The Canadian Nondelegation Doctrine:

An Architectural Imperative

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Abstract

Delegation of legislative authority to the executive branch is a dominant practice in the modern Canadian administrative state. This dissertation argues that such delegation is unconstitutional. The unwritten principles of democracy, the separation of powers, and the rule of law – all defining features of the Constitution pursuant to leading Supreme Court of Canada decisions – demand that legislative decision-making be performed in legislatures. Only the legislative branch has the mandate and the legitimacy to make substantive choices about the content of the law. The dissertation draws on the architecture of the Constitution to posit a theory of democracy as an institutionally specific form of conflict resolution. This theory provides that legislators abdicate their responsibilities when they delegate substantive legislative power, and courts abdicate their responsibilities when they permit such a fundamental distortion of constitutional structure to proceed. A judicially enforced nondelegation doctrine is a corollary of the way the Constitution is built. The project makes the case for the existence of a Canadian nondelegation doctrine, outlines its meaning and content, and illustrates its application in specific legislative contexts.

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Chapter 1

Project Introduction and Literature Review

My introductory discussion is divided into three sections. First, I clarify my overall normative enterprise, which is to assist in the important legal endeavour of constitutionalizing the administrative state. My contribution is, at least from the Canadian perspective, novel. This part of my discussion begins with a brief statement of the core of the project, then turns to analyze a central source of constitutional dysfunction in the administrative state, and concludes with my proposal for a corrective mechanism. The second section of my introduction situates my project within the landscape of existing Canadian legal scholarship. The third section offers a brief project outline.

1. The Normative Enterprise

a. The Core of the Project

The modern administrative state, often referred to as the welfare state, intervenes extensively in the economic and social activities of its citizens.[1] The goal of this officious state apparatus is theoretically the

[1] Harry Jones outlines the main characteristics of the welfare state as follows:

> (1) a vast increase in the range and detail of government regulation of privately owned economic enterprise; (2) the direct furnishing of services by government to individual members of the national community -- unemployment and retirement benefits, family allowances, low cost housing, medical care, and the like; and (3) increasing government ownership and operation of industries and businesses which, at an earlier time, were or would have been operated for profit by individuals or private corporations ("The Rule of Law and the Welfare State" (1958) 58 Colum. L. Rev. 143 at 143-44.).

This appraisal is consistent with that offered by Theodore Lowi, who identifies regulation and redistribution as the two main functions of the modern administrative state: *The End of Liberalism: The Second Republic of the United States* (New York: Norton, 1979) at 273 and *passim* ("***End of Liberalism***"). See also Cass Sunstein's discussion of the changes in the role of the modern state in "Constitutionalism after the New Deal" (1987) 101 Harvard L. Rev. 421 at 423-24, 437-40 ("**After the New Deal**"). Roderick A. Macdonald, writing in the Canadian context, stresses the "new public managerial functions" of the state, brought about by the pressures of rapid urbanization, changing employment relationships, a decline of traditional forms of social ordering (notably the family and the church), and a growing awareness of limited natural and industrial resources: "Understanding Regulation by Regulations," in Ivan Bernier & Andree Lajoie (eds.) *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: U of Toronto P, 1985) 81 at 129-31, 137-39 ("**Regulation by Regulations**").

common good. Indeed, Jürgen Habermas maintains that the interventionist state is a utopian project dedicated to "socially containing capitalism" through the intelligent application of "political and administrative power."[2]

Early advocates of the interventionist state such as the influential Anglo-Canadian administrative law scholar John Willis, the Canadian lawyer, political scientist, and academic J.A. Corry, and the American pioneer of administrative law James Landis all emphasized the ability of a professional, impartial, well-organized civil service to remedy social ills, manage the economy, and generally respond to the pressures and complexities of modern life.[3] For these theorists, the significant expansion of executive power ushered in by the administrative state was necessary, and did not fundamentally challenge the essentials of democratic governance.

This early confidence in the democratic legitimacy of the administrative state, however, has not endured. Prominent public law theorists from a range of jurisdictions, including David Dyzenhaus, Paul Daly, T.R.S. Allan, Eoin Carolan, Richard Stewart, Cass Sunstein, and Habermas himself have wrestled with the significant problems posed by the extreme expansion of executive power in societies theoretically grounded on the constitutional principles of individual freedom, popular sovereignty, and the controlled exercises of state authority and coercion. While these theorists have not rejected the central project of the welfare state, which one could say, following Habermas, is a "freedom-guaranteeing juridification" that "tame[s] the quasi-natural process of capitalistic growth,"[4] they have been concerned with seeking

[2] "The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies" (1986) 11:2 Philosophy and Social Criticism 1 at 13 ("**New Obscurity**").

[3] See John Willis, *The Parliamentary Powers of English Government Departments* (Cambridge, Massachusetts: Harvard UP, 1933) ("***Parliamentary Powers***"), and "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 U. Toronto L.J. 53 ("**Three Approaches to Administrative Law**"); J.A. Corry, "The Problem of Delegated Legislation" (1934) 11 Can. Bar Rev. 60 ("**Problem of Delegation Legislation**"); and James M. Landis, *The Administrative Process* (New Haven: Yale UP, 1938) ("***Administrative Process***").

[4] "Law as Medium and Law as Institution," in Gunther Teubner (ed.) *Dilemmas of Law in the Welfare State* (New York: Walter de Gruyter, 1988) 203 at 208-210 ("**Law as Institution**"); New Obscurity at 6. Habermas clarifies the purpose and methodology of the interventionist welfare state in the following terms:

methods of explaining, justifying, and in some respects altering intrusive systems of state power to provide a greater consistency with underlying principles and values.

In this project, I am centrally concerned with the challenge to democratic legitimacy and the rule of law posed by a defining feature of the modern state that appears to be outside of the main focus of Canadian public law, and while the remedy that I propose may be considered almost revolutionary, I argue that in fact recent evolution in our constitutional law renders my claims fully legitimate.

In his major work on public law, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Habermas has observed that the legislature has become "marginalized" in relation to the growth of administrative power in the modern state.[5] This marginalization, I maintain, flows directly from the practice of delegating legislative power to the executive branch of government. Far too often, central choices and decisions are not made by the primary democratic body, but rather vicariously by the executive, under grants of power that are of a highly questionable legality. I argue that this practice of surrogate law-making, which is a dominant feature of our political culture, must be controlled through a judicially enforced nondelegation doctrine, a remedy that ultimately seeks not to aggrandize judicial power but rather to restore the legislature to its place of prominence in the constitutional state.

I support my project with a detailed consideration of Supreme Court of Canada decisions that have recognized the primary place of unwritten principles in the Canadian Constitution. These decisions reveal that placing concrete legal constraints on the delegation of legislative power is a constitutional imperative.

> the welfare-state compromise and the pacification of class antagonism are to be achieved through employing democratically legitimated political power to foster and to tame the quasi-natural process of capitalistic growth, substantively, the project feeds on the remains of the utopian idea of a laboring society: as the status of the employee is normalized through political rights to participation and social rights to ownership, the general population gains the chance to live in freedom, social justice, and increasing prosperity. The presupposition here is that state intervention can insure a peaceful co-existence between democracy and capitalism (New Obscurity at 6).

[5] William Rehg (trans.) (Cambridge: MIT Press, 1996) [first published 1992] at 433 ("***Between Facts and Norms***").

b. The Administrative State and the Problem of the Delegation of Legislative Authority

In a seminal article entitled "The Reformation of American Administrative Law," Richard Stewart identifies a "traditional model" of public power, rooted ultimately in liberal contractarian theory, in which state interference with "private autonomy" is grounded in "consent" which is formalized in the legislature.[6] The peoples' consent to coercion, in the form of law, is transmitted from the law-making body of the legislature to the law-applying body of the executive, and this fundamental government process can be characterized as "transmission belt."[7]

Under the "'expertise' model of the New Deal period," on the other hand, Stewart observes that the liberal-contractarian model is significantly altered in that consent no longer directly fuels coercive state power through laws.[8] Instead, consent fuels broadly worded enabling clauses that authorize subordinate decision-makers to formulate law. Under the new interventionist state model, delegation becomes a dominant activity of the legislature. The executive recipient of delegated legislative authority often makes rules and regulations pursuant to vague grants of power, or applies vague legislated standards to particular cases. In the latter instance,

> the application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected interests. The required balancing of policies is an inherently discretionary, ultimately political procedure [emphasis added].[9]

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[6] (1975) 88 Harvard L. Rev. 167 at 1672-73 ("**Reformation of Administrative Law**"). Stewart observes "contractarian political theory running back to Hobbes and Locke" provides that "consent is the only legitimate basis for the exercise of the coercive power of government." It follows that because "the process of consent is institutionalized in the legislature, that body must authorize any new official imposition of sanctions on private persons" (at 1672). Grounding exercises of state power in consent formalized in the legislature enforces the cardinal liberal value of "private autonomy" by ensuring that "the governmental sanctions faced by an individual are rule-governed," and by ensuring

> on contractarian premises . . . that sanctions have been validated by a governmental authority to which the individual has consented and therefore the restraints imposed by the threat of sanctions may be viewed as self-imposed (at 1673).

Stewart draws on John Locke, and also Jean-Jacques Rousseau and John Rawls, for the proposition that "Private autonomy may thus be defined as individual freedom of choice constrained only by rule-governed sanctions authorized through procedures to which an individual would consent" (at 1673).

[7] Reformation of Administrative Law at 1675.

[8] Reformation of Administrative Law at 1684, and see generally 1676-88.

[9] Reformation of Administrative Law at 1684.

The underlined phrases here reveal the fundamental transfer of political power (rather than laws) that occurs under the administrative state model. Determining law and policy – which involves balancing interests and clarifying choices – is the core legislative activity under a direct consent model, which conceives of political choices as the unique province of an institution where citizens, through their representatives, meet, deliberate, and ultimately decide on the appropriate use of coercive state power and the corresponding infringements of individual interests. The transfer of this fundamental political activity to the executive raises the "ultimate problem" of how "to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election."[10]

The models of governance outlined by Stewart are similar to models and paradigms discussed by Habermas and by the American constitutional theorist Thomas O. Sargentich. Habermas contrasts what he refers to as the "liberal paradigm of law" with the "social-welfare paradigm of law,"[11] while Sargentich contrasts the "rule of law" ideal with the "public purposes" ideal.[12] For each of these three theorists, the primary distinction is between a system of governance rooted in previously and clearly articulated rules and choices, emanating from a legislature, and a system of governance rooted in broad and expansive delegations, also emanating from a legislature, but enabling the executive to make *ad hoc* determinations of what is required in a particular policy context. The former approach provides for a rule-based system of protecting individual interests. The latter approach looks more to an "instrumentalist" achievement of

[10] Reformation of Administrative Law at 1688.

[11] *Between Facts and Norms* at 240-53, 388-409, 430-46, and see also Habermas' summary of the separation of powers model of government (at 186-193), in which he alludes to the "transmission belt model" (at 190-91), although he appears to take the phrase from Jerry Mashaw's restatement of Stewart's theory rather than from Stewart himself (Habermas cites Mashaw, *Due Process in the Administrative State* (New Haven: Yale UP, 1985) at 22).

[12] "The Reform of the American Administrative Process: The Contemporary Debate" (1984) 1984 Wisconsin L. Rev. 385 at 397-402, 410-15 ("**Reform of Administrative Process**").

public goals by a (theoretically) expert administrative apparatus.[13] Under the welfare state paradigm, "the administration assumes tasks of political legislation and autonomously develops its own programs in the process of implementation."[14] Legislated norms take a backseat to legislative delegations of authority that enable executive management of the economy and society.

The essence of delegation, which is so central to the welfare state instrumental model, is deferral: a space is opened up within the legislative decision-making process. It is of course central to the entire project of governing human conduct through laws that there will be a space between the creation of a rule and an application of a rule to a particular situation. What delegation under the interventionist state often reveals, however, is an institutional space opening up within the making of the governing rules themselves, which are not completely formed in the legislature. This space enables the creation of important and often coercive norms outside of the representative process, and thereby directly challenges democratic legitimacy.

Space within the law-making process is not itself necessarily a problem. Nadia Urbinati has distinguished representative democracy from direct democracy, and has elevated the former over the latter, precisely on the basis that it opens up a space that increases the potential for thought, communication, and deliberation on a given difficult policy matter.[15] This is a compelling theory, and it is one that has been expressly endorsed by the distinguished legal and political theorist Jeremy Waldron.[16] Significantly,

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[13] See Sargentich's discussion of "instrumentalism" in Reform of Administrative Process at 411-416. I consider instrumentalism in more detail in Chapter 7.

[14] Habermas, *Between Facts and Norms* at 436.

[15] Urbinati observes that

> A deliberative form of politics favours representation; it fosters a relationship between the assembly and the people that enables the demos to reflect upon itself and judge its laws, institutions, and leaders. The spatial and temporal gap opened by representation buttresses trust, control, and accountability if it is filled with speech (an articulated public sphere). Representation can also encourage political participation insofar as its deliberative character expands politics beyond the narrow limits of decision and administration ("Representation as Advocacy: A Study of Democratic Deliberation" (2000) 28:6 Political Theory 758 at 761, see also 766-68, 771-73, and *passim* ("**Representation as Advocacy**")).

[16] "Representative Lawmaking" (2009) 89 Boston U. L. Rev. 335 at 352-53 ("**Representative Lawmaking**").

however, the space that Urbinati is discussing is opened up within the democratic process: this is a space that increases the potential for deliberation in legislatures. When delegation defers law-making outside of the confines of the legislature, a space opens up that extends into an institution (the executive) that is structured around principles of hierarchy and authority, and not deliberation. Consent, the backbone of popular sovereignty, is suspended in what is essentially a pathological manner. Indeed, as Stewart observes,

> consent to a legislative resolution of disputed questions of social policy does not fairly imply consent to the remission of such questions to the legislature's agency.[17]

The concept of consent, in other words, does not smoothly navigate the links in a chain of delegated authority.

The institutional space that is opened up when legislative decision-making is deferred does not appear to be of great concern to advocates of welfare state reforms in government processes. John Willis has defended broad delegation on the basis that "Parliament is the heart, the Civil Service the head and hands, of our government."[18] J.A. Corry, commenting on Willis' views, offers the following more detailed explanation:

> the Industrial Revolution had no sooner turned the economy of England into an organic unit of great complexity than there arose a social conscience bent upon adapting that economy to the end of "distributive justice." This social conscience, along with the vital necessity of fitting the productive system to the past-war conditions of world trade are the inescapable forces of English domestic politics to-day and they unite in demanding a radical reorganization of the English economy. But so complex is the thing which is to be reorganized that no part of it can be touched without it having serious consequences for the whole. Those who are charged with the task must have expert knowledge of its interrelations as well as freedom to fashion measures in the very light of the concrete situation to which they are to apply. Parliament cannot meet these requirements but the Executive, through the Civil Service, can. Parliament must therefore relinquish this task to the Executive, being content, in respect of these matters, to debate general policy, outline the ends which the Civil Service is to reach, and then to provide a forum for criticism of the Executive in its choice of means.[19]

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[17] Reformation of Administrative Law at 1673, citing E. Freund, *Administrative Powers over Persons and Property* 220-21 (1928).

[18] *Parliamentary Powers* at 171.

[19] Problem of Delegated Legislation at 60-61. These views are shared by James Landis: see Stewart, Reformation of Administrative Law at 1677-78, citing Landis, *Administrative Process*, at 10-16, 46-50, 67-70.

Habermas, however, has observed the flaws in this expertise approach to state power. Expertise is not a self-executing virtue; rather, it is informed by political calculations. In other words, allegedly neutral administrators bring with them into the decision-making process considerations and presuppositions that are potentially exercised in an arbitrary, or non-rational manner if not restrained by externally governing norms:

> independent administrative power cannot be detached from constitutional norms without consequences. That is, a self-programming administration has to give up the neutrality in dealing with normative reasons that was intended by the classical separation of powers. In this respect, a trend toward matter-of-factness is precisely what we do not observe. To the extent that the administration assumes tasks of political legislation and autonomously develops its own programs in the process of implementation, it must decide on its own how to justify and apply norms. These normative questions, however, cannot be decided from the standpoint of effectiveness, but demand that normative reasons be dealt with rationally. An administration operating in the cognitive style lacks the communicative presuppositions and procedures for doing this. The technocratic denial and empiricist redefinition of normative questions in no way leads to a matter-of-fact treatment of administrative problems. Rather, it results in opportunistic or unreflective ways of reconciling value complexes without the guidance of reasonable criteria. The symptoms of an erosion of the constitutional state no doubt signal crisis tendencies.[20]

Under the administrative state, democracy falls into the institutional space that opens up between the moment of consent and the moment of law-making. Along with democracy, a second and closely related constitutional principle, the rule of law, is likewise eroded. As the Supreme Court of Canada observes in *Re: Resolution to Amend the Constitution* ("***Patriation Reference***"), the rule of law requires "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."[21] These rule of law goals are all potentially undermined when laws and policy choices are not clearly spelled out in advance, in a legislative context. When law-making and policy-making choices are institutionally deferred, and occur outside of the representative forum of the legislature, often through opaque, transient, and under-publicized processes by executive bodies that should themselves be subject to laws, the constitutional state exhibits "crisis tendencies."

[20] *Between Facts and Norms* at 436.
[21] [1981] 1 S.C.R. 753 at 805-806.

Under a system of popular sovereignty, the formulation of governing norms is the responsibility of the people, through their elected representatives. Steering must come from the institution with the credentials to both entertain conflicting views and resolve these views fairly in a process approximating popular consent as closely as democratic institutions can. This resolution must provide detailed instructions to the executive, for otherwise there is no meaningful resolution and no meaningful consent. Willis' notion that the legislature is only the "heart" in the process of government is undemocratic. The legislature is, and must be, the "head." It is the place where conflicts are aired; it is the place where decisions are made; and it is the place where consent is given. The legislature is ultimately the place where governing norms are to be generated, thereby informing and restraining potentially arbitrary exercises of public power. When this process is dislocated, as it is when excessive delegations of legislative power occur, the rule of law joins democracy in an uncertain and unconstitutional space.

c. Seeking a Viable Restraining Mechanism

In Western democracies such as Canada, the U.K., and the U.S., the primary controls on the administrative state have come from the courts. Judicial control of executive power has developed as a response to a largely passive legislature. As Mark Elliott observes, in his detailed treatment of the "constitutional foundations of judicial review" in the United Kingdom, the courts have been required to manage an "accountability deficit" that has emerged as the "immense regulatory power" of the "interventionist" state has escaped Parliamentary control.[22] Elliott quotes the former Chief Justice of the Australian High Court, Sir Gerard Brennan to the effect that "We can perceive an increment in the scope of judicial review responding to a diminution in legislative control over executive power."[23]

[22] *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001) at 1 ("***Constitutional Foundations***").
[23] *Constitutional Foundations* at 2, quoting Sir Gerard Brennan, "The Purpose and Scope of Judicial Review," in Michael Taggart (ed.) *Judicial Review of Administrative Action in the 1980s* (Auckland: Oxford UP, 1986) 18 at 19.

Despite forceful critiques of the legitimacy of the courts interfering with executive processes advanced by prominent scholars such as Harry Arthurs and John Griffith,[24] administrative law doctrines have proved remarkably effective in restraining certain exercises of executive power. In particular, adjudicatory decision-making by boards and tribunals and discretionary decision-making by executive officials have been brought within the confines of a rapidly developing framework of legal controls. In the leading case of *Dunsmuir v. New Brunswick* ("***Dunsmuir***"), the Supreme Court of Canada clarifies that judicial review of the procedural and substantive exercises of executive power is available "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes."[25]

When attention is directed more narrowly to the question of executive law and policy-making, however, the reach of these administrative law doctrines appears quite limited. Here the root of the problem is delegating legislatures, which have effectively "marginalized" themselves, to borrow Habermas' expression. Addressing this phenomenon is somewhat outside of the province of administrative law, which takes the legality of an enabling provision as a given. Control of the underlying legislative decision to delegate law and policy-making power to the executive is more properly a matter of constitutional law. Yet the courts have proved unwilling to develop constitutional law doctrines to control legislative power unless written foundational documents are implicated. Provisions of the *Constitution Act, 1867* ("***Constitution Act, 1867***"),[26] and the *Constitution Act, 1982* ("***Constitution Act, 1982***"),[27] have often been employed by Canadian courts to control the substance of legislation, and under the latter enactment, the *Canadian Charter of Rights and Freedoms* ("***Charter***"),[28] has of course been of primary importance. But legislative decisions to delegate law and policy-making power raise formal rather than substantive

[24] H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1 ("**Dicey Business**"); J.A.G. Griffith, "The Brave New World of Sir John Laws" (2000) 63:2 Modern L. Rev. 159.
[25] [2008] 1 S.C.R. 190 at para. 28.
[26] (UK), 30 & 31 Victoria, c. 3.
[27] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[28] *Constitution Act, 1982*, Part I.

constitutional issues. Here the concern is not what the legislature seeks to achieve, but how it is proceeding. Judicial supervision in this area is appropriate.

As I discuss in detail in the ensuing chapters, and especially in Chapter 5, the architectural logic of a democratic form of governance is based on a decision-making process that channels politically contentious matters into a forum where citizens can make binding decisions. The institution of the judiciary is required to respect the substantive political choices made within this forum, to the extent that such choices conform to express constitutional enactments. But the courts are also required to guard the integrity of the overall decision-making process itself, and this guardianship role includes ensuring that power is channelled in institutionally appropriate ways. A formal control on the actual movement of decisions and choices out of the political process and into the implementation institution of the executive is an architectural imperative. Indeed, it is truly remarkable that the courts do not already exercise this very power.[29]

It is time for Canadian constitutional law to recognize a mechanism that enables the courts to control legislation on a non-substantive basis, specifically by demanding that delegations of legislative power meet certain formal thresholds.[30] This is precisely the focus of my project: a judicial interrogation of whether a given legislative initiative is phrased in a manner that adequately cabins any resulting executive law-making activity.

[29] The courts in the United States have on rare occasions in the past exercised this type of control, but they have done so under an alleged written warrant stemming from Article I of the U.S. Constitution. As I suggest in Part C, the U.S. nondelegation doctrine must be viewed as a failure, and this failure is due in part to the reluctance of the U.S. courts to treat controls of legislative delegation as unwritten and architectural in nature, rather than written.

[30] A partial exception in this area is the "vagueness" doctrine under the *Charter*, which is very limited in scope and applies most often to the exercise of discretionary authority by state officials (generally courts and prosecutors), rather than subordinate law-making. I discuss the *Charter*-related "vagueness" doctrine, and its relevance to a nondelegation doctrine, in Chapter 8.

There are two barriers, one doctrinal and the other ideological, to the use of constitutional law to control legislative delegations of power. I maintain that the doctrinal barrier can be overcome, and if so, the ideological barrier, which is in part fed by the doctrinal barrier, can also be overcome.

The doctrinal barrier is the rule of parliamentary sovereignty, which the United Kingdom Supreme Court summarized as follows in a recent ruling:

> In our system of parliamentary supremacy (subject to arguable extreme exceptions, which I hope and expect will never have to be tested in practice), it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so.[31]

In Canada, the primary exception to this statement comes in the area of the substantive judicial review of legislation under the authority of the constitutional texts noted above.[32] Aside from these specific forms of substantive review, the conventional wisdom is that a formal review of legislation is not possible in a system based on parliamentary sovereignty, other than on the grounds of prescribed "manner and form" requirements.[33]

I contend, however, that the prevailing notion that parliamentary sovereignty is a barrier to the formal review of legislation on common law grounds is flawed. A.V. Dicey, who is often taken as the foundational authority on the scope of parliamentary power, states that

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[34]

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[31] *R. (Public Law Project) v. Lord Chancellor*, [2016] UKSC 39 at para. 20.

[32] As I discuss in Chapters 3 and 4, judicial control of legislation affecting the jurisdiction and independence of the courts has been strongly informed by common law principles, and not strictly by constitutional text. Also, there is strong *obiter* authority that legislation affecting the exercise of democratic rights could be struck down on non-textual grounds. I consider this authority at several points in my project, most notably in Chapters 5 and 7.

[33] On manner and form requirements, see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 52-54, and the decisions cited therein.

[34] *Lectures Introductory to the Study of the Law of the Constitution* (London: MacMillan, 1885) at 36 ("***Law of the Constitution***").

This formulation surely provides a very notable restriction on parliamentary power, for "the right to make or unmake any law whatever" requires that parliament acts through "law." Dicey proceeds to define "law" as "any rule which will be enforced by the Courts."[35] Parliamentary power is thus formally limited, in the sense that it must respect the formal qualities of "law." Furthermore, the acceptable dimensions of this medium of expression are to be determined by a wholly separate institution of government. Sir William Wade, the foremost authority on the Diceyan conception of sovereignty, acknowledges that it is ultimately the courts that determine what is valid law.[36]

Wade qualifies his view that the courts control the basis of what constitutes valid law by observing that the judicial understanding of this matter must remain stable, for otherwise, a "revolution" will occur.[37] More recently, however, T.R.S. Allan, a leading British public law scholar, has strongly rejected the notion that an alteration in the judicial approach to the validity and authority of statutes necessarily constitutes a "revolution":

> A revolution occurs, or is cemented, only when a new source of authority is acknowledged, or fundamental rule adopted, which is not justified by the existing order, from which the courts have for whatever reason withdrawn their allegiance [emphasis added].[38]

This observation is very important for my project because Allan recognizes the potential for substantial change – or evolution – in judicial doctrines regarding the allocation of power and authority in a legal system, provided that such change is consistent with the "existing order." Legitimate judicial change can follow where courts recognize the architectural imperatives of the existing system. Changes of this nature

[35] *Law of the Constitution* at 36.
[36] "The Basis of Legal Sovereignty" (1955) 13 Cambridge L.J. 172 at 189, and see generally the discussion at 187-90 ("**Legal Sovereignty**"). A central question in Wade's essay is whether Parliament can bind itself as to the "manner and form" of a valid enactment.
[37] Legal Sovereignty at 190-92.
[38] "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 Law Quarterly Review 443 at 444. Allan addresses an essay by Professor Wade entitled "Sovereignty – Revolution or Evolution?" (1996) 112 Law Quarterly Review 568.

in the doctrine of parliamentary sovereignty have in fact occurred, both in the U.K., and much more dramatically, in Canada.

In the U.K., clear evidence of change can be seen in Lord Steyn's opinion in *R. v. Secretary of State for the Home Department, Ex Parte Pierson* ("***Pierson***"), an important 1997 human rights decision from the House of Lords:

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has *prima facie* force. It can be displaced by a clear and specific provision to the contrary.[39]

This statement situates, and limits, parliamentary sovereignty within a given set of legal and political principles, defined ultimately by the courts. While there appears to be a limit to the power Lord Steyn is willing to grant to the courts in defying legislation, in that an express statement of legislative power evidently cannot be resisted, this limitation is remarkably fluid and malleable. A central common law principle grounding Lord Steyn's analysis in *Pierson* is the rule of law. In the 2015 judgment of *R. (Evans) v. Attorney General* ("***Evans***"), three members of the United Kingdom Supreme Court used the principle of the rule of law to read an express legislative provision (authorizing the executive to overrule the courts) so restrictively as to deny its literal meaning. Parliament could not have intended such an inversion of the constitutional order, Lord Neuberger declared, absent express statement to that effect.[40]

U.K. decisions such as *Pierson* and *Evans* reveal that the doctrine of parliamentary sovereignty is subject to judicial modifications grounded in legal and political principle, although neither goes so far as to suggest that the courts can declare legislation invalid, and *Evans'* substantial assault on the doctrine remains

[39] [1997]3 W.L.R. 492 at 518 (H.L.).

[40] [2015] UKSC 21 at paras. 51-58. Lord Hughes, writing in dissent, noted that the effect of Lord Neuberger's judgment was precisely to upstage the sovereignty of parliament through the use of the principle of the rule of law (at para. 154). It is worth noting that in the House of Lords decision of *Jackson v. Her Majesty's Attorney General*, [2005] UKHL 56 ("***Jackson***"), Lord Hope of Craighead identified the rule of law as the "ultimate controlling factor" of the British Constitution in an opinion that qualified the doctrine of parliamentary sovereignty in very strong terms (at paras. 104, 107). See also the opinion of Baroness Hale (at para. 159).

ultimately an exercise of (quite restrictive) statutory interpretation.[41] In Canada, a much more significant alteration in the doctrine of parliamentary sovereignty arises from four decisions of the Supreme Court of Canada: *Reference re Manitoba Language Rights* ("***Manitoba Language Reference***"),[42] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* ("***New Brunswick Broadcasting***"),[43] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* ("***Judges Reference***"),[44] and *Reference re Secession of Quebec* ("***Secession Reference***").[45] These judgments, which I analyze in detail in Chapter 3, explore and refine the important place that unwritten constitutional principles occupy in the "architecture" of the Canadian Constitution.[46] Crucially, these judgments are not revolutionary in Wade's sense, but rather are truly evolutionary in Allan's sense, for they are carefully grounded in arguments relating to the shape of the "existing order."

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[41] David Dyzenhaus, Michael Taggart, and Murray Hunt have discussed the use of statutory construction by English judges to give enhanced protections to human rights against executive interpretations of legislative enactments: "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 Oxford U. Commonwealth L.J. 5 at 20-23. Under the "principle of legality," a reviewing court insists that only express wording in a legislative enactment can sanction executive curtailment of fundamental human rights. Thus the courts stop short of questioning parliamentary sovereignty (there is, in other words, no denial of the power of parliament to curtail human rights through an express enactment), but nevertheless push judicial power as far as it can go. Baroness Hale alludes to this method of restrictive construction in *Jackson*:

> The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny (at para. 159).

This passage reveals both the "principle of legality" discussed by Dyzenhaus, Taggart, and Hunt, and, in the parenthetical "might even reject," a cautious challenge to parliamentary sovereignty itself. The use of statutory interpretation to limit parliamentary power is strongly criticized by advocates of the administrative state such as John Willis ("Administrative Law and the British North America Act" (1939) 53 Harvard L. Rev. 251 at 272-77 ("**British North America Act**")); and Harry Arthurs (Dicey Business at 20-22).

[42] [1985] 1 S.C.R. 721.

[43] [1993] 1 S.C.R. 319.

[44] [1997] 3 S.C.R. 3. This judgment contained decisions on several appeals (from Prince Edward Island, Alberta, and Manitoba) all raising the same general issues. The full title of the judgment is *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*.

[45] [1998] 2 S.C.R. 217.

[46] The term "architecture" is employed in the *Secession Reference* (at paras. 50-51), and, as I discuss in Chapters 2 through 4, captures the essence of the Court's unwritten principles jurisprudence.

I noted previously that there are both doctrinal and ideological barriers to the acceptance of judicial control on legislative decisions to delegate power. Having discussed the doctrinal objection arising from the rule of parliamentary sovereignty, I now consider the ideological barriers.

Ideology, as David Beetham observes, can be defined as "the appearance of the socially constructed as natural."[47] Ideology is relevant to a project advocating a nondelegation doctrine on two levels: the first is institutional, and the second is political. Neither can withstand scrutiny.

The institutional manifestation of ideology comes in the form of the dominant assumption on the part of legislators, administrators, judges, and academics that broad delegations of legislative power to the executive branch are an acceptable, appropriate, and necessary response to the requirements of modern governance. The doctrine of parliamentary sovereignty obvious feeds this assumption, or at least rationalizes it in legal terms, but it is also assumed that legislatures cannot perform their tasks in an interventionist state beyond providing authority to others to act. The quotation from J.A. Corry in the previous section captures this ideology ("Parliament cannot meet these requirements but the Executive, through the Civil Service, can"), and John Willis has stated the point even more bluntly: "Why waste the time of parliament on details or on technical matters which it cannot understand?"[48] As I discuss in Chapters 6 and 7, however, it is not clear that executive-based law and policy-making is necessarily an efficient form of state regulation, nor is it clear that significantly expanded legislative responsibilities are impossible. Delegation is an ideology – it is, to borrow Beetham's language, a "constructed" practice that appears "natural." This ideology can be, and indeed must be, countered by the force of law, wielded by the courts. Judges of course are not immune to the governing ideology. As I discuss in Chapter 6, the courts have offered little resistance to the march of delegated legislation across the terrain of the

[47] *The Legitimation of Power*, 2nd ed. (New York: Palgrave MacMillan: 2013) [first published 1991] at 107 ("***Legitimation of Power***").
[48] Three Approaches to Administrative Law at 55.

administrative state. But courts are also responsive to legal arguments, and it is a legal argument, grounded in the aforementioned Supreme Court of Canada decisions affirming the requirements of the architecture of the Constitution, that I offer to combat the ideology of delegation.

The political manifestation of ideology that appears to provide a barrier to judicial controls on delegation is particularly dated, yet still has force. In an important article on the institutionalization of the administrative state in the United States, Cass Sunstein observes that some opponents of the New Deal found a nondelegation doctrine to be appealing because the requirement for detailed legislative authorization provided a potential means of hindering reformist regulatory initiatives:

> By requiring a degree of consensus before regulation could be undertaken, the nondelegation doctrine was not merely a neutral requirement of specificity, but an obstacle to government intervention. There is thus a connection between the era of substantive due process represented by *Lochner* and the nondelegation doctrine. In the early twentieth century, the nondelegation doctrine and substantive due process served similar antiregulatory functions.[49]

Other commentators have also noted a connection between conservative or anti-regulatory views and opposition to delegation under the administrative state.[50] While I have no doubt that such a connection is well grounded in some instances, and is of considerable historical, political, and cultural significance, I reject out of hand the notion that an argument against broad delegations of legislative authority must service a conservative or reactionary ideology. Advocating a judicial mechanism to control delegations can be based on a range of political motivations, and may even be politically neutral. Furthermore, as I

[49] After the New Deal at 482, see also 447. *Lochner v. New York*, 198 U.S. 45 (1905), was a controversial decision of the U.S. Supreme Court that employed the "due process" clause of the Constitution (U.S. Const. amend. XIV) to strike down early reformist legislation limiting the maximum hours workers could be required to work (see Sunstein, After the New Deal at 437-38).

[50] See, for example, John Willis, *Parliamentary Powers* at 3-4 (discussing the famous critique of delegation and the administrative state provided by the Lord Chief Justice of England, Lord Hewart of Bury, in *The New Despotism* (London: Ernest Benn, 1929)); Cass Sunstein and Adrian Vermeule, "The New Coke: On the Plural Aims of Administrative Law" (2016) 2015:1 Supreme Court Rev. 41 at 63-68, and *passim* (discussing U.S. Supreme Court Justice Clarence Thomas' recent opposition to delegation); David Schoenbrod, "Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine" (1987) 36 Am. U. L. Rev. 355 at 357; and Peter H. Aronson, Ernest Gellhorn, and Glen O. Robinson, "A Theory of Legislative Delegation" (1982) 68 Cornell L. Rev. 1 at 10 (discussing two controversial U.S. Supreme Court decisions from 1935 deploying a nondelegation doctrine to strike down provisions of New Deal legislation).

discuss in Chapter 6, delegation itself can service a range of political agendas.[51] William Scheuerman observes, in his comprehensive (and hardly ideological or anti-regulatory) discussion of the rule of law and the legal theorists of the post-Marxist Frankfurt School, that "There is nothing intrinsically conservative about accepting the value of basic legal and constitutional constraints on state authority."[52] Indeed, the first clause in the above passage from Sunstein's article suggests very strongly that the concerns addressed by a nondelegation doctrine are totally legitimate within a democratic state:

> By requiring a degree of consensus before regulation could be undertaken, the nondelegation doctrine was not merely a neutral requirement of specificity, but an obstacle to government intervention [emphasis added].

It is hard to see how demanding "a degree of consensus" can be viewed as necessarily conservative or ideologically suspect. The result of such a demand may well be to slow down "government intervention," but rather than offer evidence of an opposition to intervention *per se*, such a result may well reflect a strongly held view that intervention should be clearly and adequately thought out in advance, and should reflect the will of a reasonable sector of the populace.

It is worth noting that Sunstein agrees with the substantive goals of the New Deal, but has strong reservations about the institutional means used to achieve these goals, which he suggests involved a virtual, and ultimately unwise, constitutional amendment.[53] Amongst the reforms he advocates for

[51] On the use of delegation to service both progressive and conservative agendas, see especially David Mullan, "Willis v. McRuer: A Long-Overdue Replay with the Possibility of a Penalty Shoot-Out" (2005) 55 U. Toronto L.J. 535 at 573 ("**Willis v. McRuer**").

[52] *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, Massachusetts: MIT Press, 1994) at 197 ("***Between the Norm and the Exception***"). Scheuerman's overall sympathy for the goals of equality, his support for a very dynamic and inclusive conception of democracy, and the depth of his critique of the fascist legal philosopher Carl Schmitt render his political credentials beyond reproach. On the former two points, see *Between the Norm and the Exception* at 61 and 181; on the latter point, see 13-95 and *passim*. Scheuerman is strongly critical of the broad and normless delegations of legislative power to the executive that typify modern governance: see *Between the Norm and the Exception* at 211-217.

[53] After the New Deal at 428-29, 447-48, 452, and *passim.*

controlling the administrative state, Sunstein includes greater legislative specificity (although he stops short of advocating a nondelegation doctrine).[54]

If commentators with progressive credentials such as Sunstein and Scheuerman are willing to acknowledge the legitimacy of some control on the scope of legislative delegation, I maintain there is substantial room for a more broadly based nondelegation doctrine without engendering any categorical suspicion of a reactionary or rear-guard political ideology waiting in the wings. My proposed nondelegation doctrine is not hostile to legislative initiatives, only to legislative initiatives lacking clarity. My project in fact proceeds without taking a stand on the desirability of particular regulatory goals in the interventionist state. Furthermore, far from engaging the concerns regarding judicial interference in democratic decision-making voiced by prominent opponents of judicial review such as Jeremy Waldron and Richard Bellamy,[55] a nondelegation doctrine is democracy-reinforcing: it compels legislatures to perform their primary task. The goal is to de-marginalize legislatures, and make them active and not passive players in modern governance. I conclude that the ideological barriers to controls on delegation are not well-founded.

I observed at the outset of this Introduction that Habermas views the interventionist state as a utopian project dedicated to "socially containing capitalism" through the intelligent application of "political and administrative power." Habermas, associated for a time with the post-Marxist Frankfurt School, is both one of the primary advocates of the administrative state and one of its strongest critics. He has condemned the paternalistic dependency relationships that have grown between the state and its

[54] After the New Deal at 478-483. Sunstein's overall treatment of the U.S. nondelegation doctrine is somewhat ambivalent: he notes at one point that a "general revival of the nondelegation doctrine would also be a mistake" (After the New Deal at 494), yet acknowledges in an article written 20 years later the "democracy-forcing function" that could be served by invalidating legislation on nondelegation grounds ("Is OSHA Unconstitutional?" (2008) 94 Virginia L. Rev. 1407 at 1447-48).

[55] I discuss the concerns of theorists such as Waldron and Bellamy in Chapter 5.

citizens, and also the rise of mechanisms of state surveillance.[56] The solution to these problems, he suggests, lies in processes of communication, deliberation, and democratic revitalization.[57] I find his prescription to be compelling in its broad outlines, but I suggest that an important element of a revitalized democracy is placing a greater demand of specificity on the output of legislatures. This is a concrete proposal that will force legislatures to set about the very task for which they are uniquely suited. Habermas maintains that the welfarist project of "socially containing capitalism" must now itself be "socially contained."[58] A nondelegation doctrine is a crucial part of this normative enterprise – directly targeting the legal apparatus and the dominant ideology that fuels an unconstrained and dangerously undemocratic practice.

2. The Relationship of the Project to Existing Canadian Legal Scholarship

The enormous growth of the modern administrative state, which David Dyzenhaus has characterized as "the most important legal phenomenon of the [20th] century,"[59] can be understood as a wholesale expansion of the executive branch of government into the domains of both the judiciary and the legislature. An analysis of this expansion in Canada suggests two very different trajectories of executive power, trajectories that have attracted very different levels of academic commentary.[60]

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[56] I expand on these aspects of Habermas' theories in Chapter 7.

[57] Habermas looks particularly to the emergence of subcultural communication communities ("autonomous and self-organized public spheres") to challenge, through democratic means, the hegemony of the administrative state and the capitalist economy (New Obscurity at 13-17). See also "Three Normative Models of Democracy" (1994) 1:1 Constellations 1 at 6-10 ("**Three Normative Models**"); and *Between Facts and Norms* at 185-86, 427-46.

[58] New Obscurity at 13.

[59] "The Legitimacy of Legality" (1996) 46 U. Toronto L.J. 129 at 133 ("**Legitimacy of Legality**").

[60] This concept of different trajectories of the expansion of institutional power is supported by comments made by David Mullan in an analysis of the administrative law judicial review of executive policy-making, although Mullan's focus and terms of reference are different than mine: "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality," in Mary Jane Mossman and Ghislaine Otis (eds.) *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Montreal: Canadian Institute for the Administration of Justice, 1999) 313 at 317-318, 368-69 ("**Role of the Judiciary**").

The Supreme Court of Canada has cautiously guarded the jurisdiction of the judiciary, only yielding parts of this territory to the executive after extensive legal debates.[61] Over the last forty years, a transfer of judicial power has been evident in three main areas: certain judicial functions have been taken on by administrative tribunals;[62] administrative decision-makers have been given the power to interpret the law in the area of their expertise;[63] and the Court has affirmed the power of expert administrative tribunals to consider constitutional matters and grant certain constitutional remedies.[64] This substantial expansion of executive power into the terrain traditionally occupied by the judiciary has been the subject of a breathtaking quantity of academic commentary.[65]

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[61] *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*, [1970] S.C.R. 425, has been characterized as the "high water mark" of judicial opposition to executive appropriations of judicial functions: David Mullan, "Judicial Deference to Executive Decision-Making: Evolving Concepts of Responsibility" (1993) 19 Queen's L.J. 137 at 142 ("**Evolving Concepts of Responsibility**"), citing Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell Methuen, 1974).

[62] *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186. These transfers have been held to be constitutional to the extent that the judicial function in question is situated within a broader administrative regime such that it is ancillary to the operation and goals of the regime.

[63] *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dunsmuir*; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654. This area of the law is very fluid. The general tendency is an expansion of deference to executive decision-makers, but there have been recent rumblings of discontent amongst some members of the Court: see *Wilson v. Atomic Energy of Canada Ltd*., 2016 SCC 29.

