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“GRAND ENTRANCE HALL,” BACK DOOR OR FOUNDATION STONE? THE ROLE OF CONSTITUTIONAL PRINCIPLES IN CONSTRUING AND APPLYING THE CONSTITUTION OF CANADA

Warren J. Newman^{*}

The ship of state is run and governed by a most difficult mechanism of rules, principles, precedents and administrative wheels. Without a thorough knowledge of this complicated machinery, there is not much use in trying to direct its course in a proper channel and a correct way.

Maurice Ollivier, *Problems of Canadian Sovereignty* (1945)

I. INTRODUCTION: CONSTITUTIONAL LAW, CONVENTIONS AND PRINCIPLES

In the wake of the Supreme Court of Canada’s opinions in the *Provincial Court Judges Reference*¹ and the *Quebec Secession Reference*,² the courts have

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¹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Court Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3. The current trend began after the decisions of the Court in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, holding *inter alia* that parliamentary privileges “fall within the group of

been seized with an ever-burgeoning multitude of new cases in which the constitutional principles of judicial independence,³ federalism, democracy, the rule of law and the protection of minorities⁴ have been invoked to challenge the

principles constitutionalized by virtue of [the] preamble” to the *Constitution Act, 1867* (at 377, *per* McLachlin, J., as she then was, for the majority), and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, in which interprovincial recognition and enforcement of court judgments were premised on the “full faith and credit” doctrine “inherent in the structure of the Canadian federation, and, as such, [...] beyond the power of provincial legislatures to override” (at 324, *per* La Forest J., for the Court). However, the proliferation of cases invoking constitutional principles became especially noticeable after the *Provincial Court Judges* and the *Quebec Secession* references (*infra*, note 2).

² *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. I disclose that I was of counsel for the Attorney General of Canada in this reference and in several of the cases subsequently referred to in these remarks, including the *Potter* and *Hogan* matters (*infra*, note 4) as well as the *Lalonde* case (*infra*, note 4).

³ See *Alberta Provincial Judges’ Assn. v. Alberta* (1999), 177 D.L.R. (4th) 418 (Alta. C.A.), leave to appeal to S.C.C. denied June 8, 2000; *Re British Columbia Legislative Assembly, Resolution on Judicial Compensation* (1998), 160 D.L.R. (4th) 477 (B.C.C.A.), leave to appeal to S.C.C. denied January 21, 1999; *Conférence des juges du Québec c. Québec (Procureur général)*, [2000] J.Q. No 400 (C.S.Q.); *Newfoundland Association of Provincial Court Judges v. Newfoundland* (2000), 191 D.L.R. (4th) 225 (Nfld. C.A.); *Ell v. Alberta* (2000), 83 Alta. L.R. (3d) 215 (C.A.); *Re Independence of the Provincial Court of British Columbia Justices of the Peace* (2000), 81 B.C.L.R. (3d) 164 (S.C.) (*per* Sigurdson J.); *Re Therrien*, 2001 SCC 35.

⁴ See *Samson v. Canada (Attorney General)* (1998), 165 D.L.R. (4th) 342 (F.C.T.D.), notice of appeal to F.C.A. filed, but appeal subsequently abandoned (principle of democracy); *Brown v. Alberta* (1999), 177 D.L.R. (4th) 349 (Alta. C.A.) (principle of democracy); *Potter v. Quebec (Attorney General)*, [1999] R.J.Q. 165 (S.C.Q.) (principle of protection of minorities raised in appeal pending before Quebec Court of Appeal; *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20, 205 W.A.C. 20, [1999] 11 W.W.R. 51 (Sask. C.A.), leave to appeal to S.C.C. denied on June 1, 2000 (rule of law principle); *Singh v. Canada (Attorney General) (sub nom. Westergard-Thorpe v. Canada (Attorney General))*, [2000] 3 F.C. 185 (C.A.), leave to appeal to S.C.C. denied on August 10, 2000 (principles of parliamentary supremacy, rule of law and judicial independence); *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2000), 48 O.R. (3d) 50 (Div. Ct.), appeal heard May 14 to 17, 2001, and decision of Ontario Court of Appeal pending (principle of protection of minorities); *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225 (Nfld. C.A.), application for leave to appeal before S.C.C. denied on November 9, 2000 (principles of federalism, democracy, rule of law and protection of minorities); *Dehenne v. Dehenne* (2000), 47 O.R. (3d) 140 (S.C.J.) (principle of protection of minorities); *JTI-Macdonald Corp. v. British Columbia (Attorney General)* (2000), 184 D.L.R. (4th) 335 (B.C.S.C.) (federalism and rule of law); *Wilder v. Ontario (Securities Commission)* (2000), 184 D.L.R. (4th) 165 (Ont. Div. Ct.), *affd* (2001), 197 D.L.R. (4th) 193 (Ont. C.A.) (rule of law, independence of bar and judiciary); *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409 (refusing to recognize a purported constitutional principle or convention of reasonable autonomy for municipal institutions, or a principle of mirror equality between rights of public schools and those of separate schools). Several motions for declaratory judgment challenging the validity of Bill 170, Quebec’s municipal amalgamation legislation (S.Q. 2000, c. 56), and related amendments on the basis, *inter alia*, of the principles of democracy and the protection of minorities, have recently been denied by the Quebec Superior Court: *Villes de Baie d’Urfé, Westmount*,

validity of constitutional amendments,⁵ statutory provisions⁶ and governmental action.⁷ Legal practitioners, long used to equating “the Constitution of Canada” with the written text of the *Constitution Acts*,⁸ were now left wondering as to the extent to which, if at all, constitutional *principles* might supplant (or at least supplement) constitutional *provisions* as a source of supreme and fundamental law, and might thus provide the basis for legal rules or constitutional obligations enforceable by the courts.

The Constitution of Canada, taken in its broader analytical sense, has always embraced not only the provisions of the written text but also the conventions of the Constitution — the unwritten rules regarding the operation of the constitutional framework that political actors consider to be binding upon themselves and their actions. However, constitutional conventions are more within the realm of political science⁹ than that of law because although they are normative rules in that they are understood to be obligatory, the sanction for their breach is a matter for the political process and public opinion, not for the legal process and the courts. While they have occasionally recognized the existence of constitutional conventions, the courts have consistently rejected attempts by litigants to have those conventions applied and enforced in the same manner as legal provisions and rules.¹⁰ In the *Patriation Reference*,¹¹ the

Hampstead et autres c. Procureur général du Québec (June 28, 2001), Doc. No. 500-05-062072-002 *et al.*, (Que. S.C.), appeal now pending before the Quebec Court of Appeal.

⁵ See *Potter and Hogan*, *supra*, note 4, challenging the validity of the *Constitution Amendment, 1997 (Quebec)* and the *Constitution Amendment, 1998 (Newfoundland Act)*, respectively, relating to denominational schools within each of the two provinces.

⁶ See, for example, the judicial independence cases in note 3, challenging certain provisions of various provincial statutes relating to the administration of justice and the organization of the provincial courts; and the *Singh* case, challenging section 39 of the *Canada Evidence Act*.

⁷ See, for example, the *Samson* and *Brown* cases, *supra*, note 4, challenging the Senate appointments process, and *Lalonde*, *supra*, note 4, challenging the directives of the Health Services Commission to Hôpital Montfort in Ottawa.

⁸ More precisely, the *Canada Act 1982* and the *Constitution Acts, 1867 to 1982*: *vide s. 52(2)* and *s. 60*.

⁹ For a useful and fairly recent study in this area by a Canadian political scientist, see Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press Canada, 1991).

¹⁰ See, for example, *Reference re Sections 26, 27 & 28 of Constitution Act, 1867*, [1991] 4 W.W.R. 97 (B.C.C.A.); *LeBlanc v. Canada* (1991), 80 D.L.R. (4th) 641 (Ont. C.A.); both appeal courts refusing to pronounce upon the existence of constitutional conventions after the appointment of additional Senators was an established fact. See also the decision of Riche J. at trial in *Hogan v. Newfoundland (Attorney General)* (1999), 173 Nfld. & P.E.I.R. 148 (Nfld. T.D.), and most recently, *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15 (March 8, 2001), *per* Iacobucci J. for the Court, paras. 63-66, upholding the decision of the Ontario

Supreme Court put a definitive end to the proposition that had been advanced in some respected academic circles that a convention, although political in origin, might “crystallize” into a rule of law.

Moreover, even establishing the existence of a constitutional convention requires a demonstration that the putative conventional rule meets three rather stringent and objective criteria: there must be a precedent (or series of precedents) showing adherence to the rule; there must be a reason for the rule; and the rule must be regarded as obligatory by the political actors to whom it is said to apply.¹² It is this third, “normative” element which the Supreme Court of Canada has stated is the most important of the three criteria.¹³ Therefore, while as a matter of convention, a substantial consensus amongst the provinces was required to patriate and amend the Constitution along the lines of the federal government’s 1980-1981 constitutional proposals, there was no conventional requirement that Quebec’s consent was a necessary part of that consensus, or that the legislative assembly or Government of Quebec possessed a conventional power of veto over the process.

So it was, then, that both prior to and after the enactment of the *Canada Act 1982*¹⁴ and the proclamation of its schedule, the *Constitution Act, 1982*,¹⁵ it could be fairly said, as the Supreme Court put it in the *Patriation Reference*, that “constitutional conventions plus constitutional law equal the total constitution of the country.”¹⁶ This was also the stuff of standard contemporary textbooks on Canadian constitutional law and political science.¹⁷

Court of Appeal (44 O.R. (3d) 7, at 31-32 (*per curiam*)), dismissing arguments in relation to denominational schools guarantees based on convention.

¹¹ *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 877-83. A majority of the Court agreed to answer the question as to whether a constitutional convention requiring provincial consent existed, but distinguished conventions from rules of law: “The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. [...] This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption” (at 880-82).

¹² This is the test formulated by Sir W. Ivor Jennings in *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), and adopted by the Supreme Court of Canada in the *Patriation Reference*, *id.*, at 888.

¹³ *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793.

¹⁴ *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁶ *Patriation Reference*, *supra*, note 11, at 883-84. Put another way, in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at 87, *per Sopinka J.*: “Underlying this distinction between constitutional law and constitutional conventions is the contrast between legal and political constitutionalism.”

¹⁷ See, for example, Professor Peter W. Hogg’s *Constitutional Law of Canada*, student ed. (Toronto: Carswell Co., 1977), in which he divided the first chapter (“Sources”) of the first part

II. THE NEW EMPHASIS ON CONSTITUTIONAL PRINCIPLES

With the *Provincial Judges Reference* and the *Quebec Secession Reference*, suddenly (it seemed), “constitutional principles” had replaced “constitutional conventions” as the most prominent and important feature of the “unwritten constitution.” These principles were said to be “not merely descriptive,” but rather, “invested with a powerful normative force” and “binding upon both courts and governments.”¹⁸ Their role was not only to interpret the existing terms of the Constitution, but also to be employed, as an innovative tool of constitutional dentistry, in the “filling of gaps” (and apparently, the adding of more teeth) in “the express terms of the constitutional text.”¹⁹ Moreover, establishing these principles did not first require proof that they conformed to the rigorous set of criteria that applied to determining the existence of constitutional conventions. The existence of constitutional principles was largely self-evident.

