Constitutional Theory and The *Quebec Secession Reference*

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1. Introduction: The *Quebec Secession Reference* and the Poverty of Theory in Canadian Constitutional Discourse

From the moment that it was handed down, the judgment of the Supreme Court of Canada in the *Quebec Secession Reference* produced a torrent of public commentary.[1] Journalists, politicians, and legal academics have debated the consequences, and the merits and demerits of the result. The judgment has been read as a statute that lays down the roadmap to referendum and secession. If one of the Court's goals was to secure a central place for the judgment in the ongoing debate over the future of the country, that goal has surely been met.

Remarkable as the decision is, however, and given the fundamental issues about the relationship between law and politics that it raises, the discussion in question has remained almost entirely in what we describe as the *pragmatic perspective*, which asks how positive politics entered into the motivations and justifications of the Court, and looks at the results in terms of their political consequences, without

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1. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Quebec Secession Reference*]; A.C. Cairns, "The Quebec Secession Reference: The Constitutional Obligation to Negotiate" (1998) 10:1 Constitutional Forum 26; Editorial, "Court Answers Succeed" *The Kitchener-Waterloo Record* (25 August 1998) A6; D. Greschner, "The Quebec Secession Reference: Goodbye to Part V?" (1998) 10:1 Constitutional Forum 19; P. Joffe, "Quebec's Sovereignty Project and Aboriginal Rights" (1999) 7 Canada Watch 6; J. Legault, "How to deny Quebec's right to self- determination: With the Supreme Court's opinion, we have entered the realm of colonial federalism" *The Globe and Mail* (21 August 1998) A19; P.J. Monahan, "Doing the Rules: An Assessment of the Federal *Clarity Act* in Light of the *Quebec Secession Reference*" (2000) 135 *C.D. Howe Institute Commentary* 3; P.J. Monahan, "The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*" (1999) 11 N.J.C.L. 65; J. Morin, "L'avis de la Cour supreme: Une sécession légitime et réalisable… en théorie" *Le Devoir* (31 August 1998) A7; T. Morton, "A ticket to separate: Has the Supreme Court curbed separatism? No, says Ted Morton" *Ottawa Citizen* (22 August 1998) B7; P. Oliver, "Canada's Two Solitudes: Constitutional and International Law in *Reference re Secession of Quebec*" (1999) 6:1 Int'l J. on Minority and Group Rights 65; C. Ryan, "What if Quebeckers voted clearly for secession? While the Supreme Court did a good job of defining broad principles, it left a great contradiction hanging in the air" *The Globe and Mail* (27 August 1998) A19; J. Simpson, "Court finds the right tradeoff" *The Globe and Mail* (25 August 1998) A12; D. Turp, "Globalizing Sovereignty" (1999) 7 Canada Watch 4; W. Walker, "Difficult Questions Remain for the Politicians to Resolve" *The Toronto Star* (21 August 1998) A9; J.D. Whyte, "The Secession Reference and Constitutional Paradox" in D. Schneiderman, ed., *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto, ON: Lorimer, 1999) 130; J. Woehrling, "Unexpected Consequences of Constitutional First Principles" (1999) 7:1-2 Canada Watch 18; R.A. Young, "A Most Politic Judgment" (1998) 10:1 Constitutional Forum 14.

deep or sustained reflection on the ultimate grounds for the role the Court took upon itself, or on the normative sources of its reasoning. The preoccupations of this perspective are along the following lines:

- What were the political *origins* of the judgment? More specifically, what circumstances led the Court to be thrust into the political morass of constitutional reform, and how did the Court respond? It is fairly clear that the reference to the Supreme Court was a centre-piece of the federal government's strategy to get tough with Quebec—widely known as "Plan B." Moreover, rather than shying away from the task thrust upon it, the Court interposed itself into the political thicket, and fundamentally altered the rules of the game.
- What were the political *effects* of the judgment? On this point, there seems to be a consensus that the judgment was a success. It has been widely accepted by political actors across the political spectrum. Moreover, it has shaped the terms of debate in a stability-promoting way. It has eliminated extreme opinions—that a yes vote would effect a unilateral secession, or could be ignored by the federal government with impunity. Additionally, it has focused debate over certain issues, such as what constitutes a clear majority and a clear question.
- Who were the political *winners and losers*? Here, the picture is mixed. As expected, the Court summarily rejected arguments made on Quebec's behalf that it would be legal for Quebec to unilaterally secede from Canada, decisively refuting the claim that Quebec possessed a right to self-determination cognizable in Canadian constitutional law. Contrary to expectations, though, the Court decided that in the event of a yes vote, the federal government would be under a constitutional duty to negotiate in good faith. The uncertainty of the federal response to a positive referendum result—a source of strategic power for the federal government in the past—has been eliminated. Moreover, Quebec nationalists now have an incentive to hold referenda repeatedly until they achieve a positive result.
- What political issues remain *unresolved*? The Court left many questions unanswered, creating ongoing uncertainty—the borders of an independent Quebec, the division of the national debt, citizenship, and the rights of aboriginal peoples in northern Quebec, to name a few. More accurately, the Court relegated these issues to constitutional negotiations, and steadfastly refused to speculate on the implications of a breakdown in those discussions.

The domination of the pragmatic perspective in public discourse about the judgment is perhaps understandable, given the political context in which the Court was asked to decide and the obviously high stakes in Canadian constitutional politics. But this dominance also reflects an abdication of intellectual responsibility on the part of the Canadian academy, and the traditional poverty of theory in Canadian constitutional law. Apart from some rather crude attacks on the "politicization of the law" through activist judicial review,[2] with some important exceptions,[3] analysis

2. The foremost work here is F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).

3. Some notable exceptions are: J. Bakan, *Just Words: Constitutional Rights and Social Wrongs*

of Canadian constitutional law and jurisprudence based on systematic reflection concerning the relationship between constitutional adjudication and democratic politics has been, for the most part, sorely lacking. While some of the crucial elements of the judgment beg for adequate theorization—especially the reliance on unwritten constitutional principles and the Court's self-limitation of its judicial review function with respect to the application of the law by the political actors—it has of course been possible either to embrace or reject these features of the decision, understanding them cynically as the Court seeking an "old-fashioned" Canadian compromise, or getting itself out of a political bind into which the government awkwardly and unjustifiably put it.

Yet the respect of citizens for the Court depends importantly on their view of it as a forum of principle and of reason. Indeed, absent such a belief, it is doubtful that the judgment of the Court could play any role whatever in restraining or informing political behaviour in the circumstances of the secession, where hateful passion and prejudice are likely to be running at their highest, and the potential "end game" nature of the situation removes many of the usual pragmatic constraints on the degeneration of political action into force and fraud.

Thus, even from a pragmatic perspective dominated by a concern with political effects, the question of the legitimacy of the Court's decision, the "compliance pull" of its reasons even and especially in the presence of potentially overmastering passion, deserves serious attention. And this question, especially given the apparent novelty and anomaly of some of the Court's holdings in this case, can only be answered through an excursion into constitutional theory of the kind dreaded by many Canadian legal academics.

The premise of this paper is that for constitutional adjudication to be a legitimate practice, it must be supported by reasons that justify the judicial role. Although courts may not be forthright in providing these reasons, the task of the constitutional

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(Toronto, ON: University of Toronto Press, 1997); D. Beatty, *Constitutional Law in Theory and Practice* (Toronto, ON: University of Toronto Press, 1995); R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto, ON: E. Montgomery Publications, 1991); R.F. Devlin, "Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson" (1996) 22:1 Queen's L.J. 81; D. Dyzenhaus, "The New Positivists" (1989) 39 U.T.L.J. 361; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits of the Use of *Charter* Litigation to Further Feminist Struggles" (1987) 25:3 Osgoode Hall L.J. 485; P. Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54:1 U.T. Fac. L. Rev. 1; A. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38:3 U.T.L.J. 288; A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto, ON: University of Toronto Press, 1995); P. Macklem, "Constitutional Ideologies" (1988) 20:1 Ottawa L. Rev. 117; P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21:1 Queen's L.J. 173; P.J. Monahan & A. Petter, "Developments in Constitutional Law: the 1985-86 Term" (1987) 9 Supreme Court L. R. 69; P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Scarborough, ON: Carswell, 1987); D. Réaume & L. Green, "Education and Linguistic Security in the Charter" (1989) 34:4 McGill L.J. 777; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36:2 McGill L.J. 309; D. Schneiderman, "Economic Citizenship and Deliberative Democracy: An Inquiry Into Constitutional Limitations on Economic Regulation" (1995) 21:1 Queen's L.J. 125; B. Slattery, "A Theory of the *Charter*" (1987) 25:4 Osgoode Hall L.J. 701; L. Weinrib, "Limitations on Rights in a Constitutional Democracy" (1996) 6 Caribbean L. Rev. 428.

theorist is to identify whatever justifications the courts may provide, and to weave those justifications into coherent accounts. Constitutional theories emerge from and seek to justify our interpretive practice. Only then can we examine the ability of that theory to provide satisfactory explanations of the salient features of particular constitutional decisions, such as the *Quebec Secession Reference*. Practically, a theoretical account is valuable for two reasons: it helps us to better identify in what respects the Court owes us more detail on the legal framework governing secession, and more generally, it helps us to grasp the Court's understanding of its own role in the Canadian constitutional scheme.