[64] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Conway*, [2010] 1 S.C.R. 765. The Court has held that the constitutional remedies available to a tribunal do not extend to the power to grant a declaration of invalidity of a statutory provision: available remedies apply only to the matter before the decision-maker.

[65] For a sample of important academic treatments coinciding with the Supreme Court's rapid transformation of the field over the last several decades, see Arthurs, Dicey Business; H. Wade MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 U. Toronto L.J. 343; Debra M. McAllister, "Administrative Tribunals and the *Charter* : A Tale of Form Conquering Substance," in *Special Lectures of the Law Society of Upper Canada 1992 – Administrative Law: Principles, Practice and Pluralism* (Scarborough: Carswell, 1993) 131; David Dyzenhaus, "Dicey's Shadow" (1993) 43 U. Toronto L.J. 127; David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart (ed.) *The Province of Administrative Law* (Oxford: Hart, 1997) 279; David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's L.J. 445 ("**Fundamental Values**"); Mullan, Evolving Concepts of Responsibility; David Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 C.J.A.L.P. 59; Grant Huscroft, "Judicial Review from CUPE to CUPE: Less is Not Always More," in Grant Huscroft and Michael Taggart (eds.) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: U of Toronto P, 2006) 296; Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application, and Scope* (Cambridge: Cambridge UP, 2012) ("***A Theory of Deference***"); Paul Daly, "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58 McGill L.J. 483; John M. Evans, "Standards of Review in

The expansion of executive power into the terrain traditionally occupied by the legislature, on the other hand, has followed a very different path. The Supreme Court has sanctioned an overwhelming delegation of legislative law-making and policy-making functions to the executive for almost 100 years, offering little or no meaningful scrutiny of this practice,[66] and Canadian academic commentators, especially in the last several decades, have not dealt extensively with the constitutional significance of this transfer of power.[67] In his recent book on deference to the executive in administrative law, for example, Paul Daly "assumes that the legislature is capable of delegating wide powers," and observes, regarding the delegation of legislative power, that

> It is generally true in modern legal systems that wide delegations of power are permissible: "The Lockean principle that the grant of legislative power is one 'only to make laws, and not to make legislators' has fallen before the inexorable momentum of the administrative state."[68]

The leading Canadian practitioners' text in this area, John Mark Keyes' *Executive Legislation*, treats the constitutional questions posed by the delegation of law-making power in relatively brief and descriptive terms.[69]

Set against the dominant tendency in Canadian public law to deal primarily with executive expansion into the judicial sphere, and not subject executive expansion into legislative territory to detailed constitutional scrutiny, my project is unique in modern Canadian legal scholarship. I provide an extended critical and normative analysis of the separation of legislative and executive power, and I explore the judicial

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Administrative Law" (2013) 26 C.J.A.L.P. 67; and Hon. Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (February 17, 2016), online: <ssrn.com/ abstract=2733751>.

[66] I discuss this case law in detail in Chapter 6.

[67] I note several exceptions below.

[68] *A Theory of Deference* at 53, internal quotation cited to Henry Monaghan, "Marbury and the Administrative State" (1983) 83 Colum LR 1 at 25. Daly has commented in passing elsewhere that "Concerns about the separation of powers are overblown. Legislative grants of authority in broad terms are a feature of the modern administrative state" ("Some Thoughts on the SCC Decision in *Agraira*," *Administrative Law Matters Blog* (June 24, 2013), online: <www.administrativelawmatters.com/blog/2013/06/24/some-thoughts-on-the-scc-decision-in-agraira/>).

[69] 2nd ed. (Markham, Ontario: LexisNexis, 2010) at 104-115 ("***Executive Legislation***"). Keyes observes that

> In parliamentary states, arguments for limiting the delegation of legislative authority on the basis of the democratic responsibilities of the primary law-making institutions have either been rejected, or else reduced to chimeric wisps of legal theory (at 104).

toleration of delegated legislation in detail. I also propose a concrete judicial mechanism – the Canadian nondelegation doctrine – to control such delegation and restore the separation of the legislative and executive branches that is so lacking in modern governance. I ground my argument in Supreme Court of Canada decisions endorsing the unwritten constitutional principles of democracy, the rule of law, and the separation of powers, although I take this case law to a place it has not yet visited.

I should note that while my proposal for a Canadian nondelegation doctrine may seem to be far outside of the mainstream of legal scholarship, it is not completely without academic precedent. David Mullan, one of Canada's foremost administrative law scholars, has commented briefly on the need for some form of nondelegation control in Canadian law.[70]

Despite Mullan's comments, however, I am not aware of any discussions of a nondelegation doctrine in Canadian legal scholarship in recent decades, nor am I aware of any extended critical treatments of the constitutionality of the delegation of legislative power.[71] I do note the following studies that deal with important aspects of subordinate law-making:

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[70] Role of the Judiciary at 368 and 375. Writing in 1993, Mullan observed that the absence of "any really effective form of anti-delegation of legislative power doctrine under the *Constitution Act, 1867*" leaves a range of executive decision-making pursuant to broad grants of power effectively beyond the reach of the courts (Evolving Concepts of Responsibility at 156-157). However, writing on the same subject in 1999, and noting the general tendency of judicial deference to executive law and policy-making, as well as a predisposition (possibly even a bias) on the part of Canadian judges towards executive power, Mullan stated,

> In making these arguments, I should not be read as philosophically opposed to the inevitable and, for the most part, desirable extensive delegation of discretionary powers in the modern state, even one in which deregulation has become one of the primary objectives. <u>There is, however, some room for a re-evaluation of whether some features of the admittedly much criticized United States anti-delegation doctrine has any lessons for Canada</u> [emphasis added] (Role of the Judiciary at 368).

[71] Several government commissioned reports in the late 1960s covered some of the relevant constitutional ground: see, for example, Canada, Special Committee on Statutory Instruments, *Third Report* (Ottawa: Queen's Printer, 1969) (Chair: Mark MacGuigan); and Ontario, Royal Commission Inquiry into Civil Rights, *Report Number One*, vols. 1-3 (Toronto: Queen's Printer, 1968) (Commissioner: Chief Justice of the Ontario High Court James Chalmers McRuer) ("***McRuer Report***"). While these reports may have been the product of earlier concerns with the overall propriety of the delegation of legislative authority (see Macdonald, Regulation by Regulations at 93-100 on this point), I find little evidence that such concerns have remained a significant preoccupation of Canadian legal scholars in recent decades or have had any impact on the scale of delegation by legislatures to the executive. For an excellent and wide-ranging treatment of the *McRuer Report*, see Mullan, Willis v. McRuer, *passim*.

1. Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century."[72] While Taggart's focus is on the Commonwealth, and not Canada, this is an excellent and wide-ranging treatment of delegated legislation that addresses issues such as legislative oversight, judicial review, and the recent (and disturbing) phenomenon of the delegation of public power to private entities. Taggart uses the figure of John Willis as a focal point for his discussion. He also probes the question of why delegated legislation has such a low profile in British and Commonwealth public law. The focus is for the most part descriptive, but in his concluding remarks Taggart strongly challenges the absence of a legitimizing theory in this area of the law.

2. John Keyes' *Executive Legislation* is a comprehensive work, dealing in mostly descriptive terms with a range of issues fundamental to delegated legislation including constitutional framework, legislative oversight, judicial review, formal and informal rule-making procedures, and public participation.

3. Andrew Green, "Regulations and Rule Making: The Dilemma of Delegation."[73] This is a discussion in a text-book format designed for students that covers a wide range of material, including the pros and cons of delegation and issues relating to the legislative, judicial, and public oversight of the process of regulation and rule-making in Canada. While Green does not expressly deal with constitutional issues in his pros and cons discussion, he does provide an interesting principal-agent rubric to approach the phenomenon of delegated legislation.

4. Genevieve Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?"[74] This important article argues that expanding opportunities for citizen participation can compensate for the democratic shortcomings of executive legislation. Cartier recommends that the common law rules of procedural fairness that currently govern exercises of administrative discretion can and should be extended to cover subordinate law and policy-making.

5. Roderick A. Macdonald, Regulation by Regulations. The primary focus of this hard-hitting study is less on delegated legislation than on the overall practice of regulation by legislation itself, which Macdonald argues is so dominant and ingrained in the legal and political culture of Canada that other important forms of regulation have not received adequate attention.[75] In the course of his analysis, Macdonald provides a useful overview of delegated law-making, situating the practice historically, and noting the scope of legislative and judicial oversight and also the various government inquiries and commissions dealing with the question of whether available mechanisms of oversight should be augmented.

6. J.R. Mallory, "Curtailing 'Divine Right': The Control of Delegated Legislation in Canada."[76] Mallory does not criticize the constitutionality of the practice of delegated legislation, but he is a strong advocate of increased legislative oversight, and provides a useful discussion of the state of oversight in the early 1980s, and of efforts for reform, with reference to various Parliamentary reports.

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[72] (2005) 55 U. Toronto L.J. 575 ("**Chequered History**").
[73] Colleen Flood and Lorne Sossin (eds.) *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 337 ("**Dilemma of Delegation**").
[74] (2003) 53 U. Toronto L.J. 217 ("**Procedural Fairness**").
[75] Regulation by Regulations at 112-31, 136-46. Macdonald's primary concern appears to be less constitutional (such issues are generally treated briefly and descriptively) than practical: regulation by legislation does not offer a comprehensive, efficient, and just approach to managing the pressing needs of the modern state (see 92-100, 119-120, 142-46, and *passim*).
[76] O.P. Dwivedi (ed.) *The Administrative State in Canada: Essays in Honour of JE. Hodgetts* (Toronto: U of Toronto P, 1982) 131 ("**Curtailing Divine Right**").

Generally speaking, all of the above discussions accept the reality of delegated legislation, and proceed either by describing various features surrounding this phenomenon, or by advocating mechanisms to improve its accountability within the existing constitutional structure.

My project is devoted explicitly to an interrogation of whether the delegation of legislative power is a desirable and appropriate practice from a constitutional perspective. My proposed judicial mechanism does not seek to upgrade accountability within existing allocations of power as much as alter these allocations such that decisions to delegate are themselves controlled, thereby cabining executive discretion from the outset. I should stress that the alteration in power configurations that I am proposing is designed to bring the political system closer to where it should be, given the informing principles of the Canadian Constitution. I should also note that the forms of oversight and accountability advocated by the above scholars are largely desirable. All possible legal avenues to control state power should be explored, and where possible, instituted.

Before concluding this survey of relevant academic work, I should note two other studies that do not focus on delegated legislation, but that share an important methodological approach with my work. Both Vincent Kazmierski, in "Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada,"[77] and Marc Ribeiro, in *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law*,[78] make use of the Supreme Court of Canada's unwritten principles jurisprudence to fuel arguments that certain constitutional doctrines need to be revisited. Kazmierski is concerned chiefly with the effect of the unwritten principle of democracy on the doctrine of parliamentary sovereignty, and Ribeiro is concerned with the effect of the unwritten principle of the rule of law on the vagueness doctrine under the *Charter*. In common with these writers, I argue that the unwritten principles jurisprudence

[77] (2010) 41:2 Ottawa L. Rev. 245 ("**Draconian but not Despotic**").
[78] (Vancouver: U of British Columbia P, 2004) ("***Vagueness Doctrine***").

necessitates a reconsideration of important aspects of constitutional law and provides a basis for greater judicial scrutiny of legislation.

3. Outline of the Project

I have divided my discussion into three parts, dealing with Methodology, Theory and Practice, and the Nondelegation Doctrine itself.

Part A argues for the legitimacy of a method of constitutional interpretation employed by the Supreme Court of Canada in its leading unwritten principles decisions. Chapter 2 outlines this approach, and Chapters 3 and 4 discuss in detail the leading cases.

Part B applies the methodology identified in Part A in order to enunciate a theory of democracy that demands that political conflicts be resolved in the legislature and not the executive. This Part also isolates and critiques the practice of delegating legislative power. In Chapter 5, I outline the theory of democracy and its required institutional configurations. In Chapter 6, I outline the uncontrolled practice of delegating legislative power to the executive that is dominant in Canada, focusing on court decisions and legislation. I explore in particular the ways in which both the legislature and the judiciary have abdicated the roles required of them by the Constitution. In Chapter 7, I consider and reject the various theories that have been offered to account for and justify the dominant practice of delegation.

Part C focuses on the scope and content of the Canadian nondelegation doctrine. In Chapter 8, I outline the scope of the doctrine, and in Chapter 9, I outline the actual test that should be employed by a court conducting a nondelegation analysis. I also apply this test to a range of broad delegation strategies evident in a prominent Canadian statute.

PART A

Methodology:

The Tetralogy, Unwritten Principles, and Reasoning from Constitutional Essentials

Introduction

The goal of my project is to establish that a nondelegation doctrine is a required feature of the Canadian Constitution. In order to achieve this goal, I employ a methodology that I refer to as "reasoning from constitutional essentials."

This methodology is well supported in Canadian law. The Supreme Court of Canada has used it many times, and most notably in four important rulings between 1985 and 1998: the *Manitoba Language Reference*, *New Brunswick Broadcasting*, the *Judges Reference*, and the *Secession Reference*. In these judgments, which I refer to collectively as the "**Tetralogy**," the Court makes use of unwritten principles to resolve difficult legal questions not fully determined by existing constitutional texts.

The rulings in the Tetralogy are dramatic. In the *Manitoba Language Reference*, the Court finds that the principle of the rule of law gives rise to a positive obligation on the state to create and maintain a system of laws, an obligation that is so pressing that it can actually suspend the express commands of written constitutional texts. In *New Brunswick Broadcasting*, an unwritten principle again suspends the operation of written constitutional text, for the Court determines that the principle of parliamentary privilege exempts legislatures from the operation of the *Charter*. In the *Judges Reference*, the principles of the separation of powers and judicial independence give rise to rules protecting the courts from legislative and executive initiatives affecting salaries. In the *Secession Reference*, the principles of federalism, democracy, the rule of law, and the protection of minorities limit the power of provincial governments to

unilaterally secede, and create duties on the part of all Canadian governments to negotiate in circumstances where the people of one province express a will to secede.

The Court's work in the Tetralogy has been subject to considerable academic commentary, some positive and some very critical.[1] This range of responses is not surprising given that the project of recognizing and applying unwritten legal rules poses a direct challenge to positivism – a very influential but also highly contested strain of modern legal theory, which seeks to demarcate the boundaries of "law" largely by relying on textual sources of authority.[2] Constitutional development that proceeds from the courts, and that is perceived to lack a firm grounding in text, can raise concerns about judicial activism, democratic legitimacy, and the appropriate institutional separation of law and politics.[3] Indeed, it can be said that

[1] For positive responses, see Kazmierski, Draconian but not Despotic; Mark D. Walters, "Written Constitutions and Unwritten Constitutionalism," in Grant Huscroft (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge UP, 2008) 245 ("**Unwritten Constitutionalism**"); David Mullan, "Underlying Constitutional Principles: The Legacy of Justice Rand" (2010) 34:1 Manitoba L.J. 73 ("**Legacy of Justice Rand**"); and Mark D. Walters, "The Law behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 Journal of Parliamentary and Political Law 127 ("**Prorogation Debate**"). For strongly critical responses, see W.H. Hurlburt, "Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court of Canada" (1998-1999) 26 Man. L.J. 181 ("**Fairy Tales**"); Patrick J. Monahan, "The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*" (1999-2000) 11 National J. Const. L. 65 ("**Public Policy Role**"); Jeffrey Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11 Const. F. 60 ("**Judicial Integrity**"); Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389 ("**Unfathomable Principles**"); and Jamie Cameron, "The Written Word and the Constitution's 'Vital Unstated Assumptions,'" in P. Thibault, B. Pelletier and L. Perret (eds.) *Essays in Honour of Gérald-A. Beaudoin* (Cowansville: Éditions Yvon Blais, 2002) 91 ("**Unstated Assumptions**"). For very cautious responses, see Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar. Rev. 67 ("**Structural Argumentation**"); and Warren J. Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14 Sup. Ct. L. Rev. (2d) 197 ("**Grand Entrance Hall**"). This list is not intended to be exhaustive, as the literature is substantial. I cite other studies below.

[2] I will have more to say about legal positivism in the ensuing discussions of this project. For now, I note concise discussions of the general contours of the positivist project in Joseph Raz, "Legal Positivism and the Sources of Law," in *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford UP, 2009) [first published 1979] 37 ("**Sources of Law**"); David Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24:1 Oxford J. of Legal Studies 39 ("**Genealogy of Legal Positivism**"); and Jules L. Coleman, "Negative and Positive Positivism" (1982) 11 J. Legal Studies 139 ("**Positive Positivism**"). The foundational modern statement of positivism in the common law tradition is H.L.A. Hart's *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) [first published 1961] ("***Concept of Law***"). For a largely positivist (and quite critical) approach to unwritten constitutional principles, see Jeffrey Goldsworthy, "Unwritten Constitutional Principles," in Grant Huscroft (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge UP, 2008) 277 ("**Unwritten Principles**").

[3] On these points, see especially Goldsworthy, Unwritten Principles at 285, 288-89, 304-312; Cameron, Unstated Assumptions at 91, 111-13; and Sujit Choudhry and Robert Howse, "Constitutional Theory and the *Quebec*

the Tetralogy offers a fundamental challenge to the very purpose of a constitution, which is to regularize and control the production of law and the exercise of state power.[4] How can the project of ordering the exercise of power proceed on unwritten grounds? Where is certainty and predictability to be found if courts are free to have recourse to sources of meaning that are not set out in publicly accessible foundational documents?

The answers to these questions, and also to the critical responses to the Tetralogy, can be found, I submit, in the intellectual coherence of the methodology of reasoning from constitutional essentials. This methodology does not give courts license to roam freely armed with a repository of unwritten principles that can be applied at will. Rather, it is a mode of analysis that can only be applied to a narrow range of subjects – those subjects that offer a distinct threat to the architecture of a democratic constitution. Because broad delegations of legislative authority to the executive offer precisely this kind of threat, this methodology can be legitimately used to reveal a nondelegation rule. Such a rule is not a fabrication or an imposition, but rather is inherent to the structure of power in a constitutional state that claims to operate pursuant to democratic principles.

Over the course of the next three chapters, I clarify the ambit of the methodology of reasoning from constitutional essentials and argue for its internal coherence. I thereby pave the way for Part B and Part C of this project, where I reason from the essentials of three unwritten constitutional principles to ground a nondelegation doctrine. I should stress that the nondelegation rule itself is not the subject of this first Part, and as the ensuing analysis of the Tetralogy is complex and lengthy, readers who are primarily

Secession Reference" (2000) 13:2 Canadian J. of Law and Jurisprudence 143 at 146-154, and *passim* ("**Constitutional Theory**").

[4] M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2nd ed. (Indianapolis: Liberty Fund, 1998) [first published 1967] at 2 ("***Constitutionalism***"); Walters, Unwritten Constitutionalism at 247; Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (New York: Springer, 2012) at 25 ("***Legislative Delegation***").

interested in the nondelegation issue can skip to Part B where the analysis pertinent to the actual doctrine begins. A brief discussion of the methodology of reasoning from constitutional essentials can be found in Chapter 2, section 2. The detailed analysis of the Tetralogy that occupies Chapter 3 and Chapter 4 of this Part, however, is essential in order to establish the status of the methodology of reasoning from constitutional essentials in Canadian law.

The complexity of my analysis of the Tetralogy emanates from the decisions themselves. These judgments are by no means static. Rather, there is substantial fluidity in the Court's treatment of unwritten principles – an observation that has not been given adequate critical attention. The Court is exploring new terrain here, and as one proceeds through the four decisions, it becomes evident that a range of strategies and understandings of unwritten principles and rules are advanced, tested, and modified. Internal tension is very evident in several of the decisions, not only between dissenting and majority voices, but within the Court's rulings themselves. These tensions are intimately connected to the questions noted above, and the problem of reconciling the project of constitutionalism with the potential uncertainty arising from relying on unwritten sources of meaning.

I conclude these introductory comments by drawing attention to an important point. Institutional structure is a significant source of legal meaning in the Tetralogy. Yet very little work has been done in assessing the full institutional ramifications of the unwritten constitutional principles recognized by the Court. It is almost always the role of the judiciary in relation to the other branches of government that has been the centre of attention. The important institutional relationship between the legislature and the executive has not yet been dealt with in any significant way, either by courts or commentators concerned with unwritten principles. My project seeks to remedy this situation. I argue that the unwritten principles relevant to the relationship between the legislative and executive branches of

government are so compelling as to require the formulation of a legal rule, enforceable through the courts, controlling the delegation of legislative authority.

My discussion in Part A proceeds as follows. In Chapter 2, I address several interpretive and theoretical matters that clarify the ensuing analysis. In Chapter 3, I discuss each of the four decisions of the Tetralogy, observing continuities, discontinuities, and tensions where appropriate. The length of these discussions follows directly from the internal complexity of the individual decisions. My goal is ultimately to establish both the legality and the coherence of an unwritten principles approach to constitutional interpretation. In Chapter 4, I discuss several post-Tetralogy judgments where tensions and inconsistencies have re-emerged, and I provide a basis for managing these discordant elements. I conclude with a brief summary of the constitutional analysis that emerges from the authorities discussed throughout this Part.

Chapter 2

Interpretive Strategies

In this chapter, I address two introductory matters. First, I defend my strategy of approaching the four decisions of the Tetralogy as a unit. Second, I provide an overview of the two main interpretive strategies used by the Court in these judgments.

1. The Tetralogy as a Cogent Interpretive Unit

Mark D. Walters has argued that a "a distinctive sense of Canadian constitutionalism" has emerged from a range of Supreme Court judgments decided between 1938 and 1998 – a "judicial narrative" outlining a "durable legal fabric [that] stretches across the entire domain of governance in Canada preventing the possibility of legal gaps or holes, with unwritten principles supplying legal substance where the written texts seem threadbare."[5] Professor Walters cites the following decisions: *Reference re Alberta Statutes* ("***Alberta Statutes***");[6] *Saumur v. Quebec (City)* ("***Saumur***");[7] *Switzman v. Elbling* ("***Switzman***");[8] *Ontario (Attorney General) v. O.P.S.E.U.* ("***OPSEU***");[9] the *Judges Reference*; and the *Secession Reference*.

I advance the last two decisions noted by Walters, the *Judges Reference* and the *Secession Reference*, along with the *Manitoba Language Reference* and *New Brunswick Broadcasting*, as a distinct and climactic phase of his "judicial narrative." It is through these four decisions that the appropriate place of unwritten principles in the "legal fabric" of the Canadian Constitution has been fully recognized. In the non-Tetralogy decisions noted by Walters, members of the Court infer the existence of certain fundamental rights –

[5] Prorogation Debate at 136.
[6] [1938] S.C.R. 100.
[7] [1953] 2 S.C.R. 299.
[8] [1957] S.C.R. 285.
[9] [1987] 2 S.C.R. 2.

freedom of speech, freedom of the press, political dissent – from the unwritten principle of democracy. In several instances, these rights are framed in the form of a rule constraining the power of legislative institutions, and in one case, this rule is supported by a majority of the Court.[10] However, the rule is not actually applied in any of these judgments, and thus the legal force of the inferences drawn from unwritten principles is never tested. The comments are ultimately all made in *obiter*.[11] In each of the four decisions of the Tetralogy, on the other hand, the Court both recognizes and deploys unwritten constitutional principles. Two of these decisions are unanimous judgments of the entire Court, and two are supported by significant majorities (7 to 1 and 5 to 3). The non-Tetralogy decisions mentioned by Walters are certainly important, and not least because they offer brief examples of the methodology of reasoning from constitutional essentials (discussed in the next section) that will take more definitive shape in the *Manitoba Language Reference*, *New Brunswick Broadcasting*, the *Judges Reference*, and the *Secession Reference*.

The four judgments of the Tetralogy are increasingly concerned not just with answering a pressing issue arising in a particular set of circumstances, but also with articulating a coherent vision of the Canadian Constitution that can more generally accommodate both written and unwritten sources of authority. There is a sense of momentum that builds over the course of the four decisions. Indeed, the Tetralogy can be said to mark a period of self-conscious constitutional growth. This growth has not been easy. The decisions themselves contain tensions and uncertainties, and commentary has not been uniformly positive. But it is the very sustained process of recognizing and deploying unwritten principles in several

[10] See *OPSEU* at paras. 151-52 (*per* Justice Beetz, writing for a majority of the Court). Prior to *OPSEU*, the strongest statement of the rule was in *Switzman* at 328 (*per* Justice Abbott).

[11] These non-Tetralogy decisions were all determined by the division of powers under sections 91 and 92 of the *Constitution Act, 1867*, and thus any implied restrictions on legislative power outside of the arena of federalism remain muted. Justice Beetz's *obiter* comments on the freedom of political speech are quite strong in *OPSEU*, although with the recent enactment of the *Charter*, the risk of making such comments was arguably quite low – much lower than was the case with Justice Abbott's lone statement in the 1957 decision of *Switzman*.

different contexts in a relatively short period of time that has allowed for such substantial growth. The Court has had opportunities in these decisions to explore relevant tensions and uncertainties and work them out. Subject to one possible exception, which I will consider in Chapter 4, the constitutional growth that has occurred through the Tetralogy has endured. In the 2014 *Reference re Senate Reform* ("***Senate Reference***"), the Court unanimously cites all four judgments immediately after stating that "Generally, constitutional interpretation must be informed by the foundational principles of the Constitution" [emphasis added].[12]

I conclude by noting one pre-Tetralogy decision that deserves special mention: the *Patriation Reference*.[13] In this very complex judgment, six members of the Court held that the unwritten principle of federalism supports a political rule (a constitutional convention) that the Canadian government cannot attempt to change the Constitution in matters involving provincial powers and interests without the consent of the provinces.[14] This political rule, by its nature, was legally unenforceable. The crucial change that occurs in the Tetralogy is that unwritten principles give rise to legal rules, and not just political ones. But two members of the Court in the *Patriation Reference*, Justices Martland and Ritchie, writing in dissent, presaged later developments by determining that the unwritten principle of federalism could also give rise to rules of "full legal force in the sense of being employed to strike down legislative enactments."[15] This precedent thus arguably stands at the very threshold of the Tetralogy. Indeed, it is notable that the

[12] [2014] 1 S.C.R. 704 at para. 25.
[13] In addition to the *Patriation Reference*, the Tetralogy, and the other judgments noted by Professor Walters, there have been isolated cases in which the Court has recognized and occasionally deployed unwritten constitutional principles. See, for example, the federalism judgments cited by Chief Justice Lamer in the *Judges Reference* (at paras. 97-98) and by Justices Martland and Ritchie in the *Patriation Reference* (at 841-44). Such decisions, however, have largely focused on the issues at hand, as opposed to addressing the use of unwritten constitutional principles generally or engaging in a project of constitutional development.
[14] Constitutional conventions are unwritten political rules "based on custom and precedent" that are part of the Constitution: "constitutional conventions plus constitutional law equal the total constitution of the country" (*Patriation Reference* at 880-84). The provisions of the *Constitution Act, 1982* now clarify many of the matters surrounding amendments to the Constitution.
[15] *Patriation Reference* at 845.

comments of Justices Martland and Ritchie are cited approvingly by the Court in both the *Manitoba Language Reference* and the *Secession Reference*.[16]

2. The Court's Two Interpretive Strategies

The magisterial *Secession Reference* brings textual and extra-textual sources of constitutional authority into a single intelligible framework. To get to the *Secession Reference*, however, it is necessary to traverse some very difficult terrain. Each of the three previous decisions of the Tetralogy pursues two separate interpretive strategies, or methods, to substantiate using unwritten constitutional principles to achieve legal results. These methods are not clearly distinguished in the judgments, leading at times to uncertainty as to the exact basis on which the Court reaches its ruling. Confusion surrounding interpretive strategies accounts in particular for the very great complexity of *New Brunswick Broadcasting* and the *Judges Reference*, and threatens to undermine both decisions. In the *Secession Reference*, the weaker of the two methods is marginalized, leaving intact a very cogent and compelling vision of the Constitution that has remained unchanged for 20 years.

It is useful at this point to outline the two methods mentioned above. The first revolves around the purported effects of the preambles to Canada's two primary constitutional texts. In the *Manitoba Language Reference*, both preambles are invoked to ground the existence of an unwritten constitutional principle. In *New Brunswick Broadcasting* and the *Judges Reference*, the Court goes much further, and appears to suggest that the preamble to the *Constitution Act, 1867* ("**Preamble**") actually serves to legalize unwritten principles. The Court does not, however, adequately address the uncertain status of preambles under the prevailing canons of statutory interpretation. Nor is the vague language of the Preamble itself

[16] *Manitoba Language Reference* at para. 66; *Secession Reference* at para. 54.

adequately managed. Over the course of these three decisions, the broad claims made under this interpretive strategy become increasingly unsustainable.

The second method advanced by the Court to justify the use of unwritten principles involves reasoning from the essential attributes of a democratic constitution. This method is central to my project, and thus I will take some time now to sketch out its theoretical basis. During the course of my analysis of the Tetralogy, I will provide specific examples of the actual application of this methodology.

Basic principles can be said to inhere in a given form of governance, and while these principles are necessarily of an abstract nature, in certain circumstances more specific and embedded legal corollaries can become evident. Reasoning from constitutional essentials involves distilling the concrete legal rules that are required by the abstract principles in order to make the system work in a coherent fashion. Professor Walters offers a useful description of this form of legal reasoning when he speaks, in a discussion of the tradition of "unwritten constitutionalism," of "identifying the practical legal implications" that can be drawn from the "forms of constitutionalism to which societies commit themselves."[17] While the methodology of reasoning from constitutional essentials, as it is used by the Supreme Court of Canada in the Tetralogy, should not be equated with "unwritten constitutionalism,"[18] there are at least some commonalties. One very important commonality is the view that not all of the "practical legal implications" of a political system are inscribed, or indeed can be inscribed, in authoritative written texts. It must be stressed, however, that the Court does not reject the authority of written texts anywhere in

[17] Unwritten Constitutionalism at 261; see also 252-54 on the movement between abstract principles and specific rules.

[18] One important difference is that the Tetralogy does not expressly endorse a natural law view that the law must contain certain moral content – a view that may possibly be located in some of the authorities discussed by Professor Walters. See also my comments below on natural law and morality in relation to Hans Kelsen's "static" system of norms.

the Tetralogy. Rather, these decisions affirm that written texts operate alongside unwritten sources of meaning to establish the entirety of the Canadian Constitution.

Further insight into the methodology of reasoning from constitutional essentials can be found by considering Hans Kelsen's distinction between "static" and "dynamic" systems of norms.[19] A "static" system is defined by rational relationships – certain norms have necessary correlations with others, and more concrete norms can be inferred from more abstract ones. A "dynamic" system, by contrast, is defined by willed relationships. In a dynamic system, which Kelsen associates with legal positivism, certain procedural criteria exist to determine the "validity" of a norm, and provided that these criteria are met, a law-maker can will any content into the norm. Human will is therefore the determining factor in a dynamic system, while human reason is the determining factor in a static system.[20]

Kelsen's taxonomy can be applied to a democratic system of governance. A constitutional democracy provides for a decision-making process that channels politically contentious matters into a forum where citizens, through their representatives, can make binding decisions. A network of institutional relationships provides the mechanisms through which the decisions are interpreted and implemented. The norms generated by the decision-making process are "dynamic" within the meaning of Kelsen's taxonomy, but the organizing framework of the decision-making process, including the various supporting institutional relationships, is "static." Kelsen's own theory of democracy, which I consider in Chapter 5, requires the existence of a set of "static" organizational norms.[21] These norms are not willed, but rather

[19] *General Theory of Law and State*, Anders Wedberg (trans.) (Cambridge: Harvard UP, 1949) [first published 1945] at 112-114, 399-400 ("***General Theory***").
[20] For all of the points made in this paragraph, see Kelsen, *General Theory* at 112-114, 399-400.
[21] Kelsen locates a vaguely defined hypothetical "grundnorm" or "basic norm" at the root of his dynamic system of positive law, and suggests that legal positivism assumes but does not interrogate the nature of the "basic norm" of the legal system as this would move beyond the realm of legal science into the realm of "metaphysics." A hypothetical originating norm is necessary to stabilize the system of positive law:

> Only by making this assumption can [the positivistic jurist] demonstrate the normative meaning of all other acts which he comprehends as legal acts simply because he ultimately traces them all back to the original constitution. The hypothetical basic norm which establishes the original legislator expresses this

are inherent to the logic of the system. They offer the necessary stability to an otherwise dynamic system of governance.

While Kelsen identifies morality and natural law as static systems, it does not follow that these two closely related examples are exhaustive. The static norms that organize a democratic system of government are not primarily moral in nature, but rather are structural – they enable the system to function pursuant to its own inherent logic.[22] A constitutional democracy can thus be understood as a dynamic and positive norm-producing form of governance surrounded by a static and stable organizational framework. This framework is based on abstract foundational norms, or unwritten principles, such as the separation of powers, the rule of law, judicial independence, and of course democracy itself. While the norms produced by the system are changeable, the norms supporting the system are fixed.

One of the democratic state's primary institutions is the judiciary. This body has the mandate of protecting the overall architecture of the system, a mandate that flows from, and is nourished by, the fact that only this institution is independent of the decision-making process and the politically contentious matters dealt with therein. In fulfilling its guardianship role, a court can reason from the abstract unwritten principles that organize the system to determine binding concrete rules to protect it. These rules are inherent – they are part of the static constitutional structure. It is possible to view this process of reasoning as bringing to light, and effectively rendering conscious, the latent or unconscious legal meaning existing within the framework of the constitution.

> assumption; it consciously formulates it, nothing more. This means that legal positivism does not go beyond the original constitution to produce a material and absolute justification of the legal order (*General Theory* at 396, and see also 111-116, 395-96).

This vaguely defined "basic norm" may be adequate for the purpose of establishing a science of dynamic positive law, but Kelsen's theory of democracy, as discussed in Chapter 5, cannot function without fundamental organizing norms with a specific content.

[22] It may be possible to locate moral attributes within the governing norms of a constitutional democracy, and these attributes may in turn add additional coherence to the overall system. It is not necessary for me to pursue this line of inquiry in my project.

The process of reasoning from the essential attributes of a democratic constitution has been employed, albeit not under that name, by the influential American constitutional scholar Charles L. Black, who published a series of lectures in the late 1960s entitled *Structure and Relationship in Constitutional Law*.[23] Professor Black maintains that there are two dominant forms of legal interpretation in the Anglo-American tradition: the older method of reasoning from precedent, and the more modern method of reasoning from textual enactments.[24] But he also argues that a third "method" of interpretation is fully legitimate in the area of constitutional law, a method that involves drawing "inference from political structure" and "inference from the structures and relationships created by the constitution in all its parts or in some principal part."[25] In an analysis of numerous landmark United States Supreme Court decisions, Black demonstrates that results purportedly reached on the basis of textual analysis were in fact derived from "structural" analysis.[26]

Professor Walters and Professor Robin Elliot have both discussed the application of Black's theories to the Supreme Court of Canada's unwritten constitutional principles jurisprudence, although they have reached different conclusions on the subject. Elliot refers to Black's method as "structural argumentation," and defines it as

> the drawing of implications from the structures of government created by our Constitution, and the application of the principles generated by those implications – which can be termed the foundational or organizing principles of the Constitution – to the particular constitutional issue at hand.[27]

Elliot, however, expresses concern that this form of reasoning can strain the legitimacy of judicial review if a court moves too far away from enacted constitutional texts. He urges that wherever there is an

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[23] (Baton Rouge: Louisiana State UP, 1969) ("***Structure and Relationship***").
[24] *Structure and Relationship* at 4-7. Black also observes that the method of reasoning from precedent is often superimposed onto the method of reasoning from textual enactments, such that the interpretation of enactments is now performed extensively through reference to prior judicial commentary (*Structure and Relationship* at 5-6).
[25] *Structure and Relationship* at 7, 13.
[26] See the decisions discussed in *Structure and Relationship* at 8-31, including the seminal *McCulloch v. Maryland*, 17 U.S. 316 (1819).
[27] Structural Argumentation at 68, 116, and see the discussion of Black's work at 75-77.

attempt to overrule legislation, any recourse to unwritten principles must be grounded in textual provisions.[28] Elliot's approach suggests that legislation, due to its authority as a product of democratic will-formation, should be especially resistant to judicial inquiry grounded on unwritten sources of authority. Walters, on the other hand, situates Black's work within a larger tradition of unwritten constitutionalism and unwritten law leading back to English legal scholars writing in the 16th and 17th centuries.[29] In this tradition, texts can never fully embrace a nation's constitution, for they are "evidence of supreme law, rather than . . . a single canonical statement of supreme law."[30] In Walter's analysis, "The constitutional text is not just supplemented by unwritten principles; it rests upon them."[31] Elliot's strictures regarding the need for a textual warrant to legitimize judicial review when legislation is at issue makes no sense in this expansive interpretive framework.

It is certainly not tenable to grant courts license to review legislation at will, and Elliot's cautions should definitely be heeded. Judicial review that operates within the confines of written constitutional sources of authority respects the proposition that courts have no business interfering with matters that should be dealt with through political institutions. I agree with Elliot that boundaries should be placed around "structural argumentation" – or what I am referring to as reasoning from constitutional essentials. However, I am not convinced that his solution of cordoning off legislation as being beyond the reach of an unwritten principles analysis absent some kind of textual warrant is coherent. The important point is whether there is a threat to the framework of the Constitution. If there is, the source of the threat is irrelevant. Elliot's proposal overlooks the very real prospect that legislatures can violate fundamental

[28] Structural Argumentation at 86, 141-42.
[29] See Unwritten Constitutionalism at 261-66 for Walter's discussion of Black, and see more generally 248-254 and *passim* for his discussion of the earlier English legal theorists. I should note that Walter's understanding of unwritten constitutionalism is not identical to Black's "structural" method. Black is more concerned with the "structure" of a given constitution. Walters is more concerned with the "practical legal implications" of law itself: see Walters, Unwritten Constitutionalism at 248-54; 261-66.
[30] Walters, Unwritten Constitutionalism at 273; see also 275: "the attempt to capture the ideal of legality in written form can never be seen as complete or exhaustive."
[31] Unwritten Constitutionalism at 264-65; see also the discussion at 274-75.

constitutional precepts in circumstances where no textual authorities are on point. As I discuss over the course of the next two chapters, courts will often respond to such situations by straining the meaning of available texts so far as to engage in the very practice that is of concern to Elliot himself: excessive judicial discretion.

A preferable approach is to isolate the constitutional transgressions that are within the reach of an unwritten principles analysis rather than a category of governmental activity that is out of bounds. Neither Black nor Elliot clearly delineates the class of matters that could be subject to "structural argumentation," other than to suggest that these matters are "constitutional" in the broad sense. It is possible, however, to formulate a relatively cogent rubric. Simply put, when there are threats to the distribution of power within government or the generation of law, an unwritten principles analysis should follow. These matters directly implicate the constitutional architecture of a system of democratic governance – the decision-making process and the web of institutional relationships emanating from that process – and must be managed through the foundational principles governing that architecture. The source of the threat is ultimately immaterial to invoking unwritten principles. Threats can come from the legislature, the executive, or the courts themselves.

The role of constitutional architecture in a democratic society is to establish the framework within which political conflict – often intense – can ensue in a peaceful fashion. Matters that appear to belong within the political realm of conflict will likely not rise to the level of justifying a judicial intervention armed with unwritten sources of authority. I note that Patricia Hughes has made a case for recognizing substantive equality as a fundamental and enforceable unwritten constitutional principle, drawing on decisions such

as the *Judges Reference* and the *Secession Reference*.[32] Yet as Hughes herself repeatedly observes, substantive equality is a highly contested subject in modern society:

> The inquiry into whether individuals or groups are experiencing substantive inequality in a particular context demands a complex assessment. It will ask how the equality needs of different people relate to each other. In a pluralist society there will inevitably be differing views of what it means to be equal as part of the more general project of different views of the "good society.'" The inquiry cannot assume one view, but neither can it be without moral (some might prefer "political") compass. The values which govern this process and the meaning of substantive equality are not immune from criticism or change, but neither are they without some significant grounding in a more comprehensive understanding of how people are to be treated and how they are expected to treat each other.[33]

It appears to me that this entire subject is a minefield of contentious political and moral questions, and thus is properly situated within the dynamic norm-producing process, rather than in the surrounding organizational structure. The appropriate protection for substantive equality, in other words, is likely legislation, or super-legislation, such as section 15 of the *Charter*. Society needs to debate this subject matter and hammer it into positive legal form through an act of will. With respect, I do not think that Hughes has made a compelling case for viewing substantive equality as an architectural norm that should come within the rubric of an unwritten principles analysis.[34]

Each of the decisions of the Tetralogy operates in the realm of constitutional architecture. These cases concern fundamental questions regarding the distribution of power amongst institutions and levels of government, and the generation and the very existence of law. Crucially, for my purposes, a nondelegation doctrine also operates within the realm of constitutional architecture, as it directly addresses the allocation of institutional power and the structured process of law-making. These are

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[32] "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dalhousie L.J. 5 ("**Substantive Equality**").

[33] Substantive Equality at 47-48, and see also 20, 24-26, and 41. Hughes cites John Rawls, *Political Liberalism* (New York: Columbia UP, 1996) at xvi, after her reference to the "good society."

[34] Jürgen Habermas possibly provides a basis on which an architectural argument in favour of substantive equality as a foundational democratic principle could proceed when he observes that "legal freedom, that is, the legal permission to do as one pleases, is worthless without actual freedom, the real possibility of choosing between the permitted alternatives" (*Between Facts and Norms* at 403, and generally 392-409, and 414-418). Much more work is required, however, to enable this kind of argument to navigate the political (and moral) minefield that surrounds it and to rise to the level of a structural imperative.

matters that are subject to the methodology of reasoning from constitutional essentials. That methodology, to summarize the foregoing discussion, involves responding to architectural threats by considering the underlying abstract foundational principles of the constitutional edifice, and determining if concrete legal rules can and should be distilled from these principles to meet the challenges posed.

