Judicial Amendment of the Constitution

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Constitutions with substantial written or codified components typically specify a set of rules or procedures for their amendment. The inclusion of constitutional amendment procedures tends to imply that there is but one set of rules for legitimate *formal* amendment of a written constitution, although as scholars of comparative constitutional law have increasingly explored, there are many other means by which *informal* constitutional change can occur.[1] One of the most important ways informal constitutional change occurs is via judicial interpretation. As Richard Albert writes, "where courts possess the power of judicial review, and where that power is effective, the functionally binding quality of an interpretation of the constitutional text by the national court of last resort approximates the formally binding quality of a written constitutional amendment. The form of entrenchment may differ but their effects are largely indistinguishable."[2]

The notion that constitutional meaning evolves over time via judicial interpretation is the norm in common law systems like the United States, Canada, and Australia. Yet a number of scholars in these countries have distinguished between 'ordinary' constitutional evolution via judicial interpretation and 'improper' instances of judicial interpretation that contravene, or occur without appropriate recourse to, the formal amending procedures.[3] These latter instances of interpretation result in constitutional changes that, from the critic's perspective, necessitated a formal amendment process. In commentary on the United States Constitution in particular, the concept of judicial amendment is an old idea. For example, Frederic R. Coudert, writing in 1904, notes "[t]hat the law must change with the development of civilization is plain; the doubt arises as

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[1] Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 39(2) DUBLIN UNIVERSITY L.J. 387 (2015); JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS (1994); Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN L. REV. 155; SANFORD LEVINSON, ED. RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (1995); Dennis Baker and Mark D. Jarvis, *The End of Informal Constitutional Change in Canada?* in CONSTITUTIONAL AMENDMENT IN CANADA (Emmett Macfarlane, ed. 2016); Warren J. Newman, *Constitutional Amendment By Legislation, in* CONSTITUTIONAL AMENDMENT IN CANADA (Emmett Macfarlane, ed. 2016).

[2] Albert *supra* note 1, at 389. See also: Allan C. Hutchinson, *Constitutional change and constitutional amendment,* in ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (Xenophon Contiades, ed. 2013).

[3] Edgar S. Vaught, *Amending the Constitution by Judicial Decree*, 9(3) OKLAHOMA L. REV. 249 (1956); Klaus H. Heberle, *From Gitlow to Near: Judicial 'Amendment' by Absent-Minded Incrementalism*, 34 THE JOURNAL OF POLITICS 458 (1972); Stephen Markman, *The Amendment Process of Article V: A Microcosm of the Constitution*, 12 HARVARD JOURNAL OF LAW & PUBLIC POLICY 113 (1989); William P. Gray Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALABAMA L. REV. 509 (1998); Greg Craven, *The High Court of Australia: A Study in the Abuse of Power,* 22(1) UNSW L.J. 216 (1999); Jeffrey Goldsworthy, *Constitutional Implications Revisited*, 30 UNIVERSITY OF QUEENSLAND L.J. 9 (2011).

to how far fundamental institutions should be modified or abrogated by the Court rather than in the constitutionally prescribed way."[4]

This paper will examine the concept of judicial amendment of the constitution as distinct from ordinary constitutional interpretation. In the first section, I analyze previous invocations of this distinction in order to assess whether the idea of judicial amendment coheres as a meaningful and conceptually substantive phenomenon. An analysis of instances of alleged judicial amendment invoked by commentators in the United States, Canada, and Australia finds that many of these examples do not draw a sufficiently clear line between interpretation and amendment. Of the scholars who have invoked the distinction between judicial interpretation and judicial amendment, few have devoted considerable effort to examining *how* to identify it,[5] and fewer still have done so in a way that is not ultimately reliant on, or merely critical of, a specific approach to constitutional interpretation.

In order to identify a meaningful distinction between judicial amendment and judicial interpretation, the distinction should hold regardless of whether one privileges fidelity to the text, the purpose of the constitutional provision or the intent of the constitutional framers, or even progressive 'living tree' constitutionalism (presuming one does not adopt a radical version of this latter approach that assumes virtually no limits to judicial creativity in interpretation, as I discuss below). As such, my objective is to avoid wading too deep into theories of interpretation in order to develop a set of factors that helps conceptualize the distinction within an assumed judicial environment of pluralistic approaches to constitutional interpretation.

I argue that for a judicial amendment of the constitution to occur, the resulting constitutional change (via addition, removal, or modification) must neither be a plausible interpretation of the existing text nor consistent with reasonable understandings of its purpose or the intent of the framers. Moreover, any attempt to draw a line between judicial amendment and judicial interpretation must also consider the context and history behind a constitution's development and evolution. My analysis thus also considers a key political (non-jurisprudential) factor: the prevailing expectations of existing political actors as to what the constitution requires. Evidence of a consensus within the broader political community that the constitution does or does not contain a thing, or that a formal amendment is required to add or remove that thing, provides a clear implication that judicial amendment, rather than interpretation, is at stake, at least in instances where the other factors listed above are also met. Reliably identifying the relevant political actors is difficult, and I discuss some basic parameters below.

I thus define judicial amendment as a judicial decision that effectively adds to, removes from, or modifies the constitution in a manner that is inconsistent with, or not plausibly contemplated by, the text in its original or modern meaning, the intent or purposes of the relevant provisions, and the expectations of the broader political community as to what the constitution contains. This factor-based approach gives very liberal breadth to what counts as normal constitutional interpretation and creates a high bar – the necessary presence of multiple factors – before a particular judicial interpretation has crossed the line into judicial amendment.

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[4] Frederic R. Coudert, *Judicial Constitutional Amendment as Illustrated by the Devolution of the Institution of the Jury from a Fundamental Right to a Mere Method of Procedure*, 13 YALE L.J. 331, 341 (1903-04).

[5] Dale Gibson, *Founding Fathers-In-Law: Judicial Amendment of the Canadian Constitution*, 55(1) LAW AND CONTEMPORARY PROBLEMS 261 (1992); Andrée Lajoie and Henry Quillnan, *Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution: The Proportionality Test as a Moving Target*, 55(1) LAW AND CONTEMPORARY PROBLEMS 285 (1992); Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16(2) J. OF CONSTITUTIONAL LAW 443 (2013).

In the second section, I explore instances of successful and attempted judicial amendment of the Constitution in the case of Canada and India. Canada presents a fitting case to examine the factor-based approach described above because its judiciary most often relies on a progressivist, 'living tree' approach to constitutional interpretation, which permits considerable judicial creativity in a context of functional strong-form judicial review[6] and an entrenched *Charter of Rights and Freedoms*. This context represents a hard case for the existence of judicial amendment, because the latitude the court enjoys to interpret the constitution is a wide one. In order to apply the factor-based approach in another context, I also explore a case in India. While Canada has a complex amending formula and one of the most difficult to amend constitutions in the world,[7] India has a comparatively simple amending formula, providing an interesting juxtaposition in which to evaluate the conceptual distinction.

Three cases form the focus of analysis. The first is the *Quebec Secession* reference,[8] which determined that although Quebec does not enjoy a unilateral right of secession under the Canadian Constitution, the other partners of Confederation owe a duty to negotiate in the event that a clear majority of Quebec voters on a clear question indicate a desire to secede. The second case examines Justice Louise Arbour's dissenting reasons in *Gosselin v. Quebec*,[9] arguing that section 7 of the Charter, which guarantees the right to life, liberty and security of the person, imposes a positive obligation on the state of offer basic protections like economic or welfare rights. The third case examines the invocation of basic structure doctrine in India in *Kesavananda Bharati v. State of Kerala.*[10] I conclude with a brief discussion of the implications recognizing judicial amendment might have for normative debates over judicial review.

1. Conceptualizing Judicial Amendment

1.1 – Framing Judicial Amendment

The focus of this analysis is judicial amendment as distinct from ordinary constitutional interpretation, even accounting for progressive forms of interpretation wherein constitutional meaning can evolve over time in line with changes in societal values. It is worth briefly examining an initial objection: that judicial amendment, at least as something akin to formal amendment, is

[6] In strong-form systems the courts enjoy the general power to declare what the constitutional means and their decisions are widely considered binding on the other branches of government. Canada is seen as the formal progenitor of 'weak-form' judicial review, largely due to the inclusion of the 'notwithstanding clause' of s 33 in the Charter, which permits legislatures to temporarily insulate laws from judicial review if they implicate certain sections of the Charter. However, in practice the notwithstanding clause is rarely used and so the Canadian system operates as a strong-form one. See: Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003); Mark V. Tushnet, *New Forms of Judicial Review and the Persistence of Rights- And Democracy-Based Worries*, 38 WAKE ROEST L. REV. 813 (2003). [MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2007); Emmett Macfarlane, *Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights* 34 INTERNATIONAL POLITICAL SCIENCE REVIEW 39 (2013).

[7] Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53(1) ALBERTA L. REV. 85 (2015); Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUPREME COURT L. REV. 181 (2014).

[8] Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [hereinafter 'Secession;].

[9] Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84.