2. The Theoretical Context

Our excursus into constitutional theory takes place against the background of a voluminous critical literature. Not surprisingly given what we have already said about the relative poverty of theory in Canadian constitutional scholarship, much of that literature is American, and is framed around that nation's constitutional practice. Nevertheless, that literature is general in aspiration, and accordingly may be of relevance to other jurisdictions, including Canada. What we do here is to briefly mention some of the relevant debates in American constitutional theory. In section 3, we develop an analytical framework to organize these debates; in sections 4 and 5, we examine the *Quebec Secession Reference* in the light of that framework.

The Political Questions Doctrine: A long-standing dispute among American constitutional scholars is the question of whether some constitutional provisions, or some constitutional disputes, are by their very nature non-justiciable and hence beyond the ambit of constitutional adjudication, because they are perceived as being fundamentally political in nature. Well-known examples of such political questions are impeachment trials by the Senate and House of Representatives, and the interpretation of the Guarantee Clause (Article IV, section 4) and the Privileges and Immunities Clause (Amendment XIV, section 1).[4]

Although there is general agreement that such a doctrine—known as the political questions doctrine—exists, scholars and courts are divided over its rationale and scope. Some scholars ground the political questions doctrine in constitutional text, claiming that some provisions of the U.S. Constitution commit an issue to the legislative and executive branches for their final determination.[5] Given that constitutional texts are rarely so explicit or unambiguous, though, other scholars have turned instead to the apparent lack of judicially manageable standards for interpreting open-ended constitutional language as a rationale for the doctrine.[6] However, in the face of the development of large and complex bodies of jurisprudence to implement open-ended guarantees such as "equal protection" and "due process" in the U.S. Constitution, defenders of the political questions doctrine have been

4. *Baker* v. *Carr*, 369 U.S. 186 (1962).
5. H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73:1 Harv. L. Rev. 1.
6. A.M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Indianapolis, IN: Bobbs-Merrill, 1962).

pushed back to prudential concerns regarding the legitimate scope of judicial review. At this level, critics of the political questions doctrine raise the stakes by arguing that a commitment to judicial review is logically incompatible with the political questions doctrine, because the legitimacy concerns that drive the latter in fact undermine the justification of the former.[7] Proponents of the political questions doctrine respond in two different ways—that a political questions doctrine protects the legitimacy of judicial review by avoiding disputes that would undermine it; and that the political questions doctrine acknowledges that constitutional supremacy does not necessarily lead to an exclusive power for courts to interpret and apply the constitution.[8]

The Judicial Supremacy & Exclusivity Debate: Related to the political questions doctrine is the issue of the proper scope of the power of judicial review first asserted by the U.S. Supreme Court in *Marbury* v. *Madison*.[9] *Marbury* stands for the proposition that the power of courts to interpret constitutional provisions, and to give them priority over conflicting legislation, follows from the combination of (i) the notion of constitutional supremacy (i.e. that the constitution is supreme law), and (ii) the power of the courts to resolve legal disputes before them on the basis of the relevant legal materials, including the Constitution. *Marbury* is the source of on-going controversy, because it infers that courts are *competent* to interpret and enforce written constitutions (point (ii)) from the very idea of a written constitution that creates institutions and confers limited powers upon them (point (i)). The notion of constitutional supremacy, though, is agnostic on the practical question of which institution is best suited to enforce constitutional provisions.[10] Driven by the suspicion that *Marbury* may have amounted to a judicial usurpation of constitutional power, critics of the decision read it narrowly, by highlighting that it is ambiguous on two critical questions. The first is whether judicial competence implies judicial *supremacy*, i.e. whether judicial interpretations of the Constitution bind other institutions whose own interpretations of the Constitution may differ. The second is whether judicial competence implies judicial *exclusivity*, i.e. whether only the courts have the power to interpret the Constitution.

Debate on the first issue has revolved around the relationship between the doctrine of precedent and the separation of powers. Proponents of a narrow reading of *Marbury* have suggested that court decisions only bind the parties to a lawsuit (Jefferson), or both the parties and the executive with respect to the enforcement of that decision (Lincoln). However, they stress that precedent does not operate to preclude independent executive or legislative consideration of a constitutional issue.[11] Proponents of a broad reading of *Marbury* argue that judicial supremacy is important because it settles legal disputes with finality, and hence argue that judgments in constitutional cases establish precedents binding on the other branches

7. M.H. Redish, "Judicial Review and the 'Political Question'" (1984) 79 Nw. U.L. Rev. 1031.
8. M. Tushnet, "Principles, Politics, and Constitutional Law" (1989) 88:1 Mich. L. Rev. 49.
9. 5 U.S. (1 Cranch) 137 (1803), 31 U.S. (6 Pet.) 515 (1832) [hereinafter *Marbury*].
10. R.M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996) at 33-34.
11. See generally, G. Gunther & K. Sullivan, *Constitutional Law*, 13th ed. (Westbury, NY: Foundation Press, 1997) at 20-27.

of government.[12] Debate on the second issue is focused on whether courts are uniquely qualified to interpret the Constitution. Proponents of exclusivity have argued that certain institutional features of courts (judicial independence and impartiality, the requirement of reasoned decisions) give them a comparative advantage in matters of constitutional adjudication.[13] Critics of exclusivity argue both empirically, positing that non-judicial actors are capable of constitutional interpretation, and normatively, asserting that constitutional discourse should not be confined to legal fora.[14]

The Theory vs. Anti-Theory Debate:[15] The last debate of relevance revolves around the role of normative political, social, and economic theory in adjudication. Over the course of the last half-century, the most imaginative and influential legal scholarship has applied normative theories to the analysis of legal doctrine, statutes and institutions. Normative law and economics is a prominent example;[16] another is scholarship that relies on the liberal tradition defined by Kant and Rawls[17] or

12. L. Alexander & F. Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110:7 Harv. L. Rev. 1359.

13. O.M. Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv. L. Rev. 1.

14. M.V. Tushnet, "The Hardest Question in Constitutional Law" (1996) 81:1 Minn. L. Rev. 1; N. Devins & L. Fisher, "Judicial Exclusivity and Political Instability" (1998) 84:1 Va. L. Rev. 83. To some extent, the American debate over the scope and extent of *Marbury* is inapplicable to Canada, because there is clear support in both the constitutional text and in the Canadian constitutional tradition, for the practice of judicial review. Section 52(1) declares the *Constitution Act, 1982* to be the supreme law of Canada, and provides that laws inconsistent with it are of no force or effect; moreover, the status of the *Constitution Acts* as enactments of the Imperial Parliament justifies judicial review as a means to pursuing the traditional goals of parliamentary supremacy and legislative intent. By contrast, since Alexander Bickel's examination of the question in the *Least Dangerous Branch*, there is a broad consensus that neither the text of the U.S. Constitution nor the intent of the framers expressly or impliedly authorizes judicial review. Judicial review must therefore be justified as a matter of first principle. Nevertheless, the institutional questions raised by *Marbury* with respect to the interpretive responsibility of courts are relevant to the Canadian context, because the scope and extent of judicial review are open to differing interpretations.

In this connection, we mention the important work of Brian Slattery. In "A Theory of the *Charter*," *supra* note 3, Slattery argues for a theory of judicial review in Canada in which courts, executives and legislatures all share the responsibility of interpreting the *Canadian Charter of Rights and Freedoms*. Moreover, he suggests, barring exceptional circumstances, that judicial interpretations of the *Charter* may not even be supreme. Slattery in effect resists a conception of judicial review in Canada that would be identical to a broad reading of *Marbury* in the United States. Slattery's argument is novel, because it is premised not only on the institutional considerations at play in the American discourse, but on the nature of law itself. For Slattery, the very idea of law is that it possesses a normative force that makes it a guide for conduct, a standard for evaluation, and a reason for compliance, in the minds of the persons to whom it is addressed. The role of coercive sanctions to ensure compliance with the law is secondary, or parasitic. In the constitutional context, this means that the rules of constitutional law are addressed primarily not to the courts that enforce them, but to political institutions that are bound by them. Inasmuch as coming to terms with constitutional norms is an inherently interpretive act, Slattery accordingly argues that executives and legislatures have an important role to play in constitutional interpretation, and that the power of courts to interpret the Constitution is not exclusive. Moreover, since political institutions are presumed to give due consideration to constitutional questions in arriving at their decisions, Slattery suggests that their constitutional interpretations be given deference in certain circumstances defined by relative institutional competence.

15. We draw this account from F. Michelman, "Normative Theory in Legal Scholarship: Moral and Related Political Philosophy" [unpublished].