I conclude this discussion with one final observation. I have chosen to refer to the methodology that I will employ in this project, and the methodology employed by the Court in the Tetralogy, as "reasoning from constitutional essentials" rather than "structural argumentation," which is Elliot's rendering of Black's method. This choice is guided by two factors. First, as I noted above, I am not convinced that either Black or Elliot has outlined the structural "method" with a desirable degree of specificity. Second, the phrase "reasoning from constitutional essentials" more accurately captures the crucial elements of the methodology – it is an analysis that employs legal reasoning to move from abstract constitutional propositions to more refined and concrete legal rules.

Chapter 3

The Tetralogy

The greatest difficulty in assessing the achievement of the Tetralogy comes from the Preamble. In the *Judges Reference*, the Court stresses the importance of "legal certainty" to the "project of constitutionalism":

> There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is.[35]

The Preamble, however, cannot meet the demands of this paragraph as far as providing an intelligible "source" for unwritten rules. Arguments based on the Preamble are advanced in the *Manitoba Language Reference*, *New Brunswick Broadcasting*, and the *Judges Reference*, and in the latter two cases, these arguments seriously undermine the overall cogency of the Court's entire use of unwritten principles. The solution is to set the preambular materials aside. Once that is done, the Court's strongest line of reasoning – reasoning from constitutional essentials – can be more clearly seen. The Preamble adds little of value to this much more compelling interpretive enterprise.

The goal of the first section below is effectively to set the Preamble aside. I consider how the Preamble functions in each of the three judgments noted above, and I conclude by introducing a positivist frame of reference that offers an explanation for why the Court relies on this ultimately unsatisfying device.

In the second section, having cleared the way, I focus on the methodology of reasoning from constitutional essentials. I consider how this methodology functions in each of the four decisions of the Tetralogy, and I argue that the Court, in its use of unwritten principles, has indeed gone to "the heart of the project of

[35] *Judges Reference* at para. 93.

constitutionalism," and has made an impressive case for both "legal certainty" and the "legitimacy of constitutional judicial review."

1. The Preamble

a. *Manitoba Language Reference*

In the *Manitoba Language Reference*, the Supreme Court was confronted with the illegality of virtually all of the enacted laws of the province of Manitoba. Section 23 of the *Manitoba Act, 1870* ("***Manitoba Act***") provides that "The Acts of the Legislature shall be printed and published in both [the English and French] languages."[36] Contrary to this binding manner and form requirement, the Manitoba legislature had consistently enacted legislation only in English. Under the supremacy clause of the *Constitution Act, 1982*, such legislation was invalid:

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

Ironically, the imperatives of the written Constitution placed the province in an effective "state of emergency," for there were very few valid enacted laws, and even the central organs of government in many cases had no legal authority to act.[37] The unanimous Court dealt with this crisis by looking beyond textual authorities:

> in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.[38]

One of these "unwritten postulates," the rule of law, could not tolerate a legal vacuum in the province, and thereby provided a basis on which to forge a legal response to the situation.

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[36] 33 Victoria, c 3 (Canada). The *Manitoba Act* is part of the Constitution: *Constitution Act, 1982*, ss. 52-53.
[37] *Manitoba Language Reference* at paras. 55-57, 107.
[38] *Manitoba Language Reference* at para. 66.

The Court relies on the introductory language of both of Canada's foundational written texts to establish that the rule of law has constitutional status. While it is "not set out in a specific provision," the rule of law is nevertheless implicitly referenced in the Preamble:

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

Observing that the "rule of law has always been understood as the very basis of the English Constitution," the Court determines that this "unwritten postulate" is incorporated through the phrase "a Constitution similar in Principle to that of the United Kingdom."[39] As for the preamble to the *Constitution Act, 1982*, there the principle is expressly invoked:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

The Court takes the preambular argument no further than this: the preambles provide evidence that an unwritten principle is part of the Canadian Constitution.[40] This recognition on its own does not solve the problem at issue. Further interpretive work is required, and I will consider that work below. But there are latent difficulties in the *Manitoba Language Reference* in that the Court does not indicate whether the preambular evidence of the unwritten principle of the rule of law is necessary to the overall analysis. Furthermore, the Court does not address the exact legal status of preambular authority. These are questions of some importance, for it must be remembered that the Court is relying on an unwritten principle to counter express textual commands. Does preambular authority provide a required starting point? Are the preambles textual? These questions become much more pressing in the next two judgments. For now, the point I wish to underline is that uncertain preambular authority is invoked with an uncertain purpose.

[39] *Manitoba Language Reference* at para. 63.
[40] *Manitoba Language Reference* at para. 63.

b. *New Brunswick Broadcasting*

The question before the Court in *New Brunswick Broadcasting* was whether a decision of the Nova Scotia House of Assembly to deny a media company access to the House to film proceedings violated the freedom of expression and the freedom of the press enshrined in section 2(b) of the *Charter*. There were multiple concurring opinions and a dissent, making this decision harder to manage than the unanimous *Manitoba Language Reference*.

Justice McLachlin (as she then was), writing for Justices L'Heureux-Dubé, Gonthier, and Iacobucci, found that the *Charter* does not apply to the House of Assembly. In excluding the media, the House was acting pursuant to parliamentary privilege – one of the unwritten principles of the Canadian Constitution. Such action is not, she reasoned, subject to the *Charter*. In a separate and very brief opinion, Justice La Forest agreed with Justice McLachlin's ruling subject to a single, but very important, qualification regarding the source of the principle of parliamentary privilege.

Chief Justice Lamer also found that the *Charter* does not apply to the House of Assembly, but he relied on text, arguing that under section 32(1)(b), the *Charter* only applies to the "legislature and government" of the provinces. The Chief Justice reasoned that the Nova Scotia House of Assembly was only a component part of the "legislature," and thus was not subject to the alleged constitutional constraints. Justices Cory and Sopinka, in separate opinions, also relied on text. They both found that the *Charter* does indeed apply to the House of Assembly, but only Justice Cory found a violation of section 2(b) that could not be upheld under section 1. The Court thus divided 7 to 1 on the result, and 5 to 3 on the use of unwritten principles.

The core of the majority judgment is that the decision to deny the media access to the Nova Scotia House of Assembly was taken pursuant to the unwritten constitutional principle of parliamentary privilege. Justice McLachlin bases this conclusion on three arguments: first, the effect of the Preamble; second, the authority of "historical tradition"; and third, "the pragmatic principle that the legislatures must be

presumed to possess such constitutional powers as are necessary for their proper functioning."[41] However, the judgment fails to clearly interrelate these lines of inquiry, leaving uncertainty, as in the *Manitoba Language Reference*, as to the circumstances in which the priority of text can be challenged. At various points in *New Brunswick Broadcasting* the Court implies that each argument is adequate on its own to constitutionalize the unwritten principle in question.[42] I consider only the preambular argument at this stage.

Preambles have traditionally been accorded a lower status than the express provisions of an enactment, serving as aids to interpretation of the rest of the text (particularly in cases of ambiguity), but not having direct legal effect of their own.[43] Indeed, seven members of the Court made this very point in the *Patriation Reference* about the Preamble itself:

> What, then, is to be drawn from the preamble as a matter of law? A preamble, needless to say, has no enacting force but, certainly, it can be called in aid to illuminate provisions of the statute in which it appears.[44]

Courts have also been reluctant to allow preambles to contradict express textual language.[45]

Nevertheless, in *New Brunswick Broadcasting*, the majority appears to proceed on the basis that the Preamble itself functions as authoritative text. The Court's analysis on this point is triggered by a comment made by Chief Justice Lamer in his concurring reasons. The Chief Justice does not reject outright

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[41] *New Brunswick Broadcasting* at para. 109.
[42] *New Brunswick Broadcasting* at paras. 113, 126, 127-28.
[43] On preambles generally, see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 296-299. The *Interpretation Act* provides that "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object" (R.S.C. 1985, c. I-21, s. 13).
[44] *Patriation Reference* at 805. On the legal status of the Preamble, see also Peter Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U. Toronto L.J. 715 at 720, 728-29 ("**Rule of Law**"); and Elliot, Structural Argumentation at 85-86.
[45] See *McVey v. United States of America*, [1992] 3 S.C.R. 475 at 525; and *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557 at para. 101 (*per*. Justices LeBel and Deschamps, dissenting).

the possibility that parliamentary privilege is an unwritten constitutional principle,[46] but he does express considerable unease with the notion that such status can block the operation of the *Charter*:

> I am not sure, however, that this argument can be taken so far as to grant parliamentary privileges a constitutional status which is on the same footing as the *Charter*. The *Charter* is a part of an evolution of our Constitution which culminated in the supremacy of a definitive written constitution. Given this, I would be reluctant to import unexpressed concepts into the Constitution in a way that would evade scrutiny under the express guarantees of the *Charter* [emphasis added].[47]

Justice McLachlin responds to this passage by suggesting that there is in fact textual support for elevating the principle of parliamentary privilege to a point where it can resist *Charter* guarantees:

> It is argued, however, that we in Canada have pursued the enterprise of constitution-writing to the point where unwritten concepts can no longer be said to have a place in our Constitution. I say immediately that I share the concern of the Chief Justice that unwritten concepts not be freely imported into a constitutional regime which has culminated in a written constitution.
>
> . . . . .
>
> It is my view that far from contradicting the proposition that Parliament and the legislatures possess inherent constitutional privileges, the wording of our written constitution supports that proposition.
>
> This is evident from the first part of our written constitution, the preamble to the *Constitution Act, 1867*, which announces the intention of securing to the provinces of Canada, Nova Scotia and New Brunswick, a "Constitution similar in Principle to that of the United Kingdom." There is no question that this preamble constitutionally guarantees the continuance of Parliamentary governance; given Canadian federalism, this guarantee extends to the provincial legislatures in the same manner as to the federal Parliament. The Constitution of the United Kingdom recognized certain privileges in the legislative body. This suggests that the legislative bodies of the new Dominion would possess similar, although not necessarily identical, powers [emphasis added].[48]

These passages appear to move some distance from the subordinate legal status accorded to preambular language in the authorities noted above. Justice McLachlin does not address such authorities in her analysis, and instead asserts not only that the Preamble is somehow part of the text, but also that it has substantial legal effects in that it "constitutionally guarantees the continuance of Parliamentary

[46] *New Brunswick Broadcasting* at paras. 55-58.
[47] *New Brunswick Broadcasting* at para. 57. It is worth noting that the Chief Justice was part of the Court when the *Manitoba Language Reference* was decided (in which the unwritten principle of the rule of law halted the application of written constitutional texts), and furthermore, he endorses that decision in the *Judges Reference* (at para. 99). Under his preferred section 32 approach to the matter before the Court in *New Brunswick Broadcasting*, however, he was able to avoid coming to a decision of the relation between unwritten principles and the express provisions of the *Charter* (see *New Brunswick Broadcasting* at para. 58).
[48] *New Brunswick Broadcasting* at paras. 110-112.

governance." This itself is a fairly bold statement. Yet Justice McLachlin goes further still, and maintains that the Preamble legalizes the principle of parliamentary privilege:

> It seems indisputable that the inherent privileges of Canada's legislative bodies, those "certain very moderate privileges which were necessary for the maintenance of order and discipline during the performance of their duties," fall within the group of principles constitutionalized by virtue of this preamble. The principles constitutionalized in this manner were seen to be unwritten and unexpressed; I do not understand the entrenchment of written rights guarantees, or the adoption of specific written instruments, to negate the manifest intention expressed in the preamble of our Constitution that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested. This is not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental to the constitutional regime which Canada has adopted in its Constitution Acts, 1867 to 1982 [emphasis added] [internal citation elided].[49]

What exactly is the effect of a "constitutionalized" unwritten principle? In *New Brunswick Broadcasting* the effect is of the greatest possible significance, for the Court invokes the "basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution."[50] It thus appears that the Preamble can halt the operation of the *Charter*. Further scrutiny of this proposition is required.

The source that Justice McLachin cites for the "basic rule" is *Reference re Bill 30, An Act to amend the Education Act (Ont.)* ("***Bill 30***"),[51] a decision that involved a conflict between express provisions of different parts of the Constitution: section 93 of the *Constitution Act, 1867*, and sections 2(a) (freedom of religion) and 15 (equality rights) of the *Charter*. Justice Wilson's majority comments in *Bill 30* appear to be slightly narrower than Justice McLachlin's formulation suggests:

> It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise.[52]

This strikes me as a slightly more specific proposition than a "rule" that "one part of the Constitution cannot be abrogated or diminished by another part of the Constitution." Justice Wilson does not cite

[49] *New Brunswick Broadcasting* at para. 113, internal quotation cited to R. M. Dawson, *The Government of Canada* (5th ed. 1970) at 338.
[50] *New Brunswick Broadcasting* at paras. 95, 105, 144-151.
[51] [1987] 1 S.C.R. 1148, cited and applied in *New Brunswick Broadcasting* at paras. 105, 144-151.
[52] *Bill 30* at para. 62.

authority for her statement, and there is not much case law between *Bill 30* and *New Brunswick Broadcasting* on the subject.

Even accepting that *Bill 30* establishes a "rule," however, raises difficulties in the context of *New Brunswick Broadcasting*. Justice Sopinka, in his concurring reasons in the later decision, is sceptical about applying a precedent involving a conflict between written provisions to a situation where a written provision is in conflict with an unwritten principle.[53] While Justice Sopinka does not expand on this point, it is very important to do so. Justice McLachlin herself makes no attempt to address the novelty of applying the *Bill 30* decision to an unwritten principles situation.

There may well be considerable merit in having a relatively fixed rule against one part of a written constitution overruling another. This is because democratically elected decision-makers consciously craft written constitutional texts. One written provision should not be lightly cast aside on the strength of another. But when one turns to unwritten principles, the entire equation changes. Unwritten principles are considerably more fluid than written texts, and may appear to conflict with texts and with other principles much more frequently than written provisions are likely to conflict with each other. The *Manitoba Language Reference* is a case in point. Conflicts involving unwritten principles should be resolved by keeping in mind the architectural function of such principles: the most structurally pressing interest should prevail. This is a more appropriate strategy than applying *Bill 30*, which arose in the context of a specific conflict between a particularly sensitive provision of the *Constitution Act, 1867* and provisions of the *Charter*.[54]

[53] *New Brunswick Broadcasting* at para. 158.
[54] Section 93 of the *Constitution Act, 1867* involved, as Justice Wilson suggests in the passage quoted from *Bill 30* above, crucial compromises in relation to education, religion, and provincial power.

I noted earlier that a difficulty with the *Manitoba Language Reference* is that it is unclear if the Court's invocation of preambular language is necessary to the resolution of the matter at issue. In *New Brunswick Broadcasting*, it can be seen that the stakes are considerably higher, for with the *Bill 30* rule in play, the possibility arises that preambular language is sufficient to resolve the matter at issue. In essence, a portion of quasi-text, lacking clear legal status in traditional treatments of preambles (including the *Patriation Reference*), is nevertheless elevated to fulfill a constitutionalizing role that can halt the operation of a written enactment. This, I respectfully suggest, is an astonishing proposition.

Oddly enough, however, even with this suggestion that the Preamble is sufficient to hold the *Charter* in abeyance, the decision does not clarify if the Preamble is necessary. As noted above, the Court advances two other arguments to support its ruling ("historical tradition"; "pragmatic" function). These three arguments are nowhere ranked or ordered, leaving the Preamble potentially cast in both a lead and a supporting role. Consider the following passage that concludes the Court's Preamble analysis:

> I conclude that the written text of Canada's Constitution supports, rather than detracts from, the conclusion that our legislative bodies possess those historically recognized inherent constitutional powers as are necessary to their proper functioning [emphasis added].[55]

Here the Preamble, elevated to textual status, is tucked within the other two arguments. The implication is that the Preamble is not necessary: it only "supports." But how can written text, text that "constitutionalize[s]" an unwritten principle, be reduced to simply reinforcing other arguments? What is needed, and what is not provided anywhere in the decision, is a thoroughgoing clarification of priorities.

Before turning to the *Judges Reference*, where the role and status of the Preamble becomes even more complicated, it is worth noting Justice La Forest's one paragraph concurring opinion in *New Brunswick Broadcasting*, which offers an attractive alternative approach that avoids relying on the Preamble:

> As I see it, when the British government granted a legislative assembly to a colony, the grant carried with it as an adjunct the power necessary for that body to carry out its functions, in particular the power to

[55] *New Brunswick Broadcasting* at para. 115.

> regulate its internal processes in the traditional manner developed over the years. This is really what we are talking about when we speak of parliamentary or legislative privileges in this country. The broader parliamentary privileges of the British Parliament were not carried over to this country but colonial legislatures necessarily had to have such privileges as were necessary to their functioning. The legislative assembly, with its concomitant privileges, was part of the colony's constitution, which in the case of the pre-existing provinces like Nova Scotia was continued by the *Constitution Act, 1867*. Parliamentary legislative privileges in Nova Scotia are, therefore, ultimately anchored in the grant of a legislative assembly and incorporated into the *Constitution Act, 1867*. The new legislative bodies created by that Act and subsequent constitutional instruments over the years are governed by the same principle. The preambular statement in the *Constitution Act, 1867* that what was desired was "a Constitution similar in Principle to that of the United Kingdom," among other things, gives expression to the nature of the legislative bodies that were continued or established by it. The privileges of these bodies are similar in principle, though not identical, to those of the Parliament of the United Kingdom [emphasis added].[56]

Justice La Forest agrees with the majority that the case should be resolved on the basis of the unwritten principle of parliamentary privilege, but he finds this principle to be "ultimately anchored in the grant of a legislative assembly and incorporated into the *Constitution Act, 1867*." This analysis is focused on fully authoritative constitutional text. Sections 17, 69, and 71 of the *Constitution Act, 1867* grant legislative assembles to each of Canada, Ontario, and Quebec, while section 88 continues the existing grants of legislative assemblies to Nova Scotia and New Brunswick.[57] If the express provisions of the Constitution contain a "grant" of legislatures, there is no need to "constitutionalize" anything through the Preamble, which is at best redundant, and at worst unsustainable, given the uncertainty discussed above regarding its exact legal status. Under Justice La Forest's approach, which I will refer to in future discussions as the "**textual anchor theory**," the Preamble is relegated to the supporting position preambles traditionally occupy in legal analysis – it merely "gives expression to the nature of the legislative bodies that were continued or established" by the main provisions of the text.

I conclude this discussion by noting a point of extreme irony. While Justice La Forest offers an appealing alternative to the murky authority of the Preamble, the rest of the Court expressly endorses his concurring

[56] *New Brunswick Broadcasting* at para. 93.
[57] On the original grants in Nova Scotia and New Brunswick, see Mark Rieksts, "The Constitutions of the Maritime Province" (January-February 2013) Law Now 24 at 26-28.

opinion![58] It is not at all clear how one opinion can endorse another when the only substantive point made in the latter is a recasting of a central argument of the former. Due to the Court's reliance on the Preamble, the relationship of text and unwritten principle, as well as the source and authority of the latter, remain obscure in *New Brunswick Broadcasting*.

c. *Judges Reference*

In the *Judges Reference*, the Preamble occupies both a more elevated and a less elevated place than in *New Brunswick Broadcasting*. Indeed, in the later decision, virtually everything about the Court's handling of the Preamble is ambiguous. There is a lengthy discussion that comes close to identifying the Preamble as a mechanism that legalizes unwritten principles, but this discussion is not in fact used in resolving the matter before the Court. Throughout, the claims made about the Preamble are expressed with a lack of clarity that renders the entire discussion of uncertain value. At the beginning of this chapter, I quoted a passage in which the Court comments on the "utmost importance," in the interests of "legal certainty and through it the legitimacy of constitutional judicial review," to articulate the "source" of unwritten laws. On this standard, the treatment of the Preamble in the *Judges Reference* must be counted as a failure. This is not to denigrate the result of the decision, or the Court's handling of the methodology of reasoning from constitutional essentials, both of which, as I discuss in the next section, are exemplary. My goal in this section, it will be recalled, is to set aside the Preamble as a distraction.

A brief overview of the *Judges Reference* is useful at this point. The governments of P.E.I., Alberta, and Manitoba acted through legislation and executive orders to reduce the pay of provincial court judges and control certain matters relating to the administration of the provincial courts. In each jurisdiction, the constitutionality of these measures was challenged, variously through references and motions.[59] The

[58] *New Brunswick Broadcasting* at para. 152.

[59] The Court heard two appeals from Prince Edward Island (which began as references before the appellate courts), three from Alberta (which began as motions in criminal trials), and a single appeal from Manitoba (which began as

appeals were all heard together by the Supreme Court of Canada. Six members of the Court, in an opinion written by Chief Justice Lamer, declared that many of the impugned legislative provisions and executive orders were unconstitutional. Justice La Forest, in his dissenting reasons, found several of the executive orders to be unconstitutional, but found no defects in the relevant legislation.[60]

The primary issue before the Court was the extent to which the independence of the provincial courts is constitutionally protected. While the appeals were all argued primarily on the basis of section 11(d) of the *Charter*, the Chief Justice determined that the analysis of judicial independence should extend beyond section 11(d), and consider "the broader question of whether the constitutional home of judicial independence lies in the express provisions of the Constitution Acts, 1867 to 1982, or [is] exterior to the sections of those documents."[61]

Justice La Forest differed in his interpretation of the ambit of section 11(d), but the real force of his dissent comes from his strong objection to the conclusions reached by the Court in the wider constitutional analysis. He also expressed "grave reservations" about the Court even considering the question of judicial independence beyond the ambit of section 11(d) as the matter was not adequately argued by counsel:

> My concern arises out of the nature of judicial power. As I see it, the judiciary derives its public acceptance and its strength from the fact that judges do not initiate recourse to the law. Rather, they respond to grievances raised by those who come before them seeking to have the law applied, listening fairly to the representations of all parties, always subject to the discipline provided by the facts of the case. This sustains their impartiality and limits their powers.[62]

These comments have great force. They are, however, not without a very strong rejoinder. The extended constitutional analysis was required, the Chief Justice reasoned, both because some of the written and oral arguments before the Court addressed the larger question of the "constitutional home of judicial

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a constitutional challenge launched by the Provincial Judges Association). The matters relating to the administration of the provincial courts involved designating sitting days, places of residence of judges, and staffing.

[60] *Judges Reference* at paras. 353-365.

[61] *Judges Reference* at para. 1.

[62] *Judges Reference* at paras. 297-302.

independence,"[63] and because the express wording of section 11(d) only applies to matters involving an "offence," and thereby leaves the civil jurisdiction of the provincial courts, including their role in constitutional litigation, without clear protection.[64] This latter point is arguably determinative, for as the Chief Justice expressly observed, the Court was faced with an "unprecedented situation" in which the constitutional status of provincial court judges had come under "serious strain" in many jurisdictions.[65] One of the fundamental roles of the Supreme Court of Canada is to settle uncertain matters of law arising from different provinces. Where such uncertainty implicates the very constitutional status of provincial courts, the need for resolution is particularly pressing. Had the Court confined itself solely to section 11(d), as Justice La Forest counselled, future claims arising in the context of the civil and constitutional jurisdiction of the provincial courts would be inevitable. The Court was thus justified in addressing the "constitutional home of judicial independence." Ironically, however, the *Judges Reference* was in danger of falling between the chairs, for the Court both opined on the larger unwritten constitutional status of judicial independence and resolved the matter ostensibly on the narrower basis of section 11(d). In my view, a more aggressive decision clearly resolving the appeals on the basis of unwritten principles was desirable. As I discuss below, the Court's actual use of section 11(d) was nominal, with the real analysis coming from unwritten sources of authority. A more forthright acknowledgment of this would have provided clarity on the role of unwritten principles in overruling legislation. For now, however, I focus on the Preamble.

[63] *Judges Reference* at para. 83

[64] See the *Judges Reference* at paras. 86, 126-128, where the Chief Justice emphasizes the role that the provincial courts play in constitutional matters that fall outside of the reference to "offence" in the text of section 11(d). The Chief Justice also observes that the provincial courts are not protected by sections 96-100 of the *Constitution Act, 1867*, which apply primarily to Superior, District and County Courts: *Judges Reference* at paras. 83-89.

[65] *Judges Reference* at paras. 6-7. In addition to the appeals from each of P.E.I., Alberta, and Manitoba, a similar constitutional challenge was working its way through the British Columbia courts: *Judges Reference* at para. 6.

Chief Justice Lamer's lengthy treatment of the Preamble suffers from the same basic problems evident in both of the previous decisions of the Tetralogy. The question of whether the Preamble is either a necessary or a sufficient part of an unwritten principles analysis remains obscure. At times, the Chief Justice makes very elaborate claims for the Preamble, commenting on its "important legal effects" and "special legal effect," and also describing it dramatically as the "grand entrance hall to the castle of the Constitution."[66] The following passage is of considerable importance:

> In the words of Rand J., the preamble articulates "the political theory which the Act embodies": *Switzman*. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law [internal citations abridged].[67]

Several commentators have read the *Judges Reference* as providing that the Preamble is the "source" of unwritten principles – a view that cannot survive the statement in this passages that the Preamble "recognizes and affirms the basic principles which <u>are</u> the very source."[68] The Preamble variously "express[es]," "articulate[s]," and "identifies" the "organizing principles" of the Constitution, but it does not originate.[69] Far from being a "source," the Chief Justice appears to present the Preamble as a mechanism: it is "the <u>means</u> by which the underlying logic of the Act can be given the force of law." This

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[66] *Judges Reference* at paras. 95, 104, 109.

[67] *Judges Reference* at para. 95.

[68] For commentators reading the judgment as providing that the Preamble is the "source" of unwritten principles, see Cameron, Unstated Assumptions at 93, 99-100; and Elliot, Structural Argumentation at 87, 89, 90, 120, 141. It may well be that one particularly difficult passage contributes to some confusion on this matter:

> Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located (*Judges Reference* at para. 109).

A careful reading here, however, reveals that this passage states that the "true source" is "<u>in</u>" the Preamble, and is not the Preamble itself. This is undoubtedly awkward, but appears to refer to the unwritten principles that are at the root of the Constitution of the United Kingdom, and by extension, the principles that are at the root of the Canadian Constitution (i.e. "a Constitution similar in Principle to that of the United Kingdom"). The rest of this passage confirms that the Preamble is not the "source." It is the means by which the unwritten principle of judicial independence is "recognized and affirmed." Furthermore, the Chief Justice's arresting metaphor clearly provides that the Preamble, as the "grand entrance hall," is not the final destination – it leads somewhere else.

[69] *Judges Reference* at paras. 96, 99, 104.

implies a legalizing mechanism, and possibly an exclusive ("the means") legalizing mechanism. Implicitly, all unwritten rules must run through the Preamble. Viewing the Preamble as a legalizing mechanism is consistent with *New Brunswick Broadcasting*, where the Preamble "constitutionalized" the unwritten principle of parliamentary privilege.

There is uncertainty, however, in the Court's phraseology. The Chief Justice states six times that the Preamble "recognizes and affirms" the unwritten principles of the Constitution.[70] What does this phrase mean? When the Preamble "recognizes and affirms" an unwritten principle, does it only provide evidence that the principle is part of the Constitution, or does it go further and provide that the principle has legal effect? In the *Patriation Reference*, the Court recognized that the Constitution contains both legal and nonlegal elements.[71] If the Preamble truly legalizes an unwritten principle ("special legal effect"), then we have a surrogate enacting mechanism. Jeffrey Goldsworthy, in his detailed discussion of the British Constitution (which is of course invoked by the Preamble), argues that constitutional principles such as democracy and the rule of law are moral and political in nature, but not legal.[72] For Goldsworthy, the only legitimate mechanism that can convert such extra-legal principles into legal rules is the process of formal written enactment.[73] In *New Brunswick Broadcasting* and at times in the *Judges Reference*, the Court appears to be asserting another, less than fully formal, mechanism at work – incorporation by reference rather than by enactment.

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[70] *Judges Reference* at paras. 83, 95, 97, 101, 109, 163.

[71] *Patriation Reference* at 883-84: "constitutional conventions plus constitutional law equal the total constitution of the country" [emphasis added].

[72] *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) at 257-59 ("***Sovereignty of Parliament***"). Goldsworthy's view that unwritten constitutional principles are moral and political but not legal has been strongly challenged by T.R.S. Allan: *Constitutional Justice: A Liberal Theory of the Rule of Law* (New York: Oxford UP, 2001) at 201-242, and esp. 216-22 ("***Constitutional Justice***"). Goldsworthy addresses Allan's theories in Unwritten Principles at 289-304; and *Sovereignty of Parliament*, ch. 10, *passim*.

[73] *Sovereignty of Parliament* at 258.

But the Court does not consistently pursue this surrogate enacting mechanism approach in the *Judges Reference*. In his discussion of the *Manitoba Language Reference*, Chief Justice Lamer states that the Preamble provided "one basis for holding that the rule of law was a fundamental principle of the Canadian Constitution" [emphasis added]."[74] Here the Preamble does not appear necessary to the analysis in that decision, but only optional, and its exact effect is not necessarily to legalize.[75] The Chief Justice also observes, regarding the *Manitoba Language Reference*, that "the fundamental principles articulated by preamble have been given legal effect by this Court."[76] This statement suggests that any legalizing came from the Court's analysis, and not the Preamble itself, although the importance of the fact that the Preamble "articulated" the principle in question remains, as always, uncertain.

The following two passages, both referring to earlier decisions such as *Alberta Statutes*, *Switzman*, *Saumur*, and *OPSEU*, also seem to acknowledge the legal work performed by the Court, rather than an automatic legalizing effect brought about by a preambular mechanism:

> the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text.
>
> . . . . .
>
> members of the Court, correctly in my opinion, have been able to infer [the] general principle [of Parliamentary government through representative institutions] from the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom."[77]

If the bulk of the legal work is done through judicial reasoning, and the Preamble just provides a point of departure, or a set of tools, it is not clear that it has such a "special legal effect" after all. The Preamble is not definitive in any of the above decisions, nor is it definitive in the *Manitoba Language Reference*. With

[74] *Judges Reference* at para. 99.
[75] The Preamble also appears optional when it provides an "alternative explanation" for deriving the rules of "full faith and credit" and "paramountcy" from the principle of federalism: *Judges Reference* at paras. 97-98, discussing *Huson v. Township of South Norwich* (1895), 24 S.C.R. 145; *Hunt v. T & N PLC*, [1993] 4 S.C.R. 289; and *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.
[76] *Judges Reference* at para. 99.
[77] *Judges Reference* at para. 100, 102-103.

the important exception of *New Brunswick Broadcasting*, where the troubling *Bill 30* rule appears to allow parliamentary privilege to halt the *Charter*, the Preamble on its own has not been sufficient to lead to legal results.

Judicial independence, the express subject of the *Judges Reference*, must also be noted in connection with the alleged legal effect of the Preamble. The Chief Justice repeatedly states that judicial independence is an unwritten principle "recognized and affirmed" by the Preamble.[78] But even if this is granted, there are no unwritten rules forthcoming to manage the appeals before the Court. Those rules, as I argue below, are recognized through the methodology of reasoning from constitution essentials.

The need for the Preamble, the legal status of the Preamble, and the exact role of the Preamble all remain vague in the Court's analysis, and these points are surely fatal, given the Chief Justice's emphatic declaration that it is "of the utmost importance," in the interests of "legal certainty," to determine the "source" of "unwritten norms." If the Preamble cannot deliver clarity, I respectfully submit that it should not occupy an important place in an unwritten principles analysis.

Two additional problems with the Preamble should be briefly noted: first, the still unresolved question of the legal status of preambles generally, and second, the vagueness of the Preamble's wording. Unlike Justice McLachlin in *New Brunswick Broadcasting*, Chief Justice Lamer does address the legal status question:

> Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force": *Reference re Resolution to Amend the Constitution*. In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.
>
> But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language: *Driedger on the Construction of Statutes*. The preamble to the *Constitution Act, 1867*, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates "the political theory which the Act embodies": *Switzman*. It recognizes and affirms the basic principles which

[78] *Judges Reference* at paras. 83, 105, 109.

> are the very source of the substantive provisions of the *Constitution Act, 1867* [internal citations abridged].[79]

Even accepting that the Preamble does indeed "articulate" the "political theory" underlying the text, and does indeed "recognize" and "affirm" the unwritten principles at the core of the Constitution, there is no basis provided here for maintaining that it has "important legal effects." It is this final proposition, the extraction of legal rules from unwritten principles, that is the most significant. Recognizing a political principle ("the political theory which the Act embodies") does not make it legal. How exactly does this mechanism create law? Is the law innate to the principles, or is it virtually enacted through quasi-text?

The final difficulty with using the Preamble as a constitutional mechanism is its actual wording. Through the central phrase, "a Constitution similar in Principle to that of the United Kingdom," the Preamble points to an uncertain body of material. Warren Newman observes that

> there is no unified, organic, comprehensive and authoritative statement expressly declaring the fundamental principles, postulates, powers and jurisdictions underlying British constitutional government.[80]

How much space can be traversed by the phrase "similar in Principle to" in constitutional argumentation before the Preamble is pushed beyond the bounds of legitimate argument? S.M. Corbett pointedly observes that

> The sense in which Canada ever had a constitution similar in principle to that of the United Kingdom is, and should be, a matter of debate.[81]

Surely the mere possibility of such debate renders the Preamble largely unfit for service in an unwritten principles analysis, other than in a supporting capacity. The primary focus of such an analysis cannot rest on a mechanism that lacks both a clear legal status and a clear referent. The latter point is amply demonstrated by the *Judges Reference* itself. In his dissent, Justice La Forest forcefully argues that in 1867

[79] *Judges Reference* at paras. 94-95.
[80] Grand Entrance Hall at 205-206.
[81] "Reading the Preamble to the British North America Act, 1867" (1998) 9 Const. F. 42 at 43 ("**Reading the Preamble**").

the principle of judicial independence did not extend to inferior courts in the United Kingdom,[82] and he also argues that the principle of judicial independence has never sanctioned the proposition that the courts could overrule an Act of Parliament in the United Kingdom:

> Even if it is accepted that judicial independence had become a "constitutional" principle in Britain by 1867, it is important to understand the precise meaning of that term in British law. Unlike Canada, Great Britain does not have a written constitution. Under accepted British legal theory, Parliament is supreme. By this I mean that there are no limitations upon its legislative competence.
>
> . . . . .
>
> The idea that there were enforceable limits on the power of the British Parliament to interfere with the judiciary at the time of Confederation, then, is an historical fallacy. By expressing a desire to have a Constitution "similar in Principle to that of the United Kingdom," the framers of the *Constitution Act, 1867* did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, entrench the fundamental components of judicial independence set out in the *Act of Settlement* such that violations could be struck down by the courts. This was accomplished, however, by ss. 99-100 of the *Constitution Act, 1867*, not the preamble.[83]

Justice La Forest's views here are entirely consistent with Professor Goldsworthy's claim that unwritten principles become law through enactment. The Preamble cannot serve this function: it is a "historical fallacy" to attempt to extend judicial independence to provincial (i.e. inferior) courts, and to attempt to overrule legislation on this basis. Justice La Forest's arguments have been strongly endorsed by academic commentators.[84] In all fairness to the Chief Justice, however, "similar in Principle" does not mean identical, and thus there is in theory room in a Preamble argument to accommodate the considerable evolution that has occurred in Canada since 1867.[85]

I suggest, however, that it does not really matter whether the Chief Justice or Justice La Forest is correct on the details of the historical argument. The crucial point is that the language of the Preamble simply

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[82] *Judges Reference* at paras. 313, 321. See also Hurlburt, Fairy Tales at 189.
[83] *Judges Reference* at paras. 308, 311.
[84] See Goldsworthy, Judicial Integrity at 61-63; and Robert G. Richards, "Provincial Court Judges Decision-Case Comment" (1998) 61 Sask. L. Rev. 575 at 581-83 ("**Judges Decision**"). See also Corbett, Reading the Preamble at 43.
[85] The Chief Justice addresses the evolutionary point expressly in the *Judges Reference* at paras. 89 and 106. See also Jennifer Smith, "The Origins of Judicial Review in Canada" (1983) 16:1 Canadian J. Political Science 115 at 118-21, discussing W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769.

leaves too much room for uncertainty, and thus should not be granted an important role in constitutional interpretation where unwritten principles are involved.

Before moving on to consider the more vital and stable elements of the Tetralogy, it is useful to consider why the Court chose to introduce such an unstable element into these decisions. If deploying unwritten constitutional principles to achieve legal results is a contentious enterprise, why bring the Preamble on board in the first place?

d. A Positivist Frame of Reference: Making Sense of the Court's Use of the Preamble

While there have been no detailed treatments of the relevance of positivism to the Tetralogy, several commentators have noted the connection between this branch of modern legal theory and specific decisions.[86] Most importantly for my purposes, David Dyzenhaus has observed a "positivist anxiety" at work in the concerns expressed by members of the Court in the *Judges Reference* regarding the legitimacy of judicial review when textual sources of authority are left behind.[87] A positivist frame of reference may be of assistance in understanding the role of the Preamble.

Legal positivism prioritizes certainty in the transmission of legal meaning and legal authority. Kelsen's understanding of posited law as a system emanating from deliberate exercises of human will rather than

[86] The most extensive discussion is provided in Choudhry and Howse, Constitutional Theory at 150-154. See also Mark Carter, "The Rule of Law, Legal Rights in the *Charter*, and the Supreme Court's New Positivism" (2008) 33 Queen's L.J. 453 at 468-70 ("**New Positivism**"); David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 U.N.B.L.J. 111 at 115-17 ("**Deep Structure**"); and Dyzenhaus, Fundamental Values at 480-485 and *passim*. The absence of a sustained treatment of the relevance of modern legal positivism to the Tetralogy is a notable gap in our understanding of these important decisions. A consideration of Ronald Dworkin's powerful challenge to positivism outlined in *Taking Rights Seriously* (Cambridge: Harvard UP, 1977) ("***Taking Rights Seriously***") might also provide helpful insights. While the Supreme Court's unwritten constitutional principles are not identical to Dworkin's legal principles, concepts surrounding the latter such as "weight" and "fit" are arguably relevant to the Tetralogy, as is the question of whether the Court exercised "discretion" in these judgments (for these concepts, see *Taking Rights Seriously* at 14-130). I leave a detailed consideration of these matters to others, although I do comment on the application of "weight" to the Tetralogy in my discussion of the *Secession Reference*.

[87] Deep Structure at 116; see also his discussion in Fundamental Values at 481-82.

human reason foregrounds a publicly accessible concept of legality, as does Joseph Raz's "sources thesis," which views law as determined by "social facts":

> The sources of a law are those facts by virtue of which it is valid and which identify its content.
>
> . . . . .
>
> According to [the sources thesis] the law on a question is settled when legally binding sources provide its solution. In such cases judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral acumen. If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer – the law on the question is unsettled. In deciding such cases courts inevitably break new (legal) ground and their decisions develop the law (at least in precedent-based legal systems). Naturally, their decisions in such cases rely at least partly on moral and other extra-legal considerations.[88]

While "moral and other extra-legal considerations" play a crucial role in ordering human relations, positivism appears to operate on the basis that exercises of coercive state power are best governed by what Raz refers to as "publicly ascertainable standards."[89] Jules Coleman also stresses the social importance of a "fact" based understanding of the law, observing that

> Law is knowable and ascertainable; so that, while a person may not know the range of his moral obligations, he is aware of (or can find out) what the law expects of him. Commitment to the traditional legal values associated with the rule of law requires that law consist in knowable, largely uncontroversial fact; and it is this feature of law that positivism draws attention to and which underlies it.[90]

Where "standards" are no longer "publicly ascertainable" and "largely uncontroversial," compliance becomes difficult if not impossible. Equally important, the generation and enforcement of law can become arbitrary. Arbitrary behaviour by state officials, as theorists such as William Scheuerman and A.V. Dicey observe, is the very opposite of the rule of law.[91]

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[88] Sources of Law at 37, 47, 49-50.

[89] Sources of Law at 51-52.

[90] Positive Positivism at 145. I should clarify, given the prominence of the rule of law in the Supreme Court of Canada's unwritten principles jurisprudence, that Coleman appears to invoke this principle here as an "extra-legal consideration" (in Raz's terminology), that is, as a "value" that informs our understanding of the law's social purpose.

[91] Scheuerman, in his comprehensive discussion of the rule of law and the legal theorists of the Frankfurt School, stresses that controlling "the exercise of arbitrary power" and "unpredictable state action" is the core of the rule of law: "its centerpiece has always been the idea that governmental action must be rendered calculable and restrained" (*Between the Norm and the Exception* at 68-69). Similarly, Dicey observes that the rule of law

For my purposes, it is important to observe that the positivist attempt to establish a boundary between legal and "extra-legal considerations" has implications for the institutions of government in a democratic society. As Raz notes in the above passage, when courts move outside the law and rely on "extra-legal considerations," they "inevitably break new (legal) ground and their decisions develop the law (at least in precedent-based legal systems)." Such activity is viewed by positivism as involving exercises of judicial "discretion," for the law has evidently run out, and judges are thereby allegedly engaged in a process of creating rather than discovering or recognizing.[92] In a democracy, it can be argued that the courts should exercise great caution when creating new law, for it is citizens and legislatures that have primary authority in interpreting moral and political concerns, and in determining the extent to which such "extra-legal" matters should become law. On this view, courts have primary authority in interpreting the law, not making it.

Maintaining the clear distinction between law and not-law encouraged by positivism, a distinction grounded in written "sources," may enable the point where judges create rather than recognize the law to be more readily discerned, thereby furthering the democratic goal of popular self-government. In circumstances where the primary issues in a dispute are "extra-legal," a court can decline to reach a decision on the basis that the matter is non-justiciable, and is more properly dealt with in a political forum.[93] Alternately, if a matter is pressing and requires judicial resolution, a court can proceed to render

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> means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government (*Law of the Constitution* at 215).

[92] The thesis that judges exercise discretion and create law in 'hard cases' not fully determined by existing textual sources is mapped out in a dialogue between H.L.A. Hart (*Concept of Law* at 135-36, 272-276, and generally 124-47) and Ronald Dworkin (*Taking Rights Seriously* at 31-39, 81-130). The subsequent commentary on the dispute between Hart and Dworkin on this point is extensive. Scott J. Shapiro ("On Hart's Way Out" (1998) 4 Legal Theory 469); and Coleman (Positive Positivism)) provide very helpful treatments.