It did not take the proverbial rocket scientist (or, to modernize the metaphor, a web page designer) to realize that a whole new vista of legal argument had just opened up. All it took was a score of reasonably imaginative litigation lawyers. Within the days,²⁰ weeks and months following the release of the *Quebec Secession Reference* opinion, new or revised statements of claim and defences were filed, challenging or resisting the application of various constitutional instruments, ordinary statutes and administrative action. If there

(“Basic Concepts”) of his book into five sub-chapters: “The ‘Constitution’”; “Imperial Statutes”; “Canadian Statutes;” “Caselaw;” and “Conventions.” Professor J. Mallory in *The Structure of Canadian Government* (Toronto: Gage Publishing, 1971) placed heavy emphasis on the role of conventions in the opening pages of the first part (“The Pattern of the Constitution”) of his book (at 2): “The Canadian constitution is a product of negotiation and bargaining, of a feeling that the practical operation is more important than the letter of the law, and that the spirit supersedes the letter of the agreement. This has made our constitutional law harder to discover and apply than the American, for it shares the ambiguities of the British constitution. The difference between American and British constitutionalism is essentially this: for the Americans, anything unconstitutional is illegal, however right and necessary it may seem; for the British, anything unconstitutional is wrong, however legal it may be.” See too, Dawson, *The Government of Canada*, 4th ed., revised by N. Ward (Toronto: University of Toronto Press: 1963), Chapter 4, “The Nature of the Constitution” (at 63-64): “the unwritten constitution is every whit as important as the British North America Act, and indeed, [...] much of the latter is transformed and made almost unrecognizable by the operation of the former, which in all these instances consists of established customs and usages which have grown up over a long period of years.”

¹⁸ *Quebec Secession Reference*, *supra*, note 2, at para. 54.

¹⁹ *Provincial Judges Reference*, *supra*, note 1, at para. 104.

²⁰ The Supreme Court’s opinion in the *Quebec Secession Reference* was rendered on August 20, 1998. The challenge to the Senate appointments process in the *Samson* case was brought almost immediately, and the application for an interlocutory injunction was heard and decided on September 1, 1998.

was no tangible support in the words of the textual provisions, or if a constitutional convention could not easily be proved (and in any event, could not be enforced at law), the answer for counsel appeared to be obvious: appeal to principle!

In the *Provincial Judges Reference*, the former Chief Justice of the Supreme Court concluded that constitutional principles stride in majestically through the preamble to the *Constitution Act, 1867*:²¹ “the grand entrance hall to the castle of the Constitution.”²² In certain cases, however, one was tempted to wonder if their invocation amounted to a concerted effort to slip in through the back door that which could not be accomplished through straightforward judicial interpretation of existing textual provisions. Some over-worked governmental lawyers — already tasked, for example, with developing detailed evidentiary justification for legislative and governmental action under section 1 of the *Canadian Charter of Rights and Freedoms*,²³ and with fully grasping the scope of governmental fiduciary obligations under section 35 of the *Constitution Act, 1982* — might perhaps be forgiven if they were to have looked upon these new developments with a doleful and jaundiced eye, and to predict that constitutional principles would soon become the last refuge of the scoundrel.²⁴

²¹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

²² *Provincial Judges Reference*, *supra*, note 1, at para. 109, *per* Lamer C.J., for the majority; but see La Forest J.’s striking dissent, discussed later in this paper.

²³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁴ Here, I am paraphrasing Samuel Johnson’s observation on patriotism. It appears that at least one other commentator has also been drawn to Johnson’s remark in a not entirely dissimilar context; *viz.*: “Dr. Johnson was, of course, only partly right. Patriotism can also be noble. But it is an aphorism worth remembering when we celebrate constitutional patriotism, national or transnational, and rush to its defence from any challenges to it. How, then, do we both respect and uphold all that is good in our constitutional tradition and yet, at the same time, keep it and ourselves under sceptical check?” (Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg,” Harvard Law School Jean Monnet Working Paper No. 10/00, 2000; the final version of this paper will be published in Nicolaidis and Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (New York: Oxford University Press, 2001)). For some trenchant critical analysis of (and a sceptical check upon) the use of constitutional principles in the *New Brunswick Broadcasting* case and the *Provincial Court Judges* and *Quebec Secession* references, respectively, see, notably, Leclair and Morrissette, “L’indépendance judiciaire et la Cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance” (1998), 36 Osgoode Hall L.J. 485; Goldsworthy, “The Preamble, Judicial Independence and Judicial Integrity” (2000), 11:2 *Constitutional Forum* 60; Hurlburt, “Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court of Canada” (1999), 26:2 *Manitoba L.J.* 181; Hogg, “The Secession Reference: The Duty to Negotiate” (1998 Constitutional Cases Conference, Osgoode Hall Law School, 16 April 1999), reproduced in (1999), 7:1-2 *Canada Watch* 1; Monahan, “The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*” (1999), 11 N.J.C.L. 65. *Nota bene*: Two new and important analyses of

III. THE VITAL ROLE OF CONSTITUTIONAL PRINCIPLES

This, however, is at best only one side of the story (even for the law officers of the Crown). First, it must be recognized that by whatever route they may have entered, constitutional principles have taken up residence and are here to stay. Indeed, a careful reading of the jurisprudence²⁵ shows that they have always been with us, even if their role had never heretofore been quite as fully articulated and developed as in the *Provincial Judges Reference* and the *Quebec Secession Reference*. Second, like constitutional conventions, which themselves are grounded in principle,²⁶ constitutional principles reflect the wisdom that comes with an appreciation of the constitutional *values* that imbue the constitutional text. “[W]e must never forget, that it is a *constitution* we are expounding,” thundered Chief Justice Marshall of the American Supreme Court.²⁷ Judicious resort to constitutional principles helps to diminish the rigidity and inflexibility of thought that might otherwise dominate and stifle the characterization of the written text, itself amenable to formal amendment only by a series of procedures that are, at the best of times, difficult to operate.

the recent Supreme Court jurisprudence on constitutional principles have been published since I drafted and presented this paper: see Elliott, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001), 80 Can. Bar Rev. 67; Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001), 51 U.T.L.J. 91.

²⁵ As Riddell J. of the Appellate Division of the Supreme Court of Ontario aptly observed in *Bell v. Town of Burlington*, (1915), 34 O.L.R. 619, at 622, “In our usage, that is unconstitutional which is opposed to the principles, more or less vaguely and generally stated, upon which we think the people should be governed.” See, for example, the early judgments of the Judicial Committee of the Privy Council on the operation of various facets of the federal principle in construing the distribution of legislative powers in sections 91 and 92 of the *Constitution Act, 1867*, and the pre-Charter *dicta* in the jurisprudence of the Supreme Court of Canada inferring principles of freedom of expression and the rule of law from the preamble to the *Constitution Act, 1867* and the British constitutional tradition. The key decisions of the Privy Council may be found most conveniently in the three-volume collection prepared by Richard Olmsted, Q.C., of the Department of Justice, *Canadian Constitutional Decisions of the Judicial Committee* (short title), (Ottawa: Queen’s Printer, 1954). The key principles emanating from the case law of the Supreme Court of Canada from 1949 (when it truly became “supreme” with the abolition of new appeals to the Privy Council) have been very usefully set out by my colleague Louis B.Z. Davis, *Canadian Constitutional Law Handbook: Leading Statements, Principles and Precedents* (Aurora: Canada Law Book, 1985).

²⁶ To take but one example, in the *Patriation Reference*, *supra*, note 11, at 880 and 888, the “constitutional value” said to be the “pivot” for the conventions of responsible government “is the democratic principle”; and the “reason for the rule” of substantial provincial consent to the proposed constitutional amendment “is the federal principle” (at 905). In other words, first principles are logically prior to (and at least in this case, a condition precedent for) the establishment of constitutional conventions.

²⁷ *McCulloch v. State of Maryland et al.*, 17 U.S. (4 Wheat.) 316 (1819), at 407 (emphasis in original).

Constitutional principles, as our own Supreme Court has rightly stated, “emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.”²⁸ At the same time, as the Court has also emphasized, the existence of constitutional principles must not be taken as an invitation to supersede or otherwise to dispense with the primacy of the written text. To do so would be to put into question the role of the courts and the legitimacy of constitutional review,²⁹ the power of review being judicial rather than legislative in character.

Constitutional principles, unlike constitutional conventions, can be employed to interpret and apply constitutional and legislative provisions. Constitutional principles are “binding upon both courts and governments” essentially because the application of these principles to the interpretation of constitutional and legislative texts results in a judicial pronouncement on the scope and application of the law itself.³⁰ This is different from saying that these principles *are themselves law*, in the sense that they can be simply substituted for constitutional provisions that have been promulgated as part of the text of the supreme law. The very nature of unwritten principles — their judicial and jurisprudential origin, their broad scope and the flexibility that they bring to the interpretation of the constitutional instrument — makes it inappropriate to assimilate them, in absolute terms and without nuance or distinction, to the role and function of provisions having direct force of law.

Constitutional principles in *structural* terms (Chief Justice Lamer’s “castle”) may be seen, then, as “foundational,” forming part of the “internal architecture” of the Constitution.³¹ In *dynamic* terms (Lord Sankey’s “living tree”³²), they “breathe life” into the Constitution; they are “its lifeblood.” Constitutional principles perform a vital role in construing and applying the provisions of the Constitution of Canada. The challenge is to ensure that they are employed in a balanced and stable fashion so that the edifice is supported and not weakened

²⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32.

²⁹ *Id.*, at para. 53, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Court Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, at para. 93. These concerns are discussed later in this paper.

³⁰ The doctrine of precedent (*i.e.*, *stare decisis*), judicial comity and the hierarchy of the court structure itself ultimately ensures — to a greater or lesser degree, depending on the circumstances of a given judicial decision — the binding character of the judicial pronouncement on other courts or levels of court.

³¹ *Quebec Secession Reference*, *supra*, note 28, at paras. 49 and 50.

³² *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.); *Quebec Secession Reference*, *supra*, note 28, at paras. 50, 51 and 52.

from within, and to ensure that their growth is kept within “natural limits”³³ so that they do not overtake and eventually strangle the organism itself.