16. E.g., R.A. Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981).

17. E.g., R.M. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); F. Michelman, "Constitutional Welfare Rights and *A Theory of Justice*" in N. Daniels, ed., *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (Oxford: Basil Blackwell, 1975).

Locke and Nozick.[18] The rise of normative theory in law can in part be understood as a response to an intellectual movement known as Legal Realism. Put simply, the Realists proposed that formal sources of law—legal texts and precedents—did not contain within them the resources to provide "the sort of determinate and defensible answers to concrete and controverted normative questions required by the very idea of law and its rule."[19] Realists attributed this deficiency to the vagueness, abstractness or indeterminacy of legal terms and categories. These features of legal language served as a cloak for judges to implement their own preferences through adjudication, often at the price of important rule of law values such as consistency. In response, scholars invoked normative theories as a means to constrain judicial discretion, to pursue important social goals, and to protect important values.[20]

In recent years, though, scholars have begun to question the appropriate role of normative theory in legal interpretation generally, and constitutional interpretation in particular. There are two versions of this criticism. Strong critics argue that moral theories do not and should not play a role in adjudication.[21] Instead, adjudication should be conceived of pragmatically, relying not on moral theory but on common sense, professionalism, and a sense of people's needs, wants, and expectations. Weak critics argue that given the fact of reasonable pluralism in modern societies, adjudicating on the basis of particular moral theories lacks legitimacy.[22] Courts should resist the tendency to ascend to abstract normativity, and instead ground their judgments on "incompletely theorized agreements" that can secure the consent of persons holding divergent and mutually irreconcilable conceptions of the good.

The relevance of these debates among American constitutional theorists to an analysis of the *Quebec Secession Reference* is clear. The judgment, for example, vests primary responsibility for contextualizing the constitutional rules governing secession with the political organs of the Constitution, and eschews any supervisory role for the courts. This part of the judgment is reminiscent of the political questions doctrine, and therefore implicates issues regarding that doctrine's scope and rationale. Similarly, by dividing interpretive responsibility for the norms of the Canadian Constitution between the judicial and political branches, the judgment invites an examination of the issues of interpretive supremacy and exclusivity. This is an issue

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18. R.A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985).

19. Michelman, *supra* note 17, section 2 at 2.

20. Set against this background, the debate between non-interpretivists and interpretivists—between scholars who endorsed the reliance in adjudication on substantive principles of political morality not expressed in the written text of the Constitution (T.C. Grey, "Do We Have an Unwritten Constitution?" (1975) 27:3 Stan. L. Rev. 703) and those who did not (Justice H.L. Black, "The Bill of Rights" (1990) 35 N.Y.U. L. Rev. 865) can easily be seen as part of the larger debate over Legal Realism.

21. R.A. Posner, "The Problematics of Moral and Legal Theory" (1998) 111:7 Harv. L. Rev. 1637. Also see the following commentaries on Posner's lecture in the same issue of the Harvard Law Review: R.M. Dworkin, "Darwin's New Bulldog" (1998) 111:7 Harv. L. Rev. 1718 [hereinafter *Darwin's New Bulldog*]; C. Fried, "Philosophy Matters" (1998) 111:7 Harv. L. Rev. 1739; M.C. Nussbaum, "Still Worthy of Praise" (1998) 111:7 Harv. L. Rev. 1776.

22. C.R. Sunstein, "Incompletely Theorized Agreements" (1995) 108:7 Harv. L. Rev. 1733; C.R. Sunstein, *Legal Reasoning & Political Conflict* (New York: Oxford University Press, 1996) [hereinafter *Legal Reasoning*]; R.H. Fallon, Jr., "Foreword: Implementing the Constitution" (1997) 111:1 Harv. L. Rev. 54.

with far broader implications than the constitutional framework governing the secession of Quebec.

Finally, the Court's reliance on abstract, unwritten constitutional principles implicates the place of normative political theory in its crafting of the decision. It may be that the intuitively plausible appeal of these principles in the context of secession comes not so much from their implicit source in the constitutional text taken as a whole—the constitution that is being *rejected* by one of the parties in this dispute—but from their place in a certain kind of regime, a liberal democratic one, which the majority of both federalists and secessionists are compelled to accept as legitimate. Here, it may be that one of the most important lessons of the *Reference* for debates in constitutional theory about the role of abstract argument in the presence of normative controversy, is that there are some situations where the problem of agreement under conditions of normative dissensus actually points to a solution at a higher rather than lower level of abstraction. Because of historical disagreements and grievances about Quebec's acceptance of the written constitutional text, including and especially an amending formula that did not give it a veto over most constitutional changes, reliance on the text would have accentuated normative dissensus, while reliance on basic liberal democratic principles did not.

3. A Framework for Analysis

We propose to examine these questions by using the following analytical framework. Our claim is that despite fundamental differences in methodology and outlook, every theory of constitutional interpretation has the following three components. First, a theory of constitutional interpretation must contain an account of *sources*; that is, it must specify criteria for the identification of the constitutional norms which are the objects of constitutional interpretation. Although an emphasis on sources is a prominent feature of positivist jurisprudence,[23] any theory of legal interpretation must address the issue of which materials may properly figure into interpretation, even if the criteria so specified do not sharply distinguish between the law and normativity more generally.[24] An account of sources, in turn, will usually contain a theory of *amendment*, which specifies criteria for the adoption of new constitutional norms, or the removal of existing ones. Again, it may be that a particular theory denies the possibility of amendment[25] but nevertheless in so stating touches on the issue.

Second, a theory of constitutional interpretation must also contain an account of *interpretive responsibility*, which specifies which institutions are charged with

23. E.g., H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) (the rule of recognition); H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg (Cambridge, MA.: Harvard University Press, 1945) (the grundnorm).

24. E.g., *Taking Rights Seriously*, *supra* note 17 at 344; R.M. Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986).

25. E.g., the view of the German Constitutional Court that certain articles of the German Basic Law are unamendable (see D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 1989) at 76).

the task of constitutional interpretation. Interpretive responsibility can be understood in two different but equally important senses. It can be understood as *jurisdiction*, that is, whether interpretive responsibility for constitutional norms is exclusive to, divided among, or shared by certain institutions. But interpretive responsibility can also be understood as *supremacy*, which addresses the question of whether the constitutional interpretations of an institution or of institutions vested with interpretive jurisdiction bind other institutions. Although jurisdiction and supremacy are different dimensions of interpretive responsibility, jurisdiction is of primary importance, because exclusive jurisdiction over constitutional interpretation obviates an assessment of which competing interpretation is supreme.

Third, a theory of constitutional interpretation must contain an account of *interpretive style*. Given the identification of constitutional norms, and the allocation of interpretive responsibility, the question which remains is how those norms are to be interpreted and applied. For most of the last half century, American constitutionalists have hotly debated whether the text, original intent, or various versions of substantive political morality should be given pride of place in constitutional interpretation. It is important to recognize that interpretive methodology or style is to a large extent indissociable from the first two features of theories of constitutional interpretation. Debates over style, in essence, have revolved around the identification of the sources of constitutional norms, and the relative importance of these various sources. Similarly, style may be driven by the institutional allocation of interpretive responsibility, so that, for example, a court may decline to articulate a complete theory of a constitutional provision in order to prompt a political actor to do so.[26]

4. The Positivist Understanding of Constitutional Interpretation

Utilizing this framework, we now detail what we call the *positivist account* of constitutional interpretation. This account cannot be found in any canonical texts or judicial decisions. Rather, it is a composite that we have constructed on the basis of our understanding of Canadian constitutional culture. The positivist account, in other words, articulates many of the intuitions held by the various actors in the Canadian constitutional scheme, but in a systematic way. Although this account is descriptively inaccurate of actual Canadian constitutional practice, the enterprise is nevertheless valuable because it serves to highlight the distinctive features of the judgment in the *Quebec Secession Reference*. In important ways, although not more than crudely theorized, this account is *presupposed* in the attack on "activist" judicial review by right-wing scholars such as Morton and Knopf, who adopt a conservative variation of the positivist account, in which ambiguous constitutional language is construed by reference to original intent, or failing that, the "traditional understanding" of the concepts invoked by constitutional provisions, as revealed by political practice.[27]

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26. N.K. Katyal, "Judges as Advicegivers" (1998) 50:6 Stan. L. Rev. 1709.
27. R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson Canada, 1992) at 130.

Sources: According to the positivist account, the sources of constitutional norms in Canada are limited to the express provisions of the *Constitution Acts* (this account has, of course, to deal in some way with important rules of Canadian constitutional law, for example concerning the prerogative powers of the Crown and the doctrine of parliamentary privilege, that are not specified in the constitutional text; this element in the Canadian constitutional system drives something of a wedge, however narrow, between positivism and textualism *tout court*). One textual basis for the textualism of the positivists is s. 52(2) of the *Constitution Act, 1982*,[28] which lists the legal documents that together make up the Constitution of Canada.[29] This is not to say that the *Constitution Acts* are exhaustive of constitutional law; the positivist account also gives an important place to past interpretations of those provisions, which have precedential force. However, those precedents derive their legitimacy from the fact that they represent authoritative interpretations of the constitutional text, and applications of the constitutional text to the facts of particular cases.