[10] AIR 1973 SC 1461.

not possible, for the very same reasons that any type of informal constitutional change should not be conflated with constitutional amendment. Formal amendments to written constitutions are explicitly recognized by, or reflected in, changes to the text. Informal constitutional change, whether through changes to unwritten constitutional practices or norms, quasi-constitutional enactments of ordinary legislation, or judicial interpretation do not enjoy this explicit recognition. As Brannon Denning argues, there is an impermanence and relative inherent instability to informal changes effected by judicial decisions.[11] Formal amendments "must be reckoned with, whereas a case or custom may be altered or distinguished."[12]

There are two key responses to this objection. The first is that in systems of constitutional supremacy (or even judicial supremacy), the decisions of high courts are treated as every bit as authoritative as the constitutional text itself. The second is that to assume judicial amendment of the kind I hope to elucidate is impossible is to imply that there are no limits whatsoever on what might constitute a plausible interpretation of a constitutional text. If a constitution can literally mean anything, then the act of interpretation itself becomes untethered to the constitution's purpose. As Dale Gibson writes:

> While it is true that a given expression is rarely capable of meaning only one thing, even when the limiting effect of context is taken into account, there are *limits* to what it is capable of meaning. 'Elephant' cannot mean 'mouse'; 'banana' cannot mean 'apple.' 'Direct tax' cannot mean 'indirect tax.' Judicial rulings that go beyond those outer limits cannot be fairly considered to be interpretative exercises.[13]

As a result, the distinction drawn by Sanford Levinson seems a more reasonable starting point for the present analysis, in that the contrast between judicial interpretation and judicial amendment is "akin to that between organic development and the *invention* of entirely new solutions to old problems. From this perspective 'interpretations' are linked in specifiable ways to analyses of the text or at least to the body of materials conventionally regarded as within the ambit of the committed constitutionalist. 'Amendments,' however, are something else."[14] He notes further that the "Constitution 'could contain what it does not,' or, concomitantly, could have taken away from it what it now contains; presumably, though, either the adding or the taking away would require amendment."[15] This assumption serves as the basis for the rest of the analysis.

Where some view judicial amendment as impossible, others invoking the concept of judicial amendment have occasionally done so in a way that collapses, rather than elaborates on, the distinction. Stephen Markman, for example, cites among his American examples of judicial amendment cases involving abortion, busing, affirmative action, school prayer, the rights of aliens, AIDS policy, drug testing, education policy, and gays in the military.[16] With such a plethora of issues supposedly implicated by judicial amendment, it becomes difficult to know whether *any*

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[11] Denning, *supra* note 1 at 200.
[12] *Id.*, at 199.
[13] Gibson, *supra* note 5 at 272.
[14] Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson, ed. 1995) at 15 [emphasis in original].
[15] *Id.*, at 16, citing WILLIAM HARRIS, THE INTERPRETABLE CONSTITUTION 165 (1993).
[16] Markman, *supra* note 3, at 118.

interpretation of the constitution that relates to matters not *specifically* referenced in the constitutional text could stand.

A similar problem arises in Andrée Lajoie and Henry Quillinan's analysis in the Canadian context of the courts' approach to rights limitations analysis under section 1 of the Charter. The authors note that the advent of the Charter in 1982 opens the constitutional text to so much more interpretation that "what we had wanted to paint as mere evolving interpretation cannot but now appear as what it has always been: the creation of new constitutional rules by the judges."[17] They argue that changes the Supreme Court of Canada has made in its evolving approach to section 1's "reasonable limits" that "can be demonstrably justified in a free and democratic society" – an approach that came to be rooted in a proportionality assessment dubbed the Oakes test[18] – is itself a form of constitutional amendment, such that judges can "amend the Constitution by the very *process* by which they ascertain conformity of these limits."[19] This too effectively collapses any meaningful distinction between interpretation and amendment. Changes to doctrine or the way legal tests like Oakes are applied, or shifts in the latitude or deference courts give to governments in justifying their policy choices, cannot be equated with judicial amendment as I mean to analyze it, lest virtually all interpretation count as amendment.

In some contexts, the notion of judicial amendment appears as explicit criticism of progressive interpretation of a Constitution. This is the primary complaint of Greg Craven, writing in the Australian context, who argues that "it was not be the role of the Court to 'update' the Constitution in light of the passage of time":

> The Founders saw no role for the High Court in relation to this judicial form of constitutional amendment. On the contrary, they went to infinite pains to construct the s 128 amending procedure, with its carefully crafted democratic and federal elements, and there is not the slightest suggestion in the historical record that this painstakingly drafted provision was conveniently to be bypassed by judicial decree.[20]

For the purposes of the present analysis, there is a meaningful distinction between an approach to constitutional interpretation that allows for the meaning of constitutional provisions to evolve with society over time, as contrasted with the effective addition, subtraction, or alteration of constitutional provisions, as noted by Levinson above. Indeed, identifying that fine line is the primary objective of this paper: how should we distinguish interpretations of existing constitutional provisions from changes that ought to have been made via the formal amending procedures?

Similarly, an instance of judicial amendment is distinct from a departure from, or overriding of, precedent. A judicial amendment might theoretically occur in the context of a case that appears to be consistent with a long line of precedent but that is (perhaps erroneously) applied to a different context. By contrast, a judicial amendment may be the culmination of an evolving area of doctrine that had a particular trajectory and that, at a certain point, reaches a tipping point beyond ordinary interpretation. Or it may result in a case that clearly overrides established precedent. Therefore, while attention to the underlying logic of certain precedents may be

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[17] Lajoie and Quillinan, *supra* note 5 at 286.
[18] R. v. Oakes, [1986] 1 S.C.R. 103.
[19] Lajoie and Quillinan, *supra* note 5 at 288 [emphasis in original].
[20] Craven, *supra* note 3 at 221-2.

instructive for determining the fidelity to text, the purpose or intent of the framers as it regards particular constitutional provisions, or the original meaning of them, fidelity to precedent is not itself an independent factor in determining whether a judicial amendment has occurred.

1.2 – Identifying Judicial Amendment through Textualism

The concept of judicial amendment in the sense I seek to explore it appears most frequently in commentary in the United States, with a handful of scholars invoking the term in Canada and Australia. This is unsurprising; the literature on amendment in the US is voluminous, and includes debates over whether and how constitutional change can occur outside the ambit of Article V's amending procedures.[21] Although often invoked, the concept of judicial amendment is rarely subject to much elaboration. Its use is commonly limited to complaints about particular developments in the law, and as such, it gets wielded as a critical cudgel against a wide range of cases or issues in the US, including the development of interstate commerce,[22] decisions implicating the Tenth and Eleventh Amendments,[23] the finding of a right to privacy,[24] and the doctrine of "prospective-only application."[25]

Most pertinent for the purposes of this analysis are the different degrees of emphasis placed on certain factors by various commentators. A focus on the constitutional text is the least surprising of these different perspectives. As John Vile writes, courts can initiate constitutional change when they take "a giant step into uncharted territory, guided less by gaps in the constitutional text than by principles that justices think are or should be embodied there."[26] As an example, Vile cites *Griswold v. Connecticut*[27] and the Supreme Court's finding of an implication of a right to privacy "in the penumbras of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments without therefore having to designate which was to carry the weight of the load."[28]

If finding a right to privacy cannot be defended by a straightforward reading of the text, it has been defended as a broader structural reading of the Constitution. Commentators note that the decision is often cast as the "archetypal example of structural reasoning in an individual rights case," even if it some critics do not find it particularly persuasive.[29] The decision might also be defended on the grounds that the Ninth Amendment explicitly acknowledges the existence of unenumerated rights, and that it may be possible to identify them by implication through other

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[21] See, for example: Bruce Ackerman, *Higher Lawmaking, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (1995); Bruce Ackerman and David Golove, *Is NAFTA Constitutional?* 108 HARVARD L. REV. 799 (1995); Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARVARD L. REV. 1221 (1995).

[22] Vaught, *supra* note 3.

[23] Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16(2) JOURNAL OF CONSTITUTIONAL LAW 443, 445 (2013).

[24] Vile, *supra* note 1 at 46.

[25] The holding that constitutional decisions take effect only from the day they were announced. See Justice Black's criticism in DeBacker v. Brainard, 396 U.S. 28 (1969) at 396.

[26] Vile, *supra* note 1 at 45.

[27] 381 U.S. 479 (1965).

[28] Vile, *supra* note 1 at 46.

[29] Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance between State Sovereignty and Federal Supremacy*, 88(4) MARQ. L. REV. 693, 707-10 (2005).

constitutional provisions.[30] Thus, while *Griswold* may be an example of a case where "the Court went far beyond the explicit commands of the Constitution,"[31] it arguably does not do so in defiance of a reasonably accepted approach to interpretation.

Among understandings of judicial amendment that privilege the text, Eric Segall engages in one of the more comprehensive analyses of the concept in the US context. He writes that "[w]hen the Court ignores or distorts clear and unambiguous constitutional text … absent such an interpretation leading to an absurd result, the Court is, in effect, amending the Constitution without utilizing the Article V procedures."[32]

Segall argues that the Court's decision in *Hans v. Louisiana*[33] amended the Constitution by barring citizens from suing their own state. The text of the Eleventh Amendment specifically bars suits of citizens against "another" state, but says nothing about citizens suing their own state. The Court noted that the proposition that the states would have permitted their own citizens to sue them without their consent at the time the Eleventh Amendment was adopted "is almost an absurdity on its face."[34] Indeed, that even to present the case "is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of"[35] and that the "suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."[36] The Court also pointed to the language of the Act of Congress by which the jurisdiction of the federal Circuit Court is conferred, which provides for concurrent jurisdiction with state courts. Since the "state courts have no power to entertain suits by individuals against a State without its consent" then "how does the Circuit Court, having only concurrent jurisdiction, acquire any such power?"[37] Much of the Court's reasoning here explains why the text, however clear, may simply not consider the issue at hand. However persuasive Segall's textual point remains, it rests on a relatively strict adherence to text that assumes that whatever is not explicitly prohibited must be permitted. Segall is similarly critical of the Court's decision in *New York v. United States*,[38] which he says "effectively amended the Constitution by creating a non-textual exception" to the Tenth Amendment's principle that when Congress is properly exercising its enumerated powers, state law must give way.[39]

Both of the cases that serve as the core of Segall's analysis invoke historical and contextual reasoning, arguably to the detriment of the otherwise unambiguous text. Segall acknowledges that "structural concerns certainly can help inform interpretation" but objects to the creation of a non-textual limitation that seems to fly in the face of clear text.[40] Segall's account of judicial amendment clearly privileges an adherence to the text over and above other factors that may guide interpretation.