[93] On this point, see Newman, Grand Entrance Hall at 233-34; and Choudhry and Howse, Constitutional Theory at 152. See also Professor Walters' detailed discussion of the complex relationship between law, political conventions, and justiciability in Prorogation Debate at 145-50.

a judgment that does not obscure the recourse to moral or political considerations.[94] Such an acknowledgment would leave the basis of the judicial solution transparent, and provide greater authority for other members of society to challenge the ruling in the realm of public or political discourse. However, if the boundary between legal and "extra-legal considerations" is blurred, matters that should be open for public debate and resolution in democratic institutions may be improperly dealt with by courts.

The Supreme Court of Canada's use of unwritten constitutional principles in the Tetralogy challenges the "social fact" basis of the distinction between legal and "extra-legal considerations" endorsed by positivism. The content of unwritten principles is not readily "publicly ascertainable." A range of pressing institutional questions thus arises. What is the "source" of the Court's authority? Is the Court making law or recognizing law? Has the Court stepped beyond its proper role? The very existence of strongly worded criticisms of the *Judges Reference* and the *Secession Reference* amply indicates that the move into a non-textual terrain can undermine the overall authority of the judiciary as an institution. Indeed, the charge has been made that in these decisions the Court improperly decided matters that should have been left for political institutions to manage. Jamie Cameron, for example, is highly critical of both the *Judges Reference* and the *Secession Reference*, and finds the legitimacy of employing non-textual sources of authority in constitutional interpretation to be "dubious":

> Though its meaning may not be self evident, the text identifies the principles that are entrenched as the supreme law of our land. Unstated assumptions which might be considered vital cannot claim the pedigree of text or the supreme status it confers.[95]

[94] For the virtues of an open acknowledgment of judicial law-making, see Goldsworthy, Unwritten Principles at 311; and Hurlburt, Fairy Tales at 183.

[95] Unstated Assumptions at 91. For other strong criticisms of the institutional legitimacy of relying on extra-textual sources of authority in the Tetralogy, see Hurlburt, Fairy Tales at 182, 187-88, 190-91, 202; Leclair, Unfathomable Principles at 400-401; Goldsworthy, Judicial Integrity, *passim*; and Monahan, Public Policy Role at 77-79, 97. Professor Elliot has also expressed concerns about the legitimacy of the judicial role when unwritten principles are involved in legal analysis, although in less strident terms than the above commentators: see Structural Argumentation at 81-86, 141-42.

This is a positivist-based critique ("pedigree" is a positivist touchstone[96]), and it is a form of critique that the Court itself is very concerned about. In addition to Chief Justice Lamer's observation in the *Judges Reference* about the "utmost importance" of isolating the "source" of unwritten rules, it will be recalled that Justice McLachlin gives voice to a similar apprehension attendant on such a venture in *New Brunswick Broadcasting*:

> I say immediately that I share the concern of the Chief Justice that unwritten concepts not be freely imported into a constitutional regime which has culminated in a written constitution.

The recourse to preambular language in the first three decisions of the Tetralogy can be usefully viewed as an attempt to manage and deflect concerns about the legitimacy of using unwritten sources of authority. Preambular language provides a mechanism to cope with the "positivist anxiety" noted by Professor Dyzenhaus, and with the "tension" that he observes "positivist" judges with a strong commitment to text experience when they operate in a legal system that accepts the existence of non-textual sources of law.[97]

As discussed above, in *New Brunswick Broadcasting* and the *Judges Reference*, the Court presents the Preamble as a mechanism that integrates unwritten materials into the law. This is very similar to a recognizable positivist strategy known as "incorporationism," also sometimes referred to as "weak," "soft," or "inclusive" positivism. This strategy provides that authoritative laws, emanating from the domain of verifiable public facts, can in turn expressly incorporate "extra-legal" sources of authority, including moral or political principles, into the law. Professor Coleman explains the strategy in the following terms:

> The characteristic of legally binding moral principles that distinguishes them from nonbinding moral principles can be captured in a clause in the relevant rule of recognition. In other words, a rule is a legal

[96] See Dworkin, *Taking Rights Seriously* at 17, 17-22, 39-45; Hart, *Concept of Law* at 263-268; and Coleman, Positive Positivism, *passim*. Coleman suggests that the concept of "pedigree" can be approached as providing for a "noncontentful criterion of legality" (Positive Positivism at 140).
[97] See Genealogy of Legal Positivism at 45-51, 63-65.

> rule if it possesses characteristic C; and a moral principle is a legal principle if it possesses characteristic C1. The rule of recognition then states that a norm is a legal one if and only if it possesses either C or C1.[98]

John Gardner observes that incorporationism provides that

> the law of any legal system consists of all the standards (reasons, rules, principles, etc.) that the system's law applying institutions are bound by the law of their system to apply, never mind where the standards hail from [emphasis added].[99]

The following description of the Preamble in the *Secession Reference* strongly suggests a "soft positivist" mechanism:

> we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference [emphasis added].[100]

The virtue of using the Preamble as a "soft" or "incorporationist" version of positivism is that it can assuage concerns ("anxiety"; "tension") about reaching outside of the public "fact" realm of text. The Preamble is thus enlisted to fulfill a stabilizing function, offering a mechanism that "constitutionalize[s]" certain "extra-legal considerations," thereby easing the tension that arises from employing unwritten sources of authority. Text can be both present and not present; determinative and non-determinative. Unwritten principles can operate, but under the cover of a kind of textual warrant.

For "hard" or "strong" positivist purists such as Gardner and Raz, however, the publicity and certainty that is central to the very project of law is undermined where "every law" is not "fully determined by social sources."[101] Indeed,

> Law purports to settle matters that would otherwise be unsettled, or to give us ways of settling matters that we would otherwise not have, or at least to influence us when we are unsettled. But when the law

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[98] Positive Positivism at 148-49; see also 162-63. Other useful discussions of incorporationism/soft positivism can be found in Hart, *Concept of Law* at 250-54; Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (New York: Oxford UP, 2009) at 95-97; and Dyzenhaus, Genealogy of Legal Positivism at 44, 54-55.

[99] "The Many Faces of the Reasonable Person" (2015) 131 L.Q.R. 563 at 569 ("**Reasonable Person**").

[100] *Secession Reference* at para. 53. See also *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 at para. 68 (per Justice McLachlin (as she then was) and Justice L'Heureux-Dubé):

> The preamble to the *Constitution Act, 1867* affirms a parliamentary system of government, incorporating into the Canadian Constitution the right of Parliament and the legislatures to regulate their own affairs. The preamble also incorporates the notion of the separation of powers, inherent in British parliamentary democracy, which precludes the courts from trenching on the internal affairs of the other branches of government [emphasis added].

[101] Raz, Sources of Law at 46.

> directs us to rely for some purpose only on 'considerations which ordinarily regulate the conduct of human affairs' it purports to leave us, for that purpose of that law, in just the same position we would be in if that law had not existed.[102]

My discussion of the first three decisions of the Tetralogy suggests that the Preamble is singularly unable to fulfill incorporationist goals, and if anything, actually compounds the uncertainty that Raz and Gardner find objectionable in this form of positivism. The Preamble lacks clear status as text. It is unable to "settle" anything, and offers at best a false sense of security.

Raz, drawing on his "sources thesis," acknowledges that an incorporating provision can be law as it is a social fact, while the referenced material cannot attain this status.[103] This distinction can be illustrated through the following hypothetical example of a simple incorporationist provision in a statute:

> Disputes under this Act shall be resolved pursuant to the moral precepts of the Anglican Church.

On a Razian analysis, the provision itself is law, but the "moral precepts of the Anglican Church" are not, as this content is fundamentally uncertain, and cannot be "sourced." Keeping this distinction in mind, it can be seen that the Preamble raises a double uncertainty. The content that it references is uncertain – this is true of all incorporationist provisions – but additionally, it lacks firm legal status. Here is the above hypothetical provision rewritten in preambular form:

> Whereas the moral precepts of the Anglican Church are a defining feature of our country, the legislature enacts as follows . . .

The legal authority of this statement to determine matters arising under the statute is dubious, and rightly so. But the Preamble itself requires yet a further addition, making it triply uncertain:

> Whereas moral precepts <u>similar in Principle to</u> those of the Anglican Church are a defining feature of our country, the legislature enacts as follows . . .

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[102] Gardner, Reasonable Person at 570, internal quotation cited to *Blyth v Birmingham Waterworks* (1856) 11 Ex. 781 at 784; 156 E.R. 1047 at 1049 per Alderson B. See also Raz, Sources of Law at 45-49, 51-52.

[103] Sources of Law at 46:

> To conform to the strong thesis we will have to say that while the rule referring to morality is indeed law (it is determined by its sources) the morality to which it refers is not thereby incorporated into law.

Even if one grants the power of an enactment to incorporate "extra-legal" material into the law (the root proposition offensive to Raz and Gardner), the Preamble's uncertain legal status and its vague wording makes it a very flimsy vessel to "constitutionalize" unwritten concepts. This piece of quasi-text cannot stabilize an unwritten principles approach to constitutionalism, and thus compounds rather assuages "positivist anxiety."

There is another more stable and more transparent basis on which to demonstrate the existence of unwritten constitutional principles and to derive unwritten rules from these principles. That alternate basis is the process of legal reasoning from constitutional essentials. It is employed in all of the decisions of the Tetralogy, and resolves each decision without the aid of the Preamble. Before turning to this other methodology, a final observation is warranted. The Preamble has not played a very substantial role in Supreme Court judgments after the *Judges Reference*. In the *Secession Reference*, the Court endorses the *Judges Reference* as noted above, but that is all. Three of the four unwritten principles employed in the *Secession Reference* (democracy, the rule of law, and federalism) can be easily sourced in the Preamble, yet the Court does not do so. For the most part, the Court has declined to further develop or deploy the Preamble as an incorporationist mechanism. The main exceptions here are decisions that fall directly within the ambit of the *Judges Reference* and deal with the principle of judicial independence, most notably *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick* ("***Mackin***");[104] *Ell v. Alberta* ("***Ell***");[105] and *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*.[106] Yet even these decisions mention the Preamble only briefly, largely in acknowledging the authority of the *Judges Reference*. It can be said that the "grand entrance hall to the castle of the Constitution" appears to have fallen into disuse.

[104] [2002] 1 S.C.R. 405.
[105] [2003] 1 S.C.R. 857.
[106] 2016 SCC 39.

2. Reasoning from Constitutional Essentials

a. *Manitoba Language Reference*

In seeking a solution to the crisis posed by the illegality of the bulk of Manitoba's enacted laws – a crisis triggered by the express requirements of written texts – the Court in the *Manitoba Language Reference* is forced to look beyond preambular authority and engage in the process of reasoning from constitutional essentials. The focus of the analysis becomes the very essence of a democratic constitution, which provides both an unwritten principle and an unwritten rule. The principle is distilled in the following passage:

> Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.[107]

The Court's reasoning process begins with the abstract concept of a constitution as a "purposive ordering of social relations," and then determines that a structuring principle, the rule of law, must exist for this project to have any viability. As the analysis continues, it becomes evident that this inherent principle has concrete legal attributes, for the rule of law creates an obligation on the part of the state to provide "an actual order of positive laws" to satisfy the basic requirements of "civilized life" and the most "basic democratic notions":

> the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies ... simply the existence of public order" (W.I. Jennings, *The Law and the Constitution*). As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*). According to Wade and Phillips, *Constitutional and Administrative Law*, "... the rule of law expresses a preference for law and order within

[107] *Manitoba Language Reference* at para. 64. Elliot identifies this passage as a "good example" of Black's method: Structural Argumentation at 114. There is an "inference from political structure" at work here (Black, *Structure and Relationship* at 7).

> a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions" [emphasis added] [internal citations abridged].[108]

The unwritten constitutional principle thus gives rise to an unwritten rule, and this rule, in turn, is used to counter (or at least temporarily suspend) the express commands of the written texts:

> The only appropriate solution for preserving the rights, obligations and other effects which have arisen under invalid Acts of the Legislature of Manitoba and which are not saved by the *de facto* or other doctrines is to declare that, in order to uphold the rule of law, these rights, obligations and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the *Manitoba Act, 1870*. The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.[109]

What the Court has done here, to recall the language used by Professor Walters, is to identify "the practical legal implications" that can be drawn from the "forms of constitutionalism to which societies commit themselves."[110] The overall method is to isolate an unwritten principle as an inherent attribute of the system of governance, and then to further isolate the inherent legal properties of this principle. The movement is from the abstract to the concrete.

It is important to keep in mind here that the situation confronting the Court arose because written texts (section 23 of the *Manitoba Act*; section 52 of the *Constitution Act, 1982*) demanded a certain set of legal consequences. These consequences, however, threatened the very structure of the Constitution, and therefore legitimated careful judicial scrutiny of that structure, and the recognition of a specific rule of sufficient force to hold the express commands of the written texts in abeyance.[111]

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[108] *Manitoba Language Reference* at para. 60

[109] *Manitoba Language Reference* at para. 83.

[110] Unwritten Constitutionalism at 261.

[111] In the *Judges Reference*, the Court summarized the significance of the *Manitoba Language Reference* in the following terms:

> The Court developed this remedial innovation notwithstanding the express terms of s. 52(1) of the Constitution Act, 1982, that unconstitutional laws are "of no force or effect," a provision that suggests that declarations of invalidity can only be given immediate effect (at para. 99).

I conclude this discussion by noting the following very interesting passage from the decision:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.[112]

The reference to the "statement of the will of the people" suggests a written understanding of constitutionalism: the people state their "will" in a definitive, formal, and consciously crafted text. But the principle that is "fundamental" to the decision, the rule of law, is not written – it is an "unwritten postulate." It follows that the "will" of the people includes propositions that have not yet been fully realized. A constitution, in other words, contains both conscious and unconscious meaning. The conscious meaning is always available, memorialized in text; unconscious meaning, on the other hand, is formalized only gradually, when specific circumstances (often threats to the overall constitutional framework) force great judicial reflection on the essentials of governance. Out of the crucible of the crisis dealt with by the Court, an unconscious (i.e. unwritten) rule becomes a formal part of the "statement of the will of the people." The legitimacy of this addition to the conscious meaning of the Constitution is entirely dependent on the transparency and cogency of the Court's reasoning process.

b. *New Brunswick Broadcasting*

I noted previously that Justice McLachlin pursues three lines of inquiry in *New Brunswick Broadcasting* to support the decision of the Nova Scotia House of Assembly to exclude the media despite the entrenched guarantees of the *Charter*. The first argument is based on the effect of the Preamble, the second argument is based on the effect of "historical tradition," and the third argument is based on "the pragmatic principle that the legislatures must be presumed to possess such constitutional powers as are necessary for their proper functioning."[113]

[112] *Manitoba Language Reference* at para. 48.
[113] *New Brunswick Broadcasting* at para. 109.

The "pragmatic" argument is another example of reasoning from constitutional essentials, and is the real core of the decision. In the following passages, Justice McLachlin outlines a compelling theory of institutional separation that flows from the very existence of representative democracy, and leads to the conclusion that a degree of parliamentary privilege must be respected by the courts:

> In my view, this privilege is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries. The legislative chamber is at the core of the system of representative government. It is of the highest importance that the debate in that chamber not be disturbed or inhibited in any way. Strangers can, in a variety of ways, interfere with the proper discharge of that business. It follows that the Assembly must have the right, if it is to function effectively, to exclude strangers. The rule that the legislative assembly should have the exclusive right to control the conditions in which that debate takes place is thus of great importance, not only for the autonomy of the legislative body, but to ensure its effective functioning.
>
> . . . . .
>
> The Speaker of the House of Assembly of Nova Scotia is of the view that [the right of the media to film proceedings] would interfere with the decorum and the efficacious proceedings of the House and has ruled against it. In doing so, he acts within the ambit of his constitutional power to control attendance in the House. There is no more cause for a court to review that decision than there would be for the legislature to review the decision of a court to exclude activities in the courtroom which it deems to interfere with the business of the court.
>
> . . . . .
>
> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[114]

The insistent use of absolutes and mandatory language in these passages ("exclusive right"; "must have the right"; "fundamental"; "necessary"; "core"; "highest importance") suggests that the "right" of the House of Assembly to exclude the media is a constitutional imperative. In the language of Professor Black's structural method, parliamentary privilege is a "relational right": it flows from the relationship between the institutions of government inherent to our constitutional system, and thus "arises by

[114] *New Brunswick Broadcasting* at paras. 137, 139, 141.

necessary implication . . . as clearly as though it had been specifically stated in the Constitution."[115] The institutions of government have, Justice McLachlin insists, "proper role[s]" and "legitimate spheres of activity." These are matters protected by "fundamental" law.

The reasoning from constitutional essentials in the above paragraphs relates specifically to institutional structure. Institutional structure is also pivotal in the *Judges Reference*. It is central to my project as well, as will become evident in Chapter 5, where I explore the institutional logic of democracy. In *New Brunswick Broadcasting*, institutional structure requires that the courts protect the legislature from the demands of the *Charter*. The *Charter* is administered by the courts pursuant to the will of the people.[116] But in the circumstances of this decision, an entrenched command must be subordinated to an essential and inherent aspect of the parliamentary system itself. In other words, the institutional requirements of democracy displace one of the express products of democracy.

It is useful to trace the links in the Court's line of reasoning. First, if one accepts the abstract proposition that the Canadian political system is a project of democratic governance, then it follows that a representative institution must exist: the "legislative chamber is at the core of the system of representative government." Second, it further follows that a range of legal rules (written or unwritten) protecting the core attributes and "legitimate sphere of activity" of this institution must be in effect. Third, in appropriate circumstances, where the very existence or functioning of the legislature is threatened, these rules must be able to trump other rules. The rules applicable in *New Brunswick Broadcasting* are not written; rather, they are unwritten, and inherent to the operation of the Constitution

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[115] *Structure and Relationship* at 18, quoting *Brewer v. Hoxie School District No. 46*, 238 Fed. Rep. (2d) 91 (Eighth Circuit U.S. Court of Appeals, 1956). I should clarify that Professor Black is solely concerned with the U.S. Constitution. I am applying his insights to the institutions of parliamentary government.

[116] See *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para 134:

> it should be emphasized again that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy.

itself. The word "inherent," it is worth noting, appears more than a dozen times in Justice McLachlin's opinion, always in connection with parliamentary privilege.

An important question, however, is whether the Court's institutional structure argument is sufficient on its own to dispose of the matter at issue, or is the Preamble somehow necessary to the result. In my view, there is no question that the reasoning from essentials analysis is entirely sufficient on its own. The Court follows a powerful and impressive line of reasoning to deal with an institutional threat. It is appropriate that legal results should follow. Justice McLachlin appears to view this line of reasoning as sufficient as well when she asks,

> As a general proposition, can unwritten constitutional privileges inherent to our legislative bodies be justified on the ground of necessity? Putting the matter differently, can our legislative bodies function properly, clothed only with those powers expressly conferred by our written constitutional documents? The answer to this question must, in my view, be negative. The importance of the unwritten constitutional right, for example, to speak freely in the House without fear of civil reprisal, is clear.[117]

While the institutional structure argument is sufficient to dispose of the appeal, and the Preamble argument is fundamentally flawed, as discussed above, what about the "historical tradition" argument? Justice McLachlin considers several 19th century judicial precedents dealing with the status of privilege in the British Parliament, the colonial legislatures, and the early provincial legislatures.[118] She also quotes extensively from several noted academic works on parliamentary history and government. Two main points emerge from these materials. First, privilege has different roots in the United Kingdom and in Canada, and second, consistent with the institutional structure argument outlined above, privilege is an inherent and necessary attribute of parliamentary democracy. In Canada, parliamentary privilege evidently was not simply "transplanted."[119] Instead,

> The privileges attaching to colonial legislatures arose from common law. Modelled on the British Parliament, they were deemed to possess such powers and authority as are necessarily incidental to their

[117] *New Brunswick Broadcasting* at para. 128.
[118] *Stockdale v. Hansard* (1839), 112 E.R. 1112 (Q.B.); *Kielley v. Carson* (1842), 13 E.R. 225 (P.C.); *Landers v. Woodworth*, (1878) 2 S.C.R. 158; *Fielding v. Thomas*, [1896] A.C. 600 (P.C.).
[119] *New Brunswick Broadcasting* at para. 119, quoting R. M. Dawson, *The Government of Canada* (5th ed. 1970) at 337-38.

> proper functioning. These privileges were governed by the principle of necessity rather than by historical incident, and thus may not exactly replicate the powers and privileges found in the United Kingdom.[120]

While Justice McLachlin does not expressly prioritize either the "pragmatic" argument or the argument based on "historical tradition," it makes most sense to view the latter as supporting the former. Institutional structure, in other words, is logically prior: it defines what must exist for a coherent and principled system of democratic government to function in Canada. To the extent that privilege "arose from common law," it does so precisely because the courts have recognized the inherent requirements of a democratic system. It is thus not surprising to find historical sources providing evidence that the demands of institutional structure have in fact been respected in the past. Justice McLachlin does imply, quite strongly, that institutional structure, supported by historical sources, is adequate to ground the constitutional status of parliamentary privilege:

> it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege [emphasis added].[121]

Historical analysis thus provides concrete evidence to support the conclusions derived from reasoning from constitutional essentials. The historical authorities can provide a short-cut to the extent that the Court is willing to view them as authoritative. Reasoning from constitutional essentials, however, provides a transparent analysis building the argument from the ground up, leaving no doubt that whatever authority is ascribed to the historical sources is well-placed.

Before moving on, I would like to make a brief observation about nomenclature. Justice McLachlin refers to parliamentary privilege as an unwritten constitutional "principle,"[122] and also, in the above quoted passages, as an inherent "right." In the interests of consistency with the other decisions of the Tetralogy

[120] *New Brunswick Broadcasting* at para. 120.
[121] *New Brunswick Broadcasting* at para. 126; see also 117.
[122] *New Brunswick Broadcasting* at para. 113.

and with the constitutional theory that will begin to take more solid shape in the *Judges Reference*, I respectfully suggest that it is appropriate to view parliamentary privilege as either a right or a rule, but not as a constitutional "principle." In each of the other three decisions, constitutional principles are treated as being of an abstract nature, and specific legal rules are developed from these principles. The principles themselves, for the most part, cannot be directly applied to resolve legal disputes. The rule of law, for example, is far too abstract to resolve the *Manitoba Language Reference*. Judicial work is required to distill a specific rule capable of answering the question before the Court. It seems clear that parliamentary privilege is far more specific than the rule of law or any of the other unwritten principles treated in the Tetralogy such as federalism, democracy, the separation of powers, or judicial independence. Parliamentary privilege is virtually ready to use: it commands that the legislature must have the power to control its internal processes, and further that this power must not be subject to interference from the courts. These are rules, not principles. The real unwritten principle at work in *New Brunswick Broadcasting* is representative democracy. This is the abstract point of departure from which the Court deduces the existence of the "inherent" and concrete set of rules encompassed by the phrase "parliamentary privilege," rules designed to protect democratic institutions. Justice McLachlin's ruling itself supports this reorientation of nomenclature when she states, in the above quoted passage, "this privilege is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries." I will return to the issue of nomenclature in my discussion of the *Judges Reference*, in which decision, I should note, the Court is inclined to view *New Brunswick Broadcasting* precisely as a manifestation of the democratic principle.[123]

[123] *Judges Reference* at para. 101.

c. *Judges Reference*

Even with the Preamble set aside, the *Judges Reference* remains a difficult decision. It is also a decision that has generated considerable scholarly criticism,[124] some of which has become openly disrespectful.[125] The major targets of the critical literature are the Preamble, the Court's theory of the Constitution, and probably most important, the fact that the Court used unwritten principles to strike down legislation. Criticism of this last point is somewhat illogical given that both the *Manitoba Language Reference* and *New Brunswick Broadcasting* use unwritten principles to challenge written constitutional texts: a considerably larger endeavour than challenging legislation.[126] Nevertheless, the direct assault on

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[124] See especially, Cameron, Unstated Assumptions; Goldsworthy, Judicial Integrity; Leclair, Unfathomable Principles; Hurlburt, Fairy Tales; and Richards, Judges Decision.

[125] Jeffrey Goldsworthy and Jean Leclair have both crossed the line of appropriate critical discourse by suggesting that the Court's handling of the issues of judicial independence and judicial remuneration was politically motivated and self-serving. In the case of Goldsworthy, these claims are couched in very disrespectful language, and in the case of both Goldsworthy and Leclair, the claims remain unacceptably vague. Such charges brought against Canada's highest Court must be particularized and carefully articulated. These commentators have failed to meet this standard. Goldsworthy characterizes the Court's reasoning as variously "reprehensible," "mush," and "disingenuous rationalization":

> The Supreme Court's mush is calculated - it is mush in the service of an agenda.
> . . . . .
> The rationale for judicial independence relies on judges applying the law in a politically neutral way, rather than changing it to advance their own political goals (Judicial Integrity at 64).

Goldsworthy does not specify the nature of the "agenda" or the "political goals" that he alludes to here. Leclair is less reticent in foregrounding self-interest as the Court's motivation, but again fails to substantiate his claims with an adequate consideration of the details of the decision:

> The above description demonstrates, I believe, that the methods employed by some members of the judiciary in the handling of cases concerning their own remuneration are not respectful of the most basic rules of propriety. In truth, they are not respectful of the rule of law, which provides that there is "one law for all" (Unfathomable Principles at 437, internal quotation cited to the *Secession Reference* at para. 71).

I suggest that there is much in the *Judges Reference* that is open to respectful criticism, but there is no basis for these offensive charges. The claims that there was a self-serving "agenda" at work, or a lack of respect for the rule of law, remain unsubstantiated. The Court expressly endorses the use of an <u>independent</u> commission to stand <u>between</u> the judiciary and the government on matters of judicial remuneration, and the recommendations of this committee <u>are not binding</u> (*Judges Reference* at paras. 166-85). This, it appears to me, keeps the courts well-removed from decisions on compensation, and meets fairly basic public standards of transparency and disinterest. Jamie Cameron has also expressed very sharp criticism of the Court's judgment, and while most of this criticism operates on the level of legitimate intellectual disagreement, there are several allegations of "political purposes" that strike me as both unsubstantiated and inappropriate (Unstated Assumptions at 111-13).

[126] Marc Ribeiro aptly observes that

> the unwritten principle in *New Brunswick Broadcasting* can be said to have been given an even greater status than the one of striking down legislation, namely, the power to prevent the application of a constitutional enactment such as the *Charter* (*Vagueness Doctrine* at 49).

parliamentary sovereignty strikes at the backbone of dominant strains in constitutional theory, as is evident in Justice La Forest's strongly worded dissent.

One aspect of the *Judges Reference* that has received surprisingly little close scrutiny is the actual basis on which the Court reaches its ruling. My discussion below is divided under four headings. First, I make a brief but important introductory observation about nomenclature. Second, I consider the Court's theory of the Constitution. Third, and most important, I consider the actual meat of the ruling: reasoning from constitutional essentials relying on institutional structure. Finally, I consider several aspects of Justice La Forest's dissent, where the textual anchor theory, introduced in *New Brunswick Broadcasting*, assumes a central but problematic place.

i. Principles and rules: a clarified taxonomy

An important but manageable difficulty with Chief Justice Lamer's complex majority opinion is imprecise nomenclature. In the course of his analysis, he employs all of the following expressions: "unwritten constitutional principle," "organizing principles," "basic principles," "underwritten understandings," "fundamental rules," "unwritten norms," "unwritten rules," and "components."[127]

A careful reading of the judgment indicates that he is talking about the two separate phenomena that I have noted in previous discussions: unwritten principles and unwritten rules. The former are abstract, and are the foundation of the Constitution. The latter are more specific, and are derived from the former. An unwritten rule can be deployed to create duties or obligations, and in appropriate circumstances can be used to halt the operation of constitutional texts, legislation, or executive action. The rules are thus law. They are mandatory requirements. The exact status of the principles is more difficult to assess, and I will return to this question later in my analysis.

[127] *Judges Reference* at paras. 83-109, 131-37.

The unwritten principles that are used in the *Judges Reference* to resolve the questions before the Court are judicial independence, the rule of law, and the separation of powers. These are also referred to as "organizing principles," "basic principles," "underwritten understandings," and "unwritten norms."

There are three main unwritten rules derived from these principles:

1. Reductions or freezes in judicial salaries must flow from a "special process" that is "independent, effective, and objective."
2. Members of the judiciary cannot engage in any negotiations on matters of remuneration.
3. Judicial salaries cannot fall below a certain minimum level.[128]

While the Chief Justice refers to these legal requirements as both "principles" and "components,"[129] under the clarified taxonomy that I am proposing, they are rules: they are derived from the abstract underlying principles of judicial independence, the rule of law, and the separation of powers, but they are specific and can be directly applied to control the actions of government – overruling legislation and executive orders.

Comparing any of the above rules with any of the above principles reveals the merit of a clarified taxonomy. How can a specific legal requirement (judges cannot negotiate) exist on the same level as the more abstract principle of judicial independence or the separation of powers? Allowing the word "principle" or "norm" to account for both phenomena is confusing. The appropriate distinction is evident in the *Manitoba Language Reference*. There, the abstract principle is the rule of law. Out of this principle, the Court formulates a specific rule: the state must create and maintain a body of positive law. Rules can be applied to specific conflicts; the principles on their own cannot. The latter must be refined before they can be used to settle a controversy. The word "norm" can be slippery as it can apply to either a principle or a rule. This slipperiness is evident in the Chief Justice's discussion. Keeping the refined taxonomy in

[128] *Judges Reference* at paras. 133-35.
[129] *Judges Reference* at paras 131-37.

mind – abstract informing principles and concrete applicable rules – will assist in navigating the following analysis.

ii. Unwritten principles: the "source" of the Constitution

Neither of the first two decisions of the Tetralogy attempts to enunciate a theory to account for the existence of unwritten principles and their role in constitutional analysis. The *Judges Reference* offers an impressive first attempt in this regard. The theory can be briefly stated in the following three propositions:

1. Unwritten principles are the source of the entire Canadian Constitution.
2. Written texts are derived from these principles through a process of formal enactment.
3. Unwritten rules are also derived from these principles, in particular through the mechanism of the Preamble.

When the third proposition is revised to substitute the methodology of reasoning from essentials for the Preamble, a very sophisticated and coherent understanding of the Canadian Constitution is achieved. The Court is not ready to make this move overtly, however, in the *Judges Reference*. As far as express statements of constitutional theory are concerned, this decision is imprisoned by the false promise of the Preamble.

The following three passages from Chief Justice Lamer's judgment outline the basis of the Court's theory, and also demonstrate the fundamentals of my refined taxonomy:

> Notwithstanding the presence of s. 11(d) of the *Charter*, and ss. 96-100 of the Constitution Act, 1867, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the Constitution Acts, 1867 to 1982, merely "elaborate that principle in the institutional apparatus which they create or contemplate": *Switzman*.
>
> . . . . .
>
> As I said in *New Brunswick Broadcasting*, the constitutional history of Canada can be understood, in part, as a process of evolution "which [has] culminated in the supremacy of a definitive written constitution." There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is.

. . . . .

> In the words of Rand J., the preamble articulates "the political theory which the Act embodies": *Switzman*. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law [emphasis added] [internal citations abridged].[130]

The "unwritten norms" that the Chief Justice is concerned about ("it is of the utmost importance") in the second paragraph appear to be unwritten rules, not principles. This follows because he posits unwritten "organizing principles" as the ultimate "source" of both "unwritten norms" and the "substantive provisions" of the written Constitution. The enunciation of this unified theory – unified in the sense that it accounts for written and unwritten rules through a single "source" – is an important breakthrough in the Tetralogy. It provides for a basic equality of unwritten and written rules, and thus accounts for the results in the *Manitoba Language Reference* and *New Brunswick Broadcasting*. All constitutional rules, written and unwritten, emanate from a reservoir of unwritten principles, and in the circumstances of both of these earlier judgments, unwritten rules had priority. Written rules emerge from "organizing principles" through the process of formal enactment, while in the above paragraphs, unwritten rules appear to emerge through the mechanism of the Preamble.

The very fact that the Chief Justice does not mention the reasoning from essentials method is best understood as a symptom of the "positivist anxiety," discussed previously, that Professor Dyzenhaus locates in the *Judges Reference*.[131] That anxiety is strongly expressed in the statement that it is of the "utmost importance," in the interests of "legal certainty," to locate the "source of those unwritten norms." There is also obvious tension between the reference to the "supremacy of a definitive written constitution" and the repeated assertion that the written provisions of the constitution "merely

[130] *Judges Reference* at paras. 83, 93, 95.
[131] Deep Structure at 116; Fundamental Values at 481-82.

elaborate" unwritten "organizing principles." It is this very tension, and the pull both toward and away from text, that accounts for the focus on the Preamble. The unmentioned legal reasoning method operates independent of textual provisions, and in the *Judges Reference*, as I clarify below, the Chief Justice effectively hides this method behind the skirts of section 11(d) of the *Charter*. The Preamble, on the other hand, is foregrounded because it offers the illusory comfort of quasi-text, and thus appears to offer a way of bridging the demands of a "definitive written constitution" and the logic of unwritten principles.

I turn now to consider the Court's deployment of the methodology of reasoning from constitutional essentials, which provides the most coherent way to distill unwritten rules from unwritten principles. In the *Judges Reference*, as in *New Brunswick Broadcasting*, this methodology proceeds on institutional lines.

iii. Reasoning from institutional structure

The Court's strategy of discussing constitutional theory and the Preamble in one part of the *Judges Reference*, and then turning to a separate analysis ostensibly of section 11(d) of the *Charter* to resolve the appeals, appears to have left the actual contribution of unwritten principles undervalued. In *Singh v. Canada (Attorney General)* ("***Singh***"),[132] for example, the Federal Court of Appeal rejects a separation of powers challenge to legislation in part by stating that

> [Chief Justice Lamer] found this doctrine of separation of powers to come from the preamble to the Constitution which provides for "a constitution similar in Principle to that of the United Kingdom."
> First it should be observed that these comments concurred in by five other judges in the *Judges Reference* were *obiter dicta* as the case was decided on the basis of paragraph 11(d) of the *Charter*.[133]

In fact, the Chief Justice does not mention the separation of powers in his discussion of the Preamble, and does not mention the Preamble in his discussion of the separation of powers. It is possible to argue that the Preamble discussion is *obiter* in the *Judges Reference*, but it is not possible to argue that the separation

[132] [2000] 3 F.C. 185 (F.C.A.), leave to appeal dismissed, [2000] S.C.C.A. No. 92.
[133] *Singh* at paras. 26-27.

of powers discussion is *obiter*. At least two commentators, Professor Leclair and Professor Mullan, also appear to equate the Chief Justice's treatment of the Preamble with his discussion of unwritten principles generally, and advance the view that all this material is technically *obiter* as the case was decided on the basis of the section 11(d).[134]

While Chief Justice Lamer does state that "Despite s. 11(d)'s limited scope, there is no doubt that the appeals can and should be resolved on the basis of that provision,"[135] my argument is that the separation of powers, the rule of law, and judicial independence do all the heavy lifting in the *Judges Reference*, and the express text of the *Charter* merely provides a peg on which to hang a hat fashioned out of these principles.

If section 11(d) actually resolved the appeals, one would expect an analysis of that provision, and an application of such an analysis to the facts at issue. Yet in an opinion extending close to 300 paragraphs, Chief Justice Lamer never once quotes section 11(d) or deals with its precise language. Furthermore, he explicitly deals with matters that fall outside of this language. The provision itself states that

> 11. Any person charged with an offence has the right
> . . . . .
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Justice La Forest, in his dissenting opinion of 75 paragraphs, places great weight on this wording, and argues that it protects judicial independence only to the extent necessary to protect the rights of an accused, that is, a "person charged with an offence":

> The guarantee of judicial independence <u>inhering in s. 11(d)</u> redounds to the benefit of the judged, not the judges. . . . Section 11(d), therefore, does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that accused persons receive fair trials [emphasis added].[136]

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[134] Leclair, Unfathomable Principles at 395-96; Mullan, Legacy of Justice Rand at 86. Unlike the Federal Court of Appeal in *Singh*, however, neither commentator attempts to downplay the very great significance of the Preamble *obiter*.
[135] *Judges Reference* at para. 82.
[136] *Judges Reference* at para. 329.

The level of protection for judicial independence that the Chief Justice advocates extends beyond the ambit of an "offence," and includes the civil and non-criminal constitutional jurisdiction of the provincial courts.[137] For Justice La Forest, however, the constitutional ambit of judicial independence is to be found "inhering in s. 11(d)": additional protection may be desirable from a policy perspective, but is not constitutionally mandated by the language of the *Charter*, and thus should be dealt with by the legislatures, and not the Courts.[138]

Justice La Forest's close analysis of the language of the provision is very compelling. But this analysis is only fatal to the judgment of the Court to the extent that the Court actually relies on section 11(d). If there is a more compelling argument at work within Chief Justice Lamer's section 11(d) analysis, the matter is very different.

The Chief Justice's purported section 11(d) analysis notably moves steadily away from that provision (which I note again is neither quoted nor subjected to close scrutiny) until the three legal rules that resolve the appeals are formulated. He begins by discussing *Valente v. The Queen* ("***Valente***"),[139] in which the Court sets certain standards governing judicial independence under section 11(d). First, the governing test is a "reasonable perception of bias." Second, there are three "characteristics" of judicial independence: "security of tenure, financial security, and administrative independence." Third, and most important, there are two "dimensions" of judicial independence: "individual independence" and "institutional independence."[140] The Chief Justice indicates that his concern is with "institutional independence." *Valente*, however, does not assist in clarifying this concept, so he turns to *Beauregard v. Canada* ("***Beauregard***").[141] At this point, section 11(d) appears to have outlived its usefulness. *Beauregard*

[137] *Judges Reference* at paras. 126-29.
[138] *Judges Reference* at paras. 333, 344, 350-51.
[139] [1985] 2 S.C.R. 673.
[140] *Judges Reference* at paras. 111-22.
[141] [1986] 2 S.C.R. 56.

was decided under section 100 of the *Constitution Act, 1867*, a provision that does not expressly deal with judicial independence at all, and has no application to the provincial courts or to the prosecution of an "offence":[142]

> As I have mentioned, the concept of the institutional independence of the judiciary was discussed in *Valente*. However, other than stating that institutional independence is different from individual independence, the concept was left largely undefined. In *Beauregard* this Court expanded the meaning of that term, once again by contrasting it with individual independence. Individual independence was referred to as the "historical core" of judicial independence, and was defined as "the complete liberty of individual judges to hear and decide the cases that come before them." It is necessary for the fair and just adjudication of individual disputes. By contrast, the institutional independence of the judiciary was said to arise out of the position of the courts as organs of and protectors "of the Constitution and the fundamental values embodied in it -- rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important." Institutional independence enables the courts to fulfill that second and distinctly constitutional role [internal citations elided].[143]

In performing its "constitutional role," the judiciary acts as an "umpire" of the fundamental laws of society,[144] and in particular, acts as an "umpire" of disputes involving the state. These disputes can involve federal-provincial relations (which set two levels of the state against each other), the *Charter* (which sets individuals and sometimes organizations against the state), and aboriginal rights and treaties (which set aboriginal individuals and organizations against the state). The Chief Justice stresses that the provincial courts play a role in deciding all of these state-related disputes, and thus perform a "constitutional role" as much as the superior courts.[145] Many of these disputes would fall outside of the ambit of an "offence" under section 11(d).

Having moved away from section 11(d) and *Valente* to *Beauregard* and section 100, the Chief Justice then proceeds to consider various "sources" that "ground" the "constitutional role" and the "institutional

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[142] Section 100 provides that

> The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

[143] *Judges Reference* at para. 123, internal quotation cited to *Beauregard* at 70.

[144] *Beauregard* at paras. 22, 27, 28.

[145] *Judges Reference* at paras. 124-129.

independence" of the courts. It is useful to keep both Professor Raz's concept of "sources" and Professor Black's "structural" method in mind while considering the following passage:

> The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the *Charter*, because the rights protected by that document are rights against the state. As well, the Court [in *Beauregard*] pointed to the preamble and judicature provisions of the *Constitution Act, 1867*, as additional sources of judicial independence; I also consider those sources to ground the judiciary's institutional independence. Taken together, it is clear that the institutional independence of the judiciary is "definitional to the Canadian understanding of constitutionalism" (*Cooper*) [emphasis added].[146]

The four "sources" itemized in this passage can all be related on some level to Raz's "social facts," except for the curious point that the more precise textual references offer less precise grounding for judicial independence. The "Judicature" provisions in Part VII of the *Constitution Act, 1867* speak mostly to matters of the appointment and dismissal of judges of various courts, and do not directly address independence at all. As for the Preamble, mentioned in the same breath as the Judicature provisions, there is of course no precise reference to judicial independence there. I have already canvassed the problems of using it as a definitive source in great detail. These are the most specific written sources itemized (although of course the Preamble's textual status remains obscure). The Chief Justice also refers to the "document" of the *Charter*, but unlike Justice La Forest, who looks expressly to the limited source of judicial independence "inhering" in section 11(d), Chief Justice Lamer speaks more abstractly of "adjudication under the *Charter*" – his interest is in the general concept of the relationship of individual and state. Thus he moves towards an architectural, as opposed to an explicitly textual warrant. This movement is even more pronounced in his reference to "jurisdictional disputes between the federal and provincial orders of government." While this source can be located in sections 91 and 92 of the *Constitution Act, 1867*, the Chief Justice is more interested in the abstract "logic of federalism" that is a fundamental structural component of the Canadian Constitution. The constitutional status of judicial

[146] *Judges Reference* at para. 124, internal citation to *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 11.

independence appears to find its greatest support the further the Chief Justice moves from express text. Indeed the crucial point is that the Chief Justice is operating in an entirely different interpretive mode than Justice La Forest. Justice La Forest is employing the "textual" method noted by Professor Black. For the Chief Justice, on the other hand, it is the perspective attained by viewing the Constitution as a structural whole (Black's structural "method") that provides the most compelling warrant for a broad understanding of the need for judicial independence.

Immediately after the above passage, the Chief Justice descends into the reservoir of unwritten principles at the core of the Constitution to find a "deeper" source:

> But the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government: see *Cooper*. This is also clear from *Beauregard*, where this Court noted that although judicial independence had historically developed as a bulwark against the abuse of executive power, it equally applied against "other potential intrusions, including any from the legislative branch" as a result of legislation [internal citations abridged].[147]

The separation of powers, which is later identified as a "fundamental principle of the Canadian Constitution,"[148] appears to be a more profound "source" of judicial independence than any of the textual sites noted above. This is because these textual sites themselves "merely elaborate" the "deeper" sources of the Constitution.