The centrality of text to the positivist account of constitutional interpretation has three important implications for the relationship between the norms of constitutional law, and normativity at large. First, it suggests a sharp distinction between the former and the latter. The latter lies outside the law; in constitutional terms, it lies in the world of politics. The former, by contrast, lies within and defines the boundaries of the world of the Constitution. Secondly, positivism has to cope with the possibility that no written text can explicitly contain rules for all those situations in which it would be desirable for the text to be governing of the controversy. One answer to this dilemma is to revert to original intent, asking how the framers would have wished a controversy to be resolved given what *is* explicitly specified in the text. An alternative answer, more characteristic of Canadian than American constitutionalism, is to simply say that, after a point, the law runs out. The constitutional order contains gaps, in which the law is silent, and politics reigns supreme, absent an explicit choice to amend the Constitution to deal explicitly with that situation. Thus, amendment to the Constitution requires express additions to the constitutional text, themselves the product of textually specified processes of amendment. As it turns out, Part V of the *Constitution Act, 1982* contains a variety of procedures to amend the Constitution. The relevant point for our discussion is that amendment is exclusively the domain of the political institutions (Parliament and the provincial legislatures).

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28. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

29. Section 52(2) of the *Constitution Act, 1982*, provides that:

> The Constitution of Canada includes:
> (a) the *Canada Act 1982*, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).

Note, though, that the Supreme Court of Canada held in *New Brunswick Broadcasting Co.* v. *Nova Scotia*, [1993] 1 S.C.R. 319 that s. 52(2) should not be read exhaustively (i.e., that "includes" is not synonymous with "means"), and as a consequence, that the doctrine of parliamentary privilege constituted part of the Constitution of Canada. The source of this unwritten rule was the preamble to the *Constitution Act, 1867* (U.K), 20 & 31 Vict., c. 3, which states that the Constitution of Canada is "a Constitution similar in Principle to that of the United Kingdom."

Interpretive Responsibility: The positivist account is clear on the allocation of interpretive responsibility, in both of its senses. The task of constitutional interpretation is vested with the judiciary, and, ultimately, the Supreme Court of Canada. Moreover, the responsibility of the Supreme Court is both exclusive and supreme. It has exclusive jurisdiction over constitutional interpretation because no other actors in the constitutional scheme—neither executives nor legislatures at the provincial or federal level—have any kind of interpretive responsibility with respect to constitutional norms. To adapt a distinction most famously made by Ronald Dworkin, the political organs are uniquely qualified and hence confined to examine considerations of policy, whereas courts are expert in and limited to examining questions of constitutional principle.[30] Because the Supreme Court has exclusive jurisdiction over constitutional interpretation, its interpretations also enjoy supremacy; more accurately, the issue of supremacy among competing interpretations does not really arise, because the Court's jurisdiction is exclusive.[31]

Interpretive Style: Finally, the positivist account contains a view of interpretive style. Legal interpretation is delimited by the text of the Constitution, so that the beginning and ending points of constitutional interpretation are the express terms of individual constitutional provisions. This is not to say that principles of substantive political morality should not play a role in constitutional interpretation. As Fred Schauer persuasively argues, some constitutional provisions appear to incorporate principles of political morality "by reference," and therefore invite (but do not compel) courts to engage in the type of normative reasoning characteristic of moral and political philosophy.[32] Schauer's point, though, is that not all provisions are worded in this way. Setting to one side the inherent limitations of legal language to address factual situations that were unanticipated when that language was framed (the problem of open-texturedness), some provisions are relatively specific and precise, and admit of a narrower range of interpretive choices. The interpretive frames surrounding such terms is narrow enough to create a strong presumption against the recourse to normative reasoning.[33] Given the primacy of text in signaling the appropriate style of interpretation, the positivist account defends the possibility of distinguishing the construction of constitutional provisions from moral reasoning writ-large.

The positivist account has a number of important features worth emphasizing because of their relevance to our analysis of the *Quebec Secession Reference*. First, a central tenet of legal positivism is a sharp distinction between legality and legitimacy. A legal regime may conform with legality if it complies with the formal rules and procedures laid down in the constitution. But such a legal regime may nonetheless lack legitimacy if it fails to accord with principles of political justice that can justify the coercive use of state power. Legitimacy and legality may coincide; indeed, it is the ambition of liberal democracy to make the latter a condition

30. *Taking Rights Seriously*, *supra* note 17 at ch. 4.
31. For a similar account, see "A Theory of the *Charter*," *supra* note 3.
32. F. Schauer, "Constitutional Invocations" (1997) 65:4 Fordham L. Rev. 1295.
33. F. Schauer, "Easy Cases" (1985) 58:1 S. Cal. L. Rev. 399.

of the former.[34] However, in cases where they diverge (as occurred in the *Quebec Secession Reference*), the positivist account denies courts the power to draw them together.

Second, the special role of the Supreme Court in constitutional interpretation yields a view on justiciability. Since the interpretive responsibility of the Court is both exclusive and supreme, every rule of constitutional law in principle can be the subject of adjudication. As a consequence, every rule of constitutional law is justiciable, and a dispute that is non-justiciable lies outside the bounds of constitutional law.

Finally, the positivist account, by implication, suggests what inappropriate judicial behaviour consists of. Courts that look beyond the text of the Constitution as a source of constitutional norms, that engage in amendment under the guise of interpretation, that surrender interpretive authority to other organs of government, or that engage in grand theorizing in a manner not invited by the constitutional text, have contravened the constitutional norms defining the judicial role.

5. Partnership and Institutional Dialogue

Sources: What is particularly striking about the *Quebec Secession Reference* is that it rejects each of the features of the positivist account. Consider the judgment's conception of sources. The Court considered and rejected the notion that the text of the *Constitution Acts* were exhaustive of Canadian constitutional law. Rather, at the outset of its answer to the reference questions, the Court stated:

> The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules"…[35]

The Court's assertion that the Canadian Constitution contains unwritten rules or "principles" (terms which the Court used interchangeably, without reference to the technical distinction between the two drawn by legal theorists)[36] required some sort of justification. Indeed, given the Court's statements in a recent judgment that written constitutions ground the legitimacy of judicial review in liberal democracies, and promote legal certainty and predictability[37]—elements of the positivist account—the Court needed to explain *why* the conventional account was inadequate. Unless, of course, what it meant by "unwritten rules" was confined to those rules that have long existed as part of Canadian constitutional law, concerning, for

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34. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996); D. Dyzenhaus, "The Legitimacy of Legality" (1996) 46:1 U.T.L.J. 129.

35. *Quebec Secession Reference*, *supra* note 1 at para. 32, quoting s. 52(2) of the *Constitution Act, 1982*, *supra* note 28 and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [hereinafter *Provincial Judges Reference*] at para. 92.

36. E.g., *Taking Rights Seriously*, *supra* note 17 at ch. 2.

37. *Provincial Judges Reference*, *supra* note 35 at para. 93.

example, the prerogative powers of the Crown and the doctrine of parliamentary privilege, and which were not extinguished by the creation of the *Constitution Act, 1982*.[38]

In its defense of the presence of unwritten rules or principles in the Canadian constitutional scheme, though, it is clear that the Court had in mind much more than these well-established rules. Upon close reading, it appears that the Court offered two different defenses. The first justification attempted to tie the written text and the unwritten *principles* of the Constitution together. According to the Court, the unwritten principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."[39] This formulation suggests that the principles are general or abstract in nature, and the specific provisions of the constitutional text implement or actualize them. Indeed, the unwritten norms identified by the Court—federalism, democracy, constitutionalism and the rule of law, and respect for minority rights—*were* general or abstract. These principles, in the Court's words, formed the Constitution's "internal architecture" or "basic constitutional structure," around which the specific provisions of the Constitution were framed.[40] This justification of unwritten constitutional principles also suggests that they play a rather limited practical role—as aids to the construction of ambiguous constitutional provisions or the harmonious interpretation of different and perhaps apparently divergent or conflicting constitutional provisions. Again, the Court said as much, when it stated that these principles "assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions."[41]

The difficulty with the first justification is that it cannot explain the Court's judgment, for the Court went far beyond using unwritten principles to construe ambiguous constitutional provisions or reconcile provisions that were in conflict. In fact, the constitutional text contains no references, explicit or implicit, to the legal principles governing secession. Moreover, in contrast to the generality or abstractness of the unwritten norms of federalism, the rule of law, etc., the rules governing secession laid down by the Court are rather specific. What must be acknowledged is that the Court engaged in a style of constitutional interpretation which on any positivist account would be characterized as making constitutional rules, as opposed to merely applying them. In effect, the Court wove a secession clause[s] into the Constitution through the use of unwritten constitutional norms. It seems that the Court acknowledged this, when it quoted, with approval, a statement in an earlier judgment that the unwritten principles could be used to fill the "gaps in the express terms of the constitutional text."[42]