Gibson's analysis of judicial amendment in the Canadian context places similar emphasis on the text. He defines judicial amendment as "'interpretations' of the Constitution by the ultimate

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[30] *Id.*, at 708.
[31] Vile, *supra* note 1 at 45.
[32] Segall, *supra* note 22 at 445.
[33] 134 U.S. 1 (1980).
[34] *Id.*, at 15.
[35] *Id.*
[36] *Id.*, at 16.
[37] *Id.*, at 18.
[38] 505 U.S. 144 (1992).
[39] Segall, *supra* note 23 at 447.
[40] *Id.*, at 450.

judicial tribunal … that have the result of nullifying or radically altering the constitutional text or its authoritatively accepted meaning."[41] For his purposes, judicial decisions classified "as amendments to the Constitution are those that, whatever the sweep of their impact, are not capable of having been products of a fair construction of the Constitution Acts or of other documents of the Canadian Constitution."[42]

Among Gibson's core examples of judicial amendment is the Supreme Court's decision in the equality rights case *R. v. Turpin*,[43] which he views as having "removed from section 15(1) of the Charter much of the straightforward protection against inequality promised by its text."[44] Section 15(1) of the Charter reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Turpin* involved a criminal law that requires all persons subject to murder charges be tried by a judge and jury, except those in the province of Alberta, who can elect to be tried by a judge alone. In upholding the law, the Court, in Gibson's view, dismissed the fact that section 15 explicitly refers to "every individual" and in fact declared that the equality rights provision only applies to groups.[45] The Court's decision notes that section 15 does not apply to all instances of differential treatment and that a key element in the analysis is whether a law constitutes discrimination. Gibson acknowledges that the presence of the word "discrimination" in section 15(1) is relevant to the analysis, but argues that the Court transforms a protection against discriminatory laws that impact individuals into a section that only protects historically disadvantaged or vulnerable groups. Unlike "stereotyping," Gibson argues, historical disadvantage and vulnerability are not elements of the act of discrimination, they are a consequence of it.[46] In Gibson's view, "[i]t is a nonsequitur to move from the observation that certain groups of people are statistically most vulnerable to discrimination, with consequent historical disadvantage over time, to the conclusion that discrimination can be experienced only be members of those groups."[47]

Section 15(1) specifies a set of personal characteristics (enumerated grounds) upon which a discrimination analysis might focus. This list is explicitly non-exhaustive, and has led the Court to adopt the "'enumerated and analogous grounds' approach" which "most closely accords with the purposes of s. 15" from its very first equality rights case under the Charter.[48] Gibson's textualist analysis does not find the contextualist and purposive approach the Court adopts under the Charter acceptable. Yet even from a textualist assessment it is not clear that Gibson's criticism is entirely fair. Section 15(2) explicitly prevents Charter challenges against laws, programs, or activities designed to ameliorate the conditions of disadvantaged individuals or groups belonging to the enumerated grounds. The Court's approach, grounding its analysis of discrimination in a manner consistent with that principle, seems reasonable, even if it is not explicitly dictated by the text and its reference to individuals.

Other Supreme Court decisions Gibson cites as examples of judicial amendment are arguably even less compelling given the exceedingly strict textualist rationale he adopts. For

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[41] Gibson, *supra* note 5 at 261.
[42] *Id.*, at 271-2.
[43] [1989] 1 S.C.R. 1296.
[44] Gibson, *supra* 5 at 265.
[45] *Id.*, at 262-4.
[46] *Id.*, at 266.
[47] *Id.*
[48] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 182.

example, Gibson cites the decision in the *Patriation Reference*, where a majority of justices recognized the existence of a constitutional convention requiring a "substantial degree of provincial consent"[49] before proposed amendments to the British North America Act, 1867 could be sent to the Parliament of the United Kingdom. He argues that the recognition of a convention is contrary to the text of section 101, which in his view limits the role of the general court of appeal to the administering of "laws."[50] This argument misses a number of important factors, including that the reference questions posed to the Court explicitly asked the justices to speak to the existence of the convention. Moreover, the text of section 101 of Constitution Act, 1867 empowers Parliament to establish a general court of appeal and "any additional Courts for the better Administration of the Laws of Canada." It neither specifies nor limits *how* the courts go about administering laws. The decision by the Court to recognize the convention may have been inadvisable – indeed, an overreach of the Court's appropriate role[51] – but it is difficult to specify what provision of the Constitution was altered by it.

1.3 – Identifying Judicial Amendment through Framer's Intent, Original Meaning, and Purpose

It is natural to think that the idea of judicial amendment would tend to be associated with conservative approaches to interpretation focused solely on either original intent or fidelity to the text.[52] Indeed, for some scholars of this vein original intent or original meaning is binding such that any "growth beyond the original understanding" is merely a "euphemism for judicial amendment of the Constitution."[53] Yet many modern originalists accept that the wording of constitutional provisions often leaves substantial room for interpretation, and that the discretion granted to judges at least permits "the application of modern normative shifts" in meaning in some instances.[54] The key for these originalists is that while their perspective does not necessarily rule out some form of "living constitutionalism," the latter must occur "within the communicative scope of the text as originally intended or understood. The more vague or uncertain the meaning of the text, the greater scope for interpretative discretion and evolution in the course of constitutional application."[55] Moreover, even in a system of constitutionalism like Canada's, in which the vast consensus among contemporary jurists is an embrace of living tree or progressive constitutionalism, originalist thought sometimes seeps into judicial reasoning.[56] The 'purposive

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[49] *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.
[50] Gibson, *supra* note 5 at 270-1.
[51] The decision to answer the question on constitutional conventions has been sharply criticized, in that the Court risked allowing itself to become politicized and that it invites "constitutional danger" for wading into such a finding. See: Adam M. Dodek, *Courting Constitutional Danger: Constitutional Conventions and the Legacy of the* Patriation Reference, SUPREME COURT LAW REVIEW 54(2d), 117 (2011).
[52] William Michael Treanor, *Review: Taking the Framers Seriously*, 55(3) THE UNIV. OF CHICAGO L. REV. 1016, 1023 (1988); F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms*, 20(1) CANADIAN JOURNAL OF POLITICAL SCIENCE 31, 55n17 (1987).
[53] Raoul Berger, *A Study of Youthful Omniscience: Gerald Lynch on Judicial Review*, 36 ARKANSAS L. REV. 215, 229 (1982).
[54] Léonid Sirota and Benjamin Oliphant, *Originalist Reasoning in Canadian Constitutional Jurisprudence*, 50 UBC L. REV. 505, 507 (2017).
[55] *Id.*, 509-10.
[56] Benjamin Oliphant and Léonid Sirota, *Has the Supreme Court of Canada Rejected 'Originalism'?* 42 QUEEN'S L.J. 107 (2016).

approach' to the Charter of Rights adopted by the Supreme Court seems to necessitate a consideration of the intentions of the drafters, at least in some fashion.[57]

Among the most common sighting of the concept of judicial amendment under a framers' intent approach occurs in relation to commentary on the US Fourteenth Amendment and the circuitous evolution granted to it by judicial interpretation. Critical of the Court's early restrictive application of the Fourteenth Amendment to the states, Coudert argues in 1904 that the intention of the framers was to "confer upon the citizen of the States all the rights contained in the eight amendments. … Had this view been adopted it would have gone far to nationalizing the domain of civil liberty, as was the evident intent of the framers of the Amendment, but the fact that the Court took a different view would seem to have rendered that portion of the amendment virtually meaningless."[58] For Coudert, the jurisprudence in the decades up to the time of his writing meant the effective repeal of much of the Fourteenth Amendment.[59] In his view, this "emphasizes the fact that under the fiction of interpretation the Court has actually changed the Constitution."[60]

Where Coudert finds evidence of judicial amendment in the early restrictive reading of the Fourteenth Amendment, later observes levelled the judicial amendment criticism at the Court in its subsequent move to fully incorporate various amendments and apply those to the states.[61] Klaus Heberle notes that the eventual process of incorporation was "a step that the Court had repeatedly refused to take in the past out of deference to the federal character of American government"[62] and that this marked "a major shift in constitutional interpretation, if not a judicial amendment of the Constitution."[63] Others note that framers' intent with regard to the Fourteenth Amendment is impossible to identify. Vile, for example, remarks on the "decided ambiguity that appears to have motivated those who proposed and ratified" the amendment, although he suggests that the Court's earlier approach to the Fourteenth Amendment was "too conservative a reading" and threatened to reflect a judicial reversal of the constitutional amendment.[64] This suggests that, at least in some contexts, an exclusive or narrow focus on framer's intent is unlikely to elucidate clearly whether judicial amendment has occurred. It is also a helpful illustration of why departures from, or decisions to overturn, precedent are conceptually distinct from judicial amendment.