IV. “WRITTEN” AND “UNWRITTEN” CONSTITUTIONS

In point of fact, our courts have long recognized an important role for constitutional principles in deducing the meaning of the constitutional text. This is all the more the case because our written Constitution — to the untutored mind, boggling in its level of detail and concern with *minutiae*³⁴ — is in many respects less a blueprint for constitutional government than it is a preliminary sketch of some of its broad lines. This is due in large part to our British constitutional tradition. The preamble to the *Constitution Act, 1867* recalled that heritage and carried it forward into the new Dominion:

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom ...* [Emphasis added.]³⁵

It is a truism that the British constitution is largely an “unwritten” one, in that while there are a series of seminal instruments stretching back to at least the *Magna Carta*,³⁶ there is no unified, organic, comprehensive and authoritative statement expressly declaring the fundamental principles, postulates, powers

³³ *Edwards, supra*, note 32, at 136: “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.”

³⁴ The usual (and convenient, as it is succinctly worded) example is head 9 of the enumerated heads of federal legislative power in section 91 of the *Constitution Act, 1867*: “Beacons, Buoys, Lighthouses and Sable Island.” More prolix examples abound, both in the Act of 1867 and the *Constitution Act, 1982*, as well as in the series of other statutes, orders and related instruments that make up the written Constitution.

³⁵ The late Senator Eugene Forsey, a lifelong scholar of the Constitution, insisted (at 182) in his memoirs, *A Life on the Fringe* (Toronto: Oxford University Press, 1990), that the phrase, “a Constitution similar in principle to that of the United Kingdom,” meant simply the principles of responsible government. “The Quebec resolutions had said that the executive government was to be vested in the Queen, to be exercised by Her Majesty personally, or by her representative duly authorized, ‘according to the well understood principles of the British Constitution’. The phrase in the preamble to the Act was simply the Colonial Office legalese for what the Fathers had proposed. It had nothing to do with the Bill of Rights or the Habeas Corpus Act. Those enactments became part of the law of Canada by virtue of the reception of the English law in various parts of Canada long before Confederation. There is no ground whatever for dragging them in by any preambular back door.”

³⁶ The aforementioned *Bill of Rights*, the *Act of Settlement* and the *Habeas Corpus Acts* immediately spring to mind. One of the best collections is to be found in Stephenson and Marchem, eds., *Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Interregnum*, revised ed. (New York: Harper & Row, 1972).

and jurisdictions underlying British constitutional government. This is said to be in contradistinction to the constitutions of the American and French Republics, to take the most obvious examples.³⁷

V. JOHN MARSHALL AND THE PRINCIPLE OF JUDICIAL REVIEW

However, even a written constitution in the American style must be subject to elucidation. To return to the words of Chief Justice Marshall:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced by the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.³⁸

Some 16 years earlier, by sheer parity of reasoning, Marshall had established the proposition that the Supreme Court of the United States was mandated by the Constitution to review the validity of Acts of Congress, although the written text contained nary a word on judicial review of the constitutionality of laws. Marshall's proposition flowed from first principles, the nature and logic of constitutionalism itself and the role of the judicial power.³⁹ His classic exposition in *Marbury v. Madison* is reproduced below *in extenso*:

³⁷ And putting aside the question of constitutional conventions, which, as we have seen, and as Professor A.V. Dicey maintained (at 28) in his classic text, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1959), are not part of constitutional law, written or unwritten: "The distinction, in short, between written and unwritten law does not in any sense square with the distinction between the law of the constitution (constitutional law properly so called) and the conventions of the constitution."

³⁸ *McCulloch v. State of Maryland et al.*, *supra*, note 27, at 407.

³⁹ Some powerful contemporaneous doctrinal support for this proposition may be found in *The Federalist No. 78* drafted by Alexander Hamilton and published in the second volume of the collected *Federalist Papers* in 1788. Hamilton wrote:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm [...] that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. [...] the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar

The question whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to *recognize certain principles*, supposed to have been long and well-established, to decide it.

That the people have the right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. [...] *The principles*, therefore, so established, *are deemed fundamental*. [...]

[...] The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. [...] It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. [...]

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory [...]

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and

province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable difference variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; *the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.*

*If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.*⁴⁰

VI. CONSTITUTIONAL SUPREMACY IN CANADA

In Canada, the supremacy of the written constitution originally flowed from the fact that the *British North America Act* of 1867⁴¹ was an Imperial statute extending to the colonial dominion. By the *Colonial Laws Validity Act* of 1865,⁴² any colonial law that was “repugnant to the Provisions” of any imperial statute “extending to the colony” was “absolutely void and inoperative” to the extent of the repugnancy. Although the *Colonial Laws Validity Act* was repealed in its application to the dominions by the *Statute of Westminster*⁴³ in 1931, at the request of Canada, section 7(1) of the statute preserved the pre-eminent position of the *British North America Acts, 1867 to 1930*. If Parliament or a provincial legislature enacted a law that was *ultra vires* the legislative authority of the enacting legislative body, then the repugnancy of the impugned law with the *British North America Act* would result in a judicial declaration that the law was void and inoperative.

With the patriation of the Constitution by operation of the *Canada Act 1982*, the supremacy clause of the Constitution is now set out in the first subsection of section 52 of the *Constitution Act, 1982*, in the following terms:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Textual authority for constitutional judicial review in Canada now reposes, therefore, in section 52 of the *Constitution Act, 1982*.

⁴⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at 176-78. [Emphasis added.]

⁴¹ 1867 (U.K.), 30 & 31 Vict., c. 3, now styled the *Constitution Act, 1867*.

⁴² 1865 (U.K.), 28 & 29 Vict., c. 63.

⁴³ 1931 (U.K.), 22 Geo. V, c. 4.

VII. THE TRIUMPH OF CONSTITUTIONALISM, THE RULE OF LAW AND THE ROLE OF THE COURTS

1. The Manitoba Language Rights Reference

An illustration of the operation of the principle of constitutionalism at the heart of section 52 may be instructive. In the *Manitoba Language Rights Reference*,⁴⁴ the Supreme Court of Canada was faced with the difficult task of declaring invalid almost 90 years of legislation enacted solely in English by the legislature of Manitoba, in contravention of section 23 of the *Manitoba Act, 1870*,⁴⁵ which requires the enactment, printing and publication of the Acts of the legislature in English and in French. The difficulty arose principally from the fact that a judicial declaration of invalidity of this magnitude threatened to leave the province without any current laws or even a functioning legislature, the members of the legislative assembly having themselves been elected and the legislature summoned on the basis of unilingual, and hence invalid, legislation.

The Supreme Court did not shrink from its constitutional duty. The requirement of bilingual enactment was mandatory. The *purpose* — the constitutional *value* — behind both section 23 of the *Manitoba Act, 1870* and section 133 of the *Constitution Act, 1867*, the Court stated, “was to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike.”⁴⁶ These fundamental guarantees “would be meaningless and their entrenchment a futile exercise were they not obligatory.”⁴⁷ Section 23 of the *Manitoba Act, 1870* imposed a constitutional duty on the legislature of the province with regard to the manner and form of its legislation, and this duty protected “the substantive rights of all Manitobans to equal access to the law”⁴⁸ in English and in French. That constitutional duty, the Court said, conferred upon the judiciary “the responsibility of protecting the correlative language rights of all Manitobans including the Franco-Manitoban minority.”⁴⁹

The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose

⁴⁴ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *per curiam*. I was one of counsel in this matter.

⁴⁵ 33 Vict., c. 3 (Can.).

⁴⁶ *Supra*, note 44, at 739.

⁴⁷ *Id.*

⁴⁸ *Id.*, at 744.

⁴⁹ *Id.*, at 744-45.

constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation.⁵⁰

On a more general plane, the Court then went on to make an eloquent philosophical comment about constitutionalism and the role of constitutional judicial review in Canada.

The Constitution of a country is a statement of the will of the people *to be governed in accordance with certain principles held as fundamental* and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the “supreme law” of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. *The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.*⁵¹

“Since April 17, 1982,” the Court noted, “the mandate of the judiciary to protect the Constitution has been embodied in s. 52 of the *Constitution Act, 1982.*”⁵² The Court reviewed the consequences of failure to comply with the terms of the Constitution prior to 1982, under the jurisprudence developed pursuant to the *Colonial Laws Validity Act*, and concluded:

Section 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words “of no force or effect” mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid.⁵³

The Court next turned to an examination of the principle of the rule of law, “a fundamental principle of our Constitution.”⁵⁴ Because the rule of law means that the law is supreme over government and is, therefore, “preclusive of the influence of arbitrary power,”⁵⁵ it is this supremacy of the law, as embodied in both section 23 of the *Manitoba Act, 1870* and section 52 of the *Constitution Act, 1982*, that required the Court to “find the unconstitutional laws of Manitoba to be invalid and of no force and effect.”⁵⁶ However, the notion of the rule of law also carries with it a second, broader meaning: “the rule of law

⁵⁰ *Id.*, at 745. [Emphasis added.]

⁵¹ *Id.* [Emphasis added.]

⁵² *Id.*, at 745-46.

⁵³ *Id.*, at 746. [Emphasis added.]

⁵⁴ *Id.*, at 748.

⁵⁵ *Id.*

⁵⁶ *Id.*, at 749.

requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.”⁵⁷

It was because of concern for this “second aspect of the rule of law” that the Court was obliged to consider further the role of this principle. The Court determined that the rule of law, so clearly a pillar of the English Constitution,⁵⁸ had become “a postulate of our own constitutional order”⁵⁹ through its implicit incorporation in the preamble to the *Constitution Act, 1867* and its explicit mention in Part I of the *Constitution Act, 1982*, the preamble to the *Canadian Charter of Rights and Freedoms*, which declares:

Whereas Canada is *founded upon principles* that recognize the supremacy of God and *the rule of law*: [Emphasis added.]

Beyond this, however, the Court underlined that the principle of the rule of law “is clearly implicit in the very nature of a Constitution.”⁶⁰

The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. *While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.*

The Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution.⁶¹

The Court analyzed its earlier opinion in the *Patriation Reference*, in which the principle of federalism had figured prominently in the majority’s reasoning as to the existence of a constitutional convention governing the degree of consensus needed amongst federal and provincial actors to proceed with the federal government’s constitutional amendment resolution. “In other words,” the Court stated, “in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the

⁵⁷ *Id.*

⁵⁸ Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1959), especially Chapter IV, “The Rule of Law: Its Nature and General Applications” (at 183-205).

⁵⁹ *Re Manitoba Language Rights*, *supra*, note 44, at 750.

⁶⁰ *Id.*

⁶¹ *Id.*, at 750-51. [Emphasis added.]

