>56</sup> In a sense, the interpretation begins with the text, but then asserts that the framers would have advocated an interpretation in accordance with contemporary values, had they been in the contemporary setting.

#### e. *The Canadian Approach Illustrated*

An oft-cited example of the Supreme Court of Canada's rejection of the authority of the original drafters is *Reference Re B.C. Motor Vehicle Act*.<sup>57</sup> Here, the Court considered various sources that might indicate what the original framers intended the term "fundamental justice" to mean, including proceedings from the Special Joint Committee on the Constitution and the Canadian Bill of Rights. Lamer J. rejected an approach to interpretation that would privilege an "original" intent over one that would permit for change and development:

Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to chang-

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53. Manfredi, *supra* note 29 at 43. Manfred is outlining Monahan's argument from Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Agincourt, Ont.: Carswell, 1987).

54. Hogg, *supra* note 27 at 97. The metaphor of frozen language seems aptly rejected by Canadians who spend enough of their time frozen in other ways.

55. *Ibid.* at 101 [emphasis in original].

56. *Ibid.* at 102.

57. *Supra* note 2.

ing societal needs. Obviously, in the present case, given the proximity in time of the *Charter* debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted “living tree” which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.<sup>58</sup>

Lamer J.’s observation about the “unforeseen” arising is significant, because it points to how the Constitution as much as anything is a document that must be useful to those who would sort out the legality of new events or the Constitutionality of new laws. In effect, interpreters take a view of the past’s documents so that they can also make sense of their own present circumstances: they interpret the past and the present simultaneously. The “unforeseen” always arises, and the Constitution must recognize this inevitability and deal with it.

Lamer J.’s view in *Reference Re B.C. Motor Vehicle Act* of the interpretive authority of the *Bill of Rights* is interesting as well. He notes, citing Le Dain J. in *R. v. Therens*:

In my opinion the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is *not a reliable guide* to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.<sup>59</sup>

Lamer J. goes on to further cite Le Dain J., who notes that while in some instances, “the framers of the *Charter* adopted the wording of the *Canadian Bill of Rights*, it is also clear that the *Charter* must be regarded, because of its constitutional character, as a *new* affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection.”<sup>60</sup> This comment reflects the necessity of ensuring that if, in interpreting a constitutional document, any recourse is made to sources that

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58. *Ibid.* at 509.

59. *Ibid.* at 510, citing *R. v. Therens*, [1985] 1 S.C.R. 613 at 638, 18 D.L.R. (4th) 655 [emphasis added].

60. *Ibid.* [emphasis added].



might guide views of an “intent,” interpreters must ensure that the source they turn to is itself a legitimate one. The Court thus questions and rejects the possible guiding intention of the Bill of Rights precisely “because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.”<sup>61</sup>

The Supreme Court of Canada’s decision in *Vriend v. Alberta*<sup>62</sup> provides an example of the Court’s consideration of its role in declaring legislative provisions constitutionally invalid. Cory J. states that the Court is guided in its interpretations by the Constitution itself, and the values that it enshrines. In this judgment, Cory J. writes at length about the purpose of judicial review under the *Charter*, noting that “hardly a day goes by without some comment or criticism to the effect that under the *Charter* courts are wrongfully usurping the role of the legislatures.”<sup>63</sup> He cites commentary that declares judicial review to be “illegitimate because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators).”<sup>64</sup> His response seems to advocate a “middle path” where theories of interpretation are concerned, paying attention to the intent of original drafters who put the Court in charge of constitutional enforcement,<sup>65</sup> but not confining interpretation beyond the intent to endorse judicial review. Rather than positing a purely noninterpretivist role, Cory J. rejects the notion that the judiciary makes “value judgments” about policy; instead, he argues that the judiciary upholds the Constitution as the Constitution directs,<sup>66</sup> which makes government and the Courts accountable to each other.<sup>67</sup> In making this argument, Cory J. argues importantly that interpretation must heed values besides those enumerated in the constitutional text, such as “the concept of democracy,” which is “broader than the notion of majority rule, fundamental as that may be,”<sup>68</sup> and *Charter* values: “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”<sup>69</sup> To decide *without* accounting for democratic

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61. *Ibid.*

62. [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

63. *Ibid.* at para.130.

64. *Ibid.* at para.133.

65. *Ibid.* at para.134.

66. *Ibid.* at para.136.

67. *Ibid.* at para.139.

68. *Ibid.* at para.140.

69. *Ibid.*, citing Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200.

values, Cory J. argues, is to act undemocratically.<sup>70</sup>

Major J. dissents in terms of the remedy the Court provides to a finding of unconstitutionality. The majority judgment indicated that the remedy would be to read sexual orientation into Alberta's human rights statute as a protected ground; the minority judgment would have remedied the unconstitutionality by a declaration of invalidity for a period of a year. Major J. voices some of the concerns I have cited above about judicial activism because of the clear opposition of the Alberta legislature to including sexual orientation in its human rights legislation. Major J.'s decision regarding the appropriate remedy seems to be guided by the *Charter* values articulated by Cory J., in that he does not disagree with the section 15 or section 1 analyses of the majority, but he is also guided by the intention of the framers of the legislation under scrutiny, and he therefore declines to make assumptions in determining an appropriate remedy about what the legislators would have done.<sup>71</sup> He would thus leave it to the legislature to determine how to remedy its *Charter* breach because "[t]hey are answerable to the electorate of that province and it is for them to choose the remedy whether it is changing the legislation or using the notwithstanding clause. That decision in turn will be judged by the voters."<sup>72</sup> He writes:

The responsibility of enacting legislation that accords with the rights guaranteed by the *Charter* rests with the legislature. Except in the clearest of cases, courts should not dictate how underinclusive legislation must be amended. Obviously, the courts have a role to play in protecting *Charter* rights by deciding on the constitutionality of legislation. Deference and respect for the role of the legislature come into play in determining how unconstitutional legislation will be amended where various means are available.<sup>73</sup>

This decision and the other commentary I have cited suggest that Canadian judicial review has predominantly, if not exclusively, rejected as its main source of constitutional authority the words of the constitutional text as they might have been intended by the original authors. Rather, in matters of constitutional interpretation, the Supreme Court of Canada has tended to follow its pronouncement in *Hunter v. Southam*, that "[a] constitution ... is drafted with an eye to the future ... Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable

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70. *Ibid.* at para.142.

71. *Ibid.* at para.195.

72. *Ibid.* at para.197.

73. *Ibid.* at para.198.

of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.”<sup>74</sup> This rejection of original intent can, as I argue below, be seen as an important element of the discursive approach to constitutional interpretation and amendment that I discuss further, because it opens up interpretive possibilities rather than limits them to a textual basis.