Writing in the Canadian context, F.L. Morton and Rainer Knopff criticize the Court for adopting a radical version of living tree constitutionalism.[65] Rather than a progressive interpretation that allows growth and evolution in meaning to evolve within the Constitution's natural limits, these authors argue the Court has exercised discretion to create new rights out of whole cloth. They note, for example, that the Court rejected the intent of the framers when it determined that section 7 of the Charter – the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice – should be read as providing substantive rather than procedural protections.[66] Morton and Knopff

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[57] *Id.*, at 145-5, citing Patrick J. Monahan, *Judicial Review and Democracy: A Theory of Judicial Review*, 21(1) UBC L. REV. 87, 123.
[58] Coudert, *supra* note 4 at 350.
[59] *Id.*, 353.
[60] *Id.*, 356.
[61] Heberle, *supra* note 3; RAOUL BERGER, GOVERNMENT BY JUDCIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 1 (1977); Gray Jr., *supra* note 3.
[62] Heberle, *supra* note 3 at 460.
[63] *Id.*, at 477.
[64] Vile, *supra* note 1 at 41.
[65] F.L. MORTON AND RAINER KNOPFF, THE CHARTER REVOLUTION & THE COURT PARTY (2000).
[66] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

argue that there "was ample documentary evidence that many of the most influential framers intended the narrower, procedural reading."[67] While this is true, the framers had the option of making the text much more explicit on this point rather than relying on the broad language of "principles of fundamental justice."

If a narrow focus on original meaning or intent does not always provide a convincing line to draw between judicial interpretation and judicial amendment that does not mean these are irrelevant factors for consideration. As noted above, the purpose of constitutional provisions at the time they were enacted are often relevant to their modern meaning, even in the context of living tree constitutionalism. Further, departures from *both* unambiguous text and framer's intent (or, indeed, the purpose of the relevant constitutional provision) surely call into question whether a judicial decision has strayed too far out of normal interpretative bounds. This is true even in a context like Canada, where constitutional provisions are given "large, liberal and generous" reading.[68] As Benjamin Oliphant and Léonid Sirota write, "[n]early everyone agrees that interpretative license must have limits and that the judiciary must in some sense be bound by the Constitution as much or more than anyone else."[69] As they note, the Court itself has recognized this fact in its own elaboration of the purposive approach to interpretation: "it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum and must therefore … be placed in its proper linguistic, philosophic and historical contexts."[70]

1.4 – Identifying Judicial Amendment through Political Consensus

A third and final relevant factor to determining whether a judicial decision has crossed the interpretative threshold into constitutional amendment territory pays heed to the broadly-held consensus of the political actors about what the Constitution does or does not contain. This factor goes to the core of whether a constitution's amending procedures – the need for formal amendment – are effectively ignored and judicial creativity is being substituted in their place. A number of commentators have emphasized the place of the constituent political community or the need for popular consent to constitutional changes in this vein.

William P. Gray Jr., criticizing the incorporation of the Fourteenth Amendment as judicial amendment, argues that the "unilateral judicial amendment of the Constitution is even more egregious when viewed in light of the fact that the people of the United States and the members of Congress repeatedly rejected this draconian departure from the meaning of the Constitution."[71]

Justice Hugo Black of the US Supreme Court was fond of raising the need for the consent of political representatives and the people in constitutional change. His dissenting opinion in *Griswold v. Connecticut* (discussed above) opines about the role of the political community: "The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashion I

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[67] Morton and Knopff, *supra* note 65 at 45.
[68] Oliphant and Sirota, *supra* note 56 at 163.
[69] *Id.*
[70] *Id.*, at 156, citing *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 344.
[71] Gray Jr., *supra* note 3 at 530.

must add it is good enough for me."[72] Similarly, his dissent in *DeBacker v. Brainard* complains of decisions that result "in the Constitution's meaning one thing the day prior to a particular decision and something entirely different the next day even though the language remains the same. Under our system of government such amendments cannot constitutionally be made by judges but only by the action of Congress and the people."[73]

Jeffrey Goldsworthy, writing about the finding of an implied freedom of political communication by the High Court of Australia,[74] formulates a similar argument as follows:

> Any purported discovery of a major unwritten constitutional principle that was not even noticed by our best legal minds for nearly a century is inherently suspicious. It seemed obvious to me that the Court had changed the system of government established by our Constitution in a substantial way, without asking me or my fellow Australians whether we approved of the change, as required by s 128.[75]

Goldsworthy's analysis is not limited to the expectations of the political community. He notes, for example, that the framers of the Australian Constitution deliberately chose not to include a bill of rights, and argues that "[j]udges are surely bound not only by the framers' ends, but by the means they selected to achieve those ends. That is why it has been said that the framers' decisions to omit provisions from the Constitution are entitled to as much respect as their decisions to include provisions."[76] Yet his admonishment about the existence of the enumerated amending procedures, and that bypassing formal amendment without regard to the need for popular consent to major changes to the constitution, stands as recognition of an important – and necessary – ingredient to the recipe for identifying judicial amendment.

The evident expectations of the political community about whether the amending procedures are required to effect certain changes to the Constitution, or about what a constitution presently contains, are relevant precisely because it is the political community that establishes the higher law reflected in any written constitution. It is the political actors, or the public, or both, who are granted the power to make amendments in virtually every written set of constitutional amending procedures (even those that include or allow for substantive or implicit judicial review of the amending process).

Identifying the expectations of the relevant political actors is difficult, but a starting point ought to be those actors empowered under the amending formula itself. A range of evidence may be elucidated by examining whether recent or contemporary practice of those actors accord with the judicial interpretation at stake.[77] In certain cases, this might be evident from something as specific as efforts by the political community to amend the relevant aspect of the constitution at stake in the case. Alternatively, clear evidence as to what the relevant political actors believe (via political debate, arguments before the court, etc.) will allow for a determination of whether a judicial decision defies their expectations about what the constitution does and does not contain.

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[72] Vile, *supra* note 1 at 46.
[73] 396 U.S. 28 (1969) at 34.
[74] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationalwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[75] Goldsworthy, *supra* note 3 at 9.
[76] *Id.*, at 24, citing THE HON M GLEESON, THE RULE OF LAW AND THE CONSTITUTION (2000) at 70.
[77] Richard Albert engages in a similar exercise in elaborating on his distinction between constitutional amendment and constitutional dismemberment: *Constitutional Amendment and Dismemberment*, 43(1) THE YALE JOURNAL OF INTERNATIONAL LAW 1, 50 (2018).

Moreover, there might even be an effort to amend the constitution to overturn a particular judicial decision, which is perhaps the clearest evidence as to what the political community thinks about constitutional meaning. In the cases analyzed below, these different elements are all present in some form.

Judicial decisions that surprise the political community, particularly when there are reasons to think a consensus exists about whether a constitution includes a particular rule, value, or right, should receive close scrutiny. In instances where those decisions are not evident from a reasonable reading of the text and do not reflect the provision's purpose or the intent of the framers, the prospects that judicial amendment is at hand are high.

Further, we should not dismiss the notion of judicial amendment simply because the political community adheres to, accepts, or even comes to agree with the judicially-mandated outcome. In a rule of law system, it is generally expected that political actors will adhere to the decisions of final appellate courts; indeed, in the constitutional arena a refusal to do so could very well precipitate a crisis. The point is that regardless of whether certain political actors of the day come to like or support a decision is not what determines whether or not that decision represents a judicial amendment of the constitution. The key question is whether the political community reasonably expected a given outcome based on evidence about its beliefs or (recent) practice at the time of the decision.

In the next section, I analyze cases that arguably meet these three factors – defiance of text, contradiction of purpose or framer's intent, and confounding the expectations of the political community – to examine judicial amendment in practice.

2. Judicial Amendment in Canada

Canada makes a fitting case for analyzing judicial amendment in part because of the near-consensus within the judiciary favoring progressive living tree constitutionalism. Given this widely accepted approach to constitutional interpretation, Canada stands as a 'hard case' for evaluating when interpretation crosses over into judicial amendment. Moreover, it is often noted that informal constitutional change via judicial interpretation or amendment is sometimes inevitable, indeed needed, in systems where formal constitutional amendment is difficult to achieve.[78] Given that Canada has one of the most difficult to amend constitutions in the world,[79] it is perhaps unsurprising that the courts, especially the Supreme Court, have taken an active role in evolving constitutional meaning over time. If judicial amendment is a distinct phenomenon, then assessing it in a context like Canada's requires a high threshold of analysis.

In this section, I examine two cases to analyze whether judicial reasoning has lapsed from judicial interpretation to judicial amendment of the Constitution. The first case is the Court's unanimous opinion in the *Quebec Secession Reference*, where it determined that although Quebec does not have the right to secede unilaterally, the expression of the will of a clear majority of Quebecers answering a clear question on secession creates an obligation on the rest of Canada to negotiate. It is this aspect of the decision that will be the focus of my analysis.

The second case is Justice Louise Arbour's dissenting reasons in *Gosselin v. Quebec*, in which she argued section 7 of the Charter creates a positive obligation on government to provide

[78] Paul C. Weiler, *The Supreme Court of Canada and Canadian Federalism,* in LAW AND SOCIAL CHANGE (Jacob S. Ziegel, ed. 1973); Vile, *supra* note 1 at 35; Gibson, *supra* note 5 at 277.
[79] Albert, *supra* note 7.

for the life, liberty and security of the person (in this context, the provision of a positive right to welfare). It may seem odd to examine a dissenting opinion, which is an *attempted* judicial amendment, but the case remains especially relevant because the majority judgment explicitly left the door open to the possibility of one day interpreting section 7 to include a positive dimension. As such, the question of whether positive welfare or social rights could be effectively added to section 7 of the Charter remains a live issue. Judges do not tend to write dissenting reasons for the sheer joy of writing: they hold out hope that one day their dissent will live to see the light of day and become majority thinking.[80] Moreover, the fact that the reasons are presented in a dissenting opinion does not change the factor-based analysis I have outlined.