The authority of judicial independence, and indeed the authority of the separation of powers, emanate from the core requirements of a democratic constitution. It is therefore no surprise that "potential intrusions" from the legislature can be managed by rules derived from these principles. Before turning to these rules, however, it is necessary to consider the relationship between these two principles more carefully. The Chief Justice indicates that "judicial independence flows as a consequence of the separation of powers,"[149] an observation that he also makes in *Cooper v. Canada (Human Rights Commission)*

[147] *Judges Reference* at para. 125.
[148] *Judges Reference* at para. 138.
[149] *Judges Reference* at para. 130.

("***Cooper***").[150] There is a prioritization here, a prioritization that can best be understood by recognizing that both are institutional manifestations of a "deeper" principle still: the rule of law. It is the rule of law that gives rise to the "constitutional role" of the courts. Peter Hogg and Cara F. Zwibel allude to this point when they note that

> The Court [*in the Judges Reference*] was right, with respect, to include the principle of judicial independence in the rule of law, since the principle of constitutionalism depends upon the presence of courts that will adjudicate legal disputes between government and subjects without fear or favour [emphasis added].[151]

In *R. v. Nova Scotia Pharmaceutical Society* ("***Nova Scotia Pharmaceutical***"), the Court states that the rule of law embraces a "global conception of the State as an entity bound by and acting through law,"[152] and further observes that

> In theoretical terms, the état de droit is a system of organization in which all social and political relations are subject to the law. This means that relations between individuals and authority, as well as relations between individuals themselves, are part of a legal interchange involving rights and obligations [emphasis added].[153]

At its most fundamental level, the rule of law literally conceives of a society where "all social and political relations are subject to the law." The rule of law implies a regularization of interactions, especially those involving the state, and as noted in the previous section in my discussion of positivism, the rule of law is the very opposite of arbitrariness.[154] In institutional terms, the rule of law absolutely requires a separation of the judiciary from the other branches of government, for only such a separation can provide the perspective and the power needed to bring the state within the ambit of the law. It is the exercise of this perspective and this power that is the essence of the "constitutional role" of the courts.

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[150] [1996] 3 S.C.R. 854 at para. 13: "The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by judicial bodies." The Chief Justice made this statement in a concurring opinion that was not endorsed by other members of the Court.

[151] Rule of Law at 728. Despite this comment, it should be noted that Hogg and Zwibel maintain the Court was wrong to strike down legislation based on unwritten principles in the *Judges Reference*. In their view, if invalidation was needed (a point they also reject), it should have been based solely on the explicit guarantee of judicial independence in section 11(d) of the *Charter*: Rule of Law at 728-29.

[152] [1992] 2 S.C.R. 606 at para. 66.

[153] *Nova Scotia Pharmaceutical* at para. 65, quoting J.P. Henry, "Vers la fin de l'État de droit?" (1977) 93 Rev. dr. publ. 1207 at 1208.

[154] See the authorities cited at Note 91.

It is thus possible to clarify the relationship between the three central constitutional principles at work in the *Judges Reference* as follows. The rule of law is the governing ur-concept, and demands that all individuals and entities, and particularly the state itself, are subject to law. The separation of powers functions as an institutional manifestation of the rule of law, demanding a certain configuration of structural relationships that must exist for the rule of law to be obtained.[155] Judicial independence, finally, can be viewed as a particular subset of the separation of powers, for it focuses on the institutional relationships involving the judiciary.

While the rule of law provides one important source of content for the separation of powers, it does not exhaust that content. The separation of powers also has important affinities with the democratic principle. In *New Brunswick Broadcasting*, Justice McLachlin, in the course of her institutional structure argument, observes that

> It is fundamental to the working of government as a whole that [the institutions] play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[156]

Although the separation of powers is not expressly identified by name here, it is central to this passage and to the judgment: institutional separation requires the courts to respect the internal processes of the legislature, and thus parliamentary privilege is recognized to protect the "legitimate sphere of activity" of legislative bodies. Thus the separation of powers functions as an institutional manifestation of the democratic principle in *New Brunswick Broadcasting*. I will have more to say about the democratic content of the separation of powers in Chapter 5 and Chapter 8.

In the *Judges Reference*, the content of the separation of powers comes from the rule of law. Institutional separation services the "constitutional role" of the courts. Chief Justice Lamer determines that the

[155] It follows that I do not agree with Professor Elliot's statement that "the constitutional source of the separation of powers principle in Canada remains unclear" (Structural Argumentation at 132).
[156] *New Brunswick Broadcasting* at para. 141.

separation of powers requires that the relationship of the courts and the other branches of government be "depoliticized,"[157] for in order to act as arbiters of disputes involving the state, the courts must be free from influence or manipulation from the legislative and executive branches. Crucially, it is from this separation of powers requirement of "depoliticization" that the Chief Justice distills the three rules (he refers to them as "components" of judicial independence) that decide the appeals. I noted these rules earlier, but restate them here for ease of reference:

1. Reductions or freezes in judicial salaries must flow from a "special process" that is "independent, effective, and objective."

2. Members of the judiciary cannot engage in any negotiations on matters of remuneration.

3. Judicial salaries cannot fall below a certain minimum level.[158]

These precise legal rules are the inherent legal properties of the more abstract constitutional principle of the separation of powers:

> These different components of the institutional financial security of the courts inhere, in my view, in a fundamental principle of the Canadian Constitution, the separation of powers [emphasis added].[159]

The Chief Justice does not find these rules in section 11(d). Rather, he finds them in unwritten principles. The *Judges Reference* thus offers an excellent manifestation of the institutional structure form of reasoning from constitutional essentials, with the movement from the more abstract to the more concrete, from principle to rule, expressed through the relationships of the primary institutions of government. In the *Manitoba Language Reference*, reasoning from constitutional essentials proceeds through the rule of law, but does not gain institutional specificity. In both *New Brunswick Broadcasting* and the *Judges Reference*, on the other hand, reasoning from constitutional essentials proceeds on specifically institutional lines, and moves toward the requirement of separation.

[157] *Judges Reference* at paras. 131, 140-42.
[158] *Judges Reference* at paras. 133-35.
[159] *Judges Reference* at para. 138; see also paras. 131-37.

The process of reasoning in the *Judges Reference* is as follows. First, the very basic requirements of a society under law demand that a "constitutional role" be performed by the courts. Second, this rule of law requirement mandates institutional separation. Third, this separation requires "depoliticization." The legal rules emerge from this latter insight:

> The challenge which faces the Court in these appeals is to ensure that the setting of judicial remuneration remains consistent . . . with the depoliticized relationship between the judiciary and the other branches of government. Our task, in other words, is to ensure compliance with one of the "structural requirements of the Canadian Constitution." The three components of the institutional or collective dimension of financial security, to my mind, fulfill this goal [internal citation elided].[160]
>
> . . . . .
>
> the institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government [emphasis added].[161]

After he distills the three rules (the "objective guarantees") through a process of legal reasoning that operates at a considerable distance from the express provisions of the written texts, Chief Justice Lamer proceeds to apply his conclusions to the appeals, superficially through section 11(d). The heavy lifting is thus all done by unwritten principles, which provide both the reason why judicial independence is constitutionally compelling and the precise content of the rules. The Chief Justice has already observed that judicial independence, grounded in the "fundamental principle" of the separation of powers, has sufficient legal force to fend off "potential intrusions, including any from the legislative branch." The three rules are the concrete form of this legal force. The rules are then folded into the text, with the Chief Justice frequently slipping, in the course of his application, from stating "What s. 11(d) requires" to "What judicial independence requires,"[162] using the principle and the provision synonymously. To suggest, as Professor Elliot does, that the separation of powers functions "simply as an aid to the interpretation" of

[160] *Judges Reference* at para. 146, internal quotation cited to *Hunt v. T & N PLC*, [1993] 4 S.C.R. 289 at 323.
[161] *Judges Reference* at para. 138.
[162] See, for example, *Judges Reference* at paras. 133, 172, 177-79, and 185.

section 11(d) is far too simplistic.[163] This is to ignore the primary judicial work done by reflecting on the separation of powers, and the virtual irrelevance of section 11(d) to the bulk of this crucially formative part of the decision. To borrow Professor Black's observation, made in the course of his structural analysis of important U.S. precedents, "The precision of textual explication is nothing but specious in the areas that matter."[164]

Section 11(d), a fully sourced part of the text of the Constitution, ironically comes close to serving the same "specious" function as the Preamble – a distraction from the real judicial work that is used to resolve the appeals. The Chief Justice has almost certainly demonstrated, through his compelling institutional structure argument, that the "constitutional home of judicial independence lies . . . exterior to the particular sections of the Constitution Acts."[165]

I conclude by addressing the question of the fundamental nature of unwritten constitutional principles. As noted previously, Professor Goldsworthy maintains that they are political and moral in nature, but not legal.[166] I suggest that this kind of firm distinction cannot be made. Unwritten constitutional principles are complex reservoirs of structural meaning, and have concrete legal attributes. Furthermore, far from undermining the authority of text, unwritten constitutional principles and rules guarantee the overall structure of which the texts are a central part. To anticipate the metaphors advanced in the *Secession Reference* and restated in the more recent *Senate Reference*, both unwritten rules and texts are the bulwarks and ramparts of the edifice of the Constitution, while the unwritten principles are the foundations of that edifice. The great achievement of the Court in the first three decisions of the Tetralogy

[163] Structural Argumentation at 133; see also, on the "aid to the interpretation" theory (which I reject), 83, 86, and 141-42. In the Chief Justice's analysis, the three rules that resolve the appeals "inhere" in the separation of powers, and section 11(d) is a peg.
[164] *Structure and Relationship* at 29.
[165] *Judges Reference* at para. 83.
[166] *Sovereignty of Parliament* at 257-59.

is to employ legal reasoning from constitutional essentials to develop and protect this structure from threats. It remains, however, for a clearer overall statement of this process of reasoning to be consciously provided by the Court.

Before turning to the *Secession Reference*, it is necessary to address Justice La Forest's text-based approach to unwritten principles in the *Judges Reference*. While he sets himself ardently against the Court's theory of the Preamble, his textual anchor theory is itself a manifestation of the same "positivist anxiety" – the will to ground unwritten principles in text, even while such grounding is impossible because the lines of influence run in the opposite direction. It is the texts that are grounded in the unwritten principles.

iv. Justice La Forest's textual anchor theory

Commentators have characterized Justice La Forest's dissent in the *Judges Reference* as "powerful," "sobering," and "devastating."[167] Yet it is very important in dealing with this opinion, particularly given the standing that it has amongst commentators, to distinguish between the three grounds of dissent. First, there is the matter of section 11(d). I have already suggested that Justice La Forest's handling of this provision is compelling, but also that it is not fatal to the Court's judgment, provided that one accepts that the real basis of that judgment is reasoning from constitutional essentials, through an institutional structure argument, rather than the provision itself. Second, there is the legal effect of the Preamble. Here again, Justice La Forest is very compelling. I do not intend to say anything more about the troublesome Preamble. The third basis of dissent, however, is more complicated, for it involves interrogating the Court's constitutional theory. Justice La Forest finds himself in a difficult position here, for he is unwilling to reject unwritten principles, but offers only the textual anchor theory to make sense

[167] Hurlburt, Fairy Tales at 182; Mullan, Legacy of Justice Rand at 88; Leclair, Unfathomable Principles at 396; and Goldsworthy, Judicial Integrity at 61.

of a constitutional order that includes such principles. The textual anchor theory, it will be recalled, justifies recourse to unwritten principles by positing their basis in an actual provision of constitutional text, rather than preambular language.[168] In this section I interrogate the stability of several prominent textual anchors.

I begin by considering Justice La Forest's very strident statements regarding the limits of the judicial review of legislation:

> The ability to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution. This foundational document (in Canada, a series of documents) expresses the desire of the people to limit the power of legislatures in certain specified ways. Because our Constitution is entrenched, those limitations cannot be changed by recourse to the usual democratic process. They are not cast in stone, however, and can be modified in accordance with a further expression of democratic will: constitutional amendment.
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> Judicial review, therefore, is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument.
>
> . . . . .
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> This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority [emphasis added].[169]

These passages appear to stake out a hard positivist position: an "express" textual anchor is required to support judicial review.[170] Several observations should be made about this formulation, however, which while certainly appealing in its simplicity, masks an important assumption. The supremacy of legislatures is not itself inscribed in the constitutional texts. There is no "express textual authority" for the concept of parliamentary sovereignty – it is, rather, an unwritten rule. There is no question that this particular unwritten rule is absolutely central to the tradition of British constitutionalism, with a lineage running back through the work of A.V. Dicey, William Blackstone and beyond, as Professor Goldsworthy has exhaustively detailed in his major work on the subject.[171] Nevertheless, parliamentary sovereignty

[168] *New Brunswick Broadcasting* at para. 93: "Parliamentary legislative privileges in Nova Scotia are, therefore, ultimately anchored in the grant of a legislative assembly and incorporated into the *Constitution Act, 1867*."
[169] *Judges Reference* at paras. 314-316
[170] This approach is strongly endorsed by Hurlburt: Fairy Tales at 182, 188, 191, and *passim*.
[171] *Sovereignty of Parliament*, *passim*.

remains unwritten, and this fact should not be obscured by discussions emphasizing "express textual authority."

It appears to me that Justice La Forest actually employs the methodology of reasoning from constitutional essentials in the above passages: 1) democracy provides for the legitimacy of legislation; 2) a democratic written constitution clarifies limitations on legislation; 3) judicial review is legitimate only when it proceeds pursuant to "authoritative" written text. The difficultly here is that the same methodology can reveal other unwritten rules and principles that are also, as the Court stated in the *Manitoba Language Reference*, "fundamental postulate[s] of our constitutional structure."[172] Parliamentary sovereignty, in other words, while a rule of great significance, cannot claim absolute suzerainty over other unwritten rules.

A further very pressing problem raised by Justice La Forest's strident approach to judicial review is that "express" textual anchors are not always in evidence in relevant Supreme Court of Canada precedents. In both the *Manitoba Language Reference* and *New Brunswick Broadcasting*, for example, unwritten rules derived from unwritten principles halted the operation of the written texts of the Constitution – texts that Justice La Forest himself identifies above as a "super-legislative source." There were no "express" anchors authorizing such dramatic results in these decisions. If unwritten rules can overrule written constitutional texts in certain special circumstances, there is no obvious reason why legislation cannot also be overruled. As far as the authority of the unanimous *Manitoba Language Reference* is concerned, the lack of an "express" anchor is not the only difficulty that Justice La Forest must face. Also relevant is the Court's endorsement of the following passage from the dissenting judgment of Justices Martland and Ritchie in the *Patriation Reference*:

> It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the British North America Acts or other

[172] *Manitoba Language Reference* at para. 63.

> constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada's Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments [emphasis added].[173]

As for *New Brunswick Broadcasting*, this is of course a precedent that Justice La Forest absolutely had to address in the *Judges Reference* given his concurring opinion in the earlier decision:

> Nor do I deny that the Constitution embraces unwritten rules, including rules that find expression in the preamble of the *Constitution Act, 1867*; see *New Brunswick Broadcasting*. I hasten to add that these rules really find their origin in specific provisions of the Constitution viewed in light of our constitutional heritage. In other words, what we are concerned with is the meaning to be attached to an expression used in a constitutional provision [internal citation abridged].[174]

While this statement is fully consistent with the earlier concurring opinion, there is a heightened emphasis and even insistence on text here: any legal meaning derived from the Preamble is anchored in "an expression used in a constitutional provision." However, the actual provisions alluded to in *New Brunswick Broadcasting*, as noted in my earlier discussion, are those providing for the grant of a legislative assembly: sections 17, 69, 71, and 88 of the *Constitution Act, 1867*. None of these textual anchors speak directly to the matter of legislative privileges, let along the power of such privileges to trump a constitutional text. Section 17 is typical:

> There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

The textual grants in the *Constitution Act, 1867* do not provide Justice La Forest with an actual "expression." Indeed, he is surely really talking about an implied meaning, and the question arises as to whether such a meaning can meet the "express textual authority" standard that that he claims is required to support the legitimacy of judicial review. I would not hesitate to say that Justice La Forest is on infinitely firmer ground in using the legislative grant found in various provisions of the Constitution than the rest of the Court in *New Brunswick Broadcasting* was when it invoked the shaky legal warrant of the Preamble. Nevertheless, I would also say that his textual anchor approach must travel considerable intellectual

[173] *Manitoba Language Reference* at para. 66, quoting *Patriation Refence* at 844-45.
[174] *Judges Reference* at para. 303.

distance from the text before it can reach the fairly profound legal result of trumping the *Charter*. This point seems much less pressing in the context of the one paragraph concurrence in *New Brunswick Broadcasting* than in the context of Justice La Forest's spirited dissenting protests about the primacy of text in the *Judges Reference*. Indeed, one of the most quoted and celebrated passages from his dissent is the following:

> The express provisions of the Constitution are not, as the Chief Justice contends, "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*." On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review [emphasis added].[175]

This seemingly hard positivist stance is surely stretched by the actual application of the textual anchor theory in *New Brunswick Broadcasting*. The Constitution is plainly more than its textual components, as those components cannot go the full distance required to meet the Court's own precedents. In all fairness, Justice La Forest does state that judicial review must be grounded on the "the interpretation of an authoritative constitutional instrument." This certainly creates room to maneuver around an express textual provision. This room, however, is quite expansive where it allows a simple grant of representative institutions to support the existence of a legal privilege, and then allows this privilege to halt a "super-legislative" text. Justice La Forest may in fact be engaging in a form of reasoning from constitutional essentials. The textual anchor is arguably of such an abstract nature as to be unnecessary.

The grant of a legislative assembly also serves as the textual anchor for Justice La Forest's handling of the Supreme Court's "implied bill of rights" cases. In *Alberta Statutes*, *Switzman,* and *OPSEU*, as noted in the previous chapter, *obiter* comments are made by members of the Court implying that legislative attempts to interfere with the basic freedoms of speech, discussion, and dissent are subject to judicial review.[176]

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[175] *Judges Reference* at para. 319.

[176] See *Alberta Statutes* at 133-134, 146 (*per* Chief Justice Duff and Justices Davis and Cannon); *Switzman* at 306-307 and 326-328 (*per* Justices Rand and Abbott); and *OPSEU* at para. 151 (*per* Justices Beetz, McIntyre, Le Dain and La Forest). In *Alberta Statutes*, only provincial legislatures, and not Parliament, are subject to an implied limitation on legislative authority, and thus this is the weakest of the three decisions, although Chief Justice Duff's language is cited in both of the other decisions. In *Switzman*, Justice Abbott extends the limitation on legislative

The strongest statement of this "implied bill of rights" principle is in the 1987 *OPSEU* judgment, in which Justice Beetz, writing for a majority of the Court, made the following *obiter* comments:

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*, "such institutions derive their efficacy from the free public discussion of affairs...." and, in those of Abbott J. in *Switzman v. Elbling*, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate." Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure [internal citations abridged].[177]

Considering that Justice La Forest was himself a member of the majority in *OPSEU*, it is not surprising that he feels compelled in his dissent in the *Judges Reference* to address the theory that the unwritten principle of democracy can limit legislative competence. His treatment, however, is ambivalent, for he cites authority rejecting the implied bill of rights proposition outright,[178] and also acknowledges that "a more limited guarantee of those communicative freedoms necessary for the existence of parliamentary democracy, is not without appeal."[179] In support of the latter position, he invokes his textual anchor theory:

> Whatever attraction this theory may hold, and I do not wish to be understood as either endorsing or rejecting it, it is clear in my view that it may not be used to justify the notion that the preamble to the *Constitution Act, 1867* contains implicit protection for judicial independence. Although it has been suggested that guarantees of political freedom flow from the preamble, as I have discussed in relation to judicial independence, this position is untenable. The better view is that if these guarantees exist, they are implicit in s. 17 of the *Constitution Act, 1867*, which provides for the establishment of Parliament.[180]

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competence to Parliament, while Justice Rand is non-committal on this point. *OPSEU*, however, states a limitation on the competence of both Parliament and the provincial legislatures. For useful academic treatments of these decisions, see Mullan, Legacy of Justice Rand at 74-77; and Kazmierski, Draconian but not Despotic at 278-81. These decisions are all part of Professor Walter's "judicial narrative" noted at the beginning of Chapter 2.

[177] *OPSEU* at para. 151. It is worth noting that in *Dupond v. City of Montreal et al.*, [1978] 2 S.C.R. 770 ("***Dupond***"), Justice Beetz expressly rejects the "implied bill of rights" as a limitation on legislative authority (at 796-98). The contradiction between *Dupond* and *OPSEU*, cases decided nine years apart, is addressed by Professor Mullan (Legacy of Justice Rand at 76-77).

[178] *Judges Reference* at para. 317, citing *Dupond* and various academic authorities.

[179] *Judges Reference* at para. 317.

[180] *Judges Reference* at para. 318. Both *Alberta Statutes* (at 133, 146) and *Switzman* (at 306, 326) invoke the Preamble in support of the implied bill of rights claim.

As I noted above, section 17 of the *Constitution Act, 1867* provides only for the basic grant of Parliament, nothing more. Thus Justice La Forest is again suggesting that his textual anchor theory can accommodate a fairly extensive amount of judicial interpretation to get from an express provision to a substantial legal result. This interpretation is very well-grounded in constitutional essentials, but it is implied (as in an "implied bill of rights"), and not even remotely "express." The obvious standard of "express textual authority" supporting democratic freedoms in Canadian constitutional law is section 2(b) of the *Charter*, which guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Section 17 of the *Constitution Act, 1867* provides only implied authority, along the following institutional lines: if democratic institutions have been granted, it follows that there must be the freedoms necessary to make them viable, and thus the courts must have power to review legislation threatening such freedoms.

When the textual anchor theory moves into this area of implied rather than express work, it begins to look very much like legal reasoning from constitutional essentials.[181] The grant of a legislative assembly can be invoked as an abstract source, but does it really do any work that is not more transparently performed by reasoning from the essential institutional attributes of a constitutional democracy? There are two reasons to prefer an open process of reasoning from constitutional essentials. First, if a democratic constitution does not have an express grant clause, an "implied bill of rights" argument would still be cogent and compelling. Sir John Laws and T.R.S. Allan have made precisely this point about the unwritten constitution of the United Kingdom.[182] Prioritizing the argument that can stand on its own

[181] I will make use of the "implied bill of rights" case law, and especially the above quoted passage from *OPSEU*, in my own application of the reasoning from essentials methodology in Chapter 5.

[182] Sir John Laws, "Law and Democracy" (1995) Public Law 72 at 87, 90, 92 ("**Law and Democracy**"); Allan, *Constitutional Justice* at 41, and 201-42. Laws states the argument as follows:

> Ultimate sovereignty rests, in every civilised constitution, not with those who wield governmental power, but in the conditions under which they are permitted to do so. The constitution, not the Parliament, is in this sense sovereign. In Britain these conditions should now be recognised as consisting in a framework of fundamental principles which include the imperative of democracy itself and those other rights, prime

makes more sense than invoking an indirect link to text as a primary source of authority. Second, clarity and transparency are always desirable qualities in legal reasoning. Invoking textual warrants that are highly stretched seems to be somewhat misleading and opaque. Placing primary interpretive emphasis on the principled reasoning arising from constitutional essentials is preferable. While vagueness and uncertainty cannot be removed from legal argument,[183] and while there is uncertainty attendant on any attempt to invoke unwritten principles, augmenting such uncertainty by claiming a priority for textual provisions that may in fact be absent seems counterproductive. If the anchor of the section 17 has any use, it would be to augment a reasoning from essentials argument, and not to upstage or obscure such an argument or to masquerade as a legitimate basis for judicial review on its own.

Justice La Forest also offers his textual anchor theory as a possible alternate source of authority for the Court's ruling in the *Judges Reference* itself. His preferred response to the Court's attempt to extend judicial independence to cover the provincial courts is that matters falling outside of the express wording of an "offence" in section 11(d) are not subject to constitutional guarantees. Where legislation is challenged, grounding must be found in sections 96-100 of the *Constitution Act, 1867* or section 11(d), and not in "a dubious theory of an implicit constitutional structure."[184] But having stated his preferred response, Justice La Forest's also offers a substitute textual anchor approach that could support the majority's ruling but avoid any independent recourse to the Preamble or unwritten principles:

> Thus it is possible that protection for the independence for courts charged with determining the constitutionality of government action inheres in s. 24(1) of the *Charter* and s. 52 of the *Constitution Act*, 1982. It could be argued that the efficacy of those provisions, which empower courts to grant remedies for *Charter* violations and strike down unconstitutional laws, respectively, depends upon the existence of an independent and impartial adjudicator. The same may possibly be said in certain cases involving the applicability of the guarantees of liberty and security of the person arising in a non-penal setting. I add that

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> among them freedom of thought and expression, which cannot be denied save by a plea of guilty to totalitarianism (Law and Democracy at 92).

His tools are thus the basic concepts of constitutionalism and democracy, and not express or implied grants.

[183] See H.L.A. Hart's famous discussion of the "open texture of law" in *Concept of Law* at 124-136.

[184] *Judges Reference* at para. 319.

> these various possibilities may be seen to be abetted by the commitment to the rule of law expressed in the preamble to the *Charter*.[185]

The textual anchors offered here do not provide any "express textual authority." These authorities are all implied. Sections 24 and 52 both imply the rule of law, and offer a loose textual authority that shades into the institutional structure argument deployed by Chief Justice Lamer. The same can be said for the vague allusion to section 7 of the *Charter*. An implied textual authority exists very uneasily within a dissent that insists at times so strongly on the primacy of text.

Justice La Forest's textual anchor theory is really in some respects very similar to the Preamble argument and the section 11(d) analysis advanced by the majority of the Court: all are unconvincing attempts to manage "positivist anxiety." The Preamble approach offers a fairly tortured reading of a piece of writing that lacks clear legal status, while section 11(d) and Justice La Forest's anchors seize on authoritative text and attempt to read it very expansively. What these strategies seek to do is to find a way to accommodate unwritten sources of authority within a text-based approach to the law. These strategies, in other words, are caught between a desire to acknowledge unwritten sources of authority and an unwillingness to fully relinquish the authority of text. A more coherent approach is to acknowledge the legitimacy of judicial reasoning from constitutional essentials. Such reasoning is the real engine behind all of the decisions of the Tetralogy.

d. *Secession Reference*

The important breakthrough offered in the *Judges Reference* is the emergence of a constitutional theory placing unwritten principles at the source of the Constitution, and presenting both written texts and unwritten rules as emanating from this source. But the full significance of this breakthrough is obscured by the emphasis placed on the Preamble and section 11(d) in that decision. The important breakthrough

[185] *Judges Reference* at para. 325.

offered by the *Secession Reference* is a consolidation and restatement of the theory of the previous decision combined with the crucial recognition that legal reasoning from constitutional essentials is the primary method through which unwritten rules are derived from unwritten principles.

I begin my discussion with a brief overview of the decision and then follow with an analysis of the refined constitutional theory outlined by the Court, and the unwritten rules deployed to resolve the primary question at issue.

i. Overview of the decision

In September 1996, the Canadian government referred three questions to the Supreme Court addressing the possibility of the province of Quebec separating from the rest of the country. Only the first of these questions is relevant to my analysis:

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?[186]

The Court rendered its judgment in August 1998, one year after the *Judges Reference*, and determined that four unwritten constitutional principles – democracy, federalism, the rule of law and constitutionalism, and the protection of minorities – govern secession. Based on the dynamic interaction of these principles, the Court reasoned that a vote to secede in one province could not be determinative of the right to secede, but also could not be ignored by the rest of the country. Such a vote would give rise to a legally binding duty on all Canadian governments to engage in detailed and substantive negotiations, negotiations informed by the four principles themselves.[187] The Court also determined that the full implications of the underlying principles on the various issues surrounding a vote for secession and subsequent negotiations must be worked out politically, by the relevant governments and legislators,

[186] *Secession Reference* at para. 2. The other two related to international law and the effect of international law in Canada.
[187] *Secession Reference* at paras. 90-94, 151.

and not by the courts.[188] The Court's role was thus limited to recognizing the duty to negotiate and outlining its basic contours – that is, the governing "legal framework" of the four informing principles.[189]

Various commentators have strongly criticized this decision for wilfully ignoring the text of the Constitution. Patrick Monahan argues that the Court strained its proper constitutional role by invoking unwritten principles that it chose to balance in its own fashion, rather than giving due respect to the choices embodied in the written text.[190] Jamie Cameron maintains that the Court proceeded "as though the text did not matter at all," and states that duty to negotiate was not recognized by the Court but rather fabricated for "political purposes."[191] The "deeply troubling" result, Cameron argues, was effectively a judicial amendment: "the nine judges claimed the authority to embellish and alter the meaning of a document it deemed unreliable."[192] W.H. Hurlburt likewise claims that the Court fabricated the duty to negotiate and provided its own constitutional amendment.[193]

Quebec separatism was one of the defining issues of Canadian politics in the latter part of the 20th century, and for this reason, there is at least some concern about the overall propriety of judicial involvement. I noted previously the argument that in some circumstances where the law runs out it may be appropriate for courts to decline considering matters that should be more properly addressed in a political forum. Cameron and Monahan both suggest that the Court should have left the issue of secession to the workings of Canadian politics.[194] Professors Choudhry and Howse have observed, citing positivist concerns, that

[188] *Secession Reference* at paras. 96-101
[189] The phrase "legal framework" is used many times in the *Secession Reference*, both to explain the significance of underlying constitutional principles (see para. 32), and to stress the limitations on the Court's role in any future negotiations on secession (see paras. 101, 110).
[190] Public Policy Role at 75-79.
[191] Unstated Assumptions at 104-108, 111, 113.
[192] Unstated Assumptions at 105-106, 108-111. Cameron cites other commentators who maintain that the Court's duty to negotiate is fabricated (Unstated Assumptions at 106-07).
[193] Fairy Tales at 184-88, and especially 187-88.
[194] Cameron, Unstated Assumptions at 107-108, 111-13; Monahan, Public Policy role at 90-92. Cameron sharply states that "the Court has no mandate to interfere in the political process of constitutional amendment" (Unstated Assumptions at 108).

the Court's "resort to abstract normativity" in the face of highly politically charged matters raises problems regarding the appropriate judicial role in a constitutional democracy.[195]

The concerns advanced by the above commentators can be countered by noting section 52(3) of the *Constitution Act, 1982*:

> Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

The *Manitoba Language Reference*, *New Brunswick Broadcasting*, and the *Judges Reference* definitively establish that unwritten principles are part of the Constitution of Canada. Provided that the written text itself is not determinative of the matter of secession – and none of the above commentators have demonstrated that it is – recourse to unwritten principles is no less legitimate in the *Secession Reference* than it is in any of the preceding decisions.[196] The *Judges Reference*, decided only one year earlier, provided a framework to understand the role of unwritten principles and their relationship to written text. This framework is restated and elaborated in the *Secession Reference* by the unanimous Court.[197]

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[195] Constitutional Theory at 149-54, 168.

[196] Jean Leclair observes that

> Most commentators and the lawyers who argued the case had considered the amending formula established by Part V of the *Constitution Act, 1982* to be applicable to secession (Unfathomable Principles at 398).

However, I have not seen a cogent analysis of Part V suggesting that it could determine the issue of secession. At best, several provisions are implicated (for example, section 38(2) contemplates amendments having an impact on "the proprietary rights or any other rights or privileges of the legislature or government of a province," and section 43(a) contemplates amendments having an impact on provincial boundaries). Hurlburt provides a useful analysis of some of the parts of the amending formula, but not enough to establish these provisions are determinative: Fairy Tales at 184-88. Cameron and Monahan offer no analysis of these provisions. The Court itself states that "It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation" (*Secession Reference* at para. 84).

[197] Some form of restatement (or retreat) was arguably necessary after Justice La Forest's strongly worded dissent in the earlier decision. Justice La Forest left the Court in the year between the two decisions, as did Justice Sopinka, and their positions were filled by Justices Bastarache and Binnie. Two members of the Court, Justice McLachlin (as she then was) and Justice Major, did not sit on the *Judges Reference*, but did sit on the *Secession Reference*. Chief Justice McLachlin and Justice Major both sat on the unanimous 2003 *Ell* decision (Justice Major wrote this judgment), which restates the law governing judicial independence that emerges from the *Judges Reference*, including the role of unwritten principles and the Preamble.

The restated theory stands as the Court's most mature and sophisticated attempt to make sense of the role of unwritten principles in the Canadian Constitution.

ii. The Court's theory of the Constitution: An "exhaustive legal framework"

The *Judges Reference* situates a reservoir of unwritten principles at the core of the Canadian Constitution, and provides three methods through which these principles can give rise to enforceable legal rules. First, and most authoritatively, the principles can be formally enacted into written constitutional texts. These texts, which "elaborate" the underlying principles, provide for "legal certainty" in those matters that they directly address. Second, unwritten principles "can be given the force of law" through the incorporating mechanism of the Preamble. I have argued that this mechanism is beset with uncertainties and difficulties, and is a very weak part of the theory. Third, unwritten principles can give rise to legal rules based on the process of reasoning from constitutional essentials. As discussed previously, the third method is not clearly stated by the Court, but rather is embedded within the section 11(d) analysis. The relevant legal rules "inhere" in the unwritten principles. The *Secession Reference* effectively marginalizes the Preamble. While the Court does briefly reaffirm the incorporationist role set out in the earlier decisions,[198] there is no attempt to actually use the Preamble in this manner. This marginalization leaves the method of reasoning from constitutional essentials finally on its own.

The following passages encapsulate the Court's mature theory of the role of unwritten principles in the Constitution:

> What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.
>
> . . . . .
>
> Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU* called a "basic constitutional structure." The individual elements of the Constitution are linked to the others, and must be

[198] *Secession Reference* at para. 53.

> interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference*, we held that "the principle is clearly implicit in the very nature of a Constitution." The same may be said of the other three constitutional principles we underscore today. Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood [internal citations abridged].[199]

Text "elaborates" foundational unwritten principles here, as Chief Justice Lamer put it in the *Judges Reference*. But the sense of a coherent whole is more strongly emphasized in these passages than in the earlier decision. Structural and organic metaphors suggest both a built or constructed constitution and a constitution that has naturally grown. These metaphors have important implications for the Court's own role in constitutional development. The idea of "architecture" raises the question of design, and from a positivist perspective, the Court itself is designer and builder when it reaches beyond the text and creates law. This is the view advanced by critics of the decision such as Cameron, Monahan, and Hurlburt. The image of "lifeblood," however, and the reference to an extensive "historical lineage," cast the Court's role more as an enunciator of existing structure, and not a builder. On this view, the Court discovers and recognizes, but it does not create new law. This latter understanding of the judicial role is consistent with the concept of the inherent and essential nature of unwritten principles that I have emphasized throughout this chapter. Indeed, in the above passages the Court expressly references its interpretive methodology from the *Manitoba Language Reference*, where the rule of law was "clearly implicit in the very nature of a Constitution." That methodology will now be self-consciously expanded: "The same may be said of the other three constitutional principles we underscore today."

The unwritten principles that are the "lifeblood" of the Constitution give rise to legal rules through formal enactment, but they can also give rise to unwritten legal rules when pressing needs arise that are not covered by written texts:

[199] *Secession Reference* at paras. 49-51.

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force," as we described it in the *Patriation Reference*), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada" [emphasis added] [internal citations abridged].[200]

Under the Court's mature theory, any pressing demand emanating from the source of the Constitution can legitimize the recognition of a protective rule. Such a rule can logically take precedence over any government action, including legislation, that is a threat to the Constitution and the fundamental institutions of government. The *Judges Reference* provides that unwritten rules can overrule legislation in appropriate circumstances, and furthermore, the Court's statement in the above passage that unwritten principles can give rise to "substantive limitations upon government action" would make no sense if the potential to overrule legislation were removed from the ambit of unwritten rules. To do so would recast the Court's unwritten constitutional principles jurisprudence as an exercise in controlling the executive. None of the decisions of the Tetralogy is framed in the terms of administrative law.

The only cogent qualification that can be placed on the force of unwritten rules emerging from unwritten principles is that only very rare situations will justify using such rules to halt an express command of a written constitutional text.[201] Under the Court's mature theory, written texts "have a primary place in determining constitutional rules, [but] they are not exhaustive."[202] The Constitution, on the other hand, is larger than the texts – it "contain[s] a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government" [emphasis added].[203] Legal

[200] *Secession Reference* at para. 54.
[201] The *Manitoba Language Reference* is one such example. *New Brunswick Broadcasting* may be another, depending on how one reads the *Bill 30* rule, and depending also on whether one considers the application of the *Charter* in that decision to be an express command.
[202] *Secession Reference* at para. 32.
[203] *Secession Reference* at para. 32.

problems will arise that cannot be resolved through the texts, but they will always have a solution within the "legal framework" of the entire Constitution.

It follows that legal rules governing secession must be available, and will be found in the foundational reservoir of unwritten principles at the core of the Constitution. A particularly challenging aspect of the secession issue, however, is the relevance of multiple unwritten principles. No single principle is determinative on its own in this particular situation. How are the requirements of different principles with potentially competing demands to be managed? Interestingly, even a single principle can give rise to competing demands in certain circumstances. In the *Manitoba Language Reference*, for example, the rule of law demanded both the invalidation of illegal legislation and the maintenance of a set of positive laws. Ronald Dworkin's concept of the "dimension of weight or importance" of legal principles may offer some assistance in managing circumstances where competing priorities arise.[204] The hierarchy of unwritten principles in any situation will be determined by the relevant architectural considerations.[205] The rule of law, for example, may be so compelling as to justify suspending constitutional texts (as it does in the *Manitoba Language Reference*), or overruling legislation (as it does, through its subsidiary

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[204] *Taking Rights Seriously* at 26-27:

> When principles intersect . . . one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.

While Dworkin's concept of "weight" is useful in understanding how conflicting unwritten constitutional principles can be managed, I am not suggesting that Dworkin's theories explain or account for the Tetralogy generally, nor am I advocating a detailed correspondence of Dworkin's understanding of unwritten legal principles to the Supreme Court of Canada's understanding of unwritten constitutional principles. I leave a consideration of the overall relevance of Dworkin in this regard to others.

[205] I should note that the Court states in the *Secession Reference* that

> These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other (at para. 49).

I do not read this as providing that different principles can never be prioritized. Quite the opposite, the Court is suggesting that in abstract terms there is no priority, but in a concrete set of facts, different principles take on different architectural weight. This can be seen in virtually all of the decisions of the Tetralogy in one way or another. On this point, see Leclair, Unfathomable Principles at 418:

> This should <u>not be understood</u> as though it meant that, in a particular situation, <u>no one principle could take precedence over another</u>. Such precedence, however, must be <u>justified</u> [emphasis added].

principles, in the *Judges Reference*). But the rule of law may also succumb to the force of other pressing principles and rules, such as democracy and parliamentary sovereignty, as in several post-Tetralogy decisions I note in the next chapter. Parliamentary sovereignty is an unwritten rule of great architectural force, for it protects the outcome of the political decision-making process at the core of a democratic constitution. While it would not possible to itemize in advance all of the circumstances in which this rule could be trumped by other unwritten rules, in all likelihood, only a rule protecting a very strong structural interest could do so. The independence of the courts is a very strong structural interest, and another is the integrity of the political decision-making process itself (as in the "implied bill of rights" case law).[206]

iii. The principles and the rules governing secession

The *Secession Reference* isolates four unwritten principles inherent to the architecture of the Canadian Constitution that govern the issue of secession. I offer the following simplified summary of the Court's lengthy treatment of each principle:

1. The principle of federalism, which is "inherent in the structure of our constitutional arrangements," provides for a strong central government to pursue the national interest and national identity, but also "recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction."[207]

2. The principle of democracy "inform[s] the design of our constitutional structure," and provides that each jurisdiction is governed by democratic will-forming institutions that prioritize popular participation and the "discussion and the interplay of ideas" in the process of self-government.[208]

3. The principle of minority rights, "an essential consideration in the design of our Constitutional structure," protects, but is not limited to, the language and culture of individual groups, and includes the recognition of and protection for the rights of aboriginal peoples.[209]

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[206] On the subject of the relative "weight" of different unwritten principles, it is worth nothing that Professor Monahan strongly criticizes the *Secession Reference* for providing an illegitimate "judicial balancing" that realigns the priorities set out in the text (Public Policy Role at 78, and see generally 77-79). Monahan sets the illegitimate "judicial balancing" theory against the legitimate "interpretive" theory, with the latter subordinating the use of unwritten principles to choices made by "drafters" of the foundational constitutional texts (Public Policy Role at 77). With respect, Monahan's assessment exists in a vacuum, for he does not indicate anywhere how the "drafters" of the Constitution chose to prioritize the various principles at play in the *Secession Reference*. To argue that the Court has engaged in an illegitimate act of re-balancing surely implies an existing constitutional balance that has been violated. This needs to be clearly stated in order to ground a charge against the Court.

[207] *Secession Reference* at paras. 56, 58, and 55-60.

[208] *Secession Reference* at paras. 62, 68, and 61-69.

[209] *Secession Reference* at paras. 81, 79-82.

4. The principle of constitutionalism and the rule of law ensures that the relationships between citizens, between citizens and the state, and between the various levels of governments are all controlled by law, and is "necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted."[210]

From these principles, or more accurately from the dynamic interaction of these principles, the Court discerns four concrete rules:

1. An expression of the popular will of the citizens of a province to secede is both politically and legally significant and cannot be ignored by the rest of the country.

2. A right to unilateral secession does not follow from such an expression of popular will – there is no "absolute legal entitlement" to secede.[211]

3. An obligation to negotiate, binding on all Canadian governments, does arise from an expression of the will to secede.

4. Such negotiations must be conducted pursuant to the four underlying principles.[212]

Consistent with the strategy of reasoning from constitutional essentials that I have emphasized throughout this chapter, these rules are all concrete manifestations of the underlying abstract principles.[213] The first two rules are virtually mirror images of each other, and arise inexorably from the interaction of the four unwritten principles. The basis of the legitimacy of a popular will to secede is the democratic principle, but this principle is itself guaranteed by a legal structure that binds the different democratic will-forming jurisdictions within a federal system of obligations. Thus the legitimacy of the will to secede is both enabled and constrained by a constitutional structure that merges provinces into a national whole, and ensures that both majority and minority interests have expression and protection:

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[210] *Secession Reference* at paras. 76, 70-78. The Court discusses the principles of the rule of law and constitutionalism together, but also suggests that they are different. I submit that it is most useful to view the latter as a specific manifestation of the former, a conclusion strongly supported by the following statement:

> Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution (*Secession Reference* at para. 72).