## II. *Foucault and Authorship*

So far, this discussion has tended to focus on authorship as a function of who the individuals are who write and interpret: are they original drafters, or judges? Should judges interpret or originate? Do original authors have authority over us because of their identity, or because we pay homage to their historical moment and the process they engaged in? Despite the discussion’s having considered how texts may change meaning over time, the idea of authorship discussed so far (and that discussed in much commentary on constitutional authorship) is strongly rooted in a conceptualization of the author as an individual *person* or *group* of people. For example, Lamer J.’s judgment in *Reference Re B.C. Motor Vehicle Act* perceives of authorship, if original intent is even to be considered, as a process participated in by multiple people rather than individuals:

Moreover, the simple fact remains that the *Charter* is not the product of a few individual public servants, however distinguished, but of a *multiplicity of individuals* who played major roles in the negotiating, drafting and adoption of the *Charter*. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?<sup>75</sup>

A potential alternative theoretical framework in which to consider issues of authorship in the context of constitutional interpretation is Michel Foucault’s “What is an Author?”<sup>76</sup> Here, Foucault explores the “singular

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74. [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641. One could understand the metaphorical description of the Constitution as a “living tree” in *Edwards v. Canada (A.G.)* (1929), [1930] A.C. 124 at 136, [1929] All E.R. Rep. 571 (P.C.) as another form of this interest in treating the Constitution as adaptable.

75. *Supra* note 2 at 508 [emphasis added].

76. Michel Foucault, “What is an Author?” in Hazard Adams & Leroy Searle, eds., *Critical Theory Since 1965* (Tallahassee: Florida State University Presses, 1986) 138.

relationship that holds between an author and a text, the manner in which a text apparently points to this figure who is outside and precedes it.”<sup>77</sup> Foucault offers three propositions: first, the term “author” is a special designation reserved for some types of texts; second, that there is an “author *function*” related to the realm of discourse; and third, that there are “transdiscursive” authors.

In the first part of the essay, Foucault discusses how a writer’s proper name “moves from the interior of a discourse to the real person outside who produced it,”<sup>78</sup> but an author’s name encompasses more than this:

An author’s name is not simply an element of speech (as a subject, complement, or an element that could be replaced by a pronoun or other parts of speech). Its presence is functional in that it serves as a means of classification. A name can group together a number of texts and thus differentiate them from others. A name also establishes different forms of relationships among texts.<sup>79</sup>

In adapting this idea to constitutional theory, I would suggest that when we speak of the origins of constitutional texts, we mean more than properly-named persons; we refer to people who serve as designates of a population and who write foundational documents according to procedures and values, so that constitutional texts are classified as distinct from other types of texts and give rise to and delimit other texts, such as ordinary legislation.

This special authorial status for Foucault distinguishes discourse from mere text: “Discourse that possesses an author’s name is not to be immediately consumed and forgotten; neither is it accorded the momentary attention given to ordinary, fleeting words. Rather, its status and its manner of reception are regulated by the culture in which it circulates.”<sup>80</sup> Constitutional discourse has these qualities: it is foundational, and the interpretive strategies of governmental and judicial institutions serve to regulate its status and reception. Thus, to take a Foucauldian view, the author function in constitutional discourse elevates it to a significant cultural and social position.

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77. *Ibid.* at 139.

78. *Ibid.* at 142.

79. *Ibid.*

80. *Ibid.*

Foucault states that the author function is

not formed spontaneously through the simple attribution of a discourse to an individual. It results from a complex operation whose purpose is to construct the rational entity we call an author ... these aspects of an individual, which we designate as an author (or which comprise an individual as an author), are projections, in terms always more or less psychological, of our way of handling texts: in the comparisons we make, the traits we extract as pertinent, the continuities we assign, or the exclusions we practice.<sup>81</sup>

This rings true with the construction of constitutional authorship: interpretive strategies project onto authors, traits and continuities that we “extract as pertinent” such as deliberativeness, representativeness, or a controlling intent. According to Young, we also designate authors through the exclusions we practice, valuing some constitutional actors more than others, and at times accepting exclusive configurations of authors.<sup>82</sup>

Foucault also describes a subset of “transdiscursive” authors, which I would suggest accurately describes original authors. These authors make a “distinctive contribution ... in that they produced not only their own work, but the possibility and the rules of formation of other texts.”<sup>83</sup> The transdiscursive author is one who “cleared a space for the introduction of elements other than their own, which, nevertheless, remain within the field of discourse they initiated.”<sup>84</sup> The “initiation of a discursive practice” for Foucault is “heterogeneous to its ulterior transformations.”<sup>85</sup> Foucault’s point, I think, is that a special category of authors produce works that invite the establishment of other texts; in the constitutional context, original framers are “transdiscursive” because they produce the seminal text that in turn prompts other texts (for instance, legislation and judicial decisions) and other commentary and debate (for instance, legislative debate). This initiative work is heterogeneous because it spans the multiple responses, but yet remains distinct from them, never to be confused with “mere” legislation, for example.

For Foucault, the discourse of transdiscursive authors gives rise to a “return” by others to an “act of initiation” because of some absence in the original that is “not the result of accident or incomprehension.” An act of initiation is an act of original composition:

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81. *Ibid.* at 143.

82. See generally Young, *supra* note 23.

83. *Supra* note 76 at 145.

84. *Ibid.*

85. *Ibid.* at 146.

In effect, the act of initiation is such, in its essence, that it is inevitably subjected to its own distortions; that which displays this act and derives from it is, at the same time, the root of its divergences and travesties. This nonaccidental omission must be regulated by precise operations that can be situated, analysed, and reduced in a return to the act of initiation ... In addition, it is always a return to a text in itself, specifically, to a primary and unadorned text with particular attention to those things registered in the interstices of the text, its gaps and absences. We return to those empty spaces that have been masked by omission or concealed in a false and misleading plenitude. In these rediscoveries of an essential lack, we find the oscillation of two characteristic responses: "This point was made — you can't help seeing it if you know how to read"; or, inversely, "No, that point is not made in any of the printed words in the text, but it is expressed through the words, in their relationships and in the distance that separates them." It follows naturally that this return, which is a part of the discursive mechanism, constantly introduces modifications and that the return to a text is not a historical supplement that would come to fix itself upon the primary discursivity and redouble it in the form of an ornament, which, after all, is not essential. Rather, it is an effective and necessary means of transforming discursive practice ...

A last feature of these returns is that they tend to reinforce the enigmatic link between an author and his works. A text has an inaugurative value precisely because it is the work of a particular author, and our returns are conditioned by this knowledge.<sup>86</sup>

For many constitutional legal theorists, the constitutional text has inaugurative value because of the nature of the original authors, who create the possibility of and rules of formation of other constitutional texts. They set the framework for a country's future constitutional nature. They also create the circumstances of their own interpretation.

All constitutional interpretation may be a version of what Foucault describes as the act of "return," and I would suggest that Foucault's notion of the return is particularly apt for constitutional amendments. Foucault describes the "return" to be the result of a "basic and constructive omission, an omission that is not the result of accident or incomprehension."<sup>87</sup> It is clear that the very nature of constitutional documents means that by definition, they cannot provide for the substance of their own amendment but only the procedure,<sup>88</sup> and as such, omissions that are later addressed by

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86. *Ibid.* at 146-47.