2.1 – The *Quebec Secession Reference*

Perhaps more than any other decision in the Supreme Court's history, the political context surrounding the 1998 *Quebec Secession Reference* was inescapably influential – if not directly determinative – on the way the Court approached and framed the issues at stake. The country had narrowly avoided the separation of Quebec in the 1995 referendum on secession, with voters in the province voting 'No' by a 50.58 to 49.42 percent margin. In posing questions about whether either the Constitution or international law gave Quebec the right to secede unilaterally, the federal government was throwing the Court a political hand grenade. A simple and narrow legal response that Quebec could not unilaterally secede, either on the basis that the Constitution did not contemplate secession or that the amending formula would obviously require the agreement of Parliament and a majority (if not unanimous support) of the provinces, would potentially bring fatal damage to the legitimacy of the Court in the eyes of many Quebecers.

That the Court surprised the country with a decision that not only avoided a narrow legalistic reading but also gave pro-secession Quebecers something on which to draw from, and thus preserved its own legitimacy and, in the longer term, quieted anxiety around Quebec secession, has been described as "masterful"[81] and "shrewd."[82] Whether the Court's creativity in devising an obligation to negotiate in the event of the expression of the clear will of Quebecers to secede was normatively desirable or even *necessary* is not a question I intend to answer here. My analysis is not about whether judicial amendment of the constitution is sometimes unavoidable or laudable, but whether it occurs.

The Court's invention of the obligation to negotiate constitutes a judicial amendment of the amending formula itself.[83] A constitutional obligation to negotiate is not contemplated by the text or purpose of Part V of the *Constitution Act, 1982*, nor did it reflect the expectations of the partners of Confederation.

A Departure from the Text

[80] EMMETT MACFARLANE, GOVERNING FROM THE BENCH: THE SUPREME COURT OF CANADA AND THE JUDICIAL ROLE 112 (2013).
[81] ROBERT A. YOUNG, THE STRUGGLE FOR QUEBEC 146 (1999).
[82] Alan C. Cairns, *The Quebec Secession Reference: The Constitutional Obligation to Negotiate*, 10 CONSTITUIONAL FORUM 26, 27 (1998).
[83] Richard Albert has similarly referred to this as an informal amendment of the Constitution, in *Constitutional Amendment by Stealth* 60(4) MCGILL L.J. 673 at 690.

In its opinion, the Court does not purport to draw the obligation to negotiate from the text itself, but from "unwritten constitutional principles" that also form the Constitution, which it argues "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."[84] After dispensing with the question of its jurisdiction to hear the reference, the Court undertakes an examination of four of these principles – federalism, democracy, constitutionalism and the rule of law, and respect for minority rights – which it views as most germane for resolution of the questions before it. This is central to a structuralist approach to constitutional interpretation,[85] and the Court invokes the notion of the Constitution's "internal architecture" or "basic constitutional structure" in which the "individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."[86] The Court acknowledges that "these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*" but notes that "it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[87] Also noteworthy is that the Court explicitly links "observance and respect for these principles [as] essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree'."[88]

For the purposes of the present analysis, I accept a structuralist approach as a legitimate method of interpretation. My aim is not to critique the use or application of unwritten constitutional principles or the concept of a constitutional architecture in judicial reasoning; these have been defended and criticized elsewhere.[89] The question is whether the application of unwritten principles to create a constitutional obligation to negotiate go beyond the bounds of normal interpretation *in this instance.*

In the *Secession Reference*, the Court notes that in a prior case applying unwritten constitutional principles it determined that the effect of the preamble to the *Constitution Act, 1867,*[90] "was to 'incorporate certain constitutional principles by reference'" as it "'invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text'."[91] Putting aside the question of whether the preamble actually makes such an invitation, the Court makes no effort to demonstrate that there exists a "gap" in the Constitution in the context of secession. It is true that the Constitution's text makes no mention of secession, but this is different from whether the amending procedures cover such a context.

The text of the amending formula is expressed as a complete and comprehensive code for amendments to the constitution. Importantly, the Court explicitly recognizes this when it states

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[84] *Secession*, *supra* note 8 at para. 49.
[85] Robin Elliot, *References, Structural Argumentation and the Organizing Principles of Canada's Constitution* 80 CAN. B. REV. 67 (2001).
[86] Secession, *supra* note 8 at para. 50.
[87] *Id.*, at para. 51.
[88] *Id.*, at para. 52.
[89] Mark D. Walters, *Written Constitutions and Unwritten Constitutionalism* in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft, ed. 2008); Emmett Macfarlane, *Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada* 76 SUPREME COURT LAW REVIEW 399 (2015).
[90] Which promises "a Constitution similar in Principle to that of the United Kingdom."
[91] *Secession*, *supra* note 8 at para. 53, citing *Reference re Renumeration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 at para. 104.

that a legal secession requires an amendment to the Constitution.[92] It rejects the argument that secession would constitute "a change of such magnitude that it could not be considered to be merely an amendment to the Constitution."[93] The existing text therefore provides for all possible matters of amendment, including secession.

However, the amending formula of Part V of the *Constitution Act, 1982* is not examined in the Court's lengthy opinion. In part, this is the result of the advisory process itself: the reference questions posed to the Court focused on *unilateral* secession; the Court was not specifically asked how secession might otherwise occur.[94] Instead, the Court states that "[a]lthough the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion."[95] Further, the Court states that the unwritten principle of democracy demands "that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada."[96] Coupled with the federalism principle, the Court argues, there exists "a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to the desire."[97]

The invention of the constitutional obligation to negotiate has been subject to considerable criticism. Particularly relevant to the present analysis is that several scholars have criticized the decision explicitly or implicitly as an effective amendment of the constitution. Patrick Monahan notes that the "Court appears to have proceeded on the basis of a rather novel and enlarged conception of the judicial role in constitutional matters, one in which the judiciary is free to create constitutional obligations whenever it identifies a 'gap' in the constitutional text."[98] Monahan writes that gaps implicating the underlying logic of the Constitution can be filled in one of two ways:

> The first, which might be termed the 'judicial balancing' theory, suggests that where the courts find a gap, they should conceive of their role as akin to constitutional drafters. On this view, the court should fill in the gap by relying upon its own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text. The second, which might be termed the 'interpretative' theory, suggests that the court should attempt to fill in that gap by adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to 'complete' the constitutional text.[99]

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[92] *Id.*, 84.
[93] *Id.*
[94] Kate Puddister, *'The Most Radical Amendment of All': The Power to Secede and the* Secession Reference, in CONSTITUTIONAL AMENDMENT IN CANADA (Emmett Macfarlane, ed. 2016) at 280.
[95] *Succession, supra* note 8, at para. 87.
[96] *Id.*
[97] *Id.*, at para. 88.
[98] Patrick J. Monahan, *The Public Policy Role of the Supreme Court of Canada in the* Secession Reference, 11 NATIONAL J. OF CONSTITUTIONAL LAW 65 (2000) at 69.
[99] *Id.*, at 77.

Monahan argues that the Court adopted the first approach in the *Secession Reference*, noting that "the Court is engaged in a purely legislative exercise, in which it designs the constitutional obligation based on its own conception of what would be appropriate."[100]

For Sujit Choudhry and Robert Howse, the difficulty with the Court's approach is that while it seems to justify reliance on unwritten principles on the basis that "the written text of the Constitution cannot possibly specify in advance adequate rules to govern all the situations that may arise in the future in which the constitutional order has a stake or interest" it does not provide "an account of the sources that justifies the recourse to unwritten constitutional norms" in the first place.[101] Choudhry and Howse contend the Court engages in "extra-ordinary interpretation, in which the text assumes secondary importance."[102] Rather than merely filling gaps, unwritten norms "explain, and are implemented by, the constitutional text."[103] The authors note that the result of this approach is that courts interpret unwritten principles "in a manner that, in positivist eyes, would resemble amendment, and lead to the fashioning of new constitutional rules."[104] A key problem is that the Court does not justify its reasoning on this basis; in fact, it explicitly notes that the text has the primary place in determining constitutional rules.[105] As the authors note, the Court states that the unwritten constitutional principles exist "because problems or situations may arise which are not expressly dealt with by the text of the Constitution."[106]

Even these criticisms may not go far enough, to the extent they accept the questionable premise that a gap in the constitutional text or its underlying logic exists and needs filling. Although the secession of a province is not explicitly contemplated by the constitutional text, both the textual structure and the purpose (discussed below) of Canada's amending formula provides for an exhaustive set of procedures for changes to the Constitution. Section 38 of the *Constitution Act, 1982* established a general amending procedure (known as the "7/50 rule")[107] for all major changes to the Constitution. The formula also identifies a narrow set of matters requiring the unanimous consent of all provinces, under section 41. Section 43 allows for bilateral amendments affecting one or more, but not all, provinces, section 44 allows Parliament to pass laws amending the Constitution "in relation to the executive government of Canada or the Senate and the House of Commons" and section 45 allows provincial legislatures to unilaterally amend their own provincial constitutions. Given the Court's acknowledgment that any secession process would require recourse to the amending formula as affecting the Constitution of Canada, the only debate has been whether that requires the general amending procedure or the unanimity procedure.[108]

By recognizing the amending formula's relevance for provincial secession, the Court itself indirectly acknowledges that no gap in constitutional meaning exists. However *politically* astute its decision to go further and invent the obligation to negotiate, the Court effectively amended the

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[100] *Id.*, at 91.
[101] Sujit Choudhry and Robert Howse, *Constitutional Theory and The* Quebec Secession Reference, 13(2) CANADIAN J. of LAW AND JURISPRUDENCE 143, 156 (2000).
[102] *Id.*
[103] *Id.*, at 157.
[104] *Id.*
[105] *Secession*, *supra* note 8 at para. 32.
[106] Choudhry and Howse, *supra* note 101 at 157, citing *Secession*, *supra* note 8 at para. 32.
[107] Providing for an amendment to the Constitution of Canada made by proclamation issued by the Governor General as authorized by resolutions of the Senate and House of Commons and of the legislative assemblies of at least two-thirds of the provinces that constitute at least 50 per cent of the population. For greater clarity, section 42 lists a number of matters that may be subject to amendment under the general procedure.
[108] Puddister, *supra* note 94 at 282-3. I concur with Puddister's analysis that, because the secession of a province would implicate certain matters listed under section 41, secession is only possible via the unanimity procedure.