Constitution in Canada. In the case of the *Patriation Reference*, *supra*, this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law.”⁶²

The Court stated that because of the legislature of Manitoba’s “persistent violation of the constitutional dictates”⁶³ of section 23 of the *Manitoba Act, 1870*, “the Province of Manitoba is in a state of emergency”.⁶⁴ all unilingual Acts of the legislature “are and always have been invalid and of no force or effect.”⁶⁵ However, because the Constitution “will not suffer a province without laws,”⁶⁶ temporary validity and force would be given to the current Acts of the legislature for “the minimum period necessary for translation, re-enactment, printing and publishing of the unilingual Acts”⁶⁷ in both languages. For any and all future enactments, “the Constitution requires that, from the date of this judgment, all new Acts of the Manitoba Legislature be enacted, printed and published in both French and English. Any Acts of the Legislature that do not meet this requirement will be invalid and of no force or effect.”⁶⁸

⁶² *Id.*, at 752. Tellingly, in its analysis, the Court underscored a passage by Martland and Ritchie JJ., who dissented in the *Patriation Reference* in that they would have found that provincial consent to the patriation package was not only a requirement of constitutional *convention* but also of constitutional *law*. Martland and Ritchie concluded that in the important series of cases in which “judicially developed legal principles and doctrines” had been shaped, none of those principles is to be found in the express provisions of the Constitution, and “they have been accorded full legal force in the sense of being employed to strike down legislative enactments” (at 752 of the *Manitoba Language Rights Reference*, citing the *Patriation Reference*). This characterization of the principles as having “full legal force” was cited by the Court again in the *Quebec Secession Reference* for the proposition that underlying constitutional principles “may in certain circumstances give rise to substantive legal obligations” (at para. 54). Professor Hogg (“The Secession Reference: The Duty to Negotiate” (1998 Constitutional Cases Conference, Osgoode Hall Law School, 16 April 1999), at 33-34) has chided the Court for incorporating into the “law of Canada” an obligation to negotiate secession on the basis of the “vague principles of democracy and federalism,” and thus converting “political reality into a legal rule.” He adds that “it is not entirely clear why it is a *legal* rule, since it appears to have no legal sanctions.” However, this simply begs the question: is it truly a legal rule? Although the duty to negotiate established by the Court in the *Quebec Secession Reference* (in my view, on the basis of section 46 of the *Constitution Act, 1982* construed in light of the democratic principle) is characterized by the Court as a “constitutional obligation,” and would certainly have “powerful normative force,” the Court stopped shy of calling it a legal obligation. The duty shares some of the characteristics of a constitutional convention in that it is a binding obligation in the political and constitutional sense, but it appears not to be enforceable as such by the courts as a matter of law: *vide* paras. 98-102 of the Court’s opinion.

⁶³ *Re Manitoba Language Rights*, *supra*, note 44, at 766.

⁶⁴ *Id.*

⁶⁵ *Id.*, at 767.

⁶⁶ *Id.*

⁶⁷ *Id.*, at 768-69.

⁶⁸ *Id.*, at 768.

2. The Quebec Secession Reference

There is no doubt that the Court's approach and reasoning in the *Manitoba Language Rights Reference* was highly germane to its disposition of the *Quebec Secession Reference*. It was no coincidence that the Court chose to preface the *Quebec Secession Reference* with its opening words in the *Manitoba Language Rights Reference*:

This Reference combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity.⁶⁹

In the *Quebec Secession Reference*, the Court rejected the argument advanced by the *amicus curiae* that a constitutional principle of effectivity could be established both through the preamble to the *Constitution Act, 1867* and through the second aspect of the constitutional principle of the rule of law that had allowed the Court to avoid a legal vacuum in Manitoba. In other words, this putative principle of effectivity would be there to fill the gap in the constitutional structure that would be created by the unilateral secession of the province. The similarity between the principle of the rule of law and the principle of effectivity, it had been argued, was that "both attempt to refashion the law to meet social reality."⁷⁰ But effectivity could not be taken as anything more than a possible state of fact; cast as a legal principle, it would run "contrary to the rule of law" in that it would amount to nothing more than "the contention that the law may be broken as long as it can be broken successfully."⁷¹ This would be inimical to — indeed, the antithesis of — the principle of constitutionalism itself, the "essence" of which, the Court had said, was "embodied" in section 52(1) of the *Constitution Act, 1982*.⁷²

⁶⁹ *Id.*, at 728. These words were also employed by counsel for the Attorney General of Canada to commence oral argument in the *Quebec Secession Reference*. For analysis of the Reference from the perspective of federal counsel, see generally Bienvenu, "Secession by Constitutional Means: The Decision of the Supreme Court of Canada in the Quebec Secession Reference" (New Zealand Law Conference, Rotorua, April 1999); Dawson, "Reflections on the Opinion of the Supreme Court of Canada in the *Quebec Secession Reference*" (1999), 11 N.J.C.L. 5; and Newman, *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (Toronto: York University Centre for Public Law and Public Policy, 1999). It is fair to say that counsel who represented the federal government in the reference, like most commentators and observers, were highly impressed with the clarity and cogency of the Court's reasoning in this pivotally important matter. In the latter book, I wrote that the ruling was remarkably compelling in its wisdom and that the Court has been justly praised for its profoundly intelligent and masterful handling of the issues.

⁷⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 145.

⁷¹ *Id.*, at para. 108.

⁷² *Id.*, at para. 72.

The Court took great care to emphasize that what was done in the *Manitoba Language Rights Reference* was done in pursuance of the constitutionalism principle embodied in section 52:

[N]othing of our concern in the *Manitoba Language Rights Reference* about the severe practical consequences of unconstitutionality affected our conclusion that, as a matter of law, all Manitoba legislation at issue in that case was unconstitutional. The Court's declaration of unconstitutionality was clear and unambiguous. The Court's concern with maintenance of the rule of law was directed in its relevant aspect to the appropriate remedy, which in that case was to suspend the declaration of invalidity to permit appropriate rectification to take place.⁷³

VIII. CONSTITUTIONAL PRINCIPLES AND THE FABRIC OF THE CONSTITUTION

Constitutional principles, then, can be employed in furtherance of the provisions of the Constitution. Seen in this light, it is not so much that they "fill gaps," but rather that they extend the threads of the existing fabric of the Constitution in circumstances where the principles are tightly interwoven with the meaning of the textual provisions themselves. Deftly handled, they can perform an important (and in some cases, essential) role in bringing the terms of the Constitution to life and in allowing it to respond to unforeseen situations in a way that maintains the normative order, federal structure and democratic character of our constitutional system, while, as in the *Manitoba Language Rights Reference*, keeping faith with the protection of minorities.

This is also consistent with the approach that our Supreme Court signalled it would be adopting in the earliest cases under the *Canadian Charter of Rights and Freedoms*. "Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves."⁷⁴ An entrenched bill of rights like the Charter calls for a "broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects" and which avoids what has been called "the austerity of tabulated legalism."⁷⁵ Chief Justice Dickson's words in *Hunter v. Southam* echoed those of Chief Justice Marshall

⁷³ *Id.*, at para. 145.

⁷⁴ *Law Society of Upper Canada v. Skapinger*, [1984] 1 S.C.R. 357, at 366, *per* Estey J., "[The Charter] cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty."

⁷⁵ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 156, *per* Dickson J. (as he then was).

almost two centuries earlier.⁷⁶ We must never forget that we are expounding a *constitution*. Constitutional principles play an essential role in that exposition, balancing the constitutional text with constitutional meaning.

IX. PRINCIPLES IN THE BALANCE

The principles of judicial independence, federalism, the rule of law and the protection of minorities are quite familiar to constitutional lawyers, and their textual and jurisprudential bases have been well-canvassed in the *Provincial Judges Reference* and the *Quebec Secession Reference*. It should be mentioned, however, that those are clearly not the *only* basic principles of the Constitution, nor the sole rules of constitutional interpretation.⁷⁷ Other key principles and values include the principle of parliamentary sovereignty⁷⁸ (which, although

⁷⁶ *Id.*, at 155: “*The task of expounding a constitution is crucially different from that of construing a statute. [...] Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.*” [Emphasis added.]

⁷⁷ There is an unfortunate tendency in some of the recent decisions of the lower courts to speak of federalism, democracy, the rule of law and constitutionalism, and the protection of minorities as *the* four basic pillars of the Constitution. While these principles are certainly foundational or structural (the *Quebec Secession Reference* opinion calls them “fundamental and organizing principles”), the Supreme Court was quite clear in emphasizing that these principles were those that were “relevant to addressing the question before us,” and that “this enumeration is by no means exhaustive” (para. 32 of the Court’s opinion in the *Quebec Secession Reference*).

⁷⁸ “By way of contrast [to the determination of issues relating to justiciability in the Charter context], in the residual area reserved for the principle of Parliamentary sovereignty in Canadian constitutional law, it is Parliament and the legislatures, not the courts, that have ultimate constitutional authority to draw the boundaries. It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes. [...] That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament’s auditing function is not [...] constitutionally cognizable by the judiciary. The *grundnorm* with which the courts must work in this context is that of the sovereignty of Parliament. The ministers of the Crown hold office with the grace of the House of Commons and any position taken by the majority must be taken to reflect the sovereign will of Parliament. Where Parliament has indicated in the *Auditor General Act* that it wishes its own servant to report to it on denials of access to information needed to carry out his functions on Parliament’s behalf, it would not be appropriate for this Court to consider granting remedies for such denials, if they, in fact, exist” (*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49, at 91, 103-04), *per* Dickson C. J. for the Court. See also *Reference re Canada Assistance Plan (British Columbia)*, [1991] 2 S.C.R. 525.

attenuated by the limits on federal and provincial legislative power imposed by the provisions of the *Canadian Charter of Rights and Freedoms*, remains an essential feature of our constitutional structure); parliamentary privileges; constitutional conventions relating to the principles of responsible government, including the convention of political neutrality of the public service;⁷⁹ certain doctrines flowing from the federal principle, such as the paramountcy doctrine; important common law and administrative law rules relating variously to the Crown prerogative, due process, natural justice and procedural fairness; and the basic precepts and underlying tenets of most of the provisions now entrenched in the Charter of Rights itself.⁸⁰

In the *Quebec Secession Reference*, the Court recognized the need to balance the principles at play in that case. “These defining principles,” the Court affirmed, “function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.”⁸¹ This balancing of principles has raised concerns in some quarters because, as Professor Patrick Monahan has put it, a “judicial balancing” theory seems at odds with the traditional role of judicial interpretation of existing text,