87. *Ibid.* at 146.

88. There are countries, such as Germany, that restrict the substance of constitutional amendments. See *infra* note 91 at 279. Other countries, as did Canada until recently, may not provide for amendment at all.

amendment are not the result of accident or incomprehension. To predict how a nation will wish to change in the future leads to the inevitable question about why such and such a change is not simply incorporated into the existing document at the time. As the Supreme Court of Canada notes in the *Reference Re Amendment of Constitution of Canada*, “[w]e are involved here with a finishing operation, with fitting a piece into the constitutional edifice; it is idle to expect to find anything in the *British North America Act* that regulates the process that has been initiated in this case.”<sup>89</sup>

In providing for an amending formula, constitutions save future generations from being forever bound to past generations’ substantive, if not procedural will, yet change is provided for by a process rather than by accident. Thus, constitutions are “subjected to their own distortions.” Constitutional amendments are not, however, wholesale “acts of initiation.” By establishing the link between the “return” and the initial discourse, Foucault’s view of interpretation coincides with the commentary of writers who argue for fundamentally unamendable constitutional values which, if altered, to use Foucault’s language, would constitute initiations rather than returns. For an amending “return” to be legitimate, it must originate somehow with the “unadorned” text itself, but Foucault’s analysis of the act of return and his emphasis on discourse registers the notion that the text is both presence and absence, it has “interstices of the text ... gaps and absences.” The act of return fills the gaps, but does so *from within the discourse that establishes it*. In the act of return, then, the new “text is not a historical supplement that would come to fix itself upon the primary discursivity and redouble it in the form of an ornament, which, after all, is not essential. Rather, it is an effective and necessary means of transforming discursive practice.” Constitutional amendments perform this same function: they do not supplement or ornament the constitutional text, but become part of the constitutional discourse. Foucault’s view of authorship thus is useful to constitutional legal theory because he recognizes both the value and status of the author, but also that authors and discourse emerge together. At the same time, he recognizes that discourses inevitably change because they are inevitably incomplete; change is not, however, decontextualized but is driven by the text and the discourse itself, which those who perform the act of “return” must articulate and recognize, so that an amending return is never severed from the initiating moment but is conditioned by the original circumstances, values, and authors.

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89. [1981] 1 S.C.R. 743 at 799, 125 D.L.R. (3d) 1 [*Patriation Reference* cited to S.C.R.].

### III. *Ideas of Authorship and Constitutional Amendments*

The issue of authorship is important not only to constitutions, but to the process of constitutional amendment because constitutions often articulate who or what types of author can be amending authors, and according to what procedures. This puts amending authors in a different temporal space from original authors, and also provides a different basis for their existence. While original authors are constructed by historical moments and processes, amending authors are usually constructed by the constitutions themselves. The former *precede* text, in a particular time and place; the latter emerge *from* text. With a constitution in place, the legitimacy of the amending author can be more readily scrutinized as well, because the *stakes* of finding them illegitimate are substantially less than a finding that original authors are illegitimate; the former problem means an amendment is dismissed, the latter that an entire constitutional order is questioned.

Amending authors are in an unusual position as well, because for reasons of stability, they cannot be too ready to rewrite. Constitutions should provide for amendment but yet avoid change that is too easy, which would undermine constitutional stability. Stephen Holmes and Cass R. Sunstein write about the important ways that constitutional amendments characterize a nation:

The form taken by the amending power, in other words, sheds light on the variety of theories underlying different liberal democracies. It helps us identify the broad norms and basic commitments behind the constitutional fine print. It helps explain how various framers conceived the relationship between procedure and substance, for instance, or the distinction between the core and the periphery of the constitutional order. In the American case, the amending power builds upon a democratic conception of popular sovereignty, of the authorizing democratic will that stands above the constitution and is able to change it in toto. This idea fits well with the self-conscious American revision of the English understanding of sovereignty. The German Constitution, while gesturing in the direction of popular sovereignty, declares many provisions unamendable, allowing the unelected court effectively to block certain attempts by the elected branches to change the constitution.<sup>90</sup>

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90. Stephen Holmes & Cass R. Sunstein, "The Politics of Constitutional Revision in Eastern Europe" in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995) 275 at 278-79. For other sources on American constitutional amendment, see Richard B. Bernstein with Jerome Agel, *Amending America: if we love the Constitution so much why do we keep trying to change it?* (New York: Times Books, 1993) and the work of J.R. Vile.



For some theorists, the designation by a constitution of who can author amendments may represent, in fact, a limit on the self-determination of a populace, if only certain authors can rewrite and especially if a constitution insulates certain values from the amending process (for example, Article 79 of the German Constitution prevents amendment to the constitution's basic principles of human rights<sup>91</sup>). The corresponding fear, however, is that over-valuing self-determination can construct amending authors as a function of majority rule, which threatens the continuation of other values such as respect for minority rights. If any provision is amendable, then "amendability suggests, to put it crudely, that basic rights are ultimately at the mercy of interest-group politics, if some arbitrary electoral threshold is surpassed and amenders play by the book."<sup>92</sup> For Holmes and Sunstein, a constitutional amending formula that is mainly process-oriented may "imply the triumph of procedure over substance"<sup>93</sup> while a different formula such as that of Germany may "entrench certain rights in the sense that it places them beyond not only politics, but even the kind of revision represented by constitutional amendment."<sup>94</sup> Walter F. Murphy has posited that the theories of democracy and constitutionalism are mutually modifying, so that even a democratic, procedurally correct movement to amend the American constitution according to its amending formula could be considered unconstitutional if it violated fundamental human rights by removing, for example, the protection of racial equality: this would "repudiate ... the system itself and substitute another system grounded solely on majority rule."<sup>95</sup> (An interesting point, as constitutionally entrenched racial inclusion itself only came about over time and through political and constitutional change.) Or seen another way, there "are principles above the literal terms of the constitutional document" that, if denied, would mean the "basic purposes of the whole constitutional system"<sup>96</sup> are undermined. This would not, of course, prevent a society of people who so desired to use force, for instance, to reject entirely constitutional provisions that uphold fundamental human rights; Murphy's point is that in so doing, the constitution itself is nonetheless violated and the change would not in itself be constitutional.

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91. Axel Tschentscher, ed., *The Basic Law (Grundgesetz): The Constitution of the Federal Republic of Germany (May 23rd, 1949)* (Würzburg: Jurisprudencia Verlag, 2002) at 59.