amending formula, at least with respect to the matter of secession,[109] by adding an additional procedural requirement to the process Part V outlines. The political process leading up to amendments, and indeed, whether a negotiation even occurs, is not contemplated by the amending procedures, but that does not in of itself create a gap in *legal* meaning. The fact that the Court reinforces in its decision that it is for the political actors to ultimately determine when a "clear majority on a clear question" exists, and that the courts have no supervisory role in the negotiations themselves,[110] implies that the very existence of an obligation to negotiate should have been left to the political sphere. The Court even raises the distinction between law enforced by courts and "other constitutional rules, such as the conventions of the Constitution" in prefacing its discussion on this aspect.[111]

Original Purpose, Meaning, or Intent of the Framers

Much of the preceding discussion about constitutional text also reflects the original meaning and understanding of the purpose of the Canadian amending formula. As it relates to the intent of the framers, debates over the constitutional amending formula in Canada are well documented. The Canadian search to develop a domestic formula was exhaustive and lasted for decades leading up to the patriation process in 1982. Fundamental issues included: whether the structure of the general procedure should rest on a province-based formula like the one eventually entrenched versus proposals for a more 'regional-based' model (effectively requiring even more provincial support for major changes – including ensuring a veto for Quebec); what and how many matters should require unanimous consent; and whether to include provisions for a referendum (a proposal that survived late into the negotiation process but did not ultimately survive). At no point did the framers ever believe they were establishing something other than a complete and exhaustive code for changes to the constitution. Nor were there any proposals in the record regarding rules that might compel the various partners in Confederation to take part in negotiations.[112]

The Court's decision also belies the fundamental purpose of entrenching an amending formula to begin with: to designate not only the process for amending the constitution but also to identify and delegate the amending power to specified constitutional actors. In Canada's case, this was limited to the federal Parliament and the legislative assemblies of the provinces. The invention of the obligation to negotiate places additional constraints on those actors not contemplated by the constitutional text or its underlying purpose. As Robin Elliot writes:

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[109] Some have argued that the obligation to negotiate applies to *any* issue on which there is a clear majority on a clear question in a provincial referendum. Scott Moe, Premier of Saskatchewan, and Jason Kenney, Premier of Alberta, have proposed holding votes on the federal equalization formula in order to force the partners of Confederation into negotiation. Arthur White-Crummey, *Moe open to joining forces with Alberta on threatened equalization vote*, REGINA LEADER-POST (April 17 2019) https://leaderpost.com/news/saskatchewan/moe-open-to-joining-forces-with-alberta-on-threatened-equalization-vote I do not believe this is a reasonable interpretation of the Court's decision, given it is so deeply grounded in the secession context; however, that multiple political actors share this belief reinforces the idea that the amending formula has been amended.

[110] *Secession*, *supra* note 8, at paras. 100-1.

[111] *Id.* at para. 98.

[112] See: PETER RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? (2004); ANNE F. BAYEFSKY, CANADA'S CONSTITUTION ACT 1982 & AMENDMENTS: A DOCUMENTARY HISTORY (1989); HOWARD LEESON, THE PATRIATION MINUES (2011); Nadia Verrelli, *Searching for an Amending Formula: The 115-Year Journey* in CONSTITUTIONAL AMENDMENT IN CANADA (Emmett Macfarlane, ed. 2016).

> The irony is that the approach taken to the use of our Constitution's organizing principles in the *Quebec Secession Reference* is vulnerable to the criticism that it is inconsistent with three of the very principles it relied on in that case to fashion the new constitutional rules governing secession. It is inconsistent with the rule of law because it allows what amount to amendments to be made to the Constitution of Canada otherwise than in accordance with section 52(2) of the *Constitution Act, 1982*, which stipulates that such amendments can only be made on the basis of the rules prescribed by Part V of that same instrument. It is inconsistent with the federal principle because it denies a role to the federal and provincial orders of government in the amendment process (a role, it should be noted, guaranteed by those same rules). And it is inconsistent with the principle of democracy because it allows for constitutional amendments to be made without any participation on the part of the elected representative of the people (who, in fact, according to those same rules, are given exclusive authority over that process).[113]

This particular criticism does not deny the potential relevance of unwritten principles to guide interpretation of the Constitution so much as it points out that in this instance the Court applies the principles in a way that violates them. The purpose, original meaning, and the intent of the framers are effectively undercut by the Court's decision.

Expectations of the Relevant Political Actors

All that is required for the legal effectiveness of an amendment under the general or unanimity procedures is the passage of the requisite legislative resolutions.[114] Up until the Court's *Secession Reference* decision, the *conduct* of the various partners had not been a factor in the *legal* legitimacy of the process. Importantly, the relevant political actors had acted on clear assumptions about their own requirements, or lack thereof, to negotiate or even hold a legislative vote as it regards amendment proposals. During the period leading to the failed ratification of the Meech Lake Accord (a set of constitutional proposals negotiated in the late 1980s), "it could not have been argued, for example, that the amendment ought to have been proclaimed because of the alleged 'intransigence' of Newfoundland Premier Clyde Wells in refusing to call for a vote on the Accord in the Newfoundland House of Assembly. All that mattered, as far as the law of the constitution was concerned, was that the necessary legislative resolutions had not been enacted within the necessary time."[115] This is clear evidence of the reasonable expectations of the relevant political actors about the conditions under which an amendment is brought into effect under the Canadian constitutional amending formula.

Moreover, the idea that a constitutional obligation to negotiate existed "surprised everyone, sovereigntists and federalists alike."[116] The Court's innovation was "[c]ontrary to expectations"[117] and this extends even to arguments made by the various government interveners and the *amicus*

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[113] Elliot, *supra* note 85 at 97.
[114] Monahan, *supra* note 98 at 82.
[115] *Id.*, at 83.
[116] *Id.*, at 103.
[117] Choudhry and Howse, *supra* note 101 at 144.

curiae, who generally asserted "a right of direct participation" in any negotiations that might follow a referendum, but "no one required that such negotiations be a duty."[118] This is important, because regardless of the fact that the Court's decision was ultimately lauded by many on both sides, the broader political community's expectations about what the Constitution contained was clearly defied. As a result, the *Secession Reference* checks all three boxes in the multi-factor approach to identifying judicial amendment.

2.2 – *Gosselin v. Quebec*

Gosselin v. Quebec was a Charter challenge to Quebec legislation that made an age-based distinction for the receipt of social assistance payments to the disadvantage of recipients under 30. The challenge was based on both section 7's right to life, liberty and security of the person and section 15's equality rights, and the majority of the Court rejected both arguments. My analysis focuses on the dissenting reasons of Justice Arbour, who argues that section 7 of the Charter – the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice – imposes a positive obligation on the state to offer basic protections like social assistance benefits. Many related or subsidiary arguments about the Charter and positive rights,[119] and in particular section 15 of the Charter, are not relevant to this analysis.

As a dissent, Arbour's reasoning stands as an attempted judicial amendment rather than one brought into effect, but I include this case in my analysis for two reasons. First, section 7's implications remain a live issue, as the majority in *Gosselin*, citing the living tree metaphor, note that the provision may one day be interpreted to include positive obligations.[120] Second, the purpose of my analysis – distinguishing between ordinary interpretation and judicial amendment – remains the same regardless of whether the attempted judicial amendment was successfully implemented. A future case that brings a similar issue to bear may see a majority decision one day relying on Arbour's reasons, and if it stands as a potential judicial amendment this fact ought to weigh on any court's considerations of its own role in interpreting section 7 of the Charter.

A Departure from the Text

The first and primarily textualist obstacle Arbour's argument faces is that section 7 is explicitly listed in the "Legal Rights" portion of the Charter. The Charter's very structure links section 7 to

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[118] David P. Haljan, *A Constitutional Duty to Negotiate Amendments:* Reference Re Secession of Quebec, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 447 (1999) at 451n20.

[119] Martha Jackman, *The Protection of Welfare Rights under the Charter*, 20(2) OTTAWA L. REV. 257 (1988); Jamie Cameron, *Positive Obligations under Section 15 and 7 of the charter: A Comment on* Gosselin v. Québec, 20 SUPREME COURT L. REV. 65 (2003); Margot Young, *Section 7 and the Politics of Social Justice*, 38 UBC L. REV. 539 (2005); Judy Fudge, *Substantive Equality, the Supreme Court of Canada, and the Limits of Redistribution*, 23 SOUTH AFRICAN J. OF HUMAN RIGHTS 235 (2007); Cara Wilkie and Meryl Zisman Gary, *Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality*, 30 WINDSOR REVIEW OF LEGAL AND SOCIAL ISSUES 37 (2011); Emmett Macfarlane, *The Dilemma of Positive Rights: Access to Health Care and the Canadian Charter of Rights and Freedoms*, 48(3) JOURNAL OF CANADIAN STUDIES 49 (2014); Emmett Macfarlane, *Positive Rights and Section 15 of the* Charter*: Addressing a Dilemma*, 38 NATIONAL J. OF CONSTITUTIONAL LAW 147 (2018).