Faced with the inadequacy of its first justification to make sense of its judgment, the Court offered another. It defended the use of unwritten rules to not only clarify

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38. P.W. Hogg, *Constitutional Law of Canada*, Student ed. (Scarborough, ON: Carswell, 2000) at c. 1.7 and 1.9.
39. *Quebec Secession Reference*, *supra* note 1 at para. 49.
40. *Ibid.* at para. 50; the second quotation is from *OPSEU* v. *Ontario (A.G.)*, [1987] 2 S.C.R. 2 at 57.
41. *Quebec Secession Reference*, *supra* note 1 at para. 52.
42. *Ibid.* at para. 53, citing *Provincial Judges Reference*, *supra* note 35 at para. 104.

the written Constitution, but also to augment it. This argument was functional. In the Court's words, the unwritten rules of Canadian constitutional law exist:

> because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government.[43]

The Court's argument appeared to be that the written text of the Constitution cannot possibly specify in advance adequate rules to govern all the situations that may arise in the future in which the constitutional order has a stake or interest. The difficulty with this argument, though, is that it appears to beg the question as to why the appropriate solution to this in a given case would be to evolve the Constitution through judicial interpretation of the underlying principles at its foundation, rather than to turn responsibility over to the political actors to effect an amendment of the Constitution, pursuant to the procedures provided in Part V of the *Constitution Act, 1982*. Here one kind of institutional answer that might have at least limited theoretical force is that the practice reference of questions from the political branch to the Court gives it a place, where invited by the political branch to do so, in charting the future influence of the Constitution on political events that the court might not possess when deciding cases and controversies. It should be noted that, in the *Secession Reference*, the very constitutional basis for references was challenged, and the Court had to provide an explicit affirmation of the legitimacy of the institutional role thrust upon it through the practice of the reference. Yet, in that part of the judgment as well, the Court remained largely unforthcoming with any general theory about the significance of the reference for the balance of judicial and political action in charting the future evolution of constitutional law and politics.

Thus, what the Court required, but what its judgment did not provide, is an account of sources that justifies the recourse to unwritten constitutional norms. In our view, the theory that best justifies the judgment is one we call dualist interpretation.[44] The dualist scheme comprehends two different interpretive roles for courts. First, there is the task of *ordinary interpretation*, whereby courts interpret and apply the constitutional text in the fashion suggested by the conventional account. The existence of unwritten norms is acknowledged here; however, their role is limited to resolving textual ambiguities and reconciling conflicting provisions. Ordinary interpretation covers day-to-day matters in the life-cycle of modern constitutions—specifically, the resolution of concrete legal disputes before courts of law where the parties do not challenge the very legitimacy of the constitutional order itself.

However, at exceptional moments, a court may engage in *extra-ordinary interpretation*, in which the text assumes secondary importance. Here, the Constitution is comprehended as a scheme of principle organized around unwritten norms that

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43. *Ibid.* at para. 32.

44. As will became apparent, our account of dualist interpretation differs sharply from Bruce Ackerman's account of dualist democracy in *We the People, Vol. 1: Foundations* (Cambridge, MA: Belknap Press of Harvard University Press, 1991).

explain, and are implemented by, the constitutional text. These norms are regarded as providing "an exhaustive legal framework for our system of government," and as a consequence, invite the courts to interpret them in a manner that, in positivist eyes, would resemble amendment, and lead to the fashioning of new constitutional rules. We would classify the Court's judgment in the *Quebec Secession Reference* as a paradigmatic case of extra-ordinary interpretation.

The dualist scheme raises a number of questions that revolve around the relationship between the power of the courts to engage in extra-ordinary interpretation, and the power of political institutions to alter the Constitution through formal amendment. The first concerns the respective roles of extra-ordinary interpretation and formal amendment: has extra-ordinary interpretation displaced the need for ordinary amendment, and if not, how do we determine which one applies? The second question raised by the dualist scheme concerns the distinction between extra-ordinary interpretation and formal amendment: are extra-ordinary interpretations of the Constitution equivalent to amendments, or are they something different? Again, the Court was woefully unclear, in large part because while at some points it recognizes the extra-ordinary nature of the context, in many other places it seeks to present its judgment as quite ordinary, rather than acknowledging that it had shifted gears into an extra-ordinary mode. Thus, for example, at one point it stated that the duty to negotiate flowed not from a positive referendum result that amounted to a repudiation of the existing constitutional order, but rather from any proposals for constitutional amendment.[45]

Nonetheless, some points are clear. Extra-ordinary interpretations, in strictly legal terms, are not formal amendments to the constitutional text. But extra-ordinary interpretation does force the positivist distinction between amendment and interpretation, and replaces it with a broader notion of constitutional evolution. Instead of imagining the Constitution as bounded or as containing gaps, that must be added to by constitutional amendment, dualist interpretation views the Constitution as a dynamic entity that aspires to exhaustiveness. In one narrow sense, the written Constitution does "run out," because the textual provisions may not address a particular scenario. But in a more fundamental sense, it does not, because the internal logic of the constitutional document is capable of governing those situations. The extension of the internal logic of the Constitution occurs either through formal amendment or extra-ordinary interpretation.[46]

Interpretive Responsibility: Another distinctive feature of the judgment is that it vests substantial, if not exclusive, responsibility for interpreting the constitutional rules on secession in particular situations or contexts with political organs, not the courts. This is a break with the Canadian constitutional tradition, which, as the Court itself noted, has hitherto drawn a distinction between the law of the Constitution, which was judicially enforceable, and the political conventions of the Constitution, which were only subject to political sanctions. Indeed, given that the operation of the unwritten rules on secession was held to impose binding legal obligations on

45. *Quebec Secession Reference*, *supra* note 1 at para. 69.

46. Compare this account with Ackerman's in *We the People*, *supra* note 44—ours is almost a mirror image of his dualist account.

the federal and provincial governments, one might have expected the Court to hold that the application of those rules to particular situations related to secession would be a matter of judicial interpretive responsibility. However, the Court noted "that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme."[47]

The Court then went to hold that its role was "limited to the identification of the relevant aspects of the Constitution in their broadest sense."[48] The relevant constitutional rules—defined in earlier passages—fell into two categories. First, there were the pre-requisites to the duty to engage in constitutional negotiations: a referendum vote by "a clear majority [of the population of Quebec] on a clear question" that evinced their intention to secede from Canada. Second, there were the rules governing both the process and outcome of the negotiations themselves. The Court's governing premise appeared to be that those negotiations must be conducted "in accordance with the underlying constitutional principles already discussed," such as democracy.[49] This premise led the Court to reject the view that a positive referendum would impose a "legal obligation on the other provinces and federal government to accede to the secession of a province."[50] But it also rejected the "the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government."[51] Instead, the Court held that a positive referendum vote for secession triggers "a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire," which seems to amount to an obligation not only to negotiate, but to negotiate in good faith.[52] Moreover, the judgment seemed to suggest that the substantive outcome of any agreement must show adequate respect for the unwritten constitutional principles. Thus, the Court stated that "[t]he negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in

47. *Quebec Secession Reference, supra* note 1 at para. 98 [emphasis in original].
48. *Ibid.* at para. 100.
49. *Ibid.* at para. 88. Also see *ibid.* at para. 90: "The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."
50. *Ibid.* at para. 90.
51. *Ibid.* at para. 92 [emphasis in original]. The Court went on to say (in *ibid.* at para. 92) that "[t]he continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada."
52. *Ibid.* at para. 88. It is noteworthy that "[w]hile the negotiators would have to contemplate the possibility of secession," the Court clearly envisions that the negotiations may not reach agreement (*ibid.* at para. 97). Also see *ibid.* at para. 96: "No one can predict that course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized." Thus, the Court never endorses the proposition that, at the end of the day, good faith in negotiation extends to actually offering or acceding to secession. The possibility of impasse, even in the case that the constitutional principles are respected by all parties to the negotiations, clearly implies that these principles do not contain a decision-rule able to break such an impasse. An example of such a decision-rule would be that Quebec must be offered secession if it agrees to terms consistent with the four principles. But the Court clearly preferred to accept the possibility of an impasse, with a judgment on the responsibility for the impasse to be left to the world community, than to tilt even that far in implying a right to secede. On these points, see *Special Senate Committee on Bill C-20 Debates*, (8 June 2000) (R. Howse), online: Proceedings of the Special Committee on Bill C-20 <http://www.parl.gc.ca/36/2/parlbus/commbus/senate/com-e/clar-e/04ev-e.htm>.

the negotiation process."[53] Beyond specifying these constitutional rules, the Court stated that it had "no supervisory role."[54]