92. Holmes & Sunstein, *supra* note 90 at 278.

93. *Ibid.*

94. *Ibid.*

95. Walter F. Murphy, "An Ordering of Constitutional Values" (1980) 53 S. Cal. L. Rev. 703 at 757.

96. *Ibid.*

Another consideration regarding constitutional amendments is whether there is only one source that directs how amendments can be made. For example, in the American context, some authors suggest that the only valid constitutional amendments are those that accord with the amending formula in the American constitution, Article V.<sup>97</sup> Others, such as Bruce Ackerman, suggest that the constitution is amended not only by the formal amendment procedure, but whenever “constitutional politics” allow for “mobilized popular consent to new constitutional solutions.”<sup>98</sup> He thus rejects the notion that the *only* way to amend the American constitution is through the Article V provision and instead takes a “pluralistic reading of the Founding text”<sup>99</sup> that understands “the rules for amendment laid down in 1787 as facilitative devices, which remain available when the American People choose to use them. But [denies] ... that these rules exhaust the repertoire of legitimate techniques for constitutional revision.”<sup>100</sup> Akhil R. Amar proposes similarly that Article V binds how government may change the constitution, but “nowhere prevents the *People* themselves, acting apart from ordinary government, from exercising their legal right to alter or abolish government, via the proper legal procedures,”<sup>101</sup> in which he would include exposure to and engagement with opposed ideas, where “the majority should attempt to reason with and persuade dissenters, and vice versa” so there is a “deliberate majority of the collective ‘People,’ not a mere mathematical concatenation of atomized ‘persons.’”<sup>102</sup> Both Amar and Ackerman thus seem to distinguish between formal constitutional amendment, and the recognition that political climates that interpret the constitution are always changing, and thus the lack of any particular, formal amendments does not mean a country or polis does not change.

As a Canadian Federal Government Discussion Paper indicates, the procedure for amending a federal constitution is tricky: “the constitution must ... provide for the distribution of powers between the central and regional governments” and therefore “the procedure for amending the constitution [must] be structured so that matters of fundamental concern to the constituent parts cannot be altered without appropriate support from those

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97. See David R. Dow, “The Plain Meaning of Article V” in Levinson, *supra* note 90, 117; and in the Canadian context, see Jeremy Webber, “The Legality of a Unilateral Declaration of Independence under Canadian Law” (1997) 42 McGill L.J. 281.

98. Bruce A. Ackerman, *We The People*, vol. 1, *Foundations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991) at 31.

99. Bruce Ackerman, “Higher Lawmaking” in Levinson, *supra* note 90, 63 at 73.

100. *Ibid.* at 74.

101. Akhil Reed Amar, “Popular Sovereignty and Constitutional Amendment” in Levinson, *supra* note 90, 89 at 90 [emphasis in original].

102. *Ibid.* at 110.

parts.”<sup>103</sup> The amending process must therefore be difficult, but if it is too difficult, the constitution cannot adapt to changing circumstances.

What is the Canadian position on constitutional amendments? Commentators have noted the lack of sustained Canadian discourse on the issue,<sup>104</sup> perhaps explained by there being only twenty years of a national amending formula. Not presuming to fill the gap but rather to contribute to the conversation, I suggest that in four relatively recent Supreme Court of Canada decisions on constitutional amendments, the Supreme Court counters its own trend, noted above, of *rejecting* original intent, initially by *relying* on original intent as a guiding force for how the Court is to approach the issue of constitutional amendment. The Court also builds upon the intent of the original authors by identifying federalism and regional representation as paramount determinants of which parties can rewrite the constitution and by what processes. However, more recently, the Court has taken a discursive view of authorship, identifying amending authors as being constructed from a discourse. In this most recent view of authorship, I suggest that in Canada, a Foucauldian notion of amending authorship being a function of discourse has emerged, which allows for a view of constitutional amendment in Canada that newly emphasizes the political participation of the citizens of Canada who, as a nation and with a history, direct their own constitutional order.

### 1. *The Senate Reference*

The Canadian Constitution, until 1982, lacked the capacity for self-amendment in matters fundamental to the country’s federal character. This was a role reserved for the parliament of the United Kingdom. As Peter H. Russell writes, this lack was a sign of “profoundly incomplete” nation building: “so long as it was necessary to traipse over to England to have its Constitution amended, Canada appeared to be less than a fully mature member of the international community” which was the subject of “embarrassment.”<sup>105</sup>

This legal incapacity however, to “do it oneself,” did not mean that the Canadian constitution remained unamended, even by the initiative of Canadian governments. The Canadian constitution has been amended many

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103. Canada, *Amending the Constitution of Canada: A Discussion Paper* (Ottawa: Minister of Supply and Services Canada, 1990) at 1.

104. Sujit Choudhry & Robert Howse, “Constitutional Theory and The Quebec Secession Reference” (2000) 13 Can. J.L. & Juris. 143 at para.3. This article discusses the Supreme Court of Canada’s recourse to normative law and politics and provides an excellent survey of theories of constitutional law in a Canadian context.

105. Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2d ed. (Toronto: University of Toronto Press, 1993) at 57.

times but, as the Supreme Court of Canada judgments on amendments indicate, these amendments tended to be overwhelmingly by the consent of the relevant levels of government rather than by reason of a bold assertion of capability by the amending party.

In *Reference Re Legislative Authority of the Parliament of Canada in Relation to the Upper House*,<sup>106</sup> the Court was asked to construe the meaning of section 91(1) of the *British North America Act*,<sup>107</sup> and specifically to determine if there was federal legislative authority to abolish the Upper House or Senate. Section 91(1), now repealed, was a 1949 amendment to the constitution which gave the federal government unilateral amending power regarding the constitution, save power to amend anything exclusively within provincial power, denominational school rights, and the official use of English and French in federal, Manitoba, and Quebec institutions. The amendment also protected the requirement that Parliament meet once a year, and the five year term limit to the House of Commons.<sup>108</sup>

In this decision, the Court reviews a much-cited 1965 White Paper of Hon. Guy Favreau, the Minister of Justice, which identified four principles of Canadian constitutional amendment: the request must be formally made by Canada, Parliament (the House of Commons and the Senate) had to make the request, no Province alone could request amendment, but a request had to come via the federal government representing all of Canada, and, where amendments would affect federal/provincial relationships, the Provinces would be consulted and their agreement sought.

The Court's decision clarifies that, unlike prior amendments legally enacted under section 91(1), "[t]he legislation contemplated [here] ... [w]hile it does not directly affect federal-provincial relationships in the sense of changing federal and provincial legislative powers, it does envisage the elimination of one of the two Houses of Parliament, and so would alter the structure of the federal Parliament to which the federal power to legislate is entrusted under s. 91 of the Act."<sup>109</sup> This characterization of the question makes the issue of authorship central: the proposed amendment would fundamentally change the *identity* of the governmental actor that could legislate under s.91, transforming it from a dual body of House and Senate to a single body of House only.

While this transformation is not anti-democratic in that it would main-

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106. (1979), [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1 [*Senate Reference* cited to S.C.R.].