[211] *Secession Reference* at para. 97.

[212] I should note that the Court does not itemize these rules. They are embedded in the decision.

[213] This conclusion is supported by Professors Choudhry and Howse, who observe that 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" (Constitutional Theory at 155).

> The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.
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> . . . . .
>
> Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.[214]

As the last sentence here makes clear, the third rule follows directly from the previous two. Any right to secede is constrained by the legal structure that enables it – there is an obligation to interact with the other parties of the overall community defined by the Constitution. Similarly, the other parties have an obligation, based on the legally inscribed community that defines them, to interact with the party seeking secession. The duty to negotiate is thus inherent to the interaction of the unwritten principles. It follows that

> The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.[215]

The final rule is virtually axiomatic. If the underlying principles define the legal rights and obligations of the parties, these principles must also establish the framework for any political discussions:

> The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.
>
> Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law

[214] *Secession Reference* at paras. 66, 76.
[215] Secession Reference at paras. 88, 92.

> cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.[216]

It is important to note that the Court expressly refrains from going beyond these rules to address even more specific issues such as the content of an appropriate referendum question on secession, the size of a majority vote required to legitimize a will to secede, the shape of post-secession borders, or the management of national debt. These are all held to be political questions, beyond judicial competence.[217] It could be said that these issues all involve additional levels of concreteness in the underlying principles that require political determination. But precisely because the *Secession Reference* does not entertain these questions, the claims advanced by commentators such as Professor Cameron and Professor Monahan that the Court has illegitimately crossed the line between law and politics seem difficult to sustain. The essential role of a democratic constitution is to provide the legal framework within which self-government through political struggle can occur. If the principles are indeed fundamental to the Canadian Constitution – both Cameron and Monahan acknowledge this point[218] – such principles must be capable of defining the parameters within which political decisions are made. The rules recognized by the Court flow from the principles, and effectively define the architecture of the secession process:

> Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order.[219]

I see no substance in the claims that the Court has impermissibly entered into the political arena. The decision is grounded in law. The Court has established the binding "legal framework" within which political decision-making is to proceed, and then has stepped back, mindful of its proper role within the architecture of the Constitution.[220] Regarding the Court's proper restraint on entering into overly

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[216] *Secession Reference* at paras. 94-95.
[217] *Secession Reference* at paras. 96-101.
[218] Cameron, Unstated Assumptions at 106; Monahan, Public Policy Role at 74.
[219] *Secession Reference* at para. 104.
[220] Professors Choudhry and Howse advance the interesting suggestion that the sharing of "interpretative responsibility" for the Constitution between with the legal and political branches in the *Secession Reference* provides added legitimacy to the Court's reliance on non-textual sources (Constitutional Theory 168).

politicized questions, it is worth considering whether a fifth unwritten principle may indeed be relevant to the *Secession Reference* as well: the separation of powers.[221] The separation of powers, which demands a "depoliticization" of remuneration in the *Judges Reference*, also demands a de-judicialization of political matters in the unique context of the *Secession Reference*, and thus a refinement in the law of justiciability and enforcement:

> The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the *Patriation Reference*, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, 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 [emphasis added].[222]

Outlining the general rules governing secession is as far as the Court can go in its decision without trenching on the legitimate role of popular will-forming institutions. In the first three decisions of the Tetralogy, unwritten rules were enforceable; in the *Secession Reference*, the Court steps back from enforcement, due to the political nature of the questions involved, but nevertheless establishes the governing "legal framework" with a set of rules drawn from the underlying reservoir of fundamental informing principles.

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[221] The Court briefly considers the separation of powers earlier in the decision in rejecting a very discrete argument that rendering advisory opinions is outside of the framework of adversarial litigation and thus outside of the constitutional competence of the judiciary (*Secession Reference* at paras. 12-15).

[222] *Secession Reference* at para. 98. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at paras. 33-34 ("***Doucet-Boudreau***"), the Court expressly observes that the doctrine of justiciability is a component of the unwritten principle of the separation of powers. Professor Walters suggests that

> reading the *Quebec Secession Reference* and the *Patriation Reference* together, it may be said that, in the Court's view, unwritten principles of constitutional law may sometimes be manifested in unwritten extra-legal conventions that are not judicially enforceable and they may sometimes be manifested in unwritten legal norms that may or may not be judicially enforceable (Prorogation Debate at 146, see also 145-50).

Chapter 4

The Legacy of the Tetralogy

In each of the decisions of the Tetralogy, the Court is confronted with threats to the structure of the Constitution, and responds by considering the fundamental principles underlying that structure and determining relevant concrete rules inherent to those principles. These were not decisions where the law ran out, in the positivist sense. The Court did not make law, but rather recognized law. The process of reasoning from constitutional essentials reveals embedded rules – unconscious content that comes to light when the heightened demands of an unusual set of facts force deep judicial reflection on the implications of the architecture of our political system.

In this chapter, I conclude Part A of my project by considering several important post-Tetralogy decisions. I argue that an early challenge is later overcome, leaving the Court's substantial achievement in deploying unwritten principles and enunciating their place within the Canadian Constitution firmly intact.

In the 2005 decision of *British Columbia v. Imperial Tobacco Canada Ltd.* ("***Imperial Tobacco***"),[223] the Court considered the constitutionality of British Columbia legislation that created a cause of action for the provincial government against tobacco manufacturers for the recovery of health care costs associated with treating tobacco related diseases. The manufacturers argued, *inter alia*, that the legislation violated the unwritten principles of the rule of law and judicial independence by unfairly targeting them, by being retroactive rather than prospective in character, and by altering the evidentiary and burden of proof norms of traditional tort law. These claims were all unsuccessful. The following statement by Justice

[223] [2005] 2 S.C.R. 473.

Major, who wrote the opinion of the unanimous Court, reveals a marked change in tone from the Tetralogy:

> the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box [emphasis added].[224]

Two particular propositions advanced in *Imperial Tobacco* throw the Tetralogy in doubt. First, the Court strongly intimates that the principle of the rule of law cannot overrule legislation, and instead is largely confined to the control of executive action:

> This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*. The third requires that "the relationship between the state and the individual . . . be regulated by law": *Reference re Secession of Quebec*.
>
> So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the *Act* based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation [emphasis added] [internal citations elided].[225]

Second, the Court also strongly implies that unwritten principles must pass a textual threshold (there must be a "necessary implication") before they can be used to challenge legislation:

> the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court - most notably democracy and constitutionalism - very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms) [emphasis added].[226]

I respectfully suggest that both of these propositions are wholly inconsistent with the Tetralogy, and with one other very important precedent decided at the same time as the Tetralogy.

On the rule of law point, while control of the executive branch is certainly a central role of the rule of law,[227] the *Manitoba Language Reference*, the *Judges Reference*, and the *Secession Reference* are not cast

[224] *Imperial Tobacco* at para. 66.
[225] *Imperial Tobacco* at paras. 58-59, and see also para. 60.
[226] *Imperial Tobacco* at para. 66.
[227] See *Dunsmuir* at paras. 27-30; see also Scheuerman, *Between the Norm and the Exception* at 68-69.

in the terms of administrative law, and do not even remotely imply such limitations on this fundamental constitutional principle. Justice Major's claim that "none of the principles that the rule of law embraces speak directly to the terms of legislation" appears to me, with respect, to overlook the very real potential that the content of legislation can authorize executive officials to act in an arbitrary manner (the first attribute of the rule of law outlined in the above passage),[228] and also that the content of legislation can also be so vague as to undermine the legal relationship between the individual and the state (the third attribute).[229]

Furthermore, the Court has in fact used the rule of law to overrule legislation. The rule of law is central to both the *Judges Reference* and the later decision of *Mackin*, in which the separation of powers and judicial independence are employed as vital elements in arguments overruling legislation. These principles, as I have already discussed, should be understood as dimensions of the rule of law – a conclusion, particularly in regard to judicial independence, that is supported by an enormous weight of academic commentary.[230] Justice Major himself expressly acknowledges that legislation is subject to the principle of judicial independence.[231] If judicial independence is a component of the rule of law, and if

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[228] In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 68-76 ("***Morgentaler***"), Chief Justice Dickson found the content of legislation authorized arbitrary conduct. While this legislation was overruled on the basis of section 7 of the *Charter*, it was nevertheless also in violation of the rule of law as outlined by Justice Major above. My point is not that the rule of law could or should have given the Court adequate warrant to overrule the legislation outside of the *Charter* in that decision, but rather that the content of legislation can indeed violate the rule of law.

[229] The "vagueness doctrine" under the *Charter*, which provides a basis on which to overrule legislation, is grounded on the rule of law: see *Nova Scotia Pharmaceutical* at paras. 64-71; and Ribeiro, *Vagueness Doctrine* at 80-86 and *passim*. Again, my point here is not that the rule of law could or should provide an adequate warrant to overrule vague legislation outside of the *Charter*, but rather the narrower claim that the content of legislation can violate this unwritten principle, contrary to Justice Major's assertion. In Chapter 8, I consider the "vagueness doctrine" in more detail, and note Marc Ribeiro's suggestion, drawing on the rule of law, that the doctrine should indeed be extended beyond the confines of the *Charter*.

[230] In addition to Hogg and Zwibel, quoted on this very point previously (Rule of Law at 716-717, 728), see Scheuerman, *Between the Norm and the Exception* at 70; Beetham, *Legitimation of Power* at 123-24; Paul R. Verkuil, "Separation of Powers, The Rule of Law and the Idea of Independence" (1989) 30 Wm. & Mary L. Rev. 301 at 305-308 ("**Rule of Law**"); Frederic S. Burin, "The Theory of the Rule of Law and the Structure of the Constitutional State" (1966) 15 Am. U. L. Rev. 313 at 324-35 ("**Structure of the Constitutional State**"); and Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality*, 2nd ed. (New York: Oxford UP, 2009) [first published 1979] 210 at 216-217.

[231] *Imperial Tobacco* at para. 66.

judicial independence can countenance limitations on legislative power, Justice Major's strictures regarding the constitutional ambit of the rule of law are particularly hard to follow.

Perhaps most telling, however, is the decision of *MacMillan Bloedel Ltd. v. Simpson* ("***MacMillan Bloedel***"),[232] in which the rule of law is employed to strike down legislation that threatened the "core jurisdiction" of the courts.[233] While the Preamble and section 96 of the *Constitution Act, 1867* are also invoked in this decision, all of the heavy lifting in overruling legislation is done by the rule of law and the methodology of reasoning from constitutional essentials:

> In the constitutional arrangements passed on to us by the British and recognized by the preamble to the Constitution Act, 1867, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt ex facie by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.
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> The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law.[234]

Any doubt that the rule of law is used to overrule legislation in *MacMillan Bloedel* is dispelled by an article written by Chief Justice Lamer shortly after he wrote the majority judgment:

> It is important to note that, while s. 96 was integral to the Court's ruling on the validity of the grant of jurisdiction to the youth courts over contempt *ex facie* by young offenders, it played no direct role in the ruling on the validity of the removal of that same jurisdiction from the superior courts. That ruling, as the passage just quoted makes clear, derives from the rule of law itself and the special role played by the superior courts of general jurisdiction in preserving it. In form, at least, this feature of the decision in *MacMillan Bloedel* serves to distinguish it from the decision in *Crevier* in which s. 96 was explicitly invoked in support of the decision to strike down the legislation at issue there.

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[232] [1995] 4 S.C.R. 725.

[233] *MacMillan Bloedel* falls into the category of non-Tetralogy decisions I isolated near the beginning of Chapter 2. It recognizes and deploys an unwritten principle to achieve a specific goal, but does not expatiate on the nature of unwritten constitutional principles generally, or self-consciously participate in the project the Court was pursuing in other decisions at the same time. Having said that, *MacMillan Bloedel* is an extremely important precedent because reasoning from constitutional essentials is used to overrule legislation, and this methodology is relatively unadorned by the textual (section 11(d)) and quasi-textual (the Preamble) distractions employed in the *Judges Reference*, soon after.

[234] *MacMillan Bloedel* at paras. 37-38. The Preamble plays its familiar ambiguous role of "recognizing" an unwritten principle (see *MacMillan Bloedel* at para. 37), and section 96 offers only a very flimsy textual anchor (interestingly, Justice La Forest was part of the majority in this decision).

> However, it seems unwise to place too much emphasis on this distinction. Section 96 was sufficient in and of itself to justify the decision in *Crevier*. The very act of removing the power of the superior courts to determine questions of the jurisdiction of administrative bodies necessarily constituted a grant of that same power to those self same bodies. Section 96 is concerned with precisely such allocations of adjudicative functions. Hence, there was no need in *Crevier*, as there was in *MacMillan Bloedel*, to go beyond s. 96 in explaining the Court's decision to strike down the legislation. Had there been, I have no doubt that the explanation would have been grounded, as it was in *MacMillan Bloedel*, in the rule of law and the special role of the superior courts in relation to it. It is precisely in order to preserve the rule of law in the context of the exercise of power by administrative bodies that the supervisory authority of superior courts arose and continues to play such an important role within our legal system. These constitutional commitments can be said to lie at the heart of both of these decisions [emphasis added].[235]

The limited ambit accorded to the rule of law in *Imperial Tobacco* cannot survive either the Court's precedents or Chief Justice Lamer's frank comments here.

On the necessary implication point, it can be said that none of the Tetralogy decisions rely on an analysis where necessary implications are drawn from express provisions of the text; rather, they are predicated on necessary implications drawn from constitutional essentials. The important frame of reference in the Tetralogy is the Constitution as a whole, and not individual provisions. Indeed, the whole premise of constitutional architecture, the methodology of reasoning from essentials, and the mature theory advanced by the Court in the *Secession Reference*, is an "exhaustive legal framework," and not an exhaustive textual framework.[236] *MacMillan Bloedel* again is a forceful precedent standing in the way of any attempt to require textual grounding before unwritten principles can overrule legislation.[237]

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[235] "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 U.N.B.L.J. 3 at 10-11. The other decision referenced by the Chief Justice is *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, in which provincial legislation was struck down as violating section 96. The Chief Justice's comments on the possible application of the rule of law to that decision are illuminating, and are also consistent with the Court's statement regarding the scope of the rule of law in *Dunsmuir* at para. 31

[236] *Secession Reference* at para. 32:

> 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.

[237] A "necessary implication" requirement, grounded in text rather than the entire Constitution, has been advocated by Professor Elliot (Structural Argumentation at 86, 141-42), Professor Monahan (Public Policy Role at 75-77; "The Legal Framework Governing Secession in Light of the Quebec *Secession Reference*," in *Constitutional and Administrative Law*, Special Lectures of the Law Society of Upper Canada, 2000 (Toronto: Irwin Law, 2002) 205 at 218-220 ("**Legal Framework**")); and also Warren Newman (Grand Entrance Hall at 217, 227-28). A "necessary implication" standard, however, appears to me to be very similar to Justice La Forest's textual anchor theory, and raises the considerable difficulties that I canvassed when considering the *Judges Reference* dissent. In particular,

Imperial Tobacco reveals an unfortunate re-emergence of the "positivist anxiety" evident in the pre-*Secession Reference* decisions of the Tetralogy.[238] There is, however, a very unstable irony in the decision on the positivist front, for Justice Major's prioritization of text is very selective. As Professor Carter observes, Justice Major

> treat[s] the Supreme Court's decisions as sources of law, the self-evident legitimacy of which could not be challenged by arguments based on normative considerations. Thus, as conclusive evidence that the rule of law does not require prospectivity, Major J. cited decisions of the Supreme Court upholding retroactive taxes and legislation reviving actions held earlier by the Court to be time-barred. Similarly, he rejected both the generality and ordinary law principles as components of the rule of law because past decisions of the Supreme Court had upheld legislation that offended these principles [emphasis added].[239]

If Supreme Court doctrine is so compelling as to resolve these issues regarding the content of the rule of law without any detailed analysis,[240] it is hard to see how *Imperial Tobacco* can engage in a process of refuting, or at least frustrating, the authorities of the Tetralogy on the points I have mentioned above. Positivism – privileging text – appears as a double-edged sword in this instance.

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this standard arguably does nothing but relocate the arena of judicial discretion from a space where unwritten principles are explicitly and transparently worked on through legal reasoning to a space where they are obscured by often stained invocations of text. A standard authorizing a court to ground an argument somewhere in the proximity of a textual provision invites vague exercises of judicial discretion, and surely defeats the very purpose of relying on text in the first place, which is to ground judicial authority in a certain source. Textual anchors provide a false sense of security, possibly assuaging a "positivist anxiety," but not advancing the cause of clarity, precision, or predictability in constitutional interpretation. It is notable that Monahan finds the *Judges Reference* to be adequately explained by the "necessary implication" standard applied to sections 96-100 of the *Constitution Act, 1867* and section 11(d) of the *Charter* (Legal Framework at 218-19; Public Policy Role at 76-77), while Justice La Forest, of course, rejects this very conclusion. To recall Professor Black's frank appraisal of important United States Supreme Court decisions, "[t]he precision of textual explication is nothing but specious in the areas that matter."

[238] Mark Carter presents *Imperial Tobacco* as an example of the Court's "new positivism": New Positivism at 461-75. While Carter is critical of inconsistencies in the Court's move towards a "new positivism," he is largely in favour of a re-prioritization of written text, suggesting it is a "welcome development" (New Positivism at 485).

[239] New Positivism at 465.

[240] Justice Major brushes aside the claimants' argument that the rule of law requires generality in statutory norms with reference to two decisions that do not themselves expressly address the question: see *Imperial Tobacco* at paras. 74-75, discussing *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; and *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40. The argument that the general norm is a defining formal attribute of law, and a central rule of law principle, has deep and profound roots in Western political theory, and should not be dealt with so summarily. On the controversial status of the general norm in theories of law, see especially Scheuerman, *Between the Norm and the Exception* at 68-80, 93-95, 211-217, and *passim*. See also, for more recent statements of the importance of the general norm, Lon Fuller, *The Morality of Law* (New Haven: Yale UP, 1969) [first published 1964] at 46-49, 210 ("***Morality of Law***"); Allan, *Constitutional Justice* at 36-40, 50, 53, 56-59; and Bruce Pardy, *Ecolawgic: The Logic of Ecosystems and the Rule of Law* (Fifth Forum Press, 2015) at 8-9, 37-43, 111-112.

Imperial Tobacco is notably absent from a lecture given by Chief Justice of Canada, Beverley McLachlin, shortly after the decision, a lecture strongly affirming both the place of unwritten principles in the Canadian Constitution and the profound force of such principles.[241]

Imperial Tobacco is also notably absent from the 2014 *Senate Reference*. The questions before the Court in this later case concerned the extent of provincial cooperation required to make fundamental changes to the Canadian Senate, changes including potential abolition. Unlike the situation at issue in the *Secession Reference*, these questions could for the most part be answered through the express amending formulas of Part V of the *Constitution Act, 1982*. Nevertheless, the unanimous Court took the opportunity to reaffirm the Tetralogy as well as the constitutional theory stated in the *Secession Reference* in the strongest possible terms:

> Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law: *Secession Reference*; *Provincial Court Judges Reference*; *New Brunswick Broadcasting*; *Manitoba Language Rights*.
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> These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an "internal architecture," or "basic constitutional structure": *Secession Reference*, *OPSEU*. The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole": *Secession Reference*; see also the discussion on this Court's approach to constitutional interpretation in M. D. Walters, "Written Constitutions and Unwritten Constitutionalism." In other words, the Constitution must be interpreted with a view to discerning the structure of government

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[241] Chief Justice McLachlin states:

> The role of judges in a democracy is to interpret and apply the law. The law involves rules of different orders. The highest is the order of fundamental constitutional principles. These are the rules that guide all other law-making and the exercise of executive power by the state. More and more in our democratic states, we try to set these out in writing. But when we do not, or when, as is inevitable, the written text is unclear or incomplete, recourse must be had to unwritten sources. The task of the judge, confronted with conflict between a constitutional principle of the highest order on the one hand, and an ordinary law or executive act on the other, is to interpret and apply the law as a whole – including relevant unwritten constitutional principles ("Unwritten Constitutional Principles: What is Going On?" 2005 Lord Cooke Lecture (Wellington, New Zealand: Dec. 1, 2005) at 22, online: <www.fact.on.ca/judiciary/NewZeal.pdf>).

Several comments made by the Chief Justice in this lecture affirm that unwritten principles can overrule legislation in appropriate circumstances:

> The argument I have been advancing may dispose of the suggestion that, as a matter of principle, it is inherently wrong for judges to rely on unwritten constitutional norms, if constitutional is understood here in the sense of an overriding principle that can invalidate laws and executive acts (at 11, and see also 16, and 23).

> that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text [internal citations abridged].[242]

The reference to Professor Walters' article on unwritten constitutionalism in the above passage is pinpointed to an important discussion of the Court's theory of the Constitution outlined in the *Judges Reference* and the *Secession Reference*. In the relevant passages, Walters offers the following very evocative description of Chief Justice Lamer's "merely elaborate" theory:

> The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from the single underlying foundation. The constitutional text is not just supplemented by unwritten principles; it rests upon them.[243]

The Court itself, in the *Senate Reference*, proceeds to echo Chief Justice Lamer's "merely elaborate" theory:

> the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure.[244]

Imperial Tobacco appears totally discordant when set between the Tetralogy and the *Senate Reference*. The expansive theory of the Constitution in the earlier and the later decisions is notably lacking in the 2005 judgment.

In the 2014 decision of *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* ("***Trial Lawyers***"),[245] it becomes quite evident that *Imperial Tobacco*'s strictures (no use of the rule of law to overrule legislation; unwritten principles overruling legislation must be sourced in the text by a "necessary implication") are incoherent and cannot be sustained. In *Trial Lawyers*, while regulations that

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[242] *Senate Reference* at paras. 25-26. In the course of its analysis, the Court makes use of the principles of federalism, the protection of minorities, and democracy, observing that the Senate is a distinctive and fundamental part of the "architecture" of the Canadian Constitution, for it complements the democratic legitimacy of decisions of the House of Commons with the "sober second thought" of an appointed and independent body that gives voice to distinct regional and minority interests in the national Parliament (*Senate Reference* at paras. 15-16). The Court concludes that any significant changes to this body would amount to a fundamental amendment, and require substantial provincial input (*Senate Reference* at paras. 56-61, 111).

[243] Unwritten Constitutionalism at 264-65.

[244] *Senate Reference* at para. 27.

[245] [2014] 3 S.C.R. 31.

violated the rule of law by denying certain low-income persons access to justice were struck down, the Court left no doubt that legislation would be subject to similar interdictions:

> In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account – the government will be, or be seen to be, above the law
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> . . . . .
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> Nor does the argument that legislatures generally have the right to determine the cost of government services undermine the proposition that laws cannot prevent citizens from accessing the superior courts. (Indeed, the Attorney General does not assert such a proposition). The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected [emphasis added].[246]

The Court's analysis proceeds on two fronts: first, on the basis of section 96 of the *Constitution Act, 1867*, and second, on the basis of the rule of law and reasoning from constitutional essentials. Section 96, however, is a notoriously vague and overextended textual provision,[247] and furthermore, the primary authority that Chief Justice McLachlin relies on in her majority judgment to support the section 96 analysis is *MacMillan Bloedel*. As discussed above, this earlier judgment was decided on the basis of the rule of law and reasoning from constitutional essentials, and not section 96. In other words, *Trial Lawyers* supports the Tetralogy, and not *Imperial Tobacco*. There is no solid constitutional text in *Trial Lawyers* to

[246] *Trial Lawyers* at paras. 40, 42; see also 43, 49.

[247] Section 96 states that

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

For commentators stressing that this provision cannot support the weight that the Court has placed on it, see Hogg and Zwibel, commenting on the "arcane jurisprudence surrounding s. 96" (Rule of Law at 731). David Dyzenhaus states that

> My own view of s. 96 is that it is not only a slim peg, but that if it had not existed the course of Canadian constitutional history in respect of jurisprudence on judicial independence might have been little different. Without it, the Supreme Court would have simply asserted an authority on the basis of its inherent common law jurisdiction to maintain the rule of law ("The Unwritten Constitution and the Rule of Law" (2004) 23 S.C.L.R. (2d) 383 at 395).

ground a "necessary implication."[248] The resolution of the appeal follows from the rule of law and reasoning from constitutional essentials:

> While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."
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> . . . . .
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> In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account – the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General*) [emphasis added] [internal citations abridged].[249]

This analysis is both transparent and, I suggest, unimpeachable. Furthermore, it operates outside of the text, and pursuant to the rule of law.

The Court has chosen the path of unwritten principles and reasoning from constitutional essentials in the Tetralogy, and this course is explicitly reaffirmed in the *Senate Reference* and implicitly reaffirmed in *Trial Lawyers*. Absent an express change of course, *Imperial Tobacco* should be viewed as an unstable resurfacing of "positivist anxiety" that should be left (along with the Preamble) to one side.

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[248] There is little doubt, I should add, that section 96 is invoked precisely to satisfy *Imperial Tobacco*: see *Trial Lawyers* at para. 37.

[249] *Trial Lawyers* at paras. 38, 40, internal quotation cited to *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at 230. In *Christie v. British Columbia (Attorney General)* (2005), 48 B.C.L.R. (4th) 267 ("***Christie***"), the British Columbia Court of Appeal provided a very powerful critique of *Imperial Tobacco* (*Christie* at paras. 45-72, and esp. 62-72). The irony of the Supreme Court citing this decision in *Trial Lawyers* is substantial. The Court of Appeal's ruling makes extensive use of the rule of law, the methodology of reasoning from constitutional essentials, and the Tetralogy (see especially *Christie* at paras. 68-70), and frankly shreds the "necessary implication" standard imposed by *Imperial Tobacco* by relating "necessary implication" to the Constitution as a whole, and not to individual provisions (*Christie* at para. 70). While the Supreme Court of Canada overruled *Christie*, it did so in a remarkably brief decision that did not address any of the Court of Appeal's substantive objections to *Imperial Tobacco* (*British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873). In the above passage from *Trial Lawyers*, the Supreme Court not only expressly cites *Christie* as authority for the ambit of the rule of law, but also engages in the methodology of reasoning from constitutional essentials and cites precisely those passages from *Christie* where the Court of Appeal engages in the same reasoning to support overruling legislation impairing access to justice!

I should note one other post-Tetralogy decision: *Babcock v. Canada (Attorney General)*.[250] In this 2002 case, claimants alleged that legislation violated the rule of law, judicial independence, and the separation of powers. The Court agreed that such principles "are capable of limiting government actions," but found that in the circumstances of the decision, the principle of parliamentary sovereignty was more pressing.[251] With respect, this is the route that the Court should have followed in *Imperial Tobacco*.[252] Legislation, the product of the political process at the core of the architecture of the Constitution, will always represent a compelling structural interest, and thus challenges to legislation based on unwritten principles will often fail. There was no need for the Court in *Imperial Tobacco* to undermine the integrity of its achievement in the Tetralogy. In order to overcome the structural interests served by the rule of parliamentary sovereignty, a serious threat to the integrity of the political decision-making process or the surrounding institutional configurations will be required. In the next Part of this project, I outline just such a threat.

I conclude Part A with the following brief summary.

The Tetralogy affirms the process of reasoning from constitutional essentials. The Court distills legal rules from unwritten principles, although in the first three decisions, this process is obscured, in varying degrees, behind quasi-textual strategies. When the quasi-textual strategies are set aside, the Court's reasoning in each judgment is both impressive and compelling.

By quasi-textual strategies I refer not only to the use of preambular language, but also to the use of section 11(d) in the *Judges Reference*. The recourse to preambular language is quasi-textual because this

[250] [2002] 3 S.C.R. 3 ("***Babcock***").
[251] *Babcock* at paras. 54-55. While the Court refers to parliamentary sovereignty as a "principle" in *Babcock*, I suggest that it is more coherently understood as an unwritten rule derived from the principle of democracy. This usage is consistent with the refined taxonomy discussed previously. Like other unwritten rules (and unlike unwritten principles), parliamentary sovereignty is concrete and ready to apply to specific situations.
[252] For a consideration of parliamentary sovereignty in both *Babcock* and *Imperial Tobacco*, see Kazmierski, Draconian but not Despotic at 270-76.

language lacks textual status; the use of section 11(d) is quasi-textual because the reasoning at work in the *Judges Reference* does not genuinely require or make use of this provision. The use of section 96 in *Trial Lawyers* is likewise quasi-textual.

Genuine textual analysis – analysis carefully grounded in the language of a provision – always remains a preferred form of constitutional interpretation when it is available. When texts are not on point, the Tetralogy provides that reasoning from constitutional essentials is an equally legitimate form of interpretation. The particular virtue of the legal reasoning methodology is its transparency: it foregrounds the exercise of constitutional logic. Loose invocations of text or preambles do not serve the interests of certainty or clarity, and should be avoided or used only in a well-documented supporting capacity.

One of the primary functions of the judiciary is to serve as "the guardian of the Constitution."[253] It follows that threats to the very structure of the Constitution will provide a legitimate basis for courts to consider unwritten principles and unwritten legal rules. A threats standard sets the bar high enough to avoid casual usage, but leaves the door open when access to the reservoir of unwritten meaning is needed. All of the decisions of the Tetralogy involved threats to constitutional structure. Furthermore, the standard of threats to constitutional architecture also accounts for other precedents where the Court, or members of the Court, have recognized and in some cases deployed unwritten principles. For example, in the "implied bill of rights" cases, discussed previously, various members of the Court suggested the existence of an unwritten rule to protect democratic institutions and democracy itself from predatory legislation. In *MacMillan Bloedel*, the Court made use of the rule of law to strike down legislation that threatened the "core jurisdiction" of the superior courts. One other precedent worth noting is the *Patriation Reference*. In their dissenting reasons, Justices Martland and Ritchie employ the unwritten principle of federalism to protect the structure of the Constitution from the threat of a proposed unilateral attempt by the Canadian

[253] See *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155; *Mackin* at para. 39; *Ell* at para. 23.

government to amend the Constitution without provincial consent. As observed previously, both the *Manitoba Language Reference* and the *Secession Reference* cite the comments of Justices Martland and Ritchie approvingly.[254]

[254] *Manitoba Language Reference* at para. 66; *Secession Reference* at para. 54.

PART B

Theory and Practice:

The Constitutional Architecture of Democracy and the Delegation of Legislative Power

Introduction

In Part A, my goal was to isolate a coherent basis on which to understand unwritten principles and their legitimate place in constitutional analysis. I based my inquiry on the nature of such principles and their function, and also on the Supreme Court of Canada's decisions on the subject. As far as the latter point is concerned, I noted that the institutional ramifications of the Court's unwritten principles jurisprudence are underdeveloped as far as the relationship between the legislative and executive branches is concerned. In this Part, I explore that relationship using the unwritten principles of democracy and the separation of powers and the judicially sanctioned methodology of reasoning from constitutional essentials.

In Chapter 5, I draw on the work of prominent scholars to develop an abstract theory of democracy as a mechanism of conflict resolution in pluralist societies. I argue that this theory is consistent with Canadian constitutional law, and I then explore the institutional configurations necessary to the successful functioning of this conflict resolution mechanism. I conclude by arguing that a concrete nondelegation rule must be enforced to preserve the integrity of the democratic principle.

In Chapter 6, I turn from theory to practice, and consider legislative delegation in Canada, tracing its fundamentals through three very dated yet still highly authoritative judicial decisions, one from the Privy Council and two from the Supreme Court of Canada. I then pursue the legacy of these decisions in contemporary legislative and judicial practice, observing the substantial threat to the institutional configurations of democracy discussed in Chapter 5.

In Chapter 7, I consider the dominant view that the practice of legislative delegation is a necessary result of the pressures of governance in the modern state. I also consider the primary theoretical responses and justifications for delegation offered by commentators: instrumentalism, legislative control, and democratization of the executive.

Chapter 5

The Institutional Logic of Democracy

The goal of this chapter is to establish the normativity of a nondelegation rule: a concrete rule that emerges through the mandated methodology of reasoning from constitutional essentials based on the unwritten principles of democracy and the separation of powers.

I advance a theory of democracy that links the legitimacy of law in a pluralist society, where values are highly contested, to the cogency of conflict resolution mechanisms. Such mechanisms depend on specific institutional configurations. In the first section, I explore the theory in abstract terms. In the second section, I explore relevant Canadian authorities. In Section 3, I return to abstract theory to distill the necessary institutional formations. Finally, in Section 4, I draw a concrete rule out of the prior materials.

1. Democracy as Conflict

Jean Hampton has provocatively suggested that the success of modern democracies comes from their institutionalization of "procedures for revolution."[1] She observes that the idea that "revolution [is] an organized and regular part of the political process" is "at the heart of the structure of contemporary democratic states."[2] This appraisal implies that conflict and upheaval are not banished when a society adopts a democratic political system. Instead, disruptive forces are internalized and managed such that

[1] "Democracy and the Rule of Law," in Ian Shapiro (ed.) *The Rule of Law* (New York: New York UP, 1994) 13 at 39; and see generally 32-42 ("**Democracy and the Rule of Law**").

[2] Democracy and the Rule of Law at 32. For a different approach to the intersection of democracy and revolution, see Sheldon S. Wolin, "Fugitive Democracy" (1994) 1:1 Constellations 11. Wolin suggest that genuine democracy involves a "restorative moment" when social power structures are challenged, occasionally successfully, by the people (at 23). This moment, while always available, often recedes as power structures become solidified. The revolutionary potential of democracy is never lost, but is hard to bring to fruition (at 11, 17, 22-24).

they do not threaten the system, and rather define its central dynamic. Stability is generated by harnessing instability, and not eliminating it.

To the extent that democratic societies are viewed as associations of free individuals, Hampton's argument that disruptive and potentially destabilizing forces operate within, and indeed are definitional to the political system may be inescapable. The historical narratives of modernity offered by Max Weber and John Rawls offer a useful means of expanding these insights.[3] For Weber, the intellectual changes ushered in by the European Reformation and the Enlightenment, combined with the advent of capitalism and industrialism, liberated the individual subject from a more unified and repressive pre-modern ideology, but in so doing unleashed relativism and a plurality of values and belief systems. William Rehg explains that

> modern pluralization has engendered a process that Max Weber called the "disenchantment of the world." For our purposes, this refers to the loss of the "sacred canopy," the fact that pluralization has undermined, or at least fragmented, common religious authorities and worldviews. . . .
>
> Pluralization and disenchantment undermine the ways in which communities can stabilize themselves against shared backgrounds and authorities that removed certain issues and assumptions from challenge. Modern societies witness an increasing variety of groups and subcultures, each having its own distinct traditions, values, and worldview. As a result, more and more conflicts must be settled by reaching explicit agreement on a greater range of contestable matters, under conditions in which the shared basis for reaching such agreement is diminishing.[4]

[3] I note two articles by David Dyzenhaus that have assisted me greatly in developing an understanding of the broad outlines of the historical narratives advanced by Weber and Rawls: "Liberalism after the Fall: Schmitt, Rawls and the Problem of Justification" (1996) 22:3 Philosophy & Social Criticism 9 ("**After the Fall**"); and Legitimacy of Legality. In the former, Dyzenhaus discusses Weber, Rawls, and Carl Schmitt in relation to modernity, pluralism, and conflict; in the latter, similar ideas are pursued with greater focus on legal theory and the writings of Weber, Kelsen, Schmitt, Lon Fuller, and Jürgen Habermas.

[4] "Translator's Introduction," in Jürgen Habermas, *Between Facts and Norms* ix at xvii-xviii, internal quotation taken from Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, N.Y.: Anchor-Doubleday, 1969). On Weber's theory of modernity, with its emphasis on relativism and pluralism, see David M. Frankford, "The Critical Potential of the Common Law Tradition" (1994) 94 Colum. L. Rev. 1076 at 1086-1094 ("**Common Law Tradition**"); Scheuerman, *Between the Norm and the Exception* at 15-17; and Gilbert G. Germain, *A Discourse on Disenchantment: Reflections on Politics and Technology* (Albany: S.U.N.Y. P, 1993) at 27, 38-41 ("***Discourse on Disenchantment***"). See also Dyzenhaus, Legitimacy of Legality 132-54 and *passim*, for a discussion that extends Weber's theories into the realm of law and the advent of the administrative state.

Rawls also foregrounds the emergence of individualism and pluralism out of the more cohesive world-view of pre-modern Europe:

> [the Reformation in the sixteenth century] fragmented the religious unity of the Middle Ages and led to religious pluralism, with all its consequences for later centuries. This in turn fostered pluralisms of other kinds, which were a permanent feature of culture by the end of the eighteenth century.[5]

For Rawls, one of the primary political manifestations of a culture dominated by "pluralisms" is "irreconcilable latent conflict."[6] The same is true for Weber. As William Scheuerman observes,

> In Weber's view, the political arena is essentially a battlefield for representatives of competing value choices, each of whom accumulates possibilities for (state-based) coercion, which may at some point have to be used against those with alternative value preferences. Politics is a "final instance" or juncture where competing ideologies wage a battle for control over our hearts necessarily left unresolved by science's modest and incomplete attempts to conquer our minds. In part because modernity permits no universally acceptable standards for mediating between competing political alternatives, the political sphere is inevitably conflict-ridden and potentially violent.[7]

What kind of political system can adequately respond to the "conflict-ridden" world of modernity, in which a pluralism of values makes bringing individuals into some degree of harmonious coexistence increasingly difficult? Two responses can be identified: either violent repression or a peaceful accommodation of differences. Individualism and the resulting conflicts can be either excluded from the social order by force, or they can be internalized and harnessed to become the engine of the social order itself. This distinction is foregrounded by Hans Kelsen in his two major works on democracy, both of which sharply distinguish "autocratic" forms of social ordering from democratic ones.[8] Authoritarian or "autocratic" systems, Kelsen argues, are based on the principle of "subordination,"[9] which violently replaces a multitude of individual wills, and the conflicts naturally arising from the interaction of these

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[5] *Political Liberalism* (New York: Columbia UP, 2005) [first published 1993] at xxii, and see generally xviii-xxviii ("***Political Liberalism***").

[6] Rawls, *Political Liberalism* at xxvi.

[7] *Between the Norm and the Exception* at 16 to 17. Scheuerman cites Weber's mammoth *Economy and Society*, ed. and trans. By G. Roth and C. Wittich (Berkeley: U of California P, 1978) 1492; and also two shorter pieces, "Politics as a Vocation" and "Science as a Vocation," in *From Max Weber: Essays in Sociology*, ed. and trans. By C. Wright Mills and H.H. Gerth (New York: Oxford UP, 1946).

[8] *The Essence and Value of Democracy*, Nadia Urbinati and Carlo Invernizzi Accetti (eds.), Brian Graf (trans.) (Lanham, Maryland: Rowman & Littlefield, 2013) [first published 1920] ("***Essence and Value***"); "Foundations of Democracy" (1955) 66:1 Ethics 1 ("**Foundations**").

[9] Foundations at 31.

wills as they seek to pursue their own ends in a world of relative values, with a single and unified state will, projecting certainty, order, and absolute power:

> In an autocracy . . . no opposition is tolerated. There exists no discussion, no compromise; there is only dictate. Hence there is no freedom of religion or opinion. If volition prevails over cognition, justice prevails over truth. But the question as to what is just is to be decided exclusively by the authority of the state to which not only the will but also the opinion of the citizens are subject, so that nonconformity with this authority is not only an error but at the same time a punishable crime.
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> . . . . .
>
> There exists not only an external parallelism between political and philosophical absolutism; the former has in fact the unmistakable tendency to use the latter as an ideological instrument. To justify his unlimited power and the unconditional submission of all the others, the ruler must present himself, directly or indirectly, as authorized by the only true absolute, the supreme superhuman being, as his descendant or deputy or as inspired by him in a mystical way. Where the political ideology of an autocratic and totalitarian government does not permit recourse to the absolute of a historic religion, as in National Socialism or Bolshevism, it shows an unconcealed disposition to assume a religious character itself by absolutizing its basic value: the idea of the nation, the idea of socialism.[10]

In the democratic project of "co-ordination," on the other hand, a pluralism of individual wills and values is encouraged through fundamental freedoms, and stability comes not from the repression of difference, but from mechanisms that accommodate and encourage expressions of individual difference:

> Since in democracy rulership has no supernatural quality, and the ruler is created by a rational, publicly controllable procedure, rulership cannot be the permanent monopoly of a single person. Publicity, criticism, and responsibility make it impossible that a ruler becomes irremovable. Democracy is characterized by a more or less quick change of rulership. It has, in this respect, a dynamic nature. A steady rise from the community of the ruled to the position of ruler takes place.
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> . . . . .
>
> [If] it is recognized that only relative values are accessible to human knowledge and human will, then it is justifiable to enforce a social order against reluctant individuals only if this order is in harmony with the greatest possible number of equal individuals, that is to say, with the will of the majority. It may be that the opinion of the minority, and not the opinion of the majority, is correct. Solely because of this possibility, which only philosophical relativism can admit – that what is right today may be wrong tomorrow – the minority must have a chance to express freely their opinion and must have full opportunity of becoming the majority. Only if it is not possible to decide in an absolute way what is right and what is wrong is it advisable to discuss the issue and, after discussion, to submit to a compromise.[11]

The democratic mechanism allows for the open and peaceful expression of individual wills, and predicates the exercise of state power on the interaction of these wills. Majorities form, but have no ultimate or

[10] Foundations at 26-28.
[11] Foundations at 31, 39.

absolute monopoly on truth or power. Expressions of majority will are always subject to interrogation, debate, and reconsideration. Minorities can replace majorities. Ultimately the system is fluid and "dynamic," and not static. This is consistent with Professor Hampton's view that in democracies "revolution [is] an organized and regular part of the political process." Conflict is made part of the normal fabric of political life. Nadia Urbinati and Carlo Invernizzi Accetti observe, in their recent Introduction to Kelsen's 1920 work on democracy, that

> the ultimate "guardian of the constitution" is the very open process of partisanship that characterizes the political life of free and equal citizens, inside and outside the parliament. Thus democracy preserves itself by manifesting its conflictual character and allowing the actors to achieve temporary compromises and decisions according to rules and procedures all citizens accept and comply with [emphasis added].[12]

A democratic system is self-regulating in the sense that disruptive conflicting forces, arising from the interaction of autonomous individuals, are brought within and indeed are definitional to the operation of the state.