Given this radical departure from normal constitutional practice, the Court owed us an account of how it understood its role in the Canadian constitutional scheme. The Court offered two such explanations. The first, oddly enough, reverted to the traditional distinction between the law of the Constitution and "the workings of the political process."[55] The former defines the constitutional framework within which the latter sorts of non-constitutional decisions are made. Moreover, because those latter decisions are non-constitutional, they are beyond the scope of judicial review and non-justiciable. As the Court stated:

> The Court has no supervisory role over the *political aspects* of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to *political evaluation*, and properly so.[56]

A few sentences later, the Court re-iterated the distinction between the legal framework governing secession and the non-justiciability of the political judgments that must be made within that framework, when it added, "[t]o the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties."[57] Finally, the Court clarified that non-legal was synonymous with non-justiciable, when it referred to "[t]he non-justiciability of political issues that lack a legal component."[58]

The difficulty with this justification is that it does not yield the Court's innovative holding that the rules governing secession are at once legally binding and non-justiciable. Rather, the Court appears to have regressed to the standard view that the law of the Constitution is the business of the Courts, and defines the decisional space within which the political process can proceed unimpeded aside from those constraints. Judicial interpretation of the Constitution, in other words, is both exclusive and supreme. This sort of analysis suggests the following *ratio*—that the legal rules governing secession are fully justiciable, but that beyond those legal requirements, political actors may act unconstrained. The Court, though, held exactly the opposite—that the legal rules governing secession are non-justiciable (or at least not fully justiciable), but that those rules are legally binding on all parties to the negotiating process and must guide their deliberations. In other words, the Court's judgment modified the traditional approach to interpretive responsibility in two different respects. First, it replaced exclusive with shared interpretive jurisdiction, giving the political actors a role in constitutional interpretation. Moreover, by eschewing a "supervisory role," the Court may have even divided interpretive supremacy over the Constitution, at least with respect to the rules governing secession.

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53. *Ibid.* at para. 94 [emphasis in original].
54. *Ibid*. at para. 100.
55. *Ibid.*
56. *Ibid.* [emphasis added].
57. *Ibid.* at para. 101.
58. *Ibid.* at para. 102.

The Court's second justification spoke directly to these novel aspects of its judgment. Instead of sharply distinguishing between law and politics, the Court relied on the comparative institutional advantage of the political actors in this area of constitutional interpretation, stating that the Court itself lacked the requisite "information and expertise."[59] Elaborating upon the informational limitations of the litigation process, the Court explained that "the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations."[60] Clarifying the limitations of its expertise, the Court reasoned that "the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis."[61] In other words, judicially enforceable standards are absent. Presumably, shared jurisdiction and divided supremacy are suitable responses to these institutional considerations.

Unfortunately, the Court's second justification is problematic as well. It is not at all clear, for example, that the Court is incapable of adjudicating upon both the pre-conditions to, and the process and outcome of, constitutional negotiations. The interpretation of the terms "clear majority" and "clear question," the enforcement of the obligation to negotiate in good faith, and even the compliance of a negotiated agreement with certain basic constitutional principles, are not totally beyond the realm of judicial competence.[62] As the debate over the political questions doctrine illustrates, judicially enforceable standards can always be developed. Moreover, assuming these institutional considerations to be valid, they fail to define the Court's role. Although the Court has eschewed the prospect of supervision, it nevertheless articulated the justifications behind the rules governing secession. Although this feature of the judgment may be necessary in cases of extra-ordinary interpretation, one gets the sense that the Court would have offered these justifications regardless.

The account which best explains the Court's judgment is one we call the model of *joint constitutional responsibility*. It is inspired by Lawrence Sager's theory of the underenforced constitutional norm. Sager's basic claim is that there are situations where the U.S. Supreme Court, "because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries."[63] That norm is legally valid to its full conceptual limits. Judicial decisions only demarcate the limits of its judicial enforcement, and reflect the practical limitations on the ability of courts to translate abstract constitutional ideals into judicially enforceable standards. Beyond the boundaries of judicial competence, then, it is for the political organs of the Constitution to frame their own interpretations of those norms and assess their own compliance with them. Thus, interpretive responsibility for

59. *Ibid.* at para. 100.
60. *Ibid*. at para. 101.
61. *Ibid.*
62. For example, see the judgment of the Constitutional Court of South Africa in *Certification of the Constitution of South Africa, 1996 (Re)*, [1996] S.A.J. No. 19, where that court measured the compliance of the Final South African Constitution with a list of "constitutional principles" spelled out in the Interim Constitution.
63. L.G. Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91:6 Harv. L. Rev. 1212 at 1213.

particular constitutional norms is both shared and divided. It is shared to the extent that courts are responsible for articulating constitutional norms in their conceptually abstract form. But interpretive responsibility is divided because beyond the limits of doctrine, constitutional interpretation is left to the political organs. The image which emerges is one of "judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms … come to be applied."[64]

The model of joint constitutional responsibility also draws a distinction between the full conceptual limits of a constitutional norm and the boundaries of judicial enforceability. The limits of justiciability, though, turn not on competence but on legitimacy. Vesting the courts with exclusive and supreme interpretive responsibility creates the danger of marginalizing the Constitution in public discourse. By denying democratic institutions any role in constitutional interpretation, those institutions may fail to examine constitutional considerations at all in the legislative process. As a consequence, the Constitution may recede from importance in public life. This is a particular problem for liberal democracies like Canada, for which constitutions are a central component of national self-understanding. We adopt here the (admittedly simplifying) distinction between civic nations, which are founded on the basis of a shared commitment to principles of political justice, and ethnic nations, that are viewed as instruments to ensure the survival and flourishing of a particular people or *Volk*. In civic nations like Canada, the principles of political justice often take the form of written constitutions. Written constitutions, then, serve as the cement of social solidarity, and can give rise to a constitutional patriotism. However, for that constitutional patriotism to be sustained, it is imperative that constitutional discourse take place not just in the courts, but in democratic institutions, giving a concrete political existence to the common values and principles that underpin such constitutional patriotism.[65]

The model of joint constitutional responsibility raises a number of difficult questions. The first is the question of *which* constitutional norms should be subject to this shared and divided jurisdiction, as opposed to exclusive judicial interpretation. The judgment itself offers little assistance in this regard. By focusing on institutional considerations, to the exclusion of the larger issues of political legitimacy raised by involving the courts in the future of the federation, the Court deprived itself of the opportunity to address this issue. It may be that what drove the Court was a sense that the judicial interpretation of the rules governing secession would have failed to generate widespread acceptance in the political community. This is yet

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64. *Ibid*. at 1240.

65. This understanding of the importance of constitutional politics—by necessity, a politics of principle—amounts to a rejection of the view that politics is merely about registering and aggregating the preferences of citizens. See generally, J. Cohen, "Deliberation and Democratic Legitimacy" in A. Hamlin & P. Pettit, eds., *The Good Polity: Normative Analysis of the State* (New York: Basil Blackwell, 1989); J. Cohen, "Procedure and Substance in Deliberative Democracy" in S. Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996); J. Elster, "The Market and the Forum" in J. Elster & A. Hylland, eds., *Foundations of Social Choice Theory* (New York: Cambridge University Press, 1986); C.R. Sunstein, "Preferences and Politics" (1991) 20 Phil. & Publ. Affairs 3 at 20.

another part of the judgment where the Court owed us a better explanation than it provided.

The second question raised by the model of joint constitutional responsibility concerns the interpretive responsibility of political institutions.[66] That responsibility entails an obligation for the political organs to lay down relatively concrete principles that interpret and apply the constitutional rules governing secession. This obligation follows from the general principle that rules of constitutional law often must be interpreted and specified to be fully implemented. Courts do this through the development of doctrine. Political institutions, by contrast, may do this through statutes, resolutions, or declarations. In the wake of the *Quebec Secession Reference*, for example, political institutions must now define what a clear majority and a clear question mean. These terms are not self-defining, and require elaboration. This, of course, is the best way to understand the proposed *Clarity Act* (Bill C- 20), the long title of which is "An Act *to give effect to* the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the *Quebec Secession Reference*."[67] Indeed, one effect of the judgment has been to force these issues onto the forefront of the political agenda. Bill C-20 takes up this challenge, by spelling out procedures and criteria according to which the House of Commons will determine whether a clear majority has voted in favour of a clear question in favour of secession. The more general point is that the vesting of interpretive responsibility with political institutions enhances political accountability. The Court's simultaneous statement that it lacked the power to interpret the rules governing secession, but that the political institutions *were* charged with this task, had the effect of clarifying the lines of responsibility.[68] Thus, coupled with a much clearer legal framework governing secession, the judgment means that political institutions can no longer avoid difficult questions on the pretext that they are clouded in constitutional uncertainty. Indeed, there is no doubt that *Quebec Secession Reference* gave rise to a political dynamic that made the enactment of Bill C- 20 both politically inevitable and constitutionally required.