107. *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

108. Russell, *supra* note 105 at 66-67.

109. *Senate Reference*, *supra* note 106 at 55.

tain the body of elected representatives as a governing power, the Court indicates that such a transformation would violate the intent of the original authors of the constitution. The Court states:

It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing the provisions respecting the Senate. Its important purpose is stated in ... speeches delivered in the debates on Confederation in the parliament of the province of Canada.<sup>110</sup>

The Court then quotes statements made during parliamentary debate by Sir John A. Macdonald and the Honourable George Brown, both of whom identify the Senate as an instrument protecting regional interests and minorities that might be overcome by House majorities. According to Brown, “the very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step.”<sup>111</sup>

In this decision, the Court declares two fundamental characteristics of an amending author in Canada, based largely on original intent and recourse to the text, namely the Preamble, which identifies that the original parties to the constitution were Canadian provinces: “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.”<sup>112</sup> First, the Court points out that the proposal before it would have changed the identity of the federal government. Because under s. 91(1) this federal body had constitutional amending power, albeit constrained, the Court’s decision declares that an amending author must be not only a democratically elected body, but also accommodate regional representation, which is what the Senate provides in Parliament. The “who” to amend the constitution, according to the *Senate Reference*, can thus be the federal parliament for a limited range of substantive changes to the constitution, but this federal body must represent the entire country and not only a majority of it.

110. *Ibid.* at 66.

111. *Ibid.* at 67.

112. *Constitution Act, 1867*, *supra* note 107.

Second, the Court establishes that, in addition to the federal amending author including democratically elected and regionally representative agents, the amending author in practice has always been both the federal and provincial governments. This is more than merely a comment on amending procedure requiring consultation, because the Court refers to the interest in provincial “agreement” or “consent” as well as consultation.<sup>113</sup> This is drawn from the Favreau paper as well as historical precedent:

The practice, since 1875, has been to seek amendment of the [*BNA, 1867*] Act by a joint address of both Houses of Parliament. Consultation with one or more of the provinces has occurred in some instances. The amendment in 1907 was based on resolutions passed at provincial conferences, although opposed by British Columbia. The 1930 amendment respecting the transfer of resources to the four western provinces resulted from agreements with those provinces. The 1949 amendment respecting Newfoundland becoming a province was made after there had been an agreement with that province. The amendments of 1940, 1951, 1960 and 1964, respecting unemployment insurance, old age pensions, the compulsory retirement of judges and adding supplementary benefits to old age pensions all had the unanimous consent of the provinces.<sup>114</sup>

This decision is largely based on textual interpretation and original intent, but the Court also in effect constructs as original authors Canadian provinces, regional interests, and federally elected officials. This is important because by constructing regional bodies as original authors, regions more so than people become determinant, which I would argue emphasizes federalism and Canada as a union of distinct bodies as the discourse that pervades subsequent decisions. In this respect, the Court seems to confirm a view of Canada that Reginald Whitaker criticizes:

the constitution of Canada has been, from 1867 onward, an arrangement between elites, particularly between political elites ... The British North America Act of 1867 was ... almost entirely innocent of any recognition of the people as the object of the Constitutional exercise ...

The British North America Act ignored individual Canadians, except as they qualified through membership in a church or a language group. The BNA Act was itself never submitted to a popular referendum

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113. The requirement for both consultation *and* consent provides an interesting foil to the requirement for consultation that governs the Federal/Aboriginal relationship as per *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193. See also Richard Devlin & Ronald Murphy, “Contextualizing the Duty to Consult: Clarification or Transformation?” (2003) 14 N.J.C.L. 167.

114. *Senate Reference*, *supra* note 106 at 63-64.

for ratification ... But to make matters worse, almost all of the commentary — whether political, judicial, or academic — on the nature and reform of the Constitution has tended to ignore the question of the relation of people to government, or of people to each other, in favour of persistent attention to the relation of government to government, or of Crown to parliament, or of Canada to the British Parliament.<sup>115</sup>

## 2. *The Patriation Reference*

In 1981, in the thick of the debate about constitutional amendment and patriation in Canada, the Supreme Court of Canada again heard a reference question<sup>116</sup> coming to it from the appellate courts of Manitoba, Newfoundland, and Quebec regarding the October 1980 proposal that would be considered by the House of Commons and Senate. This proposal included a Resolution to be put before the United Kingdom Parliament regarding the *BNA Act, 1867*, which would patriate the Canadian constitution and add to it a *Charter of Rights and Freedoms* and an amending formula. Only Ontario and New Brunswick supported it. The position of the contesting provinces was that because the Resolution would affect federal/provincial relations (the *Charter*, for example, could curtail enactments by provincial legislatures), the federal government could not make such a Resolution without the consent of some and possibly all provincial legislatures.

This decision includes four separate reasons and two majorities, one on the legality of unilateral action by the federal government, the other on how constitutional conventions affect how the federal government can act. I refer to the former as the “majority legality judgment” and the latter as the “majority convention judgment.” As the majority legality judgment notes, similar to the abolition of the Senate, this Resolution would not change the federal structure of Canada (“the essential federal character of the country is preserved under the enactments proposed by the Resolution”<sup>117</sup>) but it does concern *who* or what body could propose such a change to the United Kingdom and what is the process for doing so.

At the same time that the majority legality judgment recognizes an inability of self-amendment in Canada, which “suffers from an internal deficiency in the absence of legal power to alter or amend the essential distributive arrangements under which legal authority is exercised in the

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115. Reginald Whitaker, “Democracy and the Canadian Constitution” in Keith G. Banting & Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) 240 at 240-41.

116. *Patriation Reference*, *supra* note 89.

117. *Ibid.* at 807.

country, whether at the federal or provincial level,”<sup>118</sup> the Court recognizes that it has no authority to state how the United Kingdom parliament can act: “The legal competence of [the United Kingdom] ... Parliament ... remains unimpaired, and it is for it alone to determine if and how it will act.”<sup>119</sup> The conclusion of the majority legality judgment on the legal requirement for provincial consultation is that there is no *textual* support for or against the power of the federal government to make a Resolution to the British parliament: “the *British North America Act* itself is silent on the question of the power of the federal Houses to proceed by resolution to procure an amendment to the Act by an address to Her Majesty.”<sup>120</sup> While the majority legality decision references debate in the United Kingdom regarding the Unemployment Insurance constitutional amendment of 1940, which notes that provincial consent is desirable, it confirms that desirability is not paramount to a legal requirement.

In the majority legality judgment, the distinction between a legal requirement and a practical or desirable requirement is emphasized. This emphasis seems to encourage the Justices to take a very “interpretivist”<sup>121</sup> approach to the issue before them, focussing on statutory construction and rejecting evidence of historical debate and “theories”:

The arguments from history do not lead to any consistent view or any single view of the nature of the *British North America Act*; selective interpretations are open and have been made; see Report of the Royal Commission on Dominion-Provincial Relations . . . History cannot alter the fact that in law there is a British statute to construe and apply in relation to a matter, fundamental as it is, that is not provided for by the statute. Practices which took account of evolving Canadian independence, did, of course, develop. They had both intra-Canadian and extra-Canadian aspects in relation to British legislative authority . . . Theories, whether of a full compact theory (which, even factually, cannot be sustained, having regard to federal power to create new provinces out of federal territories, which was exercised in the creation of Alberta and Saskatchewan) or of a modified compact theory, as urged by some of the provinces, operate in the political realm, in political science studies.

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118. *Ibid.* at 774.

119. *Ibid.* at 799.

