I. Greene, “Constitutional Amendment in Canada and the United States,” in S.L. Newman, ed. *Constitutional Politics in Canada and the United States* (Albany SUNY Press, 2004)

**Overview**

Paper argues that both Canada and US have greater freedom for constitutional amendment than more academics suggest, and that there have been more successes than failures. Greene draws attention to innovative Cdn development of *de facto* constitutional change. He argues against the common view that constitutional supremacy = judicial supremacy. Rather, he argues that the judicial role more closely resembles that of an intermittent auditor of legislative initiative.

**Background**

* After constitutional reforms in 1982, it has become commonplace for academics to conclude that, like the US, Canada has now succumbed to judicial supremacy, in part because the domestic amending formula has made the Cdn constitution as difficult to amend as the US constitution
  + The Canadian constitution has been amended nine times since 1982
  + And the US has seen nearly six thousand successful amendments to state constitutions
* Amendment process: Canada Act of 1982 – the last and final amendment of Cdn constitution made by British Parliament at request of Canada added the Charter of Rights and Freedoms to the constitution, enshried some aboriginal rights, included a commitment to equalization payments, defined written parts of Cdn constitutions that would have status superior to that of others, and provided five domestic amending formulas

1. The unanimity formula
2. The ‘some but not all’ formula
3. Provincial govts may amend their own constitutions
4. Parliament may amend its own internal constitution
5. The general amending formula

* Record of amendments:
  + Between 1867 and 2001, the Cdn constitution was amended 32 times (32/13 decades)
  + US experienced 17 amendments (over 21 decades)
* Most Cdns more aware of the failures than the successes. Three failures stand out: (1) inability of the first ministers to agree on a domestic amending formula between 1931 and 1982; (2) the Meech Lake Accord; and (3) the Charlottetwon Accords.
  + These sorts of epic constitution-making events rarely succeed, but neither do they reflect the reality of more simple and discrete constitutional amendments that are more common

Impact of the Courts

* Two major decisions on the constitutionality of amending procedures are:
  + SCC constitutional reference decision of 1981 – without the SCC decision, which gave the federal govt a legal victory, and provincial govts a moral one, and which did not prescribe unanimous provincial consent, the constitutional accord of Nov. 5, 1981 would never have been achieved
  + Quebec secession reference of 1996

**Conclusion**

* Canada has recently begun to pursue *de facto* constitutional amendment through ordinary statutes that clarify or limit the federal role regarding some constitutional amendment procedures
* Judiciary in both countries act as check against what judges consider to be excessive or unreasonable constitutional alteration – and in this role, it is more accurate to describe the judicial role in constitutional amendments as that of an ‘intermittent auditor’ rather than ‘supreme overseer’