A further perspective on the Court's view of interpretative responsibility is provided by Sunstein's observation that certain judicial outcomes can be understood as democracy-promoting, or even democracy-forcing.[69] The Court may further a conception of deliberative democracy by deciding in such a way as to require democratic deliberation, or to improve its quality. In some instances, where positions are entrenched and common ground elusive, there may be not be an evident starting point or even rules of the game for democratic deliberation, the idea of a "clear background" against which democratic institutions can work. By specifying some

66. For interesting discussions of this issue in the American context, see D.A. Strauss, "Presidential Interpretation of the Constitution" (1993) 15 Cardozo L. Rev. 113; P. Brest, "The Conscientious Legislator's Guide to Constitutional Interpretation" (1975) 27:3 Stan. L. Rev. 585.

67. Bill C-20, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, 2d Sess., 36th Parl., 1999 (as passed by the House of Commons 15 March 2000) [emphasis added].

68. Katyal, *supra* note 26.

69. C.R. Sunstein, *One Case at a Time*: *Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

general rules or norms that can constitute legitimate common ground on which deliberation might occur, but by refusing to decide in such a way as to foreclose the possible outcomes of deliberation, the Court promotes democracy. In fact, the duty to negotiate—the most striking unwritten rule elaborated by the Court in this decision—could well be described as "democracy-forcing." The democratic angle is useful, particularly, in pointing out the oversimplification in the positivist account that suggests the appropriate posture for the Court, where the existing law "runs out," is to leave matters to the political process or constitutional amendment. But by failing to act at all, the Court may, in certain situations, actually worsen, or increase the transaction costs, of the political actors resolving the controversy, or agreeing to new explicit constitutional rules for future resolution of this kind of controversy by the judiciary.

The final question is whether the model of joint constitutional responsibility excludes the possibility of judicial review entirely. Recall that constitutional rules are valid to their conceptual limits, but are underenforced for reasons of legitimacy. It is not inconceivable, then, that a situation might arise where an interpretation put on an underenforced constitutional rule by a political institution might be conceptually invalid. This is a hard case, because the courts defer matters to the political institutions precisely because a judicial decision would lack the requisite legitimacy. But if a political institution's interpretation is conceptually flawed, then its decision may lack legitimacy as well. It may be in these exceptional cases that the courts would retain the power to strike down political decisions. Indeed, one of the justifications for allowing courts to articulate a theory underlying a provision may be to put political institutions on notice that such judicial review is still available. What this suggests is that the model of joint responsibility is ultimately founded on judicial self-restraint, rather than the abdication of the power of judicial review in deference to the prerogatives of the other branches of government. Thus, we are somewhat skeptical that the Court has washed its hands entirely of the rules governing secession.[70] In this regard, the enactment of Bill C-20 may rather

70. Compare *Nixon* v. *United States*, 506 U.S. 224 (1993) (various justices expressing the view that Congressional interpretations of the term "trial" in the Impeachment Clause are subject to judicial review in extreme circumstances, such as the adoption of Senate rules providing for automatic convictions without any formal proceedings).

The question of whether the Court will second-guess interpretations of the rules governing secession adopted by the political actors is distinct from another issue—whether the Court will enforce the provisions of Part V of the *Constitution Act, 1982* to ensure that the correct amending formulas are applied to effectuate constitutional change. Unfortunately, the judgment is extremely ambiguous on this point. On the one hand, the failure of the Court to mention the amending procedures in Part V, coupled with its disavowal of any supervisory role in constitutional negotiations, suggests that unwritten norms subject to political interpretation alone will guide the process of secession. The centrality of referenda to constitutional change, despite the lack of any textual support for that view, also lends support to this interpretation. On the other hand, the Court does consider constitutional changes as drastic as secession to still fall within the definition of a constitutional amendment (*Quebec Secession Reference*, *supra* note 1 at para. 84), and emphasizes that secession will require an amendment (*Ibid.* at para. 97). Coupled with the Court's reference to "the applicability of various procedures to achieve lawful secession" (*Ibid.* at para. 105), the Court might be suggesting that Part V will be engaged. However, even here, the Court does not identify the relevant amending formula, or even refer to Part V explicitly, suggesting that the existing formulas may be inadequate.

unexpectedly give the courts an opening to re-enter the legal fray over the constitutional framework regarding secession, because it provides a statutory basis for judicial intervention.[71] Indeed, interpreting the Court to have closed off further *dialogue ex ante* with the political branches by permanently renouncing interpretive responsibility over certain subject-matter—pre-judging its competence, as it were, without being willing to consider, based on the issues that emerge, which have sufficient legal elements to warrant further intervention—would suggest not joint responsibility, but abdication of responsibility, at odds with the Court's own substantive criteria for sharing.[72]

Interpretive Style: The final issue we address in this section is the Court's interpretive methodology. Instead of sticking closely to the constitutional text, as the conventional account urges courts to do, the Court articulated a normative vision of the Canadian constitutional order. This is evident from the outset of the judgment, where the Court stated that this case presented "momentous questions that go to the heart of our system of constitutional government."[73] After dealing with some preliminary objections to its reference jurisdiction, the Court then turned not to the text of the *Constitution Acts*, but to the unwritten principles of constitutional law that lay at the foundation of the Canadian constitutional order. The Court then went on to discuss each principle in considerable detail, both at the level of theory and practice. Thus, the Court took pains to distinguish constitutional democracy subject to the rule of law from simple majority rule. Out of these principles, the Court then fashioned the constitutional rules governing secession.

The Court offered little in the way of justification for its ascent to abstract normativity. This is rather unfortunate, given its departure from its normal practice—to begin with the relevant provisions of the Constitution. The Court came closest to providing a justification, though, in its scattered references to the relationship between legality and legitimacy. To the Court, legality stood for the compliance of public decision-making with the institutional formalities and procedures laid down by the constitutional text. Legitimacy, by contrast, referred to the justness or rightness of a constitutional regime. A constitution is legitimate if it reflects "the aspirations of the people," suggesting that a democratic pedigree is one condition of legitimacy.[74] Another condition of legitimacy, though, is compliance with "moral values, many of which are imbedded in our constitutional structure," including values which presumably do not merely reflect majority preferences.[75]

The Court's statements on the relationship between legality and legitimacy are hard to interpret, because they point to two rather different conceptions of that relationship. At times, the Court argued that legality and legitimacy are both necessary, but not sufficient, criteria for the survival of a constitutional system. On this account, legitimacy and legality are analytically distinct. Thus, the Court was careful to point

71. We owe this point to Amir Sperling.
72. This point was suggested to us by Annalise Acorn.
73. *Quebec Secession Reference*, *supra* note 1 at para. 1.
74. *Ibid.* at para. 67
75. *Ibid.*

out that the patriation of the Constitution in 1982 complied both with requirements of legality (adoption by the Imperial Parliament) and legitimacy (the conventions governing constitutional amendments); by implication, had either been absent, the 1982 amendments might not have taken hold. At other times, though, the Court seemed to suggest that legality is a necessary means to securing legitimacy. As we noted earlier, this is the aspiration of liberal democracy. We take this to be the meaning of the Court's obscure statement that in the Canadian constitutional tradition "legality and legitimacy are linked."[76]

The Court's apparently contradictory statements on the relationship between legitimacy and legality can be reconciled in the following way. On most occasions—in the day-to-day operations of the state—legality is sufficient to secure the legitimacy of liberal democratic regimes. However, in exceptional circumstances, legality and legitimacy may come apart, so that the issue of legitimacy must be addressed directly. It is readily apparent from the judgment that a positive referendum vote in favour of secession would force apart legitimacy and legality in this manner. Thus, while the Court noted that "the results of a referendum have no direct role or legal effect," it also noted that the "continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecois that they no longer wish to remain in Canada," because the latter amounted to a "clear repudiation of the existing constitutional order." [77]

The coming apart of legality and legitimacy in exceptional circumstances raises the question of how the legitimacy of a constitutional order could be restored. The positivist account, for example, suggests that the express exclusion of the courts from the amending procedures reflects an institutional division of labour between the courts and the political organs of the Constitution in the protection of legality and legitimacy. Courts ensure fidelity to legality through judicial review; Parliament and the provincial legislatures use the amending power to ensure that the constitutional scheme as a whole is legitimate. The special role of institutions that are politically accountable in constitutional change might in fact render judicial amendment illegitimate. What the Court had to explain, then, is why it did not allow the normal processes of constitutional politics and amendment to operate, and instead took on the task of restoring the legitimacy of the Canadian Constitution itself. Indeed, how could the principles of the Canadian constitutional order legitimately govern or structure a process whose starting premise was, in the Court's own admission, a clear repudiation of that order? It would seem that only constitutional amendment by the political actors could reconcile the repudiation of the constitutional order by one province with the overall legality and integrity of that order, through formalizing the response to repudiation in a constitutional amendment.

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76. *Quebec Secession Reference*, *supra* note 1 at para. 33.