120. *Ibid.* at 803.

121. See Part I.3.b., above. The “interpretivist” approach, counterintuitively, privileges the original intent and not the views of the particular interpreter.



They do not engage the law, save as they might have some peripheral relevance to actual provisions of the *British North America Act* and its interpretation and application.

... [T]here is nothing in the reference to theories of federalism reflected in some case law that goes beyond their use as an aid to a justiciable question raised apart from them.<sup>122</sup>

On a legal basis, the Court confirms that the identity of amending authors is provided for strictly in the text. This is not, however, the end of the inquiry, as it might be for an “interpretivist” Court.

Members of the Court also issued a majority judgment regarding constitutional conventions and their influence on constitutional amendments. While Russell refers to this as the Court speaking “with a forked tongue,”<sup>123</sup> and quotes Prime Minister Trudeau’s view that the justices “‘blatantly manipulated the evidence before them so as to arrive at the desired result,’”<sup>124</sup> I suggest that in its discussion of convention, the Court moves towards a discursive view of authorship, indicating that in matters of constitutional amendment, legitimacy can be as important as legality, and constitutionality is a matter of both. Where amending authors are concerned, the majority convention judgment takes a Foucauldian view of authorship, allowing Canadian constitutional *discourse* (made up of many statements and principles rather than just the text) to construct legitimate amending authors, unlike the *Senate Reference*, which takes an “interpretivist” approach to amendments.

The judgment of Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ. is the majority opinion in the matter of constitutional conventions. Like Laskin C.J., Estey J. and McIntyre J. who wrote a minority convention judgment, these Justices signal their noninterpretive approach when they observe that constitutional authority in Canada is not confined to a text:

But many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution.<sup>125</sup>

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122. *Patriation Reference*, *supra* note 89 at 803-04.

123. Russell, *supra* note 105 at 118.

124. *Ibid.* at 119.

125. *Patriation Reference*, *supra* note 89 at 877-78.

In addition to the text are constitutional conventions that, while not enforceable by Courts, serve “to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period”<sup>126</sup> and concern such things as the “democratic principle” or the independence of former British colonies.

The majority convention decision differs from the minority in a fundamental way: the former indicates that to violate a convention can be to act unconstitutionally because

conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system ... That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words “constitutional” and “unconstitutional” may also be used in a strict legal sense, for instance with respect to a statute which is found *ultra vires* or unconstitutional. The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.<sup>127</sup>

This inclusion of convention into the discourse of what it means to act constitutionally in Canada is highly significant, for it signals that, in relation to who or what body can be an amending author, it is a *broader discourse* rather than a *text* that is determinative.

However, in taking a discursive view of what it means to act constitutionally, the majority convention judgment does not entirely forego recourse to interpretivism: the judgment continues to seek a version of authorial intention. The Justices establish three requirements for establishing a convention; in addition to precedents and a reason for a rule, there must be actors who manifest an intention to be bound by the precedential rules. While these are not original authors in the usual sense understood by interpretivism, the actors cited in this judgment are authors by implication, because their consent to constitutional amendment permitted them to be passed and constitutional amendments that did not have this consent were not passed. After reviewing prior amendments made to the *BNA Act, 1867*, the Justices conclude that as a matter of convention, substantial provincial consent is required for amendments that affect Canada’s constitutional division of powers. The judgment identifies the types of actors

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126. *Ibid.* at 880

127. *Ibid.* at 883-84.

that it will rely on in establishing constitutional conventions: they have to be clothed with legitimacy. Thus, the judgment cites the amending principles found in the Favreau White Paper of 1965, which it concludes are important because of the identity of the writer and those who assented to it: it was

circulated to all the provinces prior to its publication and had been found satisfactory by all of them (see Commons Debates, 1965, at p. 11574, and Background Paper published by the Government of Canada, *The Role of the United Kingdom in the Amendment of the Canadian Constitution* (March 1981), at p. 30). It was published as a white paper, that is as an official statement of government policy, under the authority of the federal Minister of Justice as member of a government responsible to Parliament, neither House of which, so far as we know, has taken issue with it. This statement is a recognition by all the actors in the precedents that the requirement of provincial agreement is a constitutional rule.<sup>128</sup>

The judgment also gives credence to the statements of ministers, statesmen, and Prime Ministers regarding the Unemployment Insurance amendment and a Dominion-Provincial Conference of 1931 which articulated the federal principles of Canadian political organization.

Interestingly, the judgment rejects statements that do not support the conventions it upholds on the grounds that the objectors are not Ministers:

We were referred to an abundance of declarations made by Canadian politicians on this issue. A few are unfavourable to the provincial position but they were generally made by politicians such as Mr. J.T. Thorson who were not ministers in office and could not be considered as "actors in the precedents."<sup>129</sup>

This preference for high-level officials to members of parliament strikes me as strange, because, in a similar fashion to the weight given the Favreau White Paper, the Court seems to value statements by the executive branch of the government of the day over those of elected representatives (*i.e.*, the legislative branch). In a sense, the Court's privileging of the executive branch introduces an implicit emphasis on the will of the representatives of the majority of Canadians. This implicit introduction of a majority-rule principle into deliberations about authorship will be explicitly rejected in the *Secession Reference*.<sup>130</sup>

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128. *Ibid.* at 900.

129. *Ibid.* at 902.

130. See *infra* note 137.

The conclusion of the majority convention judgment is that

[i]t would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in the political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.

It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with this requirement.<sup>131</sup>

This decision amounted to what Russell describes as a “legal green light but a political red light.”<sup>132</sup> Russell states that this prompted the federal government to then attempt to reach an agreement with the provinces, despite having no legal requirement to do so. This is a significant comment on the notion of amending authorship for it substantiates the pervasiveness of the distinction between legality and legitimacy.

In reaching this decision, the Justices maintain a consideration of the intention of prior actors in the area of constitutional amendment, but expand the sources that specify conditions for amending authorship to include constitutional conventions. The convention here is that consent is required, which confirms the *Senate Reference*'s finding that amending authors in Canada had to include provincial bodies, in keeping with the principle of federalism.

### 3. *Quebec Veto Reference*

In a second Reference decision in the early 1980s, *Reference Re Amendment of Canadian Constitution*,<sup>133</sup> the Supreme Court of Canada considered the force of constitutional conventions again as they relate to constitutional amendments. The Constitution by this time had already been patriated. The question before the Supreme Court of Canada was whether by convention unanimous provincial consent was required before the Constitution could be amended, and whether Quebec could veto constitutional amendment—in other words, the question was whether Quebec *must* be an amending author. The Court of Appeal of Quebec's decision on the matter when the question was before it points to the necessity of legitimate

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131. *Patriation Reference*, *supra* note 89 at 905.