⁷⁹ *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

⁸⁰ As regards the Charter, the principles and values underlying basic liberties such as freedom of conscience and religion; freedom of thought, belief, opinion and expression; peaceful assembly and association in section 2; democracy and representative government in sections 3 to 5; citizenship and freedom of movement in section 6; principles of fundamental justice in section 7; due process and protections relating to search and seizure, arrest, detention and imprisonment, as well as other common law principles relating to criminal and penal matters in sections 8 to 14; not only formal but also substantive equality before and under the law and the right to equal protection and benefit of the law without discrimination in section 15; formal and substantive equality in relation to the official languages of Canada in sections 16 to 23 and the principle of advancement of equality in section 16(3); the right to a just and appropriate, court-ordered remedy under section 24; recognition of the interplay between the rights and freedoms guaranteed by the Charter and those of the aboriginal peoples of Canada in section 25; other rights and freedoms in section 26; the multicultural heritage of Canadians in section 27; equality of the sexes in section 28; and rights respecting denominational schools in section 29, respectively. All of the rights and freedoms set out in the Charter are expressed in section 1 as being guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In discussing section 1 of the Charter in *R. v. Oakes*, [1986] 1 S.C.R. 103, at 136, Dickson C.J. stated:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

⁸¹ *Quebec Secession Reference*, *supra*, note 70, at para. 49.

in that the former “asks the judiciary to balance for themselves underlying constitutional values and to choose the balance that they believe most appropriate.” This, he continues, “fails to distinguish the interpretation of text from its creation” and puts the courts in the role of constitutional drafters. It may be, states Professor Monahan, not implausibly, that the constitutional text itself invites the courts in certain cases to ascribe a higher value, or primacy, to certain norms and principles as reflected in the written provisions themselves, and that the role of the courts in such circumstances is not to choose a different balance but to give effect to the underlying logic of the text.⁸² To what extent, for example, can the principle of the rule of law and the supremacy of the provisions of the Constitution, as declared in section 52(1) of the *Constitution Act, 1982*, be “balanced” without saying, in effect, that the Constitution’s supremacy is not absolute? A relativist view of constitutional supremacy might risk undermining the very object of a written constitution (and constitutionalism itself): to prescribe the basic rules of government in a superior and paramount law. It could become a very slippery slope, indeed, and would raise difficult questions about the role of the courts and the legitimacy of judicial review.

In a subsequent piece,⁸³ Professor Monahan suggests that a “necessary implication” approach to unwritten principles, as evidenced notably by the reasoning of the Newfoundland Court of Appeal in the *Hogan* case,⁸⁴ could point to a more prudent path, on the theory that the courts would be permitted to have regard to unwritten constitutional principles “only where such principles are necessarily implied by the constitutional text”:

Implicit principles are those that *flow logically or of necessity from the terms of the written constitution*. They must be assumed by the existing text to be constitutionally guaranteed and are therefore required in order to give proper effect to the text itself.⁸⁵

1. The Hogan Case

The *Hogan* case involved a challenge to the validity of the *Constitution Amendment, 1998 (Newfoundland Act)*, which was enacted under the amending procedure set out in section 43 of the *Constitution Act, 1982*. The amendment

⁸² Monahan, “The Public Policy Role of the Supreme Court in the *Secession Reference*” (1999), 11 N.J.C.L. 65, at 77-80.

⁸³ Monahan, “The Legal Framework Governing Secession in Light of the *Quebec Secession Reference*” (Law Society of Upper Canada Special Lectures 2000, 8-9 June 2000).

⁸⁴ *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225 (Nfld. C.A.).

⁸⁵ Monahan, *supra*, note 83, at 12. [Emphasis added.]

modified Term 17 of the Terms of Union between Canada and Newfoundland, which terms are scheduled to the *Newfoundland Act*, itself a part of the Constitution of Canada. The amendment had the effect of abrogating denominational school rights and privileges in the province, and its validity was challenged on several grounds, including the argument that it infringed the constitutional principles of the rule of law and the protection of minorities as well as an obligation to negotiate, in light of the *Quebec Secession Reference*. The Attorneys General for Newfoundland and Canada contended for the legality of the amendment. In extensive reasons for judgment, the Court of Appeal in *Hogan*⁸⁶ upheld the validity of the amendment, notably on the basis that the applicable amending procedure set out in the provisions of the Constitution was clear, and its terms had been complied with. The Court of Appeal stated, *inter alia*:

In interpreting the Constitution of Canada, one cannot ignore the history of its development. [...] However, the fact that we now have constitutional documents to which we can refer collectively as the Constitution does not eliminate all reference to our largely unwritten constitutional past. Not every nuance of the powers of the different heads of government, for example, is written in the Constitution. Even with a written document, certain underlying assumptions will be seen as being self-evident and of constitutional stature. The *New Brunswick Broadcasting* case required the Court to express what was unwritten. Here the appellants would have this Court defeat a constitutionally mandated process by reference to the “fundamental or original principles.” However, unlike the *Provincial Court Judges Reference* or the *New Brunswick Broadcasting* case, here the Court is being asked to read in requirements, not to confirm some long-accepted unwritten principle of the Constitution but to limit the application of the amending provisions to a right that was granted by the written Constitution. This is not a case where the unwritten assumptions of educational rights need to be stated by the Courts. The rights are fully explored and stated in Term 17. Term 17 is a complete statement of denominational education rights. No other term written or unwritten of the Constitution need be called upon to interpret Term 17 or to determine how it should be amended. Neither the rule of law nor respect for minorities prevents the application of s. 43 to the amendment of Term 17. [...] The appropriate provision in Part V of the Constitution having been complied with, the validity of the amendment to Term 17 cannot be questioned.⁸⁷

⁸⁶ The original statement of claim invoked the purported existence of constitutional conventions in this regard, but with the advent of the Supreme Court of Canada’s decision in the *Quebec Secession Reference*, the challenge was broadened to include argument based on constitutional principles. Riche J.’s reasons at trial are predicated on the question of constitutional conventions (an argument he rejected), and the appellants did not pursue the conventions issue on appeal, focussing instead on principles.

⁸⁷ *Hogan, supra*, note 84, at para. 125.

2. The Brown, Bacon and Westergarde-Thorpe Cases

The approach of the Newfoundland Court of Appeal in the *Hogan* case, however, is basically consistent with the findings of the Alberta and Saskatchewan Courts of Appeal in the *Brown* and *Bacon* cases, respectively, and that of the Federal Court of Appeal in *Westergarde-Thorpe*. In *Brown*, the Court of Appeal agreed with the position of the Attorney General of Canada that the applicant, in seeking a judicial declaration that the appointment of Senators by the Governor General in accordance with the provisions of the *Constitution Act, 1867* was contrary to democratic principle, was attempting to use the courts to pronounce upon a non-justiciable issue.

We agree with the Crown that the appellant “seeks to invoke the democratic principle, *per se*, divorced of its interpretive role and devoid of legal issues, simply because a declaratory order from the Court would, in his view, ‘have considerable persuasive effect, and it would confer democratic legitimacy on the *Senatorial Selection Act*.’”⁸⁸

In *Bacon* and *Westergarde-Thorpe*, the appellate courts refused to accept the contention that statutory provisions enacted by the legislature of Saskatchewan and by the Parliament of Canada, respectively, should be invalidated on the basis of an expansive view⁸⁹ of the principle of the rule of law, in circumstances where there was no breach of the Charter of Rights, and where the provisions were not *ultra vires* — in other words, where there was no breach of section 52 of the *Constitution Act, 1982* as concerned the provisions of the Constitution. In upholding the impugned legislation, the courts gave effect to another constitutional principle: parliamentary supremacy. Wrote Wakeling J.A. for the Saskatchewan Court of Appeal in *Bacon*,⁹⁰ the protection afforded by the rule of law in a democratic country is twofold: protection “by our courts against

⁸⁸ *Brown v. Alberta* (1999), 177 D.L.R. (4th) 349, at para. 25 (Alta. C.A.).

⁸⁹ This approach suggests that beyond the generally accepted purview of the rule of law as a guarantee against arbitrary *governmental* action, and of the principle that laws should be made according to law and not otherwise (in other words, respect for manner and form requirements and orderly processes in law-making), the rule of law should also englobe a *substantive* protection against purported arbitrariness by *Parliament or a legislature* in enacting laws that abrogate previous contractual undertakings by government or that remove related causes of action and thus ancillary access to the courts for redress. *Vide* Monahan, “Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government” (1995), 33 Osgoode Hall L.J. 411. However, see Hogg and Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000), at 223, for some sober second thoughts on this approach in light of *Bacon* (and other cases).

⁹⁰ *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20, 205 W.A.C. 20 (C.A.).

arbitrary and unlawful actions by officials,” and “protection against arbitrary legislation [...] by the democratic process” of calling legislators to account through the ballot box. Thus, the principle of the rule of law posits “the law as it exists from time to time.” It “does not create a restriction on Parliament’s right to make laws;” it is, rather, a recognition that when laws are made, “they are then applicable to all, including governments.”⁹¹ Wakeling J.A. prefaced those remarks with this comment on the *Quebec Secession Reference*:

I am unable to accept that these justices of the Supreme Court, whilst providing an analysis of our federal system, were at the same time engaged in changing that system. This is particularly so when we are not talking of a subtle or marginal change, but one which would reduce the supremacy of Parliament by subjecting it to the scrutiny of superior court judges to be sure it did not offend the rule of law and if it did, to determine whether it was an arbitrary action.⁹²

Strayer J.A., writing for the Federal Court of Appeal in *Westergard-Thorpe*, “respectfully agreed” with that observation. The rule of law requires that “the relationship between the state and the individual must be regulated by law.”⁹³ This principle should not be construed as “having put an end to another constitutional principle, namely the supremacy of Parliament or the supremacy of legislatures when acting in their own domain.”⁹⁴ In other words, in these cases, the courts balanced the principle of the rule of law with that of parliamentary supremacy.

X. A DELICATE BALANCE

The delicate balance achieved by the courts in construing constitutional principles — whether *inter se* or with reference to the textual provisions of the Constitution — is, as I have argued earlier in this paper, a means of ensuring a necessary margin of flexibility in the application of the terms of the formal Constitution and their adaptation to new or changing circumstances. Like all tools of construction, however, constitutional principles have their limits. A healthy tension will likely continue to exist between the need, on the one hand, to understand constitutional principles as flowing from the words, meaning and interpretation of the constitutional text, and the evident desire, on the other hand (in specified circumstances), to give those principles virtually the force of

⁹¹ *Id.*, at para. 30.

⁹² *Id.*, at para. 29.

⁹³ *Singh v. Canada (Attorney General) (sub nom. Westergard-Thorpe v. Canada (Attorney General))*, [2000] 3 F.C. 185, at paras. 33, 35 (C.A.).