77. *Ibid.* at paras. 87, 92, 88. For a discussion of the challenge for constitutional interpretation posed by the coming apart of legitimacy and legality, and the need to have recourse to an adjudicative approach of the kind we describe in in this article, see R.J. Howse & A. Malkin, "Canadians are a sovereign people: how the Supreme Court should approach the reference on Quebec secession" (1997) 76 Can. Bar Rev. 186.

However, once we examine the political context surrounding the *Quebec SecessionReference*, it becomes evident that the Court acted in the face of the failure of federal political institutions to face the challenge posed by the referendum process in Quebec to the legitimacy of the Canadian constitutional order, and the comparable failure of the Quebec separatists to even engage the issue of the legitimacy of secession in terms of Canadian constitutional principles, rights, and interests, claiming that the choice to make a state is a matter of the will of a *Volk*, impervious to any effects on "others" who are not members of the *Volk*. Before the reference questions had been issued, it was entirely open to the federal government to lay down principles governing referenda and secession. To do so, however, would have been to confront the Schmittean extra-legalism of the Quebec separatists with a unilateral claim of the "enemy" (the federal authorities) about legitimacy. This would have reinforced the notion, propounded by separatists, that what was at stake was merely a clash of wills, unresolvable by any agreed or shared legal principles or conception of legitimacy.

In thus referring the matter to the Supreme Court, the federal government made a brilliant institutional wager—that the Court would not simply be identified by those whom it sought to persuade of the illegitimacy of unilateral secession, with the federal authorities *and* with one side in a boundless political struggle. The Court could effectively play a political role that the federal government would fail at precisely because of the Court's observance, historically and in this very case, of institutional constraints on its interpretive authority that would allow it to be fairly perceived as not "politicized" in the sense that separatists initially *claimed* that it would inevitably be if it chose to adjudicate the matter. In sum, the Court had to play a political role, which it could only legitimately and effectively do through setting institutional bounds around its engagement with the political choices of political actors.

The political context, and the Court's response to it, explains the shift to extraordinary interpretation. Moreover, the challenge to the legitimacy of the Canadian Constitution raised by the case also makes sense of the Court's ascent to abstract normativity. In the submissions of the parties, the Court was presented with two dramatically different and mutually incompatible accounts of the legitimacy of the Canadian constitutional order. On the one hand, the federal government took the position that democratic expressions of the will of the people of a province in themselves were of no significance to the legitimacy of the constitutional scheme. Rather, what was dispositive was adherence to legality, which, in the case of secession, was adherence to the amending procedures laid down in Part V of the *Constitution Act, 1982*. On the other hand, the amicus curiae took exactly the opposite position—that the legitimacy of the Canadian constitutional order was entirely dependent on expressions of democratic will, and that constitutional procedures could not fetter the right of Quebec to self-determination.

This clash of constitutional visions placed the Court in an extraordinarily difficult position. Choosing one position by necessity entailed the rejection of the other. Had the Court sided with one of the parties, its judgment would have, in effect, rendered the Constitution illegitimate in the eyes of a large segment of Canadians.

But nor was it open to the Court to avoid the abstract normative dispute at the heart of the litigation, in a manner akin to that suggested by Cass Sunstein. Sunstein proposes that, in normal cases, courts should be averse to grounding their decisions in controversial moral or political theories, because those theories are unlikely to secure wide agreement in liberal societies characterized by the fact of reasonable pluralism. He argues, though, that it may be possible that persons who disagree on a fundamental level may nevertheless agree on particular results, and on reasons that operate at a relatively low level of abstraction to justify them. Sunstein also acknowledges, however, that there are other cases, rather atypical of the daily fare of public law litigation, where it is inappropriate, or unrealistic, to seek low-level, untheorized or undertheorized agreement. He remarks that there are occasions where deciding cases on the basis of abstract, "relatively large-scale principles" is "legitimate and even glorious," referring to "rare occasions when more ambitious thinking becomes necessary to resolve a case or when the case for ambitious theory is so insistent that a range of judges can converge on it."[78]

The limitation of Sunstein's account (as he himself acknowledges) is that low-level agreement may not always be possible, especially when disagreements on fundamental questions of principle produce disagreements on specific outcomes. In the *Quebec Secession Reference*, for example, the normative dispute was of this nature, because the competing constitutional visions of the parties dictated dramatically different positions on the question of unilateral secession. Indeed, had the Court tried to follow Sunstein's advice on how *normal* cases should be adjudicated, it would have courted disaster. Justifying its decision on the basis of a theoretical account that was obscure and underdeveloped might have created the misunderstanding that it was applying one party's view by stealth, throwing into question the very legitimacy of its judgment. In fact, in a more recent articulation of his theory of adjudication, Sunstein actually raises the possibility that higher level agreement about general norms may exactly be what is required, where sharp divergences of perspective exist at a more concrete level. However, Sunstein identifies this situation strongly with constitution-making, not interpretation.[79] Yet, while this observation may be sound, there is no intrinsic reason why the only situation where agreement is easier with respect to abstract principles and harder with respect to particulars is that of constitution-making.

If one understands the Court's task as to provide a judgment that is legitimate in the eyes of Canadians on both sides of the secession debate, then we can see clearly why it resorted to general principles to craft its ruling. In the perspective of the divide between federalists and secessionists, these principles could enjoy the reasonable assent of everyone, whereas at the core of the debate over secession is in fact the moral bindingness of the constitutional *text* on Quebec, given the secessionist historical narrative of Quebec's "exclusion" in the creation of a self-standing written constitution in 1982, and the failure to remedy this exclusion in subsequent rounds of constitutional negotiations (Meech Lake, Charlottetown). Indeed, one

78. *Legal Reasoning*, *supra* note 22 at 46.
79. *One Case at a Time*, *supra* note 69 at 11-12.

could even say that in appealing to the four principles, the Supreme Court was appealing to the pride of the separatists that, contrary to the suspicions of many of their opponents, their movement is entirely liberal democratic. How then could they really repudiate the principles in question? And if they could not repudiate the principles, then how could they not accept the proposition that secession itself must take place in accordance with those principles? Thus, while in this case the Court's formal legitimacy was weak, given the secessionist repudiation of the formal text of the Constitution as a basis for deciding Quebec's future in relation to Canada, its substantive legitimacy was strong. Yet the Court apparently saw how easily this substantive legitimacy would slip away, were it required to apply in detail the abstract principles upon which it relied, and therefore enunciated its refusal to do so.

The judgment in the *Quebec Secession Reference* accordingly suggests the possibility of a dynamic interaction between sources, interpretive responsibility, and interpretive style. The idea is that only particular combinations of conceptions of sources, interpretive responsibility, and interpretive style will together secure the legitimacy of judicial review. These different components balance each other, together constituting a theory of constitutional interpretation. Moreover, altering a conception of one element in this package necessitates the modification of the others. The positivist account, for example, balances a robust notion of interpretive responsibility—judicial interpretation of the Constitution is both exclusive and supreme—against a view of interpretive style that sharply distinguishes adjudication from normative reasoning writ-large, and a narrow view of legal sources. The ascent to abstract normativity in the *Quebec Secession Reference*, along with an expansive view of sources, accordingly required an adjustment in the Court's conception of interpretive responsibility, to one where interpretive jurisdiction is both shared and divided.

The resort to abstract normativity in the *Quebec Secession Reference* raises the interesting question of *when* such a shift is justified. In this judgment, for example, the ascent to abstract normativity went hand-in-hand with extra-ordinary adjudication. In this judgment, the two were part and parcel of the same phenomenon. But one could imagine situations where the sort of institutional failure that gave rise to extra-ordinary interpretation here did not exist, but the Court nevertheless ascended to abstract normativity. Novel cases, cases where there are conflicting lines of authority, or cases where the established case-law seems to run counter to widely held moral and political values—different varieties of hard cases—all might invite the court to engage in what Ronald Dworkin calls a process of "justificatory assent."[80]

Another question which emerges is whether the phenomenon of institutional failure explains some of the more dramatic judicial decisions in Canadian constitutional history. The failure of the Trudeau government and the provinces to agree on a set of principles regarding provincial participation in the patriation of the Canadian Constitution may account for the holding on constitutional conventions

80. *Darwin's New Bulldog, supra* note 21.

in the *Patriation Reference*. The goal of relying on conventions was to combine an ambitious normative account of the Canadian federation with institutional self-restraints in the enforcement of those norms, albeit in a different manner from the *Quebec Secession Reference*. However, the use of conventions created serious problems of its own, because it conferred constitutional significance and normative force on mere political practice and tradition without any further considerations. Likewise, the inability of the federal and provincial governments to strengthen the economic union may have motivated the Court to step into the breach, with a series of ambitious judgments on the federal trade and commerce power, federal jurisdiction over peace, order and good government, mobility rights, and the constitutional aspects of conflicts of laws.[81] This suggestion is speculative, but we raise it for discussion.

81. *General Motors of Canada Ltd.* v. *City National Leasing Ltd.*, [1989] 1 S.C.R. 641; *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591; *De Savoye* v. *Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077; *Hunt* v. *T & N Plc*, [1993] 4 S.C.R. 289.