132. Russell, *supra* note 105 at 119.

133. [1982] 2 S.C.R. 793, 140 D.L.R. (3d) 385 [*Quebec Veto Reference* cited to S.C.R.].

authorship for constitutional amendments to be acceptable: the question before it was, in fact, moot, but the Court of Appeal considered it nonetheless to explore the “legitimacy” if not the “legality” of the patriation process.”<sup>134</sup> In responding to the first question regarding unanimity, the Supreme Court of Canada followed the *Patriation Reference* which found unanimity was not a requirement for constitutional amendment. With regards to the second question, the Court determined that the appellant Quebec had not been able to demonstrate a convention of a Quebec veto because it could not establish “acceptance or recognition by the actors in the precedents”<sup>135</sup> of this convention.

This decision is interesting because it confirms the Court’s view that amending authors must be drawn from the country as a whole and represent the regions of the country, not just one province:

We have been referred to an abundance of material, speeches made in the course of parliamentary debates, reports of royal commissions, opinions of historians, political scientists, constitutional experts which endorse in one way or another the principle of duality within the meaning assigned to it by the appellant, and there can be no doubt that many Canadian statesmen, politicians and experts favoured this principle.

*But neither in his factum nor in oral argument did counsel for the appellant quote a single statement made by any representative of the federal authorities recognizing either explicitly or by necessary implication that Quebec had a conventional power of veto over certain types of constitutional amendments. The statement made by Minister Favreau on November 20, 1964, and the passage to be found at pp. 46 and 47 of the White Paper have been quoted twice in the appellant’s factum, as if they supported the veto rule as well as the unanimity one, but they refer only to unanimity and have been above dealt with in this respect.*

*Furthermore, a convention such as the one now asserted by Quebec would have to be recognized by other provinces. We have not been referred to and we are not aware of any statement by the actors in any of the other provinces acknowledging such a convention. . . .*<sup>136</sup>

The Court in these three decisions thus confirms one overriding principle for constitutional amendment, and that is that the amending authors must be representative of the nation as a whole, true to the federal principle of Canadian government and the necessity upon which Confedera-

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134. *Ibid.* at 799.

135. *Ibid.* at 814.

136. *Ibid.* at 814-15.

tion itself was conditional, the protection of regional interests. Nonetheless, these authors remain conceptualized as *governmental bodies* rather than as self-governing *citizens* who are separate from, but who do elect, government representatives.

#### 4. *The Quebec Secession Reference*

In *Reference Re Secession of Quebec*,<sup>137</sup> the conditions for constitutional amending authorship are widened even further, to encompass a wide constitutional discourse and, I conclude, to inject into discussions about amending authors an acknowledgement of citizens as well as governments. An explanation for the Court's moving away from a focus on the constitutional text may be that the amending formula was explicit by now, the *Constitution Act, 1982* having been passed.<sup>138</sup>

In the *Secession Reference*, the Court was again plunged into a topic upon which the constitution is silent—secession—but the question of whether Quebec could unilaterally secede from Canada implicitly asks if a province can unilaterally alter the Canadian Constitution:

It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.<sup>139</sup>

While the Court in the prior references regarding amendments maintained a form of interpretivist approach, in this decision the Court moves entirely away from an author- and text-centred approach to the issue of amendments, relying instead on a discourse of Canadian constitutionalism made up of, among other statements, historical narrative, principles, and international law. This approach is signalled in the opening paragraph's reference to "principles":

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137. [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [*Secession Reference*].

138. The amending formula that was ultimately adopted in 1982 is the current Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. As the Federal Report notes, this amending procedure requires legislative authorization but not public consultation (Canada, *supra* note 103 at 8). For a commentary on the amending formula, see Stephen A. Scott, "Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes" (1982) 20 U.W.O.L. Rev. 247.

139. *Supra* note 137 at para.84.

In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.<sup>140</sup>

The Court has clearly moved away from its rejection of political “theory” noted earlier in this paper.

In this decision, the Court indicates that its shift away from the written constitution is not a rejection of the primacy of the text because “[a] written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.”<sup>141</sup> However, the Court does indicate that extra-textual principles and values are what permit a constitutional order to develop and change and what can fill “gaps in the express terms of the constitutional text”<sup>142</sup>:

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.<sup>143</sup>

In referencing constitutional principles, in a sense the Court is moving beyond author to discourse; the way the principles are described gives them a sense of being, in fact, *authorless*: the Court notes that behind the written word is “a historical lineage stretching back through the ages,”<sup>144</sup>

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140. *Ibid.* at para.1.

141. *Ibid.* at para.53.

142. *Ibid.*

143. *Ibid.* at para.32.

144. *Ibid.* at para.49.

and that some principles such as the democratic principle are authorless because they are self-evident:

[T]he democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers.<sup>145</sup>

In its citation of principles, the Court in essence accepts one theory of constitutional amendment, that even where a text such as Canada's constitution is silent on the issue of "core or fundamental features"<sup>146</sup> that cannot be amended, there remain unassailable values beyond the reach of elected officials. The Court notes, for example, that amendment is not a pure matter of democratic self-will or majority rule:

[O]ur belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.<sup>147</sup>

In the context of the reference decisions I have cited here, the *Secession Reference* is also different in one highly significant way from the prior cases. The Court states:

The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada.<sup>148</sup>

This is an acknowledgment, not evident in the prior decisions, that the ultimate power of constitutional amendment lies with the "people of

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145. *Ibid.* at para.62.

146. Holmes & Sunstein, *supra* note 90 at 278.

147. *Secession Reference*, *supra* note 137 at para.77.

148. *Ibid.* at para.85.



Canada” who act through their governments. Prior decisions constructed constitutional actors as governments only. This acknowledgment of citizens as well as governments may be in part due to the fact that the reference question had much to do with the bindingness of a referendum as expressing the will of the Quebec people. The Court notes that Constitutionality is not merely the expression of the will of the majority:

Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are “binding” not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

In this way, our belief in democracy may be harmonized with our belief in constitutionalism.<sup>149</sup>

In identifying the “people of Canada” as the ultimate constitutional amending authors, who must negotiate with the people of Quebec who express their will in response to a clear question in a referendum, the Court also is taken into a discussion of what types of procedures ensure that the authorship by the “people of Canada” is legitimate: procedures that ensure respect for minority viewpoints, deliberation, negotiation. As the Court notes,

the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.

Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the

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149. *Ibid.* at paras.76-77.

legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole.<sup>150</sup>

The Court's construction of the people of Canada as constitutional authors is significant because it departs from the prevailing view I cite above of Canadian constitutional action that has been criticized by commentators. The Court's construction of the people of Canada as constitutional amending authors was precursed by the circumstances of the efforts to amend the Canadian constitution after 1982 but prior to the *Secession Reference*. As Russell writes, when the Trudeau government proposed to patriate the Constitution, it represented its proposal as a "people's package" and sought to build legitimacy for it via a special parliamentary committee which for the first time televised its proceedings and heard submissions from interest groups.<sup>151</sup> Russell argues that this move "created a new public expectation about popular participation in constitution making—an expectation that the architects of the Meech Lake Accord would ignore to their peril. It also produced a new set of players in the constitutional process—the interest groups whose rights claims gained constitutional recognition and whose perspective is distinctly indifferent to federalism."<sup>152</sup> Alan C. Cairns describes the pre-1982 process as one which created "Charter Canadians."<sup>153</sup> Also significant was the fact that the Trudeau government's proposed amending formula included provision for a referendum in the face of government deadlock.<sup>154</sup> This provision was eventually removed from the amending formula.