[120] *Gosselin*, *supra* note 9 at para. 82.

sections 8 through 14, a series of provisions governing state conduct in the administration of justice. Arbour argues that this fact ought not to be controlling of section 7's scope, and that "the appeal to a *Charter* subheading as a way of limiting the kinds of interests that are protected by a rights-granting provision appears to be at odds with the generous and purposive approach that this Court has repeatedly identified as the proper approach to interpretation."[121]

Contrary to Arbour's view, the most comprehensive discussion of the relevance of Charter subheadings for interpretation appears in the Court's unanimous decision in *Law Society of Upper Canada v. Skapinker*.[122] In that decision the Court noted that the headings "appear to be integral to the *Charter* provisions and hence of more significance than the marginal notes and chapter headings sometimes appearing in statutes."[123] Although *Skapinker* specifically involved the Charter's "Mobility Rights" provisions, the Court's decision notes that it is "difficult to contemplate a situation where the heading could be cursorily rejected" and specifically noted that the "Legal Rights" heading "will likely be seen as being only an announcement of the obvious."[124] The heading also provides an important basis for understanding section 7's purpose (discussed below).

The conventional view of section 7 mandates that claims "must arise as a result of a determinative state action that in and of itself deprives the claimant to the right to life, liberty or security of the person."[125] As Justice Bastarache notes in his reasons, "[t]he requirement that the violation of a person's rights under s. 7 must emanate from a particular state action can be found in the wording of the section itself. Section 7 does not grant a right to security of the person, full stop. Rather, the right is protected only insofar as the claimant is deprived of the right to security of the person by the state, in a manner that is contrary to the principles of fundamental justice."[126] Arbour acknowledges that section 7 has required state action "in virtually all" cases, but she contends this remains largely an assumption not obvious from the text.[127] She argues, implausibly in my view, that the language of "deprivation" in section 7's text is sufficiently broad to "embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object."[128] It may literally be true that persons not receiving social assistance payments from the state are unable to attain those benefits, but this does not mean section 7 mandates that the state provide them in any cognizable sense the use of the word deprivation means in context. This re-ordering of the concept of deprivation in the context of a constitutional legal right defies the textual and purposive understanding the jurisprudence has contemplated. Moreover, if followed, Arbour's approach opens the floodgates such that any and all programs or services that could have implications for one's security of the person or liberty but are not provided by the state suddenly somehow constitute deprivations by the state.

In defense of this proposition, Arbour offers a tautology: "we must reject the assumption that s. 7 protects only against the kinds of incursions one might expect to suffer in connection with one's dealings with the justice system and its administration."[129] Why? Because doing so, in her view, "obliterates the foundation for the idea that the phrase 'principles of fundamental justice'

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[121] *Id.*, at para. 316.
[122] *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.
[123] *Id.*, at para. 15.
[124] *Id.*, at para. 23.
[125] *Gosselin, supra* note 9., at para. 213.
[126] *Id.*, at para. 209.
[127] *Id.*, at para. 319.
[128] *Id.*, at para. 321.
[129] *Id.*, at para. 322.

includes an implicit requirement of positive state action. It also leaves s. 7 bereft of any trace of language that might contain a requirement of positive state action before a breach may occur."[130] Yet as Arbour herself points out, the Court's allegedly narrow interpretation has not prevented section 7's application in contexts requiring state funding.[131]

Arbour then attempts to disconnect the right to life, liberty and security of the person from state deprivation and the principles of fundamental justice entirely. She notes that the conjunctive "and" between "the right to life, liberty and security of the person and the right not to be deprived of…" might lend itself to a reading of section 7 that actually contains two sets of rights, including a free-floating right to life, liberty and security of the person not limited by considerations of whether a deprivation exists or one that violates principle of fundamental justice.[132] However, Arbour acknowledges that this potential reading quickly fell into obscurity,[133] and at least in part because the French version of the Charter does not contain the conjunction "and" and its language can only possibly be read as a single unified right premised on "les principes de justice fondamentale." In a circumstance where the Constitution is written in two official languages and one version provides two plausible readings, but the other provides only one plausible reading, it seems a radical approach to ignore the latter in favor of one's preferred but dubious interpretation.

Bastarache comes strikingly close to the language of 'judicial amendment' when he writes that the text of the Charter cannot be avoided in an analysis premised on broader values, even if those values might aid in interpretation, and nor can "the court through the process of judicial interpretation change the nature of the right."[134] Bastarache connects this to the purposive approach to interpretation, which he notes, "while coloured by an overarching concern with human dignity, democracy and other such '*Charter* values', must first and foremost look to the purpose of the section in question. Without some linkage to the language of the *Charter*, the legitimacy of the entire process of *Charter* adjudication is brought into question."[135] Bastarache finds specific textual and purposive meaning in section 7 from the fact that it is grouped under the "Legal Rights" heading along with sections 8 through 14, and thus "has, as its primary goal, the protection of one's right to life, liberty, and security of the person against the coercive power of the state."[136] He also notes that the "judicial nature of s. 7 rights is also evident from the fact that people may only be deprived of those rights in accordance with the principles of fundamental justice."[137]

Original Purpose, Meaning, or Intent of the Framers

It is well established that the framers intended for section 7 to be limited to matters of procedure,[138] something the Supreme Court diverged from in its very first section 7 case in favor of a substantive

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[130] *Id*.
[131] *Id.*, at para. 324, citing *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46 in regards to state-funded counsel in the context of a child custody hearing. This 'positive obligation', however, falls directly within the nexus of a state-administered legal proceeding.
[132] *Id.*, at para. 336-7.
[133] *Id.*, at para. 339.
[134] *Id.*, at para. 214.
[135] *Id*.
[136] *Id.*, at para. 215.
[137] *Id*.
[138] Peter Hogg, *The Brilliant Career of Section 7 of the Charter*, 58 SUPREME COURT L. REV. 195 (2012) at 195-6; Cameron, *supra* note 126; Morton and Knopff, *supra* note 65 at 45.

reading.[139] On that basis alone, it is clear that positive social or economic rights were not contemplated by those that entrenched the Charter in 1982. Arbour's analysis belies this fact, although, as noted above, she puts much energy into arguing that a purposive reading of section 7 should not limit it to the context of the administration of justice and criminal law.

Arbour asserts that section 7's structural location in the Charter, placed in the Legal Rights section, is irrelevant to understanding its purpose. In fact, the opposite is true: while Charter subheadings may not by themselves compel a particular interpretation, they certainly provide evidence about the intended *purpose* of the provisions they contain. Unlike certain headings and notes in other legislative contexts and jurisdictions, the Charter's subheadings were consistently included in the drafting process by the framers themselves as an integral part of the document and, therefore, as the Court itself has stated, "[a]t the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the [Charter's] provisions."[140]

Expectations of the Relevant Political Actors

If Arbour's interpretation of section 7 runs counter to the text, the provision's purpose, and the intent of the framers, what about the expectations of the broader political community? On this factor we have the most emphatic and clear evidence possible that the relevant actors believe that adding free-standing social or economic rights like the right to welfare were not a part of the existing constitution: they included such rights as part of a broader package of formal amendments to the Constitution only ten years prior to the *Gosselin* case. The 1992 Charlottetown Accord included a proposed provision on "The Social and Economic Union" describing the commitment of governments, Parliament and the provincial legislatures to a set of objectives including "providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities" as well as entrenching the Canada Health Act's principles on health care, among other provisions.[141]

Notably, these provisions would not be justiciable, meaning that while the constitutional designers wanted such principles entrenched in the Constitution they did not want them subject to judicial review. Although the Charlottetown Accord was defeated in a national referendum that year, the Accord stands as a clear recognition by all of the relevant political actors of the day as to what the Constitution did not include and what might be added to it by way of formal amendment. Any attempt by the courts to subsequently make such additions to the Constitution by way of judicial interpretation should be regarded as a judicial amendment.

3.0 Judicial Amendment in India

India provides a unique and different context under which to apply the factor-based approach to identifying judicial amendment. In contrast to Canada, India has a relatively simple amending

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[139] *Motor Vehicle Act, supra* note 66. Something that an originalist might view as a judicial amendment, although as the text does not necessarily make clear that a procedural reading is required, I will avoid wading into this example here.

[140] *Skapinker, supra* note 122, at para. 22.

[141] *Consensus Report On the Constitution – Charlottetown – Final Text* (August 28, 1992), p. 2.

formula with substantially lower thresholds required for amendment. Indeed, the Indian Constitution has been amendment over 100 times since 1950. Article 368 of the Constitution of India provides that most amendments to the constitution may be made by a vote of a simple majority of the two houses of Parliament (provided that at least two-thirds of the members of each house is present). Amendments on certain matters must also be ratified by at least half of the state legislatures. Both procedures require formal assent by the President. Nothing in the text of the constitution indicates that any of its provisions are unamendable. As Yaniv Roznai writes, early "Indian jurisprudence, rooted in British tradition, initially rejected the notion of implicit unamendability."[142] Yet the Supreme Court of India would eventually establish a basic structure doctrine that would effectively limit the amending authority by rejecting amendments that removed or altered basic features or the identity of the constitution.

In the 1967 case *Golaknath v. State of Punjab*,[143] the Court determined that the amending formula did not permit Parliament to repeal any of the fundamental rights in the constitution. This case did not actually invalidate any amendments, and it was rooted in a textual interpretation of Article 13, which prohibits the state from making any law that abridges the fundamental rights. In a questionable reading, the Court interpreted "any law" as including amendments to the constitution. The *Golaknath* case is regarded as "the opening shot" of a protracted battle in India between the executive and legislative powers and the judiciary over the fate of constitutional change.[144] Parliament's eventual response included, among other things, the Twenty-fourth Amendment,[145] inserting a clause into Article 368 explicitly permitting Parliament to amend, by way of addition, variation, or repeal any provision of the constitution in accordance with the amending procedure.