A similar view of democracy can be found in Chantal Mouffe's radical theory of "agonistic pluralism," which provides that "well-functioning democracy calls for a vibrant clash of democratic political positions" and an "ineradicable pluralism of value."[13] The health of the system, Mouffe suggests, depends on the open and public manifestation of differences:

> when democratic confrontation disappears, the political in its antagonistic dimension manifests itself through other channels. Antagonisms can take many forms and it is illusory to believe that they could ever be eliminated. This is why it is preferable to give them a political outlet within an 'agonistic' pluralistic democratic system.[14]

Social order results from a political mechanism that manages disorder, through which majorities emerge out of conflict and temporarily exercise power over others until the point when new majorities form and new partial and fallible views are imposed on the rest of society:

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[12] "Editors' Introduction," in *Essence and Value* 1 at 13, and see generally 12-14.

[13] *The Democratic Paradox* (New York: Verso, 2005) [first published 2000] at 102, 104; and see generally 83-105 ("***Democratic Paradox***").

[14] *Democratic Paradox* at 114, see also 104, 115.

> the ideal of a pluralist democracy cannot be to reach a rational consensus in the public sphere. Such a consensus cannot exist. We have to accept that every consensus exists as a temporary result of a provisional hegemony, as a stabilization of power, and that it always entails some form of exclusion.[15]

While Rawls stops short of the radical "agonistic pluralism" of Mouffe, conflict is also central to his understanding of democracy. For Rawls, the ineluctable "burdens of judgment" that divide thinking individual subjects will always lead to disagreement and conflict in any system that does not forcefully repress freedom of thought and expression.[16] Liberal democracy, or "political liberalism," has emerged as a political framework that seeks to accept and manage the "irreconcilable latent conflict" of pluralism:

> A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these doctrines is affirmed by citizens generally. Nor should one expect that in the foreseeable future one of them, or some other reasonable doctrine, will ever be affirmed by all, or nearly all, citizens. Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.[17]

Rawls does suggest that a "well-ordered democracy society," while pluralist in its "comprehensive doctrines," is nevertheless defined by an "overlapping consensus" on "constitutional essentials" such as political rights and matters of "basic justice."[18] This attempt to construct a theory of consensus within a pluralist realm of ideological conflict has earned Rawls considerable criticism from Mouffe and other commentators who suggest that his "overlapping consensus" removes certain subjects from the realm of political debate and thereby undervalues the very pluralistic conflict that is at the root of the system.[19] Rawls shares with many of his interlocutors a commitment to the concept that a viable democratic social order should manage and accommodate and not violently repress disagreement, but his theory of "public

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[15] *Democratic Paradox* at 104-105.
[16] *Political Liberalism* at 54-58.
[17] *Political Liberalism* at xvi, xxvi.
[18] *Political Liberalism* at 38-39, 58-66, 133-34, and 144-68.
[19] See Mouffe, *Democratic Paradox* at 22-34, 90-93; Dyzenhaus, After the Fall at 15-25; Jeremy Waldron, *Law and Disagreement* (New York: Oxford UP, 1999) at 149-63 ("***Law and Disagreement***"); and Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (New York: Cambridge UP, 2007) at 100-107, 184-88 ("***Political Constitutionalism***"). See also Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (New York: Routledge, 1999) at 42-66. Rawls' advocacy of constitutionally entrenched rights as a cornerstone of the "overlapping consensus" of a democratic state is a lightning rod for the critiques of judicial review offered by Waldron in *Law and Disagreement* and Bellamy in *Political Constitutionalism*.

reason," which appears to define the bounds of acceptable political discourse, may have the effect of non-violently repressing disagreement, at least in the political realm.[20]

I conclude my discussion of the role of conflict in a pluralist democratic social order with a highly evocative passage from Jürgen Habermas' *magnum opus* on law and political theory, *Between Facts and Norms*:

> If the communicatively fluid sovereignty of citizens instantiates itself in the power of public discourses that spring from autonomous public spheres but take shape in the decisions of *democratic, politically accountable* legislative bodies, then the pluralism of beliefs and interests is not suppressed but unleashed and recognized in revisable majority decisions as well as in compromises. The unity of a completely proceduralized reason then retreats into the discursive structure of public communication. This reason refuses to concede that a consensus is free of coercion, and hence has legitimating force, unless the consensus has come about under the fallibilist proviso and on the basis of an anarchic, unfettered communicative freedom. In the vertigo of this freedom, there is no longer any fixed point outside that of democratic procedure itself [emphasis in original].[21]

The extract is couched in Habermas' notoriously difficult language and conceptual framework,[22] but nevertheless powerfully captures the ideas that I have explored in this section: pluralism, and the inevitable conflict engendered by pluralism, is harnessed and not repressed through the fluidity of a democratic decision-making process. The consensus that emerges from Habermas' "anarchic, unfettered communicative freedom" is necessarily "revisable" and "fallibilist." This is the same basic terrain as Hampton's notion of democracy as providing "procedures for revolution," Kelsen's "dynamic" democracy, and Mouffe's radical theory of "agonistic pluralism."[23]

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[20] Rawls discusses "public reason" in *Political Constitutionalism* at 212-54. Many of his interlocutors (see, for example, those cited in the preceding note) are more inclined to fully embrace the right of citizens to unreasonably disagree in political forums. It is arguable that violence and not discursive reasonableness, however the latter is defined, should provide the basis for drawing the line between acceptable and unacceptable forms of political discourse.

[21] *Between Facts and Norms* at 186.

[22] Habermas' complex legal and political theories are based on his demanding philosophy of "communicative action," developed over the course of several decades, which seeks to address the dislocations caused by post-Enlightenment rationalism, relativism, and pluralism. For a very helpful summary, see Frankford, Common Law Tradition at 1105-1109. See also Germain, *Discourse on Disenchantment* at 67-120; Dyzenhaus, Legitimacy of Legality, *passim*; and John P. McCormick, "Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State" (1997) 9:2 Yale Journal of Law & the Humanities 297 ("**Crises of the State**").

[23] Mouffe criticizes certain aspects of Habermas' theories that she maintains privilege consensus over conflict (*Democratic Paradox* at 83-105). Habemas has been associated with the consensus-building tradition of deliberative democracy (see, for example, Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (Cambridge, Massachusetts: MIT Press, 2004) at 115-19, 142-52 ("***Green State***")), and it is against this

2. The Conflict Model of Democracy and Canadian Constitutional Law

In this chapter, I am concerned with establishing the cogency of a conflict model of democracy, assessing the consistency of this model with Canadian constitutional law, and finally exploring the institutional configurations required by the model. I am not concerned with situating the conflict model amongst established approaches to democratic theory, nor am I concerned with assessing the merits or demits of such approaches. These are broad questions beyond the ambit of my project.[24]

In this section, I consider the consistency of the conflict model with Canadian constitutional law under two headings, text and doctrine. I turn to the question of institutional configurations in the following section.

a. Textual Warrant for the Conflict Model of Democracy in the Canadian Constitution

The written text of Canada's Constitution sanctions a pluralistic form of democracy. The representative institutions established by Parts IV and V of the *Constitution Act, 1867*, and the right to vote protected by section 3 of the *Charter*, secure the essentials of a democratic form of governance. But these provisions

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tradition that Mouffe's critiques are levelled. Nevertheless, there remains an important commonality in the conflict-based approaches to democracy advocated by each theorist. The above quoted passage, at the very least, offers a vision of democracy that Mouffe would likely endorse.

[24] The conflict model may potentially have affinities to a "liberal" theory of democracy, to the extent that such a theory foregrounds a) individual autonomy; b) the use of democracy as an instrument to manage the conflicting needs, desires, and preferences of free and equal individuals; and c) the requirement of individual approval, through elections to representative legislative assembles, as a prerequisite for coercive state action. It is also conceivable, however, that the conflict model can conform to "republican" or "deliberative" democratic theories as well, which appear to posit citizen participation in democratic processes as having a transformative effect, either by altering individual desires and preferences, or by constituting the citizen's and/or the community's identity. While I offer no definitive comments here, I tentatively suggest that the conflict model may have a wide application. For discussions of liberal, republican, and deliberative theories of democracy, see Habermas, Three Normative Models at 1-4, 6-10; Charles Taylor, *Republican Democracy* (Santiago, Chile: LOM Ediciones, 2012) at 69-70, 72-82; Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," in *Philosophical Arguments* (Cambridge, Massachusetts: Harvard UP, 1997) [first published 1995] 181 at 186-89, 192-95, 200-201; Bernard Manin, "On Legitimacy and Political Deliberation" (1987) 15:3 Political Theory 338 at 349-355; Thomas Christiano, "Freedom, Consensus, and Equality in Collective Decision Making" (1990) 101:1 Ethics 151 at 153-60, 163, 178; and Robyn Eckersley, *Green State* at 115-119.

must be read alongside the fundamental freedoms of religion, thought and expression, assembly, and association protected by section 2 of the *Charter*, the equality rights protected by section 15, and the protection for individual dignity, independence, and autonomy protected by section 7.[25]

All of the above provisions read together secure a political culture of pluralism, and the mechanisms through which the individual differences protected by the provisions of the *Charter* can coexist. Conflict is the inevitable product of a society of autonomous, independent individuals living together. Democratic institutions channel that conflict away from violent confrontation and into the political realm, where disputes are aired and resolved, at least temporarily. The importance of the social whole is attested to by section 1 of the *Charter*, which conditions individual rights and freedoms by providing that collective goals can override individual rights. However, these collective claims can only supersede protected rights when they are "prescribed by law." In other words, democratic institutions must provide the basis on which to override pluralism. Political conflict must occur, and must be resolved, at least partially, in order for individual rights to be violated.

b. Doctrinal Warrant for the Conflict Model of Democracy in the Canadian Constitution

Members of the Supreme Court of Canada endorsed a conflict model of democracy many decades before the *Charter* clarified the scope of individual rights in Canadian law. In the 1938 *Alberta Statutes* decision, for example, Chief Justice Duff and Justice Davis observe that legislatures function as the arena in which heated discussion, debate, and conflict rage over matters of public policy:

> [representative] institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals.[26]

[25] On section 7 providing protection for individual independence, dignity, and autonomy, see *R. v. Clay*, [2003] 3 S.C.R. 735 at para. 31; and *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 49-51.
[26] *Alberta Statutes* at 133.

In the same decision, Justice Cannon strongly condemns provincial legislation that attempted to regulate and limit debate and criticism of government policies, and he observes that such action would be inimical to the contested nature of democratic politics:

> Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of *The British North America Act*, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. . . . the province cannot interfere with . . . [citizens'] fundamental right to express freely [their] untrammelled opinion about government policies and discuss matters of public concern.[27]

In the 1953 *Saumur* decision, Justice Rand also stresses a conflict approach to democracy, noting that under the Canadian Constitution, "government is by parliamentary institutions" that accommodate the "interplay of ideas" and the "widest range of controversy."[28] In *Switzman*, from 1957, Justice Rand also observes that parliamentary government requires a "condition of a virtually unobstructed access to and diffusion of ideas" in order that free citizens can "govern themselves," and Justice Abbott, in the same decision, states that

> the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.[29]

All of these statements, which stress a free and pluralistic society of independent individuals vigorously interacting in matters of political affairs, are affirmed by the majority of the Court shortly after the *Charter* was enacted, in the 1987 *OPSEU* decision. Justice Beetz forcefully declares that

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*, "such institutions derive their efficacy from the free public discussion of affairs...." and, in those of Abbott J. in

[27] *Alberta Statutes* at 145-46.
[28] *Saumur* at 330.
[29] *Switzman* at 306, 327.

> *Switzman v. Elbling*, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate." Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure [internal citations abridged][30]

In the *Secession Reference*, which Robin Elliot observes contains "the most comprehensive attempt yet undertaken by the Supreme Court of Canada to explain the precise nature of Canadian democracy," a conflict model of democracy is also emphasized in the following powerful passage:

> Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur*). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live [internal citation abridged].[31]

The Court's emphasis on pluralism, conflict, and fallibilism here recalls passages from Kelsen and Habermas discussed previously, especially the latter's invocation of "an anarchic, unfettered communicative freedom [in which] there is no longer any fixed point outside that of democratic procedure itself." In the Supreme Court's version, relativism and pluralism are accented in the references to the "marketplace of ideas" and the "interplay of ideas," as well as the statement that "No one has a monopoly on truth." Political conflict is clearly a normal state of affairs, and one that requires participants to "build majorities" through "compromise, negotiation, and deliberation." Disagreements are resolved only temporarily, as there always remain "dissenting voices."

[30] *OPSEU* at para. 151.

[31] *Secession Reference* at para. 68. Compare with Kelsen, Foundations at 38-39, and *Essence and Value* at 103; and also with Habermas' powerful and magisterial invocation of the democratic process (quoted above) as "an anarchic, unfettered communicative freedom [in which] there is no longer any fixed point outside that of democratic procedure itself" (*Between Facts and Norms* at 186).

3. The Institutional Corollaries of a Conflict Model of Democracy

In a pluralistic society, laws have a paradoxical quality. On the one hand, they are absolute and binding on all citizens who come within their purview, and the state is justified in applying coercive force to render compliance with its laws. On the other hand, laws are the products of political choices that themselves cannot aspire to any absolute value whatsoever. Thus Habermas stresses the importance of the "fallibilist proviso" in the making of laws, and Kelsen observes that

> the act of legislation elevates a particular political value to the level of positive law and adopts a particular – even if one sided – political direction.[32]

Given that, as Kelsen points out, in a democracy "what is right today may be wrong tomorrow,"[33] the procedures surrounding the making of law must be particularly rigorous – only extremely cautious law-making procedures can render coercion justified in a pluralistic society. The act of "elevat[ing] a particular political value" to coercible positive form must come about through open and public processes of debate and dispute. Habermas observes that

> If the legal statute is understood as a general norm that acquires validity from the approval of the people's representatives in a procedure characterized by discussion and publicity, then it unifies two moments: the power of an intersubjectively formed will and the reason inherent in the legitimating procedure. Democratic law, then, is characterized by "the fact that legal decisions of whatever content are combined with quite definite procedural presuppositions" [emphasis added].[34]

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[32] *Essence and Value* at 84. Kelsen's relativism provides that

> Society as a system different from nature is possible only as a normative order of human behavior, in contradistinction to the causal order of natural phenomena. A norm, that is, the expression of the idea that something ought to be, constitutes a value [emphasis added] (Foundations at 19).

Norms thus have no absolute value or truth outside of the legal system. Indeed,

> only relative truths and values are accessible to human cognition . . . every truth and every value must – just as the human individual who finds them – be prepared to abdicate its position and make room for others (*Essence and Value at 103*).

Kelsen's scientific "pure theory of law" views laws objectively within the context of a given legal system: "The Pure Theory of Law: Its Method and Fundamental Concepts" (1934) 50 Law Quarterly Review 474 at 498 (translated by Charles H. Wilson); see also *General Theory* at 110-14, 393-95. I consider the question of whether Kelsen's theory of democracy is consistent with his theory of law in Chapter 7.

[33] Foundations at 39.

[34] *Between Facts and Norms* at 189, internal quotations cited to the contemporary German democratic theorist, Ingeborg Maus: "Zur Theorie der Institutionalisierung bei Kant," in G. Gohler et al. (eds.) *Politische Institutionen im gesellschaftlichen Umbruch* (Opladen, 1990) 358 at 372.

For Habermas, the validity of law is inseparable from its normativity, and stems from procedural requirements. Indeed, for Habermas, it is "democratic procedure . . . which alone provides legitimating force to the law-making process in the context of social and ideological pluralism."[35] Furthermore, all laws must be subject to constant re-evaluation and change by the same authority that first formulated them. David Dyzenhaus has strongly endorsed a procedural understanding of democracy that provides for a "provisional closure" in the face of pluralist conflict:

> We must in fact make decisions or accept closures which seem to cut off debate even in the face of disagreement, which we should expect to persist and even intensify as a result of the decision. But what can make such closures legitimate and thus not arbitrary is that they are based on an appropriate (though not ideal) process of inquiry and that the closure is temporary - it remains open to revision in the light of future experience.[36]

Any attempt to subvert the public procedures by which laws are created and revisited effectively threatens to privilege one relative view over another, and thereby coerce free citizens without their consent. A valid law is one that can be enforced by the state, but in a democratic order, this status can only legitimately arise where procedures effectively give voice to conflict and its temporary resolution.[37]

The procedural rigour required of law-making in a pluralist democracy can only be met in a legislature. A legislature is an institution specifically designed to harbour conflict and its resolution through the representatives of the entire body of citizens. It is no mere coincidence that the dynamic energy evident in the passage quoted from the *Secession Reference* near the end of the previous section is focused in "democratic legislatures." Each of other passages cited from the Supreme Court's earlier "implied bill of rights" cases are also focused on representative institutions. Habermas' evocative description of the

[35] "On the Internal Relation between the Rule of Law and Democracy" (1995) 3:1 European J. of Philosophy 12 at 16.
[36] Legitimacy of Legality at 180, see also 176, 178.
[37] Professor Dyzenhaus' procedural approach to democracy draws on, and offers criticisms of, Habermas' theories. Dyzenhaus also assaults the positivist (i.e. non-procedural) conceptions of law advanced by H.L.A. Hart and Kelsen (see Legitimacy of Legality, *passim*). Kelsen's theory of democracy (but not his theory of law) appears broadly compatible with the procedural versions of democracy advanced by Habermas and Dyzenhaus.

"anarchic, unfettered communicative freedom" of the "democratic procedure" likewise foregrounds legislatures:

> If the communicatively fluid sovereignty of citizens instantiates itself in the power of public discourses that spring from autonomous public spheres but take shape in the decisions of *democratic, politically accountable* legislative bodies [emphasis in original].[38]

Under a conflict model of democracy, the legislature is the site where the choices that resolve conflicts (at least temporarily) and generate concrete law and policy are made. This follows directly from institutional structure. M.J.C. Vile, in the leading scholarly work on the principle of the separation of powers, observes that the legislature's primary organizing principle is "collegial."[39] This characterization is also expressly made by Kelsen.[40] A "collegial" body is one structured around the principles of dialogue and group decision-making, and thus is the appropriate site for the resolution of social conflicts, or as Hampton would put it, it is the appropriate site for institutionalizing "procedures for revolution."

Vile contrasts the "collegial" structure of the legislature with the "hierarchical" shape of the executive.[41] The latter shape is appropriate for applying and executing decisions made in the "collegial" legislature, but not for making those decisions itself. A "hierarchical" body is based on the principle of authority and coercion – the polar opposites of consensus and collegiality. Kelsen stresses that the "democratic principle" is generally confined to the "legislative process," and does not "penetrate" the executive,[42] and he notably distinguishes between the "collegial" structure of the legislature and the "autocratic" structure of the executive.[43] As I noted earlier, the opposition of democracy and autocracy is central to Kelsen's works on democracy, with the former system based on the "co-ordination" of free and equal citizens

[38] *Between Facts and Norms* at 186.
[39] *Constitutionalism* at 370-372.
[40] *Essence and Value* at 48, 80-81. Kelsen observes that

> Parliamentarism means government by a collegial organ democratically elected by the People based on universal, equal suffrage and the principle of the majority (*Essence and Value* at 48).

[41] *Constitutionalism* at 370-372.
[42] *Essence and Value* at 83-84.
[43] *Essence and Value* at 48, 80-81.

through their "dynamic" involvement in modes of temporary conflict resolution, and the latter system based on the "subordination" of wills to the "dictate" of the ruler, who banishes conflict, debate, and discussion from the polity. Kelsen's use of this distinction in his discussion of institutional structure emphasizes that the only appropriate institutional site for conflict resolution in a democratic society is in the "collegial" legislature.

The inherent logic of pluralist democracy thus demands that legislative functions be assigned to a distinct body – one separate from the institution engaging in law-application functions. The former body must be "collegial," and must be amenable to rich procedural safeguards in the formulation of coercive laws. The latter body is hierarchically structured, with procedures more properly attuned to the fair, rational, and efficient application of laws. The separation of legislative and executive powers is thus an institutional manifestation of the democratic principle, at least to the extent that the latter principle genuinely responds to the demands of pluralism.

The conclusion that pluralist democracy mandates a particular institutional structure is strongly supported by the work of Jeremy Waldron. Waldron is perhaps best known as an opponent of entrenched rights and judicial review,[44] but he energizes this critique precisely by wielding an institutionally specific theory of democracy as a form of conflict resolution characteristic of pluralist societies.

[44] In this regard, Waldron is part of a well-established tradition that includes James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harvard L. Rev. 129; Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962); and J.A.G. Griffith, "The Political Constitution" (1979) 42:1 Modern L. Rev. 1. Jeremy Bentham may well be the fount of this tradition. For Canadian contributions, see F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview, 2000); and Janet L. Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69 Modern L. Rev. 7.

The broad essentials of Waldron's critique of judicial review can be summarized as follows. First, "disagreement is the most prominent feature of the politics of modern democracies."[45] Second, in the circumstances of radical disagreement, the only appropriate decision-making procedure is one that ensures conflicts amongst citizens "should be settled by those who [are] the subjects of that disagreement."[46] Third, judicial review, which involves transferring the resolution of conflict out of the hands of the people and into the hands of a small, elite, non-representative body, who, more often than not, will disagree as deeply as the citizens as a whole, is illegitimate and undemocratic.[47]

Waldron argues that political participation, the "right of rights," is absolutely critical to realizing the fundamental democratic values of freedom, dignity, and autonomy.[48] These values require that each individual is accepted as a "thinking agent, endowed with an ability to deliberate morally," and afforded with the opportunity to exercise a "protected choice on an issue which remains morally significant."[49] Thus fundamental rights, which are basic sites of contention in pluralist societies, should not be

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[45] *Law and Disagreement* at 106. Waldron takes particular aim at Rawls, and at the concept of an "overlapping consensus" that exists underneath the latter's vision of democracy as a system of managing "irreconcilable latent conflict." Waldron states that

> In the United States, in Western Europe, and in all other democracies, every single step that has been taken by legislatures towards making society safer, more civilized, and more just has been taken against a background of disagreement . . . . each of these achievements was secured in what I have called the circumstances of politics, rather than in anything remotely resembling the justice-consensus that Rawlsians regard as essential to a well-order society (*Law and Disagreement* at 106).

Waldron defines the "circumstances of politics" as "the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be" (*Law and Disagreement* at 102). Waldron's strong critique of Rawls follows from his (Waldron's) strong emphasis on disagreement as the core of modern democratic politics:

> these speculations about the withering away of reasonable disagreement about justice in a well-ordered society should not blind us to the fact that full-blooded disagreement about justice remains the most striking condition of our own politics (*Law and Disagreement* at 163; see also 152-53).

Rawls is one of Waldron's major antagonists in *Law and Disagreement*, which is not to ignore the strong (and fully acknowledged) influence of the former on the latter.

[46] *Law and Disagreement* at 250.

[47] *Law and Disagreement* at 15-16, 264, 306-309; and see also Waldron's seminal essay on the subject, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346, which in some respects offers a condensed version of *Law and Disagreement*. A more recent contribution to his ongoing attack on judicial review is "Five to Four: Why Do Bare Majorities Rule on Courts?" (2014) 123 Yale L.J. 1692.

[48] *Law and Disagreement* at 232-254, 282.

[49] *Law and Disagreement* at 250, 282.

constitutionally entrenched. Entrenchment removes disagreement from the reach of democratic institutions, and allows courts to exercise "protected choice" in place of citizens.[50]

The part of Waldron's critique of judicial review that is of greatest interest to my investigation is the strong emphasis that he places on the legitimacy of the procedures and processes of legislatures and legislation in managing disagreement and conflict:

> Modern legislatures do not just respond to disagreement; they internalize it. For us, it matters that legislation should emerge from a process that is *deliberative*, a process distinguished not just by its Hobbesian decisiveness, but also by the engagement with one another in parliamentary debate of all of the views that might reasonably be thought competitive with whatever legislative proposal is under consideration. Modern legislatures are structured to secure this, with rules about representation (of parties as well as interests and localities), rules about hearings, rules about debates, rules about amendments, and above all rules about voting [emphasis in original].
>
> . . . . .
>
> Legislation is the product of a complex deliberative process that takes disagreement seriously and that claims its authority without attempting to conceal the contention and division that surrounds its enactment.[51]

Waldron's critique of the legitimacy of judicial review flows directly from his veneration of legislative procedures.[52] The "authority" of legislation, its "Hobbesian decisiveness," cannot be separated from the internal processes that make legislatures an institutionally distinctive part of our system of governance.

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[50] Waldron's use of a disagreement-based approach to democracy to provide the basis for an attack on judicial review and entrenched rights is strongly endorsed by the British constitutional theorist Richard Bellamy, who, in *Political Constitutionalism*, expands this approach with a consideration of republican democratic theory (see *Political Constitutionalism* at 1-9, 145-175). Bellamy argues, like Waldron, that in a situation of radical disagreement on fundamental issues, which is the norm in democratic societies, the only fair and equitable form of decision-making is one that gives each citizen a voice (see especially *Political Constitutionalism* at 154, 211-12, 218-23). For Bellamy, as for Waldron, entrenched rights policed by judicial review is undemocratic as this practice forces a partial view on all citizens (*Political Constitutionalism* at 26-48, 92-100, 107-120, 145-54, 163-71, 244-47). Judicial review, for Bellamy, thus epitomizes the primary republican vice of domination: it involves a "tyranny of the minority," prioritizing the views on an elite body over the views of those subject to laws, and thereby violating the requirements of equality (*Political Constitutionalism* at 26, 163-171). Bellamy places considerably less emphasis on the institutional structure of legislatures than Waldron. It is this latter aspect of Waldron's theories that make his work of particular relevance to my analysis. To the extent that Bellamy rejects conflict resolution in the courts, he implicitly supports (or should support) the resolution of that conflict in legislatures.

[51] *Law and Disagreement* at 16, 40.

[52] I should note that while I share Waldron's concern with legislative process and legislative procedure, and agree with him that these are definitional to democracy in a pluralist society, I do not share his blanket opposition to judicial review. In certain circumstances, the courts' role as "guardian of the Constitution" may necessitate judicial review for matters implicating constitutional structure.

This is very similar to Habermas' view that the legitimacy of law is rooted in its genesis. Waldron presents the processes and procedures of legislation as being definitional to the legitimacy of law itself:

> These procedural virtues – legislative due process, if you like – are of the utmost importance for the rule of law. Bicameralism, checks and balances (such as executive veto), the production of a text as the focus of deliberation, clause-by clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates, successive layers of deliberation, and the sheer time for consideration – formal and informal, internal and external to the legislature – that is allowed to pass between the initiation and the final enactment of a bill: these are all features of legislative due process that are salient to an enactment's eventual status as law (for the purposes of our thinking about the rule of law). To wish to be subject to the rule of law is to wish to be subject to processes like these, and to enactments that have been through processes like these [emphasis added].[53]

Waldron goes so far as to maintain that legislation is "the epitome of law-making":

> legislation and the legislative process is the place where we bring together a sense of society's occasional need for change with the most scrupulous requirements of openness, inclusiveness and due process. The tendency of [entrenched rights and judicial review], the view that I have been attacking, is to subvert these requirements.[54]

One area of government that receives very little attention in Waldron's work is the executive branch. His institutional focus is overwhelmingly on legislatures, and the democratic inadequacy of law-making by the judiciary. I submit, however, that his veneration of legislatures and legislative processes, that is, of the "forms, structures and processes that can house and frame" a "democratic mode of lawmaking,"[55] must of necessity be applicable to the relationship between the legislative and executive branches as well. While this institutional relationship is peripheral to Waldron's interest, it is essential to mine. Waldron does, however, occasionally make comments that support my overall approach to the relationship between the democratic principle and the separation of powers:

> Legislating is not the same as passing a resolution or issuing of a decree; it is a formally defined act consisting of a laborious process [emphasis added].[56]
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> . . . . .

[53] "Legislation and the Rule of Law" (2007) 1 Legisprudence 91 at 107 ("**Legislation**").
[54] Legislation at 99, 123.
[55] Representative Lawmaking at 353.
[56] Legislation at 107.

> [The executive's] shape is appropriately managerial rather than dialectical and, however much we believe in deliberative democracy, we should be wary of trying to transform it into a mode of discussion more appropriate for one of the other branches.[57]

This opposition of a "managerial" executive with a "dialectic" legislature is the same as that isolated by Vile and Kelsen, where the "hierarchical" and "autocratic" executive is set against the "collegial" legislative body. Conflict resolution belongs in the deliberative body that is structurally equipped to accommodate it – or in Waldron's words, in the institution that can "house and frame" it.

4. The Constitutional Logic of a Rule Protecting the Institutional Structure of Pluralist Democracy

In this chapter, I have argued that modern societies that embrace pluralism, that is, the political interaction of free and equal individuals, find a crucial mechanism for the peaceful resolution of conflicts in democracy. Channelling disagreements into democratic institutions assists in preventing the large scale and overt violence that subordinates individuals in authoritarian regimes. This theory is consistent with the Canadian Constitution. However, in order for destabilizing conflicts to be managed and turned into the engine of peaceful political change, it is essential that democratic institutions in fact fulfill the task of forming the coercive state laws and policies that curtail the freedom of individuals. Practice, in other words, must follow theory. The process of making decisions and choices that emanate from democratic conflict is institutionally specific in a society committed to pluralist values. The actual processes of governance must conform to this structure.

Constitutional law must thus recognize a rule limiting legislating to a truly collegial institution. A nondelegation rule flows directly from the institutional logic of democracy as clearly as the well-established unwritten rule limiting the power of legislatures to interfere with political rights. In the

[57] "Separation of Powers in Thought and Practice?" (2013) 54 Boston Coll. L. Rev. 433 at 464 ("**Separation of Powers**").

passage from *OPSEU* quoted in the previous section, Justice Beetz (for the majority of the Supreme Court) outlines the latter rule through a perfect example of the methodology of reasoning from constitutional essentials. He begins by observing that the "basic structure of our Constitution . . . contemplates the existence of certain political institutions," and he proceeds to reason that such institutions must be supported by a system of free discussion and debate ("such institutions derive their efficacy from the free public discussion of affairs"). He concludes by recognizing a legal rule, derived from the underlying principle of democracy, that "neither a provincial legislature nor Parliament itself can 'abrogate this right of discussion and debate.'" In the *Judges Reference*, the Court forcefully reaffirms both this reasoning and the resulting rule, observing that "governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy."[58] Chief Justice Lamer goes even further in the *Judges Reference*, and applies the logic of *OPSEU* to other structural relationships:

> In *OPSEU*, as I have mentioned above, Beetz J. linked limitations on legislative sovereignty over political speech with "the existence of certain political institutions" as part of the "basic structure of our Constitution." However, political institutions are only one part of the basic structure of the Canadian Constitution. As this Court has said before, there are three branches of government – the legislature, the executive, and the judiciary: *Fraser v. Public Service Staff Relations Board*; *R. v. Power*. Courts, in other words, are equally "definitional to the Canadian understanding of constitutionalism" (*Cooper*) as are political institutions. It follows that the same constitutional imperative – the preservation of the basic structure – which led Beetz J. to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system [internal citations abridged].[59]

The relationship between the legislature and the executive branch cannot be left out of this rationale – this relationship must also be subject to the "same constitutional imperative." The reasoning that leads the Court to formulate unwritten rules protecting political freedoms and judicial independence from legislative interference also operates to demand a rule protecting the structural integrity of the conflict model of democracy. Consistent with the separation of powers, this rule requires that law and policy-making decisions resolving conflicts must be made in the legislature.

[58] *Judges Reference* at para. 103.
[59] *Judges Reference* at para. 108, internal quotations cited to *OPSEU* at 57, and *Cooper* at para. 11.

The separation of powers, expressly invoked by Chief Justice Lamer in the above passage through the references to *Fraser v. Public Service Staff Relations Board* ("***Fraser***")[60] and *R. v. Power*,[61] captures the institutional separation necessary to protect the democratic principle. As discussed in Chapter 3, the separation of powers is "a fundamental principle of the Canadian Constitution,"[62] and is an institutional manifestation of both the rule of law and democracy. The former usage is exemplified in the rules protecting the "constitutional role" of the courts in the *Judges Reference*, and the latter usage is at play in *New Brunswick Broadcasting*, in which parliamentary privilege protects the integrity of the legislative process, and Justice McLachlin states that

> It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[63]

The "legitimate sphere of activity" of the legislature, in a pluralistic system of democracy, is the resolution of political conflict through the formulation of law and policy. It is precisely the sanctity of this activity that necessitates the protection afforded by parliamentary privilege in *New Brunswick Broadcasting*. A rule against delegation further protects the legislature's "sphere of activity," ensuring that conflict is resolved in that collegial institution, and not in the hierarchical executive.

While I will have more to say about the separation of powers in Chapter 8, it is worth noting at this point the Court's pithy statement of the basic contours of the principle in *Fraser*:

> There is in Canada a separation of powers among the three branches of government – the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.[64]

[60] [1985] 2 S.C.R. 455; separation of powers discussed at para. 39.
[61] [1994] 1 S.C.R. 601 ("***Power***"); separation of powers discussed at paras. 28-29.
[62] *Judges Reference* at para. 138.
[63] *New Brunswick Broadcasting* at para. 141.
[64] *Fraser* at para. 39.

Here the Court recognizes the institutional allocation of "collegial" and "hierarchical" functions that is essential to a conflict-resolution model of democracy. It is legislatures that "decide upon and enunciate policy." Only the legislature, through its representational matrix, can accommodate all citizens who are the subjects and the objects of state coercion. To be both subject and object of state power is the essence of democratic self-government. As the Supreme Court states in the *Secession Reference*:

> democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities. Put another way, a sovereign people exercises its right to self-government through the democratic process [internal citation elided].[65]

Self-government, it must be stressed, is necessarily a circular process – circular in the sense that the inputs and the outputs of the system of governance must be closely correlated. Habermas makes this point when he states that

> Legitimate law closes the circle between the private autonomy of its addressees, who are treated equally, and the public autonomy of enfranchised citizens, who, as equally entitled authors of the legal order, must ultimately decide on the criteria of equal treatment.[66]

Professor Dyzenhaus also emphasizes a circular concept of democracy that engages citizens as both "authors" and "addressees" of law:

> Law must, as Habermas frequently says, respect the individual in his dual role as both addressee and author of positive law.
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> . . . . .
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> Lawmakers must aspire to communicate with the subjects or addressees of the law in a way which makes their communication, first, recognizable as valid law and, second, understandable.[67]

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[65] *Secession Reference* at para. 64.

[66] *Between Facts and Norms* at 415. These comments are not specifically made in the context of a conflict-resolution model of democracy or restraints on delegation, but Habermas captures here the idea that law originates and returns to citizens, and those citizens must have a meaningful involvement in the originating moment for the returning moment to be legitimate.

[67] Legitimacy of Legality at 131, 156, and see also 171-74. In this article, Dyzenhaus draws especially on the theories of Habermas and Lon Fuller to develop an understanding of the nature of legitimate law in a democratic society. The second of the two passages quoted above occurs in the context of comments regarding Fuller, as does the following, where a circular understanding of the legitimacy of law is again evident:

> his view of the authority of law was of the "product of an interplay of purposive orientations between citizens and government" (Legitimacy of Legality at 171, internal quotation cited to Lon Fuller, *Morality of Law* at 204).

In order for the circular process of legitimized self-rule to be viable, the fact of coercion (outputs) must be "understandable" and "recognizable" to the citizens who have engaged, through their elected representatives, in the collegial process of conflict resolution (inputs). This means that the authorizations that emanate from the legislature and empower the instrumentalities of the state must contain considerable information. A visual descriptor is apt at this point: the authorizations must be thick and not thin. A thin authorization is a naked grant of power, nothing more. A thick authorization, by contrast, contains sufficient information to allow citizens to recognize it when it eventually crystalizes in concrete form, possibly as a coercive order.[68] To secure a thick line of authorization – to protect the integrity of

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Dyzenhaus likewise comments on Fuller's interest in law as involving "a relationship of reciprocity between ruler and ruled" in "The Logic of the Rule of Law: Lessons from Willis" (2005) 55 U. Toronto L.J. 691 at 705-706 ("**Lessons from Willis**"). On the circularity idea, see also Habermas, *Between Facts and Norms* at 449:

> the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees.

[68] Theorists have used the words "thick" and "thin" to describe various subjects in legal and political theory including democracy (Waldron, Legislation at 97-98; Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: U of California P, 2003) [first published 1984] at 3-25); the rule of law (Carter, New Positivism at 458-475; Allan C. Hutchinson and Patrick Monahan, "Democracy and the Rule of Law," in Allan C. Hutchinson and Patrick Monahan (eds.) *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 97 at 100-102; Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 Columbia L. Rev. 1 at 54 ("**Constitutional Discourse**")); legal and political forms of constitutionalism (Bellamy, *Political Constitutionalism* at 6); and legal controls on the exercise of discretion (David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U. Toronto L.J. 193 at 206, 219, 238 ("**Rethinking the Distinction**"); Dyzenhaus, Lessons from Willis at 705-706). While my use of the descriptions "thick" and "thin" as a means of quantifying the information contained in a statutory enabling clause is not the same as any of the above applications, there is some analogy to the rule of law usage, at least to the extent that this usage appraises law based on its content (see Fallon, Constitutional Discourse at 54). However, unlike "thick" or "substantive" conceptions of the rule of law, I am not concerned with the character of law generally, that is, I am not asserting some quality that all law must have to be genuine law. Rather, I am concerned only with legislated law that delegates law-making power to the executive. Furthermore, the information or content that I maintain such enabling provisions must contain to be legitimate is not tied to any particular transcendent moral value, but rather to whatever goals the legislature is seeking to achieve through a given enactment. I should also note that Professors Dyzenhaus and Fox-Decent focus on the way that law addresses citizens, and are particularly interested in the "thicker" common law procedural controls (especially the requirement of justification) that accompany delegations of administrative power absent express statutory commands to the contrary (Rethinking the Distinction at 218-219, 238-241). While Dyzenhaus and Fox-Decent focus on law-application by the executive (citizen as addressee), I focus on the other half of the circular process: law-making by the legislature (citizen as author). My claim is that the integrity of the latter half of the circle is dependent not only on the procedural legal controls governing the exercise of power, but also on the sufficiency of the information provided by the legislature of the first place. Dyzenhaus uses the concept of the circular process of the law (via Fuller, noted in the previous footnote) in concert with the descriptions "thick" and "thin" in Lessons from Willis at 705-706.

the link between the inputs and the outputs of the circular process of democratic self-government – the resolution of the conflict at the root of the authorization must occur in the legislature, not the executive. The separation of powers, protected by a nondelegation rule, is thus definitional to the legitimizing circularity of the democratic process.

I conclude this chapter by noting that several Canadian jurisdictions have legislative oversight procedures in effect through which executive law-making can be scrutinized by committees of the legislature. The theory behind this innovation is that legislative review can adequately compensate for the lack of legislative participation in the making of law. I will discuss in greater detail the fundamental flaws in the concept (and practice) of legislative oversight in Chapter 7. For now, I wish to note that the guidelines and mandates of several of these oversight bodies expressly acknowledge the normativity of a nondelegation rule. The *Terms of Reference* of the Ontario Standing Committee on Regulations and Private Bills, for example, provides that

> Regulations should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.[69]

In Manitoba, the Standing Committee on Statutory Regulations and Orders is guided by the principle that

> Regulations should not contain substantive legislation that should be enacted by the Legislature, but should be confined to administrative matters.[70]

The Parliamentary Standing Joint Committee for the Scrutiny of Regulations is required to consider

> Whether any regulation or statutory instrument within its terms of reference, in the judgement of the Committee:
>
> . . . . .
>
> amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment.[71]

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[69] Ontario, Legislative Assembly, Standing Committee on Regulations and Private Bills, *Terms of Reference*, Standing Order 108(i), online: <www.ontla.on.ca/web/committee-proceedings/committees_detail_mandate.do?locale=en&detailPage=mandate&ID=138>.

[70] Manitoba, Legislative Assembly, *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Manitoba*, s. 84(2)(a), online: <www.gov.mb.ca/legislature/business/rulebook_full.pdf>.

[71] Canada, Parliament, Standing Joint Committee for the Scrutiny of Regulations, "Mandate" at 12, online: <www.parl.ca/Committees/en/REGS/About>.

These principles and guidelines all state that a separation of powers allocation of institutional functions is appropriate: the legislature is the proper source of "new policy," "substantive legislation," and "substantive legislative power," while the executive should deal with "administrative matters."

Such expressions of the normativity of a nondelegation rule, however, operate strictly in the political realm – they offer guidance to the actors in the political process, but have no force of law. I submit that under the Supreme Court of Canada's unwritten principles jurisprudence, a nondelegation rule must be recognized as having legal, and not just political force. The delegation of legislative power to the executive constitutes a significant threat to the structure of the Constitution – to the distribution of governmental power and the generation of law. A process of reasoning from constitutional essentials reveals that a nondelegation doctrine is an appropriate response to these threats. I quantify the constitutional threat that I am referring to in the next chapter by considering in detail the practice of legislative delegation in Canadian law. I consider the content of the applicable nondelegation rule in Chapters 8 and 9.

Chapter 6

The Delegation of Legislative Power: A Dominant Practice and a Constitutional Threat

While the methodology of reasoning from constitutional essentials provides that a rule should exist to control the delegation of legislative power to the executive, on the same basis that a rule exists preventing legislative interference with political rights and freedoms, in fact Canadian courts have tolerated broad delegations of legislative power for well over a hundred years.

In this chapter, I trace the three leading decisions tolerating this practice, and assess the legacy of an approach to governance that eschews a separation of legislative and executive functions. I outline substantial threats to the architecture of the Canadian Constitution. First, the integrity of the democratic decision-making process, with its legitimizing circle of authorization, is undermined. Citizens are confronted with (and coerced by) unrecognizable laws. Second, the role of the courts as the "guardian of the Constitution" is seriously undermined. The courts passively condone broad delegations of legislative power to the executive, and then actively assist the legislature and the executive in constructing the legal meaning of these delegations of authority. The result is a dangerous orientation of the modern state as a machine for allocating power and pursuing public policy initiatives rather than as a secure and ordered framework in which citizens can coexist and pursue diverse goals.