⁹⁴ *Id.*, at para. 12.

constitutional provisions themselves. This contrast between deductive and inductive reasoning in relation to constitutional principles reached its zenith in the *Provincial Judges Reference*. For Chief Justice Lamer, the preamble to the *Constitution Act, 1867* “recognizes and affirms *the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867.*” Those provisions, he added, “merely elaborate those organizing principles.”⁹⁵ For Mr. Justice La Forest, the provisions of the Constitution are not simply elaborations upon unwritten principles; rather, the provisions “are the Constitution.”⁹⁶ While La Forest J. did not deny that the Constitution “embraces unwritten rules, including rules that find expression in the preamble of the *Constitution Act, 1867,*” in his opinion, “these rules really find their origin in specific provisions of the Constitution viewed in light of our constitutional heritage. In other words, what we are concerned with is the meaning to be attached to an expression used in a constitutional provision.”⁹⁷

XI. LEGAL CERTAINTY AND THE LEGITIMACY OF JUDICIAL REVIEW

Chief Justice Lamer did, however, make an important *proviso* regarding the role of constitutional principles. He declared:

However, I do wish to add a note of caution. As I said in *New Brunswick Broadcasting, supra*, at p. 355, the constitutional history of Canada can be understood, in part, as a process of evolution “which [has] culminated in the supremacy of a definitive written constitution.” There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review.⁹⁸

La Forest J. also underscored the point that the legitimacy of judicial review depends upon “the interpretation of an authoritative constitutional instrument.”⁹⁹ This legitimacy is jeopardized, in his view, “when courts attempt

⁹⁵ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmic; R. v. Wickman; Manitoba Provincial Court Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, at para. 95, *per* Lamer C.J. (emphasis added).

⁹⁶ *Id.*, at para. 319 (emphasis in reasons of La Forest J.).

⁹⁷ *Id.*, at para. 303.

⁹⁸ *Id.*, at para. 93. “[T]hese concerns,” added Lamer C.J., “go to the heart” of constitutionalism itself.

⁹⁹ *Id.*, at para. 315.

to limit the power of legislatures without recourse to express textual authority.”¹⁰⁰

In the *Quebec Secession Reference*, a unanimous Court repeated Chief Justice Lamer’s caution in the *Provincial Judges Reference* in the following terms:

In the *Provincial Judges Reference*, *supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as “organizing principles” and described one of them, judicial independence, as an “unwritten norm”) could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.¹⁰¹

These twin issues of certainty in the law and the legitimacy of judicial review (as well as their linkage with a written constitution) are not new; nor are they limited to the Canadian experience. As we have seen, Chief Justice Marshall of the American Supreme Court confronted them in *Marbury v. Madison* almost 200 years ago, and the principle of judicial review triumphed on the basis of the need to ensure the supremacy of the Constitution’s provisions over the ordinary laws of Congress. The same issues have arisen in

¹⁰⁰ *Id.*, at para. 316. La Forest J. goes on to invoke the principles of democracy and parliamentary supremacy in examining various *dicta* by members of the Court over the years (especially prior to the Charter) that have suggested that the curtailment of political expression by Parliament or by the provincial legislatures would be *ultra vires* them both. While neither approving nor rejecting the so-called “implied bill of rights” theory, he denied that it could justify resort to the preamble of the *Constitution Act, 1867* in the context of judicial independence. “Although it has been suggested that guarantees of political freedom flow from the preamble, [...] this position is untenable. The better view is that if these guarantees exist, they are implicit in s. 17 of the *Constitution Act, 1867*, which provides for the establishment of Parliament; [...] More important, the justification for implied political freedoms is that they are supportive, and not subversive, of legislative supremacy. That doctrine holds that democratically constituted legislatures, and not the courts, are the ultimate guarantors of civil liberties, including the right to an independent judiciary” (at para. 318).

¹⁰¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 53. In *Re Eurig Estate*, [1998] 2 S.C.R. 565, at para. 66, Mr. Justice Binnie observed: “As the Court recently affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.” Binnie J., writing for himself and McLachlin J. (as she then was), demurred from his colleague Justice Major’s interpretation of the purpose of section 53 of the *Constitution Act, 1867* on the basis of a principle of strict construction to the effect that taxation powers cannot arise incidentally in delegated legislation.

France¹⁰² and Australia in recent years,¹⁰³ for example, as these nations' judges have attempted to infuse the constitutions of their countries with constitutional principles and an implied bill of rights (in the case of France, "principes à valeur constitutionnelle"¹⁰⁴ derived from the preamble to the Constitution of the Fifth Republic and incorporating the *Déclaration des droits de l'homme* of 1789). The same issues will no doubt face the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, respectively, in the interpretation and application of the *Human Rights Act 1998* (c. 42) on the one hand, and of the UK devolution statutes — the *Government of Wales Act 1998* (c. 38), the *Scotland Act 1998* (c. 46), and the *Northern Ireland Act 1998* (c. 47) — on the other.¹⁰⁵

1. The French Experience

Professor Dominique Turpin argues persuasively that in France, like a good Beaujolais, "le droit constitutionnel nouveau est arrivé," that is to say, constitutional law which takes into account the jurisprudence flowing from the increased activity of the Conseil constitutionnel, and which has had the effect of enlarging the scope of constitutional law as well as progressively constitutionalizing all branches of law. Nor is this simply a case of pouring new wine into old bottles.

Quel politiste pourrait aujourd'hui ignorer l'incontestable «saisine de la politique par le droit» dans la mesure où, d'une part, des textes sont enfin venus régler ce qui était jadis au-delà du droit [...] et où, d'autre part, le juge constitutionnel se

¹⁰² Vide Turpin, *Droit constitutionnel*, 4th ed. (Paris: Presses Universitaires de France, 1999); Drago, François, Molfessis (eds.), *La légitimité de la jurisprudence du Conseil constitutionnel* (Paris: Editions Economica, 1999): "Depuis plus d'un quart de siècle, le contrôle de constitutionnalité connaît un développement sans précédent en France, sous l'égide d'un Conseil constitutionnel s'étant proclamé gardien des droits et libertés constitutionnelles" (at v). Indeed, the growth of constitutional judicial review throughout Europe is a significant phenomenon and a common trait: Rousseau, *La justice constitutionnelle en Europe*, 3rd ed. (Paris: Montchrestien, 1998).

¹⁰³ Vide Hanks and Cass, *Australian Constitutional Law: Materials and Commentary*, 6th ed. (Sydney: Butterworths, 1999). "One effect of the High Court's recent bout of activism has been to engender a debate within the Australian community concerning the proper limits of judicial activism, or law-making" (at 19).

¹⁰⁴ Turpin, *supra*, note 102, at 111. For a lucid analysis of the legal weight and content of the preamble and the jurisprudence of the Conseil constitutionnel in this regard, see pp. 104-15.

¹⁰⁵ Vide Le Sueur and Cornes, *What Do the Top Courts Do?* (London: Constitution Unit, School of Public Policy, University College London, 2000); Newman, "Adjudicating Divisions of Powers Issues: A Canadian Perspective" (London and Edinburgh Seminars on Reforming the UK's Top Courts: Lessons From Comparative Policy, Economic and Social Research Council's Future Governance Programme, July 2001).

trouve désormais placé au coeur des controverses politiques, obligeant les acteurs de ce jeu à formuler de plus en plus leurs interventions en termes juridiques? De ce nouvel état découlent trois séries de conséquences, relatives à la nature même du droit constitutionnel (qui est bouleversée), à son champ d'application (qui est élargi) et à sa place vis-à-vis les autres branches du droit (qui est rehaussée).

Quant à la nature du droit constitutionnel, il s'agit bien d'un retour au texte (et aux «principes à valeur constitutionnelle»), mais tel qu'il est interprété par un organe extérieur au jeu politique [...] doté d'une légitimité technique désormais supérieure à la légitimité démocratique de la majorité. [...]

Quant au champ d'application du droit constitutionnel, il s'est nécessairement élargi, dépassant la simple description du fonctionnement des institutions étatiques [...] pour englober les sources du droit, tant privé que public d'ailleurs, et tant national que local [...] ou international [...] mais aussi, du fait de l'insertion du préambule dans la Constitution, la protection des libertés publiques. [...]

Quant au rang du droit constitutionnel par rapport aux autres branches du droit, il ne peut être aujourd'hui que le premier. Après être demeuré, trop longtemps, un infra- ou un sous-droit par défaut de sanction effective de ses prescriptions au temps de la «souveraineté parlementaire», le droit constitutionnel a non seulement rattrapé les autres branches du droit mais, en même temps, les domine dans une certaine mesure.¹⁰⁶

This development raises, in turn, questions about legitimacy (questions of the sort that concerned La Forest J. in the *Provincial Judges Reference*). Professor Dominique Rousseau has captured these questions well:

Dans la tradition démocratique «classique», le principe de légitimité consacré dans tous les textes constitutionnels modernes est en effet la souveraineté populaire. Titulaire du pouvoir, le peuple est, en démocratie, au principe de toutes choses: il décide, il délègue, il sanctionne, il contrôle, il juge, mais il ne peut être lui-même jugé, sanctionné ou contrôlé. Car s'il pouvait l'être, il faudrait nécessairement poser l'existence «au-dessus» du peuple d'un lieu où se trouvent les valeurs, les règles de jugement des actions du peuple. En démocratie, le peuple, c'est la Cour suprême, pour paraphraser le général de Gaulle.

Or, dans son principe, la justice constitutionnelle s'inscrit contre cette conception-là de la démocratie puisqu'elle se définit comme le pouvoir donné à des personnes nommées d'apprécier, de contrôler et le cas échéant, de sanctionner la conformité à la constitution des actes pris par les pouvoirs publics et en particulier, des lois votées par les représentants élus du peuple souverain. [...]

¹⁰⁶ Turpin, *supra*, note 102, at 5-7.

La justice constitutionnelle inaugure ainsi une formidable mutation politique et, en même temps, provoque une formidable renouveau de la théorie et de la philosophie juridique et politique: qui dit le droit? Le droit peut-il être «arraché» à la souveraineté populaire? La loi cède-elle devant la jurisprudence? Comment se «fait» la jurisprudence? Est-ce la consécration d'une religion ou d'une métaphysique juridique?...¹⁰⁷

2. The Australian Experience

In Australia, the Commonwealth Constitution is a written text, including a preamble and eight chapters forming the body of the Constitution. The preamble recites that the people have agreed to unite in one indissoluble federal Commonwealth under the Crown. This is understood as incorporating concepts of popular legitimacy, federalism and constitutional monarchy. In their very useful and exhaustive study, Professors Peter Hanks and Deborah Cass inform us that in addition to the text, “the Constitution also contains *principles* which are said to derive from its structure and purpose.”¹⁰⁸ These principles include responsible government, federalism, representative democracy and the separation of powers, all of which are said to be reflected, although not explicitly set out, in the text. The Constitution’s history and the overlay of judicial interpretation on the text are also crucial to the content of the Constitution. For example, Hanks and Cass note that “one of the major constitutional issues for the High Court over the years has been the question of whether the principle of federalism mandates full unification or only integration of Australian institutions.”¹⁰⁹ The way in which the federal principle is construed and applied by the Court can thus have “a profound effect on the shape of constitutional outcomes.”¹¹⁰ As in Canada, the United States and elsewhere, textualism, originalism (or intentionalism) and dynamism (or progressivism or organicism) vie for dominance. “Each method of constitutional interpretation has its problems,” and “[n]o judge is totally committed to one method of interpretation over another.”¹¹¹ Nor is the choice of interpretative method simply an academic question:

¹⁰⁷ Rousseau, *supra*, note 102, at 9-11.