This set the stage for another legal challenge in the 1973 case *Kesavananda Bharati v. State of Kerala.*[146] In that case, a majority of the Court overturned its decision in *Golaknath*, with ten of the 13 justices determining that Parliament was free to amend any part of the constitution (finding that the term "law" under Article 13 does not include constitutional amendments). However, seven of the justices (a bare majority) found that an amendment did not include changes to the basic structure or framework of the constitution (the basic structure doctrine). Application of this doctrine in subsequent cases has permitted the Court to reject or invalidate amendments, including the Twenty-fourth Amendment. Basic structure doctrine is now an entrenched feature of constitutionalism in India. Its invocation in the *Kesavananda* case, as I will argue here, is also a judicial amendment of the constitution.

3.1 – *Kesavananda Bharatic v. State of Kerala*

A Departure from the Text

[142] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017) at 43.
[143] AIR 1967 SC 1643.
[144] Roznai, *supra* note 142 at 43.
[145] Constitution (Twenty-fourth Amendment) Act, 1971, s. 3.
[146] AIR 1973 SC 1461.

The text of India's constitution is clear. As Albert notes, nothing in Article 368 (or elsewhere) identifies any aspects of the constitution as unamendable.[147] In Albert's view,

> The constitutional text conferred plenary amendment power on Parliament and the states, but the Court chose to restrict that power in its judgments. And the Constituent Assembly that created the constitution had chosen not to codify any unamendable rules but the Court has in its judgments imposed several unamendable norms, with no constitutionally codified referent to identify what is off limits. The outcome is evident: the country's amendment rules have been altered without a formal amendment.[148]

It is also important to note that the Court's decision on this point was not rooted in any interpretation of the text itself. Contrary to the *Golaknath* decision, which *Kesavananda* overturns, there was no recourse to another provision to justify limiting the amending power (and indeed, the interpretation of Article 13 in *Golaknath*, described above, is a questionable one). Some of the judges in the majority seem to argue, in their separate concurrences, that repealing certain provisions is not the same as amending them (suggesting the term amendment itself is subject to interpretative disagreement). However, since the majority outcome does not rest on this logic, and instead focuses on there simply being 'basic features' that it asserts as an unalterable core of the constitution, there does not appear to be a specific interpretative issue at stake in relation to a particular textual provision. Basic structure doctrine, as invoked in this case at least, appears as an extra-textual judicial invention.

Original Purpose, Meaning, or Intent of the Framers

There is clear historical and scholarly evidence that Article 368 was intended as a complete and comprehensive formula for amendments to the constitution. There is an extensive record of deliberations by the drafters of the constitution. The idea that certain provisions, specifically fundamental rights, ought to be protected by way of making it *ultra vires* for Parliament to pass amendments that would infringe, restrict or diminish them was proposed and *explicitly rejected* as part of the Draft Committee's work.[149] Academic research in the aftermath of the *Golaknath* case, prior to the *Kesavananda* hearing, "completely undermined" arguments about implied unamendability because the direct incorporation of possible exceptions to the amending power were considered and rejected: "This destroyed the credibility of the argument that an exception in favour of Fundamental Rights was intended by the framers of the Constitution and was left to be read by implication in Article 368."[150]

This evidence is determinative as it relates to framer's intent, but understanding the implications of the decision also go to the heart of the purpose of the amending formula itself. As P. K. Tripathi writes,

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[147] RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS (2019) at 20. See also: P. K. Tripathi, *Kesavananda Bharati v. The State of Kerala: Who Wins?* in FUNDAMENTAL RIGHTS CASE: THE CRITICS SPEAK! Surendra Malik, ed. (1975), 89.
[148] *Id.*, at 21.
[149] B. SHIVA RAO ET AL., THE FRAMING OF INDIA'S CONSTITUTION: A STUDY (1968), at 830-2.
[150] Tripathi, *supra* note 147, at 89-90.

> It will be some irony if a Court so severely concerned with saving the "essential elements" or the "basic structure and framework" of the Constitution should end up with destroying the most essential and basic principle of Constitutional law, namely, that the restrictions, if any, on the power of amendment of a sovereign constitution can be imposed only by the Constituent Assembly or its nominee, the amending authority, both of whom operate upon the Constitution, and not by a Court which must operate under the Constitution and subject to it.[151]

The broader political context under which the Court developed the basic structure doctrine has certainly led many to defend the Court's decision. Whether the decision was normatively 'a good thing' is irrelevant to the present analysis, which is about what *Kesavananda* does: it introduces amendment rules that were not part of the constitution as originally drafted, nor were part of the purpose of the Article to which they were applied.

Expectations of the Relevant Political Actors

What did the relevant political community in India understand the constitution to contain? One fundamental aspect of determining this in relation to the basic structure as a limit on the amending power is recognizing that the concept was a foreign import that arrived only in hearings during the *Golaknath* case. One counsel for the petitioner was influenced by a 1965 lecture delivered by German scholar Dietrich Conrad on implied limitations theory.[152] The basic structure concept had no influence on Indian constitutionalism until that time, and so could not have possibly been viewed by the relevant political actors as part of the constitution. This is not to call into question the legitimacy or normative desirability of constitutional transplants or transnational influence on constitutional change or jurisprudence. Indeed, such processes are quite common. But to the extent that a constitution should reflect what the constituent power – the people and their representatives – believe it to be, it is important to note that the Court's eventual incorporation of basic structure doctrine emanates from beyond India's legal, political, and constitutional community and thus defied contemporary expectations of what the constitution contained.

If *Kesavananda* defied those broad expectations about the constitution at the time it was decided, it is also relevant to note that the relevant political actors who enjoyed the conferred power to amend the constitution expressly disagreed with the Court, to the point of passing multiple amendments via the amending procedures to overturn its decision. In addition to the Twenty-fourth Amendment, Parliament and the states also passed the Forty-second Amendment in 1976,[153] which included changes to Article 368 that effectively prohibited judicial review of amendments and re-asserted Parliament's unlimited power to amend. The Court invalidated this Amendment in a 1980 case under the basic structure doctrine.[154]

Had these amendments to Article 368 passed under the basic procedure requiring only a simple majority of the two houses of Parliament, a view that they represented the expectations of the relevant political actors may not be quite so convincing. There was strenuous political

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[151] *Id.*, at 129.
[152] Roznai, *supra* note 142, at 43-4.
[153] Constitution (Forty-second Amendment) Act, 1976.
[154] *Minerva Mills Ltd. V. Union of India* AIR 1980 SC 1789.

opposition to the government's motives in pursuing the various amendments. Yet amendments to Article 368 require the supermajority procedure of ratification by at least half of the legislative assemblies of the states, in addition to Parliament. This, at the very least, reflects the dominant governing coalition's views that the amending procedure stood as the complete and comprehensive set of rules for changing the constitution, and that the basic structure concept was an illegitimate limit on that provision.

Conclusion

This analysis has attempted to identify factors that delineate the distinction between interpretation and judicial amendment of the Constitution. It finds that it is difficult to identify cases of judicial amendment by relying largely or solely on a single factor, be it departures from a constitution's text or the intent of the framers. Departures from text might be justified based on structural constitutionalism and departures from original meaning or framer's intent might be justified based on living tree constitutionalism. As a result, it is necessary to apply a multi-factor approach to consider the full context under which judicial amendment may occur, and to avoid invoking an amendment versus interpretation distinction under the guise of replicating extant debates over competing theories of interpretation. For this reason, the multi-factor approach gives wide latitude to diverse approaches to interpretation, including progressive and structural varieties.

Nonetheless, the approach I have taken may not convince all readers. Levinson, for example, expresses serious doubts "that anyone can supply formal criteria by which to distinguish" the two concepts, and "that clever analysts can repeatedly show that what are thought to be 'interpretations' are better viewed as 'amendments' and, of course, just the opposite."[155] It is possible he is correct. For example, identifying decisions that defy the general consensus among relevant political actors about what the constitution presently contains is challenging. Few cases will present as clear an indicator as an attempted formal amendment that speaks directly to the consensus view about whether a given provision must be added or altered via formal amendment, as discussed in relation to the *Gosselin* and *Kesavananda* cases. More likely, ascertaining the views of relevant actors regarding the existing status of the constitution will require analysis of indirect indicators, such as arguments that are made as part of political debate or in submission to the courts, or as reflected in constitutional practices like previous attempts to amend the constitution, as explored in relation to the *Quebec Secession* reference.

However difficult the line-drawing exercise attempted here may be, a judicial decision that cannot reasonably be rooted in the text of the Constitution, that appears to fly in the face of the purpose of the relevant constitutional provision or the intent of those that established it, *and* that defies the evident expectations of the broader political community should, at the very least, raise questions about the limits of reasonable constitutional interpretation. My hope is that the preceding analysis is not judged merely by whether the decisions described create normatively or subjectively desirable outcomes. The analysis rests on an empirical assessment of whether there were departures from basic standards of interpretation as well as the evident expectations of the political community about what the constitution contains and whether formal amendment was required to achieve particular changes. Any resulting normative debate about the appropriateness of judicial amendment can and should follow from a good faith effort to identify it, but identifying it and assessing its appropriateness are two different things.

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[155] Levinson, *supra* note 14 at 33.

This paper does not engage in a normative assessment, but it is worth concluding here by noting that the existence of judicial amendment potentially generates a diverse set of normative implications. A critical perspective might go so far as to suggest that judicial amendment effectively amounts to an 'unconstitutional' decision or action by a court. A slightly less unfavorable view might simply hold that instances of judicial amendment are the clearest sign of "judicial activism," however amorphous that term may be. On the other hand, a normative defense of judicial amendment might regard it as simply inevitable, or even desirable, especially in contexts where formal amendment of a constitution has become so difficult that it threatens stasis and stagnation, as in Canada, or where amendment by a governing power is too easy and threatens to undermine important norms, as in India. Hopefully the analysis as presented will help to further such debates.