As Cairns notes, prior to 1982, "Canada ... never enjoyed a strong tradition of public participation in the formal process of constitutional change."<sup>155</sup> According to Cairns, "[t]he most important public role, however, was that of an audience carefully monitored and manipulated by the government players."<sup>156</sup> However, the patriation process rallied Canadians:

As the recognition sank in that in closed intergovernmental bargaining many of the rights fashioned and refined in the Special Joint Committee

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150. *Ibid.* at paras.94-95.

151. Russell, *supra* note 105 at 113-14.

152. *Ibid.* at 115.

153. See Alan C. Cairns in Douglas E. Williams, ed., *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McClelland & Stewart, 1991).

154. Russell, *supra* note 105 at 111.

155. Alan C. Cairns, "The Politics of Constitutional Renewal in Canada" in Keith G. Banting & Richard Simeon, eds., *Redesigning the State: The Politics of Constitutional Change* (Toronto: University of Toronto Press, 1985) 95 at 111.

156. *Ibid.* at 113.

and in the House of Commons had been diluted, a blizzard of angry protest emerged, particularly from women's groups and from various aboriginal organisations. The former were furious that the clause guaranteeing the Charter's rights and freedoms 'equally to male and female persons' had been made subject to an override by a group of male first ministers in secret sessions. The latter were angry that a clause by which the 'aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed' had been completely deleted.<sup>157</sup>

Both protests were successful. "Given the general, albeit fluctuating, government domination of the constitutional reform process through Canadian history, this successful assault on executive federalism by organisations of women and aboriginal peoples was in itself an event of great constitutional significance."<sup>158</sup> However, where the amending formula is concerned, Cairns suggests that over the course of negotiation, "[t]he disappearance of the federal formula [for referenda on amendments] in the final horse-trading thus thwarted a significant symbolic reconstruction of the Canadian polity, and instead confirmed that as far as constitutional change is concerned Canada is a country of governments and not a country of citizens."<sup>159</sup>

Since 1982, Canadians have recently witnessed two large-scale efforts to amend the *Constitution Act, 1982* in order that Quebec might sign on, but neither has achieved this aim and commentators have suggested that the failure of the processes lies in part in the illegitimacy of the would-be amending authors. As Russell writes, the Meech Lake process was "closed and elitist in nature" which led to its downfall: "[T]he first ministers and their advisers, did not realize how much the conditions of constitutional politics in Canada were changing. They did not appreciate how seriously [interest groups] . . . took their recent enfranchisement as constitutional players."<sup>160</sup> For Russell, Meech Lake was an "objectionable process":

Members of the public and of opposition parties participating in [public hearings] . . . objected to being told they could talk about the accord all they wished but not a word would be changed unless they spotted some 'egregious error.' By insisting that the Meech accord be adopted regardless of how it fared in public discussions, its sponsors did more than erode the accord's legitimacy. They reduced public respect in the En-

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157. *Ibid.* at 124.

158. *Ibid.* at 125.

159. *Ibid.* at 133.

160. Russell, *supra* note 105 at 134.

glish-speaking provinces for the legitimacy of the parliamentary institutions the governments supporting Meech presumed to dominate.<sup>161</sup>

The Federal Government proposed constitutional change again in 1991. At the time, the Beaudoin-Dobbie Committee issued a report, *A Renewed Canada*, which proposed a “Canada clause” with a poetic constitutional preamble beginning with “We are the people of Canada,”<sup>162</sup> which echoes the constitutional declarations of the American “We the People.” However, the process that grew into the Charlottetown Accord was also criticized for being consultative in name only:

Consultation is important, but it is not enough. Politicians claimed that this was the most participatory round of constitutional talks ever, that citizens were thoroughly consulted—through the Spicer Commission, the constitutional conferences, and the Beaudoin-Dobbie Committee. [The National Action Committee on the Status of Women] NAC participated in every way that was open to it, but our experience shows that the only place it matters to be is in the room where the decisions are being made.

For women this process was Meech Lake II. When the consultations were over, the doors closed again, key results of the consultations were ignored, and the interests of the players in the room dominated.<sup>163</sup>

The response to the Charlottetown Accord was ultimately the October 1992 referendum. In this referendum, “the Canadian people, for the first time in their history as a political community, acted as Canada’s ultimate constitutional authority”<sup>164</sup> and rejected the proposal.

It has been tempting for many commentators to observe that Canada is mainly a federation of governments. The Supreme Court of Canada’s decision in the *Secession Reference*, I would argue, articulates a rather different view of Canadians in its explicit indicating that Canadians are as self-constituting, and self-writing, *as a body, in an on-going way*, rather than a collection of governments. Our foundational documents, if they are

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161. *Ibid.* at 144-45.

162. Special Joint Committee of the Senate and the House of Commons, *A Renewed Canada* (Ottawa: Supply and Services Canada, 1992) at 105, cited in Russell, *ibid.* at 181.

163. Shelagh Day, “Speaking for Ourselves,” in Kenneth McRoberts & Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 58 at 65-66. See also Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women’s Press, 1983), regarding women’s political mobilization during *Charter* negotiations.

164. Russell, *supra* note 105 at 190.

amended, are to be amended by Canadians and their government representatives, who are part of a larger discourse of Canadian constitutionalism that includes not only textual interpretation, but a historical self-awareness and recognition of contemporary values. The Court's decision finally is also significant in that it includes reference to the People of the country, which remedies an absence in the constitutional document, which does not refer to the Canadian people.

### *Conclusion*

This paper has explored ideas about authorship and how the conceptualization of authorship is important to constitutional legal theories about how constitutional texts are to be interpreted, about their legitimacy, and about the role of judges. Where constitutional amendments are concerned, I have argued that authorship continues to be important, for how the identity of amending authors is constructed by a constitutional text or by a Court indicates a great deal about the constitutional order of a country. In surveying the Supreme Court of Canada's discussions about amending authors, I suggest that the Court has taken an increasingly expansive and, I would argue, Foucauldian, view of amending authorship. The Court in the *Senate Reference* adds to a narrow emphasis on original intent a sense that amending authors had to include regional representation. In the *Patriation Reference*, the Court expands its notion of authorship by directing that constitutional convention, as manifest in the intent of the actors bound by the conventions, dictates that provincial, even more so than regional, interests had to constitute the act of amending authorship. Finally, in the *Secession Reference*, the Court's discursive view of the principles behind Canadian constitutionalism and amendment mean that ultimately, amending authors are the Canadian people, represented in government, and acting according to an historically aware process of deliberation and consultation. From a country that lacked any self-amending formula at all, Canada's constitution discourse, as constructed in the *Secession Reference* seems truly and finally to constitute Canadian citizens as self-governing, self-constituting, and self-writing.