¹⁰⁸ *Supra*, note 103, at 5; emphasis in original. (Hanks is now a barrister, but for three decades taught at Monash and Sydney Universities; Cass is a senior lecturer at the Faculty of Law, Australian National University.)

¹⁰⁹ *Id.*, at 6.

¹¹⁰ *Id.*

¹¹¹ *Id.*, at 9.

It has broad-ranging practical effects because it signals, especially to the wider community, the nature of the role the High Court plays in legal and political affairs.¹¹²

Hanks and Cass suggest that the role which the High Court has played in the evolution of constitutional law in Australia has been “essential to its survival.” In light of the rigidity of the constitutional amendment process, “it has been judicial interpretation and re-interpretation which has managed to keep the structure of government, as expressed in the Constitution, in touch with the demands of a changing society and developing economy.”¹¹³ Hanks and Cass later cite commentator Brian Galligan¹¹⁴ for the proposition that Sir Owen Dixon’s classic plea, upon acceding to the position of Chief Justice, for “close adherence to legal reasoning” and a “strict and complete legalism,”¹¹⁵ has in fact “been championed by the Court because it is an effective political strategy for exercising judicial review”¹¹⁶ in a country essentially hostile to that function, notably because of a tradition of parliamentary supremacy inherited from Britain.

The High Court’s decisions in 1992 in *Nationwide News Pty. Ltd v. Wills*¹¹⁷ and *Australian Capital Television Pty. Ltd. v. Commonwealth*¹¹⁸ were of great significance for the recent development of Australian constitutional law. In those cases, a majority of the Court held that principles of representative and responsible government were implied in the Constitution, which in turn, therefore, required freedom of communication in regard to political matters. Moreover, Commonwealth and state legislation found in violation of those principles would be held invalid.

To quote from the concurring opinion of Brennan J., the principles of representative democracy, direct popular election, the national character of the lower House and the principle of responsible government are “constitutional

¹¹² *Id.* For a timely and thoughtful discussion of originalism and other schools of thought in the Canadian context, see the recent article by my colleague Luanne Walton, “Making Sense of Constitutional Interpretation” (2001), 12:3 N.J.C.L. 315.

¹¹³ *Id.*, at 31. This has particular resonance in Canada.

¹¹⁴ Galligan, “Realistic ‘Realism’ and the High Court’s Political Role” (1989), 18 Federal L.R. 40.

¹¹⁵ Dixon C.J. is cited in Hanks and Cass, *supra*, note 103, at 32. *Vide*: (1952) 85 C.L.R. xiv. (See also the discussion in Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough, Ont.: Carswell, 1997), at 129-30).

¹¹⁶ Galligan, *supra*, note 114. Galligan in turn, has been criticized by Jeffrey Goldsworthy for oversimplifying the Court’s jurisprudence over 90 years as well as the complexities of constitutional adjudication: Goldsworthy, “Realism about the High Court” (1989), 18 Federal L.R. 27.

¹¹⁷ (1992) 177 C.L.R. 1.

¹¹⁸ (1992) 177 C.L.R. 106.

imperatives” intended to make both the legislative and executive branches of government “ultimately answerable to the Australian people.”¹¹⁹

Under the Westminster model, these principles might be trespassed upon by legislation emanating from an omniscient Parliament but the Parliament of the Commonwealth is incompetent to alter the principles prescribed by the Constitution to which it owes its existence. It is a Constitution the text of which the people alone can change: s. 128.

To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential [...] ¹²⁰

Noting Hanks and Cass, these decisions “were seen at the time as opening the way for a judicially constructed Bill of Rights for Australia,”¹²¹ which has neither a constitutionally-entrenched Charter of Rights nor a statutory Bill of Rights (as has existed for Canada since 1960 and for New Zealand since 1990). These constitutional principles (or “constitutional implications”) however, were qualified in later cases¹²² as being more in the nature of a fetter on legislative action (a negative restraint) rather than a source of positive rights. The implied freedom of communication, writes Sir Anthony Mason, was also “tied [...] more closely to the express provisions of the Constitution.”¹²³

Sir Anthony makes the case (as does Professor Monahan in Canada) for a “necessary implications” test in construing and applying constitutional principles.

Implication is a natural and necessary incident of the process of interpretation, whether it is a constitution, a statute or a contract that is being interpreted. [...] That is not to say that implications are freely made. On the contrary, courts are cautious about making implications. They are only made when they give

¹¹⁹ Per Brennan J. in *Nationwide News*, *supra*, note 117, at 47.

¹²⁰ *Id.* It is interesting to note that extensive reference is made to the classic jurisprudence of the Supreme Court of Canada in this area, including *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299; and *Switzman v. Elbling*, [1957] S.C.R. 285. (The majority judgment in *Nationwide News* is made up of a series of concurring opinions; see also, most notably, Mason C.J. and Deane and Toohey JJ., respectively.)

¹²¹ Hanks and Cass, *supra*, note 103, at 904.

¹²² *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104; *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520. See also *Leeth v. Commonwealth* (1992) 174 C.L.R. 455; *Kruger v. Commonwealth* (1997) 146 A.L.R. 126.

¹²³ The Hon. Sir Anthony Mason, “The Role of the Judiciary in Developing Human Rights in Australian Law” in Kinley, ed., *Human Rights in Australian Law: Principles, Practice and Potential* (Leichhardt, N.S.W.: Federation Press, 1998), Chapter 2, at 38, referring particularly to the *Lange* decision.

expression to the intention of the relevant instrument as that intention is revealed by reference to its language considered in the light of context (including history) and the nature and purpose of the instrument.

That is why reference is made to “necessary implications,” indicating that an implication is not made unless it is necessary. Here, however, a distinction must be drawn between the making of an implication based simply on a manifestation of intention to be gathered from the provisions of the Constitution, in which event one is concerned only to ascertain whether that intention is manifested, and an implication based on the structure of the Constitution. In the latter case the implication must be logically or practically necessary for the preservation of the integrity of that structure.¹²⁴

Sir Anthony concludes that with the notable exception of the implied freedom of communication (itself quite singular in nature and distinguishable from other human rights because it is “representation-reinforcing, necessitated by the system of representative (and responsible) government for which the Constitution by its very provisions and structures provides”¹²⁵), “little has been achieved by the High Court in implying human rights protection in the Constitution.”¹²⁶

In the ultimate analysis, this is because the Australian Constitution is an instrument which defines the structure of government and distributes the power of government rather than one which defines rights and freedoms in conformity with the British parliamentary tradition and the doctrine of parliamentary supremacy.¹²⁷

Nonetheless, the dynamic school of interpretation has been and no doubt will continue to be one of the important contending approaches of Australian constitutional law, as exemplified by the statement of Isaacs J. that constitutions are “made, not for a single occasion, but for the continued life and progress of the community,” and are shaped by the “silent operation of constitutional principles,”¹²⁸ as well as that of Windeyer J., who wrote:

In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances.¹²⁹

¹²⁴ *Id.*, at 36-37.

¹²⁵ *Id.*, at 41.

¹²⁶ *Id.*, at 37.

¹²⁷ *Id.*

¹²⁸ *Commonwealth v. Kreglinger and Furnau Ltd.* (1926) 37 C.L.R. 393, at 413.

¹²⁹ *Victoria v. Commonwealth* (1971) 122 C.L.R. 353, at 396. (For ease of reference, I should note that both Isaacs and Windeyer JJ.'s remarks are drawn from Hanks and Cass,

XII. CONCLUSION

1. The Necessary Linkage Between Constitutional Law and Principles

Returning now to Canada and to Canadian law, I will begin to hazard some final observations and conclusions. Our country's constitutional edifice has been built up to a high level of development, where the structure is indisputably more evident, tangible and complete than it was in former times.

The 1982 reform brought with it not only the landmark addition of the *Canadian Charter of Rights and Freedoms*, but also long-overdue recognition of aboriginal and treaty rights, confirmation of provincial control over natural resources, plenary power to amend the Constitution's provisions in Canada (through written amending procedures), a constitutional supremacy clause and, perhaps most significantly, formal recognition in the *Canada Act 1982* of Canada's full and sovereign status as an independent nation. These major structural developments have been overlaid upon the basic division of legislative powers and the other essential features of legislative, executive and judicial power and historic guarantees that comprise the original *British-North America Act: the Constitution Act, 1867*.

Since 1982, two further attempts at major constitutional reform have failed to be ratified, but a number of more modest constitutional amendments have been enacted. Canada has also overcome an unprecedented threat to its constitutional integrity, legal order and the rule of law, in a manner that permits the legitimate political forces at play within this country to continue to promote their options for change within the prevailing constitutional and legal framework, while respecting basic rights and fundamental principles.

Nevertheless, the work is not finished. The Constitution, even as it continues to provide the legal and conventional bases for order and stability, must itself be capable of growth and adaptation, as changing circumstances and conditions may require. Such modifications are sometimes the concrete product of formal constitutional amendment, but constitutional amendments are usually difficult to achieve. More often than not, change manifests itself over time as the result of a slow, evolutionary process of subtle, incremental steps, not all of which lead inexorably in the same direction, and the pattern of which is sometimes evident only after the fact.

Canada's Supreme Court, like the Judicial Committee of the Privy Council before it, has been instrumental to the growth and development of Canadian constitutional law. The judges of the Supreme Court, as well as those of superior and appellate courts throughout the land, will continue to exercise their role as

Australian Constitutional Law: Materials and Commentary, 6th ed. (Sydney: Butterworths, 1999), at 11.)

the legal arbiters and guardians not only of the provisions of the Constitution, but also of the high objects, principles and values upon which the edifice rests.

The courts must, however, continue to link those principles and values to the legal structure and provisions from which the former emanate and draw their force. No doubt, that which often distinguishes great judges from good ones is their ability to imbue the black letter of the law with extraordinary vision, to wed law to the spirit of justice and to temper justice in turn with equity and mercy. Still, it is respectfully submitted that sagacious judges will want to continue to avoid the temptation of casting aside the dull fetters and material confines of the written law in a quest for more exalted quarters in which to ruminate and reflect, lest they lay themselves open to the accusation of becoming disembodied philosopher-kings and -queens, building constitutional castles in the air.¹³⁰ The realm of abstractions — not only of broad constitutional principles but of often vague and esoteric “concepts” and “notions”¹³¹ — is not of this world.¹³² Courts can indeed “infuse” and “breathe life” into the Constitution, but in so doing they may not stray far from the

¹³⁰ The accusation is a mean one, and often overblown, as in Morton and Knopff’s polemic *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000). For a more subtle (yet no less iconoclastic) opinion on the modern role of the “juge-interprète” and judicial power in the making of the law, see Lajoie, *Jugements de valeurs: le discours judiciaire et le droit* (Paris: Presses Universitaires de France, 1997): “La frontière entre le judiciaire et le politique n’est plus ce qu’elle était. Et le juge, qui participe à ce processus en donnant sens à un texte dont le caractère normatif l’oblige à tenir compte de l’effet de son interprétation sur les justiciables qu’il affecte, est devenu l’arbitre des valeurs dans la société. [...]” (at 207-08).

¹³¹ Woe to the lawyer who has only a “notion” to assert. “While it may be rooted in notions of tolerance and diversity, the exception in s. 93 [of the *Constitution Act, 1867*, guaranteeing denominational school rights and privileges] is not a blanket affirmation of freedom of religion or freedom of conscience [...] [and] should not be construed as a *Charter* human right or freedom” (per Beetz J. in *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at 401). “A notion of equality between Canada’s official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 [of the Charter]” (per Dickson C.J., in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at 369). In *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, at 578, Beetz J. stated that “legal rights tend to be seminal in nature because they are rooted in principle,” unlike language rights, “which are based on political compromise.” This rather invidious distinction was later overturned in the *Quebec Secession Reference*, [1998] 2 S.C.R. 217, at para. 80 (“we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled”), and the “notion” of equality in section 23 of the Charter and other language rights was elevated to the rank of a “principle” in *R. v. Beaulac*, [1999] 1 S.C.R. 768.

¹³² “For my thoughts are not your thoughts, neither are your ways my ways [...] For as the heavens are higher than the earth, so are my ways higher than your ways, and my thoughts than your thoughts” (*Isaiah 55:8-9* King James Version).

physical *corpus* of constitutional law if both are to thrive.¹³³ (*Metaphysician, heal thyself*.) Courts are here, generally speaking,¹³⁴ to decide concrete issues, live controversies and prosaic disputes on the basis of principles of *legality*, “strict logic and high technique.”¹³⁵

The resort to “unwritten law” and conceptual abstractions is, of course, attractive to the legal mind, and perhaps particularly so to minds trained in the common law. “Reason is the life of the law; nay, the common law itself is nothing but reason,” declaimed the great English jurist, Sir Edward Coke.¹³⁶

And by reasoning and debating of grave learned men the darknesse of ignorance is expelled, and by the light of legall reason the right is discerned, and thereupon judgment given according to law, which is the perfection of reason.¹³⁷

“Which, then, do you think is the sort of law,” wrote the moral philosopher and polemicist Jeremy Bentham in 1792, “which the whole host of lawyers, from Coke himself down to Blackstone, have been trumpeting in preference [to statute law]?”¹³⁸

¹³³ Nor does this mean that the Constitution of Canada will necessarily be better off if, instead of being left to the ether, unwritten principles are shoe-horned into the text of the Constitution as if they were written constitutional provisions themselves. *Vide* Hogg, *Constitutional Law of Canada*, *supra*, note 115, at 9-10, and 13-14, on the “surprising” decision of the Supreme Court in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, to add the unwritten doctrine of parliamentary privilege to the instruments listed in or scheduled to section 52(2) of the *Constitution Act, 1982* that comprise “the Constitution of Canada” as it is written. This mechanistic addition to the text of the Constitution, it is argued, not only mixed apples with oranges, but also opened the door to uncertainty — could other doctrines or instruments be judicially adduced as coming within the list? — with, as Hogg points out, the attendant “grave consequences” of “supremacy and entrenchment” that apply to the listed constitutional instruments.

¹³⁴ There is a difference, but arguably only of degree, when a court is sitting in an advisory capacity in the context of a reference (discussed in the next section of this paper).

¹³⁵ Maitland, ed., *Year Books of Edward II*, Vol. I (London: Quaritch, 1903), at xviii: “The qualities that saved English law when the day of trial came in the Tudor age were not vulgar common sense and the reflexions of the layman’s unanalysed instincts: rather they were strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries.”

¹³⁶ Coke, *Institutes of the Laws of England (1628-1644)*, drawn from the 1832 printed edition (London: J. & W.T. Clarke, Saunders & Benning; Maxwell; S. Sweet; H. Butterworth; Stevens & Sons; R. Pheene; J. Richards), at [97B].

¹³⁷ *Id.*, at [232B]. Lord Coke did voice at least one criticism of contemporary cases and commentary, which he said had lost the authority the “antient lectures or readings upon statutes” commanded: “for now the cases are long, obscure, and intricate, full of new conceits, liker rather to riddles than lectures, which when they are opened they vanish away like smoke;” and as for the readers, “all their studie is to find nice evasions out of the statute.”

¹³⁸ Bentham, *Truth versus Ashhurst; or Law as It Is; Contrasted with What it is Said to Be* (December 1792; first published in 1823). Reproduced in Bowring, ed., *The Works of Jeremy Bentham* (Edinburgh: Tait; London: Simpkin Marshall, 1843), vol. V, at 236.

That very sort of bastard law which I have been describing to you, which they themselves call the *unwritten law*, which is no more *made* than it is *written* — which has not so much a shape to appear in — not so much a word which anybody can say belongs to it — which comes from nobody, and is addressed to nobody — and which, so long as it is what it is, can never, by any possibility, be either *known* or *settled*.

How should lawyers be otherwise than fond of this brat of their own begetting? Or how should they bear to part with it? It carries in its hand a rule of wax, which they twist about as they please — a hook to lead the people by the nose, and a pair of sheers to fleece them with.¹³⁹

2. The Role of the Courts in the Constitutional System and Their Area of Expertise

How, then, to achieve both needed flexibility and certainty in the supreme law of Canada, in relation to unwritten principles? A golden metewand¹⁴⁰ has been established by the Supreme Court in the *Quebec Secession Reference*. It is intimately linked to the legitimate role of the courts in our constitutional framework. We would do well to be guided by its wisdom.

In answer to a preliminary objection to the exercise of its jurisdiction in this reference, the Supreme Court made a number of key observations. First, the Court acknowledged that in a reference,¹⁴¹ the Court is acting in “an advisory capacity” rather than in its “traditional adjudicative function.” In this context, the Court can find itself engaged in examining hypothetical questions “in an

¹³⁹ *Id.* (Emphasis in original.) The pamphlet was written in response to Mr. Justice John Ashhurst’s charge to a Middlesex Grand Jury on November 19, 1792, in which Justice Ashhurst’s propositions are set out (*e.g.*, “Happily for us, we are not bound by any laws but such as every man has the means of knowing.”) and to which Bentham (“Truth”) replies. “It is the judges,” Bentham rejoins, “that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. [...] What way, then, has any man of coming at this dog-law? Only by watching their proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth. The French have had enough of this *dog-law*; they are turning it as fast as they can into *statute law*, that everybody may have a rule to go by: nor do they ever make a law without doing all they can think of to let every creature among them know of it. The French have done many abominable things, but is this one of them?”

¹⁴⁰ The expression belonged to Lord Coke (*i.e.*, “the golden metewand of the law”).

¹⁴¹ The “special jurisdiction” of the Court and the power of the Governor in Council to refer questions to it for consideration and response are set out in section 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

exercise it would never entertain in the context of litigation.”¹⁴² Second, the Court emphasized that even in the context of a reference, the Court should not “entertain questions that would be inappropriate to answer.” In this context, however, the focus is not “on whether the dispute is formally adversarial or whether it disposes of cognizable rights.” Rather, the Court must consider “whether the dispute is appropriately addressed by a court of law.”¹⁴³

The Court cited its opinion in *Reference re Canada Assistance Plan (B.C.)*, wherein it was stated as follows:

In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court’s primary concern is to retain its proper role within the constitutional framework of our democratic form of government. ... In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.¹⁴⁴

Therefore, the circumstances in which the Court might decline to respond on the basis of “non-justiciability,” even in the context of a reference, to a question put to it, would include:

- (1) if to do so *would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government*; or
- (2) if the Court could not give an answer that lies within *its area of expertise: the interpretation of law.*¹⁴⁵

It is respectfully submitted that these same considerations may have some bearing — not only in the context of a reference, but *a fortiori*, in the normal course of adversarial litigation — on the degree to which the courts should generally entertain arguments that are based almost exclusively on constitutional principles (in contrast to constitutional or statutory provisions).

¹⁴² *Reference re Secession of Quebec, supra*, note 131, at para. 25.

¹⁴³ *Id.*, at para. 26. [Emphasis added.]

¹⁴⁴ [1991] 2 S.C.R. 525, at 545. [Underlining added by the Court in the *Quebec Secession Reference, supra*, note 131, at para. 26.]

¹⁴⁵ *Reference re Secession of Quebec, supra*, note 131, at para. 26. [Emphasis added.]

3. Some Related Questions and Guidance for the Courts

This is not to say that constitutional principles do not have their place in constitutional adjudication. The weight of the jurisprudence (and, it is hoped, this paper) demonstrates that they can perform a useful and necessary role in elucidating and enriching constitutional meaning. Before giving full play to constitutional principles in a given case, however, courts might ask themselves several of the following questions.

Is the principle relevant to the interpretation of a constitutional or statutory provision at issue? Can the words of the provision reasonably bear the construction placed upon them by the party contending for the application of the principle, or do they alter the basic thrust of the text? Is resort to the principle essential to the disposition of the case? Are we being asked to apply the principle in furtherance of a constitutional provision, or in lieu of one? If it is the latter, what normative force or weight should the principle carry in these circumstances? Should it be balanced with other constitutional principles or textual considerations? Does the principle we are asked to invoke establish a duty, rule or obligation of a constitutional character? If so, whom will it bind: the parties to the case? Political actors? The courts? Everyone? Is it enforceable at law, or is it a political obligation in the nature of a constitutional convention? If it is a convention, does it satisfy the test formulated by Jennings¹⁴⁶ for the existence of a convention? Is it appropriate, in the circumstances of the case, to pronounce upon the existence of a convention or to apply the principle? Shall applying the principle assist in resolving the controversy at issue and in clarifying the state of the law? Will reliance upon the principle reduce legal uncertainty, or will it contribute to it?

These ancillary questions can all be seen as elements of the larger issues formulated by the Supreme Court of Canada in the *Quebec Secession Reference*. Are the courts being asked to go beyond their proper role in the constitutional framework? Are the courts being asked to give answers that lie within their area of expertise: the interpretation of law?

If those considerations are borne in mind, constitutional principles will continue to act as the foundation stones of the constitutional structure. If those considerations are ignored, the castle may prove to have been built on sand.

¹⁴⁶ Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959).