In Section 1, I consider the three leading delegation decisions. In Section 2, I consider the modern legacy of these decisions under three headings. First, I explore the phenomenon of "skeleton legislation," a particularly broad and untrammelled form of legislative delegation. Second, I explore several environmental statutes that provide a good illustration of how the modern practice of delegating law and policy-making power sidesteps the legislative resolution of conflicts. Third, I focus on the question of judicial review and the role of the courts in the area of both delegating and delegated legislation. I observe

the very narrow scope afforded for constitutional review, and the more expansive scope available for administrative law review. I suggest that the latter form of review reveals a very disturbing tendency toward judicial over-cooperation with legislative initiatives. In the course of my discussion of judicial review, I also note three very isolated dissenting voices from the courts.

1. The Delegation Case Law: *Hodge*, *Gray*, and the *Chemicals Reference*

The practice of delegating legislative power in Canadian law rests on the authority of *Hodge v. The Queen* ("***Hodge***"),[72] *In Re George Edwin Gray* ("***Gray***"),[73] and *Reference as to the Validity of the Regulations in Relation to Chemicals* ("***Chemicals Reference***").[74] I refer to these precedents collectively as the "**Delegation Case Law.**" The fact that a 19th century judgment and two wartime "emergency" cases can define the normal practice of modern governance should perhaps raise some initial alarms. A closer analysis of these decisions reveals that they should not stand as authorities in a legal system that claims to respect a highly principled approach to constitutional structure.

a. *Hodge*: An Unstable Foundation

Hodge, a decision of the Privy Council, has been cited as the "foundation" of the practice of delegating legislative power in Canadian law.[75] The case involved a challenge to the authority of a Board of License Commissioners ("**Commissioners**") established under a liquor control statute enacted by the Ontario legislature. While the statute in question set certain hours during which alcohol could not be sold, the Commissioners also enacted regulations prohibiting the playing of billiards in licensed establishments during these off hours. The authority for the regulations was a vague enabling clause providing the

[72] [1883] 9 A.C. 117 (P.C.).
[73] [1918] S.C.R. 150.
[74] [1943] S.C.R. 1.
[75] *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)* (1998), 162 D.L.R. (4th) 257 at para. 179 (Ont. C.J.), varied (but not on this point) (1999), 172 D.L.R. (4th) 193 (Ont. C.A.), affirmed [2001] 1 S.C.R. 470.

Commissioners with power for "regulating the taverns and shops to be licensed."[76] The appellant was a tavern-keeper who was convicted for permitting the playing of billiards outside of the hours set for consuming alcohol.

These facts reveal a substantial violation of both the democratic principle and the rule of law. On the first point, the proprietor was coerced by a law that he had no meaningful part in creating: the regulation curtailing the playing of billiards was an unrecognizable product of a liquor control statute, and thus the circle of legitimating authority discussed in the previous chapter (citizen as "author" and "addressee" of the law) was broken. On the second point, a state instrumentality enacted a regulation that was outside of its express mandate, and thus acted in an arbitrary manner, which, as noted in Chapter 3, is the antithesis of the rule of law.[77] The violation of the rule of law and the breaking of the circularity of democratic legitimacy are intimately linked, for it is the coherence of the link between the citizen's authorship of the law and the way that the law addresses/coerces him or her that regularizes the exercise of state authority.

The tavern-keeper's response to these violations was to challenge the very basis of the regulatory regime. He argued that the province lacked competence to regulate alcohol under the division of powers in the *Constitution Act, 1867*, and further, that if the province had the requisite competence, it could not delegate regulatory authority to the Commissioners.

Lord Fitzgerald, writing for the unanimous Privy Council, rejected the division of powers argument in an important discussion which is, however, peripheral to my analysis.[78] He then turned to consider the

[76] *Hodge* at 125-26, quoting *Liquor License Act*, R.S.O. 1877, c. 181, s. 4(4).
[77] See Scheuerman, *Between the Norm and the Exception* at 68-69: the "centerpiece [of the rule of law] has always been the idea that governmental action must be rendered calculable and restrained," thereby precluding "the exercise of arbitrary power" and "unpredictable state action." See also Dicey, *Law of the Constitution* at 215: the rule of law "excludes the existence of arbitrariness."
[78] *Hodge* at 128-131.

delegation claim, which appeared to proceed largely on the basis of an impermissible sub-delegation – the provincial legislatures are but delegates of the Imperial Parliament, and thus cannot bestow power on lesser bodies. This argument is clearly tenuous, given that the Part V of the *Constitution Act, 1867* creates fully representative legislative bodies, and Lord Fitzgerald swept it aside in forceful terms. The underlined portions of the following response by Lord Fitzgerald on this issue are worth noting, not because they present a controversial point of law, but rather because they have been quite shockingly misread in two subsequent decisions:

> It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the *British North America Act* enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme [emphasis added].[79]

The Privy Council is stating here that the provincial legislatures have "plenary" and "supreme" powers within the ambit of section 92 of the *Constitution Act, 1867*. This passage does not address the executive at all, and as a statement of the sovereign power of the legislatures, it is unimpeachable. However, in the *Chemicals Reference*, and in a subsequent (and indeed very recent) British Columbia Court of Appeal decision, these comments are mistakenly read as descriptions of the executive branch. These misreadings, which I will clarify in my treatment of the *Chemicals Reference*, serve to mark the phenomenal growth of executive power in the 20th century.

It is after Lord Fitzgerald dispenses with the sub-delegation claim that he provides the "foundation" for the practice of delegating legislative authority in Canadian law:

> Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to

[79] *Hodge* at 132.

> subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.
>
> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.[80]

In this opening thrust of the Delegation Case Law, there is a very notable tension that is symptomatic of the entire practice of delegating law-making authority. On the one hand, Lord Fitzgerald characterizes the power to delegate as being constrained. On the other hand, he fails to either quantify this constraint or provide an external mechanism to enforce it. The essence of constitutionalism, as I noted near the beginning of Part A, is the regularization and control of government power.[81] Lord Fitzgerald suggests that the power to delegate is "limited" and is "ancillary to legislation." These statements imply a constitutional framework, but to make them viable, there must be some clarification of a standard of measurement. What constitutes a "limited discretionary authority" and what constitutes "ancillary to legislation"? Neither "necessity" nor "convenience" can function as constitutional standards, for the former claims to trump constraint, and the latter makes a mockery of it. Furthermore, the distance between "necessity" and "convenience" basically encompasses all imaginable possibilities. To make matters even more inhospitable to constitutionality, Lord Fitzgerald expressly precludes the possibility of external control: "How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide." The absence of a controlling mechanism, and the absence of standards to assess an alleged constraint, reveals the foundation of delegation in Canadian law to be a constitutionally incoherent.

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[80] *Hodge* at 132.

[81] See the authorities cited in the Introduction to Part A at Note 4.

The facts at issue in *Hodge* underline the weakness of Lord Fitzgerald's analysis, for the statute in question concerned regulating the sale of liquor, and not the playing of billiards. The claimant was essentially charged for a gaming offence, and not a liquor offence.[82] The Commissioners had no express mandate to regulate the playing of billiards. Surely this is unconstrained state action, authorized by a vague enabling provision ("regulating the taverns and shops to be licensed"), with no judicial control available. Indeed, the legislature and the courts both appear delinquent – the former abdicating its responsibility to make decisions guiding its instrumentalities, and the latter abdicating its responsibility to act as "guardian of the Constitution." This situation, which reveals a substantial threat to the structure of the Constitution by disrupting the distribution of governmental power and undermining the integrity of the generation of law, cannot pass muster under the unwritten principles that are now recognized as forming the core of the Canadian Constitution. A citizen cannot be constitutionally coerced by an arbitrary executive enactment. The regulations enacted by the Commissioners have no legitimate democratic source.

Hodge can be said to follow a very text-centred and positivist approach to constitutionalism. This approach places the field of the division of powers between the levels of government in a very different category than the separation of powers between the branches of government.[83] The former, set out in sections 91 and 92 of the *Constitution Act, 1867*, are subject to judicial scrutiny and enforcement,[84] while the latter, not governed by express textual provisions, are left in a gray area of political enforcement. The *Constitution Act, 1867* does in fact address "Executive Power," "Legislative Power," and "Judicature"

[82] The proprietor's license did include an acknowledgment of the governing regulations, but this hardly effects the legality of such regulations or any actions taken pursuant to them (see *Hodge* at 127-28).

[83] I should note that while for the most part, the phrases 'separation of powers' and 'division of powers' are used by courts and commentators to indicate institutional and federal allocations of power respectively, there has been an occasional and regrettable slippage in the terminology in some more recent judicial decisions, with the separation of powers used to denote the allocation of powers between the levels of government: see, for example, *Reference re Securities Act*, [2011] 3 SCR 837 at para. 61.

[84] As noted above, the Privy Council scrutinized the division of powers issue in *Hodge*. See also the Privy Council decisions of *Citizens Insurance Co. of Canada v. Parsons*, (1881) 7 App. Cas. 96; and *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437.

under different headings,[85] but it does not clearly enumerate relative powers or functions and it does not expressly address the question of delegation.[86] What is missing in *Hodge*, with its broad and generous approach to the interpretation of enabling provisions, is any considering of the governing unwritten constitutional principles. This omission leads to a very unstable foundation for the practice of legislative delegation in Canadian law. The Supreme Court proceeds to build a very shaky edifice on top of this foundation when it is confronted with the issue of the delegation of legislative power to the executive thirty years later in *Gray*.

b. *Gray*: A Shaky Edifice

In *Gray*, both the human and legal stakes are considerably higher than in *Hodge*. Additionally, the tension in the earlier decision is amplified, both due to the presence of dissenting voices, and due to uncertainties within two of the three majority opinions.

Under the terms of the *Military Service Act, 1917* ("***Military Service Act***"),[87] the petitioner, George Edwin Gray, was exempted from military service. However, under an executive decree made under the authority of the *War Measures Act, 1914* ("***War Measures Act***"),[88] this exemption was repealed. The delegating authority in question was as broad and normless as can be imagined:

> The Governor-in-council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.[89]

Four members of the Supreme Court of Canada (Chief Justice Fitzpatrick, Justice Duff (as he then was), Justice Anglin (as he then was), and Justice Davies) found Orders-in-Council enacted under the *War*

[85] See Parts III, IV, and VII, and also Part V (covering "Provincial Constitutions").
[86] The only partial exception here is the tax and financial allocation provisions in sections 53 and 54 of the *Constitution Act, 1867*. I say 'partial exception' because it is by no means clear that these provisions were originally intended to prevent delegation. I consider sections 53 and 54 later in this chapter.
[87] S.C. 1917, c. 19.
[88] S.C. 1914 (2nd session), c. 2.
[89] *War Measures Act*, s. 6.

Measures Act, and purporting to amend the *Military Service Act,* to be constitutional and within the implied reach of the enabling legislation. Two members of the Court (Justice Idington and Justice Brodeur) dissented.

The following passages from the dissenting Justices aptly summarize the scope of the primary legal issue:

> The bald proposition put forward in argument that notwithstanding the elaborate provisions of the "Military Service Act" evidently designed as a paramount code to govern the mode of selecting draftees under its provisions in substitution for the "Militia Act" and all therein contained was liable to be repealed or nullified by an order in council, I cannot accept.
>
> Nor can I as a matter of law subscribe to any such doctrine as contained in the startling propositions put forward that it was quite competent for the Governor-in-council to have proceeded under the "War Measures Act" of 1914 not only independently of but to repeal and render inoperative all the provisions of the "Military Service Act" of 1917, and to substitute therefor what the Governor-in-council might "deem necessary or advisable" including therein the levy of such taxes as needed to meet such exigencies; and in short to govern the country according to such conceptions save and except the possibility of parliament being convened once a year and invited to act and seeing fit to revoke such orders.
>
> Indeed, I venture to think that such conceptions of law as within the realm of legislation assigned by the "British North America Act" to the Dominion have no existence.
>
> . . . . .
>
> The several measures required to produce such results must be enacted by the Parliament of Canada in a due and lawful method according to our constitution and its entire powers thereunder cannot be by a single stroke of the pen surrendered or transferred to anybody.
>
> The delegation of legislation in way of regulations may be very well resorted to in such a way as to be clearly understood as such, but a wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against.[90]

The power to change law is a defining feature of a sovereign law-making body, and in a pluralist democracy it is of particular importance due to the "fallibilist proviso" that Habermas refers to as being essential to democratic will-formation. When in the course of political conflict, majorities and minorities shift, and power ebbs and flows, laws must be subject to amendment. But it is surely axiomatic that changes must emanate from the same body that first made the laws. Granting a subordinate body the power to change law emanating from the sovereign legislative law-maker, and to make such a change at will, renders law

[90] *Gray* at 164-65.

uncertain and unrecognizable to its citizen author. *Gray* illustrates this in the most emphatic way possible, because the human stakes at issue were life and death. A man was exempted from the draft, and thus from the possibility of being sent to the war in France where the likelihood of death was very high, pursuant to an express decision of Parliament. Then, under an executive decree, authorized in the broadest possible language by a statute pre-dating the exemption itself, he was placed in the position of having to be drafted after all. State coercion can arguably find no higher expression than the imposition of military service, which requires citizens potentially to kill and be killed. George Edwin Gray was confronted with a law that he did not authorize. This is arbitrary state action of the most offensive kind.

It is perhaps not surprising, given the intense legal and human stakes, that the majority opinions in *Gray* are themselves internally divided. The same tension evident in *Hodge* between the constitutional concept of a power to make a "limited" delegation and the lack of any standard by which to assess the ambit of this limitation, as well as the absence of any enforcing body, plays out in the opinions of both Chief Justice Fitzpatrick and Justices Anglin and Davies, but with even greater force, to the point of internal contradiction.

Consider the following passages from the reasons of the Chief Justice:

> But it is said that the power to make such regulations could not constitutionally be granted to such an extent as to enable the express provisions of a statute to be amended or repealed; that under the constitution parliament alone is to make laws, the Governor-in-council to execute them, and the court to interpret them; that it follows that no one of these fundamental branches of government can constitutionally either delegate or accept the functions of any other branch.
>
> In view of *Rex v. Halliday*, I do not think this broad proposition can be maintained. Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.[91]
>
> . . . . .

[91] *Gray* at 156-57.

> It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and they must be understood to have employed words in their natural sense, and to have intended what they have said.[92]
>
> . . . . .
>
> Parliament was the delegating authority, and it was for that body to put any limitations on the power conferred upon the executive.[93]

In the first excerpt, the Chief Justice expressly rejects a strict approach to the separation of powers, but at the same time seeks to enunciate a constitutional framework that can justify and contain the executive power to amend a primary statute. In *Rex v. Halliday* ("***Halliday***"), four members of the House of Lords found that a very broad grant of power in U.K. wartime legislation similar to the *War Measures Act* enabled the executive to intern naturalized citizens of enemy origin.[94] Chief Justice Fitzpatrick draws support from this decision, and posits delegation within "reasonable limits" as constitutionally acceptable, provided Parliament that does not "abdicate its functions." These are vague standards, however, and do not sit well with the facts of *Gray* (or *Halliday*, for that matter). The broad and normless grant of power in the *War Measures Act* places virtually all of the powers of government in the hands of the executive, and creates in effect a supervised dictatorship – supervised only to the extent that "Such powers must necessarily be subject to determination at any time by Parliament." Thus a passive spectator legislature, watching an active wartime executive, is a "reasonable" delegation in a constitutional democracy, and the executive amendment of primary legislation is likewise unobjectionable.

While the first excerpt pursues what could be called a (strained) constitutionalist project – that is, an attempt to contain the expansive powers at issue within an intelligible framework – the second excerpt

[92] *Gray* at 158-59.
[93] *Gray* at 160.
[94] [1917] A.C. 260. Lord Shaw delivered a lengthy and impassioned dissent, arguing that the executive could interfere with the fundamental liberties of the individual only with express statutory authorization.

notably abandons this project altogether. Here the Chief Justice simply acknowledges that "the language of the section contains unlimited powers." It seems to follow that in a time of "very great emergency," constitutionalism does not apply. The third excerpt follows logically from the second: there is no role for the courts (Lord Fitzgerald reached the same conclusion), because there is no legal framework. The idea originally offered of delegation within "reasonable limits" has disappeared.

Justices Anglin and Davies also find themselves awkwardly attempting to place an unlimited delegation within a coherent framework:

> A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its powers possessed and could bestow" (*Hodge v. the Queen*).[95]

But the pressure of the facts (an executive decree overruling primary legislation and resulting in conscription against previously exempted individuals) again renders a constitutionalist project highly strained. While Justices Anglin and Davies posit a "limited delegation," they soon follow the path of the Chief Justice and abandon constitutionalism in favour of necessity and an alleged lack of judicial competence:

> Again, it is contended that should section 6 of the "War Measures Act" be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our Parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor-in-council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in extraordinary times which necessitate the taking of extraordinary measures. At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them.[96]

The tension in this passage is palpable, and more pressing than in the reasons of the Chief Justice, for Justices Anglin and Davies are alive to the possibility that the powers in question "involve serious danger

[95] *Gray* at 176.
[96] *Gray* at 181-82.

to our Parliamentary institutions," and should "be avoided as far as possible." This sobering insight, however, proves unmanageable, and the Justices quickly retreat: "With such a matter of policy we are not concerned." A constitutional threat is hardly a matter of policy. The generation of law and the distribution of governmental power – the essentials of constitutional architecture – are directly implicated by the expansive nature of the delegation at issue. The Justices' earlier attempt to quantify and contain the impugned power as the product of a "limited delegation" has given way to resignation: "extraordinary times," "extraordinary measures," and a lack of judicial competence.

It can be said that Chief Justice Fitzpatrick and Justices Anglin and Davies are all operating in the same mode as Lord Fitzgerald in *Hodge*: apologists attempting unsuccessfully to characterize the practice of delegating legislative authority as being somehow constitutionally coherent under a poorly formulated theory of vague standards with no judicial enforcement of those standards. Justice Duff takes a different path. He enthusiastically embraces delegation without an apology, and without any standards, essentially blazing the trail that has been followed by the advocates of the administrative state ever since. Justice Duff begins by discarding the more timid approach of Lord Fitzgerald:

> In *Rex v. Halliday*, it was held by the House of Lords that under a general power to "issue regulations for securing the public safety and defence of the realm," a "regulation" could validly be "issued" authorizing the detention of persons without trial and without charge. The judgments of the Law Lords in *Rex v. Halliday* afford a conclusive refutation of the contention that a general authority to make "orders and regulations" for securing the public defence and safety and for like purposes is, as regards existing law resting on statute, limited to the functions of supplementing some legislative enactment or carrying it into effect and is not adequate for the purpose of supersession [emphasis added].[97]

The underlined portion of this passage is a virtual paraphrase of *Hodge*.[98] Justice Duff emphatically rejects the proposition that delegated legislation must be "ancillary," and instead he insists that in appropriate circumstances the power of "supersession" can be granted. Chief Justice Fitzpatrick's concern about "reasonable limits" and Justices Anglin and Davies' concern about a "limited delegation" appear misplaced

[97] *Gray* at 167.
[98] *Hodge* at 132: ". . . and with the object of carrying the enactment into operation and effect. . ."

in Justice Duff's bold formulation. A legislature can freely delegate any power it sees fit to a subordinate body, or agency, on the basis that the legislature always maintains control:

> There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law.[99]

The "**control theory**" of government, as I shall call this understanding of the constitutionality of the delegation of legislative power, casts the legislature as a manager: an allocator of power and a supervisor of the exercise of power. By maintaining control, the legislature satisfies the requirement that it does not "abandon any of its own legislative jurisdiction." The concept of control also appears to satisfy the requirement noted by the other Justices that the legislature does not "abdicate." Crucially however, the "abandon" or "abdicate" requirement sets the bar very low – a point underlined by Bora Laskin (later Chief Justice of the Supreme Court of Canada), who observes in an academic paper that the "distinction between delegation and abdication" in *Gray* is "meaningless" in that the prohibition against abdication "premis[es] only the continued existence of Parliament."[100]

An understanding of a constitutionalism that requires the primary law-making body only to exist, and from that nominal station, to function as a manager, cannot pass muster under the authorities on the democratic principle discussed in Chapter 5. The control theory links the legitimacy of executive action to what the legislature has done (it delegated power) and what it could do (reassert authority). What is missing from this theory is the legislature grapping directly with public policy issues, and resolving conflicts as *per* its collegial role under a pluralist understanding of democracy.

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[99] *Gray* at 170.

[100] Case Comment on the *Chemicals Reference* (1943) 21 Can. Bar Rev. 141 at 144, and see also 148 ("**Case Comment**").

In the Delegation Case Law, the primary dynamic is the legislature divesting itself of its democratic responsibility. Lord Fitzgerald, Chief Justice Fitzpatrick, and Justices Anglin and Davies all wrestle (unsuccessfully) with vague standards to justify this dynamic, while Justice Duff re-envisions the legislative role as a controller. In common these responses all reveal a secondary dynamic at work: judicial failure. *Gray* offers strong evidence of both dynamics. Far from guarding the structure of the Constitution, the Court holds the coat of the legislature as it dismantles its own legitimacy. This level of judicial passivity amounts to an "abdication" as serious as that of the legislature itself.

c. *Chemicals Reference*: The Constitutional "safety valve" and the "plenary" Executive

The specific issue before the Court in the *Chemicals Reference* was whether the Governor-General in Council could sub-delegate legislative powers to boards and agencies under the broad grant of authority in the *War Measures Act*. Given *Gray's* finding that the statute delegated an implied power to amend primary legislation, and *Halliday's* finding that a similar wartime statute authorized the executive to radically interfere with fundamental liberties, it is not surprising that the Court in the *Chemicals Reference* was unanimous in finding that the *War Measures Act* delegated the implied power to sub-delegate. The primary significance of this final part of the Delegation Case Law, however, is less the sub-delegation point (which was probably inevitable based even on *Hodge*[101]), and rather the consolidation of the control theory and the very expansive statements regarding the nature of executive power made by members of the Court.

Justice Davis observes that the normal constitutional relationship of the legislative and executive branches is defined by the separation of powers, but goes on to find that the control theory offers an adequate

[101] On the inevitability point, see Taggart, Chequered History at 602, discussing John Willis' essay on subdelegation, "Delegatus Non Potest Delegare" (1943) 21 Can. Bar Rev. 257.

alternate basis on which to render the practice of broad delegations and sub-delegations of legislative power acceptable:

> Fundamentally, the function of Parliament is to legislate—the function of the Executive is to administer. The exercise of supreme legislative power, the outward and visible sign of sovereignty, rests with Parliament. But Parliament, by our statute, in effect lifted much of its wartime legislative authority and handed it over to the Executive. . . . That Parliament may so legislate is no longer a matter of any doubt.
>
> . . . . .
>
> There may be ground for complaint in the system adopted by the Executive of giving the most extensive and drastic powers of control into the hands of individuals or boards who are in no way responsive to the will of the electorate. The orders made from time to time by all these controllers and boards may well appear to the people to constitute an arbitrary abuse of government by persons not representative of or responsible to the people. But the safety valve of our constitutional system of government remains intact. Parliament has not effaced itself. In the ultimate analysis the House of Commons as representative of the people has, in a practical sense, full power to amend or repeal the *War Measures Act* or to make ineffective any of the Orders in Council passed in pursuance of its provisions [emphasis added].[102]

Under the control theory, the check on "arbitrary" behaviour is located in Parliament itself. This is "the safety valve of our constitutional system of government." The legislature need not perform the task of making laws, provided that it can supervise those instrumentalities that perform this task in its stead.

The practical difficulty with the "safety valve" of the control theory is that legislatures do not and for the most part cannot meaningfully supervise the activities of their instrumentalities. This point is underlined in former Chief Justice Laskin's case comment on the *Chemicals Reference*:

> The orders and regulations resulted in the creation of a huge and complex administrative structure. Parliamentary control could inevitably only be nominal, confined as it was for its exercise to those occasions when Parliament was in session. So broad were the powers which it delegated that even its functions in the formulation of policy were reduced to a minimum, passing in effect to the Cabinet and the chief administrators. Its legal authority to reclaim the legislative powers which it had delegated was not in dispute but in the meantime these powers were being wielded by the Governor in Council (the Cabinet) which in turn provided for their exercise by agencies of its own creation and these agencies purported in turn to confer legislative power upon agencies subordinate to them.[103]

But practical difficulties are of secondary importance for a theory of governance that places the cart before the horse: the more fundamental flaw with the control approach is the absence of democratic

[102] *Chemicals Reference* at 24-26.
[103] Case Comment at 142.

legitimacy in the formulation of coercive laws. As discussed above, in both *Hodge* and *Gray* delegation breaks the circle of legitimation that should connect the citizen's input into the law-making process with the coercion that can be its end result. In the case of sub-delegation, the links between input and output become even more tenuous.

Chief Justice Duff also ascribes to the control theory in the *Chemicals Reference*, even as he did in *Gray*, observing in the later decision that

> As in respect of any other measure which the Executive Government may be called upon to consider, the duty rests upon it to decide whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the state to appoint such subordinate agencies and to determine what their powers shall be.
>
> There is always, of course, some risk of abuse when wide powers are committed in general terms to any body of men. Under the *War Measures Act* the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional.[104]

The Chief Justice is careful to emphasize not only the possibility of after-the-fact legislative supervision, but also the role of the legislature in initiating the delegation:

> It is possible that in what has been said above it has not been sufficiently emphasized that every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from the *War Measures Act*, or some other Act of Parliament. All such instruments "derive their validity from the statute which creates the power, and not from the executive body by which they are made."[105]

On this reading, the circle of democratic legitimacy is not broken by legislative delegation, for there is a chain of "validity" conferring norms – a "pedigree" to recall my earlier discussion of legal positivism – that connects any coercion stemming from a subordinate law with the foundational moment of legislative authorization.[106] I will return to the connection between legal positivism and delegation in the next chapter. For now, I wish to observe that the links that the Chief Justice is referring to here are, to recall my earlier image, as thin as can be imagined. There is a sheer authorization of power, and nothing more,

[104] Chemicals Reference at 12.
[105] *Chemicals Reference* at 13, internal quotation cited to *The Zamora*, [1916] 2 A.C. 77 at 90 (P.C.).
[106] Chief Justice Duff makes a similar suggestion (as Justice Duff) in *Gray* when he briefly notes that "the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law" (at 170).

extending from the legislature to the Governor General in Council under the enabling provision of the *War Measures Act*. A similarly thin authorization of power can extend to further subordinate agents under the principle of sub-delegation. If on a positivist theory of the "pedigree" of subordinate laws, such as the one outlined by the Chief Justice, the chain of norms remains unbroken, this chain nevertheless has been thinned out to such an extent that it can become unrecognizable to citizens, as it was in both *Hodge* and *Gray*. The crucial point is that a chain of "validity" rooted in a statutory source may exist, but a chain of legitimacy rooted in the democratic principle and the rule of law does not.[107] The information with which the law addresses and potentially coerces its original authors is formed by layers of enabled subordinate instrumentalities.

The control theory, which asserts an initiating legislative command and a continuing legislative supervision over the actions of subordinate instrumentalities, insulates an entire practice of government from judicial scrutiny, even though matters of the highest constitutional significance, directly implicating the fundamental principles on which the entire order of democratic governance is based, are at issue. The Delegation Case Law proceeds by recasting critical legal questions as political ones. Lord Fitzgerald made this point in *Hodge*: "How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide." In the *Chemicals Reference*, the Chief Justice and three other members of the Court assert the incompetence of the judiciary to interrogate the delegation or sub-delegation of power. Justice Davis concludes his opinion with the statement that "The whole matter is for Parliament, not for the courts,"[108] while Justice Rinfret (as he

[107] The distance between legal "validity" and legitimacy that I am stressing in this paragraph has also been noted by Michael Taggart, who, in his review of the practice of delegation in various Commonwealth jurisdictions, makes the following comment on "the necessity for authorization for the exercise of state power that affects the people":

> Tracing this golden thread of Ariadne back to Parliament is the constitutional underpinning of delegated legislation jurisprudence. That it is a necessary, but not a sufficient, condition to ensure legitimacy is clear from the *carte blanche* delegations and the transferral of policy formation from statute to statutory instruments [italics in original] (Chequered History at 626).

[108] *Chemicals Reference* at 27.

then was) and Justice Taschereau observe that "For a court to review the enactment would be to assume the role of legislator."[109] The Chief Justice, for his part, states that

> I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country — the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.[110]

With respect, these are all abdications of the judicial guardianship role.

I conclude my discussion of the Delegation Case Law by recalling Justice Davis' comment that "The exercise of supreme legislative power, the outward and visible sign of sovereignty, rests with Parliament." This statement contains a note of irony in the context of broad delegations of legislative power, for the end result of such delegations is that the very concept of sovereignty, which connotes a supreme law-making power,[111] is significantly diluted. The legislature comes to share its law-making authority with the very instrumentalities that it has created, instrumentalities that may exercise powers of which it may be unaware if the control function is not assiduously performed. It is instructive to note that Chief Justice Duff states that the executive enjoys "plenary discretion" under the *War Measures Act*.[112] The word "plenary" is of considerable interest here, for it recalls Lord Fitzgerald's use of the word in *Hodge*. Lord Fitzgerald, however, as noted previously, was strictly referring to the legislature, which he stressed was not a delegate of the Imperial Parliament. The *Chemicals Reference* reveals an unsettling slippage of this expression (i.e. "plenary") from an appropriate usage, in relation to legislative power, to a wholly inappropriate usage, in relation to executive power. This latter usage was perhaps presaged by Chief

[109] *Chemicals Reference* at 19.
[110] *Chemicals Reference* at 12.
[111] Beetham, *Legitimation of Power* at 122.
[112] *Chemicals Reference* at 12:

> The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war.

Justice Fitzpatrick's use of the word "unlimited" in *Gray*. Both Chief Justice Duff and Chief Justice Fitzpatrick were speaking solely of the "plenary" or "unlimited" power of the executive within the context of the *War Measures Act*, and that power remains under the control of the legislature ("nominal" control, later Chief Justice Laskin observes). But this usage is nevertheless unsettling as it hints at a maximal approach to executive authority. In the following astonishing excerpt from the opinion of Justice Rinfret and Justice Taschereau in the *Chemicals Reference*, the usage of "plenary" indeed slips toward such a maximal application:

> Parliament has not abdicated its general legislative powers. It has not effaced itself, as has been suggested. It has indicated no intention of abandoning control and has made no abandonment of control, in fact. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.
>
> As a result, of what precedes, and to use the words of [Lord Fitzgerald] delivering the judgment of the Privy Council in *Hodge v. The Queen*, the powers conferred upon the Governor in Council by the Dominion Parliament are "not in any sense to be exercised by delegation from or as agents of the Parliament." Within the limits prescribed, the authority of the Governor in Council is as plenary and as ample as the Parliament "in the plenitude of its power possessed and could bestow." The "devolution effected by the *War Measures Act*" (to borrow the expression of my Lord the Chief Justice in the *Gray* case) is not to be assimilated to a so-called delegation; and such a devolution has no analogy with agency.
>
> The maxim *Delegatus non potest delegare* is a rule of the law of agency. It has no reference to an authority to legislate conferred by statute of Parliament. Indeed, the power of delegation being absolutely essential, in the circumstances for which the *War Measures Act,* has been designed, so as to have a workable *Act*, that power of delegation must be deemed to form part of the powers conferred by Parliament in the *Act*. The Governor in Council, within the ambit of the *Act*, is not a delegate. The *Act* constitutes a devolution of the legislative power of Parliament, and, within the prescribed limits, it can legislate as Parliament itself could. Therefore, it can delegate its powers, whether legislative or administrative [emphasis added].[113]

In the underlined passages, the Justices have misread *Hodge*, and have applied Lord Fitzgerald's statements regarding the "plenary" nature of legislative authority to the executive. Under this disturbing misreading, the executive somehow is "not a delegate." This is likely the most extreme expression of executive power in Canadian jurisprudence, failing to qualify the grant of enormous authority with a clear statement of the delegate's subordinate status. The Justices' initial reference to the control theory (there has been no "abandonment of control") is not very reassuring when followed by these utterances.

[113] *Chemicals Reference* at 18.

It is instructive to note that in 2013, the British Columbia Court of Appeal, in *House of Sga'nisim v. Canada (Attorney General)* ("***Sga'nisim***"),[114] provides an identical misreading of *Hodge*, elevating the status of the recipient of delegated power to a "plenary" level:

> The case law on delegation of legislative powers admits of few, if any restrictions, on the scope or content of what powers may constitutionally be delegated. It seems to me that the principle articulated by the Privy Council in *Hodge v. The Queen*, [1883] 9 A.C. 117 at 132, that a delegate may be granted "an authority as plenary and as ample" as that of the delegating authority is well-settled, even if it is strictly *obiter dictum* [emphasis added].[115]

The slippage from a "plenary" legislature to a "plenary" executive, both in the *Chemicals Reference* and in *Sga'nisim*, is significant because it underlines the normalization of a maximal approach to executive authority, and the threat this normalization poses to the hierarchy of legislature and executive under the principles of democracy, the rule of law and the separation of power. Citing all three of *Hodge*, *Gray* and the *Chemicals Reference* in the course of its analysis, the Court of Appeal in *Sga'nisim* concludes that "there is no constitutional impediment to a sweeping delegation of legislative powers" [emphasis added].[116] The Supreme Court of Canada evidently did not see anything seriously amiss in this decision as it denied leave to appeal.

2. The Legacy of the Delegation Case Law and the Scope of Judicial Toleration

The following constitutional propositions flow *Hodge*, *Gray*, and the *Chemicals Reference*:

1. Canadian legislatures are competent to delegate virtually "unlimited" legislative powers to the executive branch, including the power to amend or repeal primary legislation, and there is no constitutional requirement that enabling legislation contain standards or norms delimiting the power conferred.

[114] (2013), 359 D.L.R. (4th) 231 (B.C. C.A.), leave to appeal dismissed [2013] S.C.C.A. No. 144.

[115] *Sga'nisim* at para. 89. *Sga'nisim* involved a constitutional challenge to a comprehensive agreement made between the Nisga'a First Nation and the Federal and British Columbia governments, an agreement that recognized substantial powers of self-government in the Nisga'a Nation. One of the appellants' main arguments was that these powers were impermissibly delegated from the Federal and British Columbia legislatures. The Court of Appeal upheld the delegation of power. While this decision is somewhat unique in that the delegation was from the legislatures to a separate self-governing body, rather than to the executive branch of government, the principles of delegation cited and applied by the Court of Appeal are those of *Hodge*, *Gray*, and the *Chemicals Reference*, and thus the decision is illustrative of the powerful influence of these decisions and their expansive understanding of executive power.

[116] *Sga'nisim* at paras. 90, 89-93.

2. The scope of executive legislative power is to be liberally interpreted in light of the implied (not the express) wording of the enabling legislation and the exigencies of the circumstances.

3. Judicial review of delegating or enabling legislation is limited to ascertaining whether the legislature was acting within its jurisdiction under the division of powers between the federal and provincial levels of government, and cannot extend to interrogate the actual decision to delegate.

Subsequent jurisprudence has left these propositions largely unchallenged, except that beginning in 1982 a decision to delegate must conform to the *Charter* in addition to the division of powers.[117]

Writing in 2009, Chief Justice Beverley McLachlin observed that regulations are "the life blood of the administrative state."[118] It would not be an exaggeration to say that *Hodge*, *Gray*, and the *Chemicals Reference* have played a very important role in pumping this blood. Canadian courts have routinely cited these three decisions as authority for the propositions that broad delegations of legislative authority to the executive branch are constitutional and that the decision to delegate cannot be interrogated by the courts.[119] When the social, economic, and political upheavals of the 20th century created a perceived need for strong executive action, the Delegation Case Law provided the legal groundwork to accommodate far-reaching government measures. Numerous contemporary academic commentators have observed the centrality of delegations of legislative authority to the rise of the modern administrative state.[120]

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[117] I discuss this point below.

[118] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 40

[119] See, for example, *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 at 42, 53; *Brant Dairy Co. v. Milk Commission of Ontario*, [1973] S.C.R. 131 at 148; *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 at 1226; *R. v. Furtney*, [1991] 3 S.C.R. 89 at para. 33; *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292 at paras. 58-59; *Waddell v. Canada (Governor in Council)* (1983), 5 D.L.R. (4th) 254 at paras. 24-27 (B.C. S.C.); *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)* (1998), 162 D.L.R. (4th) 257 at paras. 179-180 (Ont. C.J.), varied (but not on this point) (1999), 172 D.L.R. (4th) 193 (Ont. C.A.), affirmed [2001] 1 S.C.R. 470; *R. v. J.P.* (2003), 67 O.R. (3d) 321 at paras. 20-23 (C.A.); *Canadian Reform Conservative Alliance Party Portage-Lisgar Constituency Assn. v. Harms* (2003), 231 D.L.R. (4th) 214 at paras. 10-12, 15 (Man. C.A.); *Jackson v. Ontario (Minister of Natural Resources)* (2009), 2 Admin. L.R. (5th) 248 at paras. 30-32 (Ont. C.A.); *Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health)*, [2012] 2 F.C.R. 618 at paras. 58-63 (F.C.A.); *House of Sga'nisim v. Canada (Attorney General)* (2013), 359 D.L.R. (4th) 231 at paras. 89-90 (B.C. C.A.), leave to appeal dismissed [2013] S.C.C.A. No. 144.

[120] See, for example, Macdonald, Regulation by Regulations at 119; Dyzenhaus, Legitimacy of Legality at 141-44; Cynthia Farina, "Statutory Interpretation and the Balance of Power in the Administrative State" (1989) 89 Colum. L. Rev. 452 at 479-481 ("**Balance of Power**"); Kathryn A. Watts, "Rulemaking as Legislating" (2015) 103 Georgetown

In the next chapter, I will consider the cogency of various theoretical arguments that have been advanced to support the use of delegation in the administrative state, several of which, such as the control theory and the chain of positivist "validity," have already been noted in the above discussion. For the remainder of this chapter, I consider the scope of legislative delegation in Canada in the years since *Hodge*, *Gray*, and the *Chemicals Reference*. This discussion will reveal a significant discrepancy. While the Delegation Case Law predates the Tetralogy by many decades, a significant portion of the legislation and decisions considered below post-date the Tetralogy. How can the practice of broad delegations of legislative power coexist with the Supreme Court's unwritten constitutional principles jurisprudence? The answer is that the courts have yet to apply the Tetralogy to the administrative state in any consistent or coherent way. It is essential that this application begin now. Untrammelled executive power must be addressed and brought within the constraints of a principled approach to constitutionalism.

The ensuing discussion in organized thematically rather than chronologically. Because delegation has become such a dominant practice of modern governance, it is impossible to provide a comprehensive account in a brief discussion. I have chosen to focus on three subjects that will cover important aspects of the contemporary approach to legislative delegation. First, I consider several examples of "skeleton legislation" – a particularly broad form of delegation that has been accepted without question by the courts in several high-profile decisions. One could say that if this level of delegation is acceptable, there are indeed virtually no limits on the powers that can be transferred from the primary law-making body of the legislature to executive instrumentalities. Second, I consider the practice of broad delegation in several contemporary environmental statutes. These examples will serve to underline the way in which delegation expressly bypasses conflict resolution in legislatures, and thereby undermines the very essence of the pluralist theory of democracy outlined in Chapter 5. Finally, I consider more closely the nature of

L.J. 1003 at 1014-1015; and Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress" (2015) 90 N.Y.U. L. Rev. 1463 at 1465.

judicial review under a regime of broad delegation. I have already stressed in the foregoing discussions the ways in which the toleration of delegation amounts to an abdication of the constitutional role of the judiciary. However, a further unsettling dynamic in this judicial role has also emerged. The toleration evident in the Delegation Case Law reveals a passive acceptance by the courts of legislative decisions to renounce their law-making responsibilities. Under contemporary canons of judicial review, this passive acceptance has been accompanied by an active and "purposive" construction of enabling provisions that implicates the courts even more profoundly in a distortion of the architecture of the Constitution.

a. Skeleton Legislation

While *Gray* and the *Chemicals Reference* were both wartime emergency decisions, subsequent authorities have not treated them any differently than *Hodge*, and thus I have made no allowances for any emergency pressures affecting either Parliament or members of the Court.

Former Chief Justice Laskin, in his case comment on the *Chemicals Reference*, begins by noting the pressures on the Court and the government due to the exigencies of the war:

> If the importance of judicial pronouncements is tested by their actual result rather than by their content then the unanimous opinion of the Supreme Court of Canada in *Reference re Regulations (Chemicals)* under *War Measures Act*, is momentous. No lesser adjective will do to characterize a decision which saved Canada's system of wartime economic controls from the necessity of drastic reorganization.[121]

Yet later in his discussion it becomes evident that he favours the constitutionality of broad delegations of legislative power even outside of an emergency context:

> It seems difficult to conceive of any but a gratuitous judicial restriction on the authority of Parliament to delegate to the executive legislature power which it possesses. The fact of emergency could only make the case for delegation stronger.[122]

[121] Case Comment at 141.
[122] Case Comment at 145.

This academic position later assumes legal form when Chief Justice Laskin rejects any requirement for standards in delegating legislation in *Reference re Agricultural Products Marketing* ("***Agricultural Products Reference***"):

> Involved in the appellants' submissions, as reflected in their factum and in oral argument, was the contention that there is a constitutional requirement in the delegation of authority that standards be fixed by Parliament or where, as here, there is delegation in depth [i.e. sub-delegation], that is by orders which the Governor-in-Council is authorized to make, the orders of the Governor-in-Council should establish standards and not, by wholesale redelegation, leave their determination to the provincial boards nor, as s. 2(1) provides, adopt the various provincial standards for federal purposes. I do not think this Court would be warranted in imposing such a constitutional limitation on the delegation of authority. The matter of delegation in depth is covered by the judgment of this Court in *Reference re Regulations (Chemicals)* under the *War Measures Act*, and I would not limit its rationale to emergency legislation [emphasis added].[123]

The *Agricultural Products Reference* reveals the enormous breadth of the post-war practice of delegation on two fronts. First, the legislation in question involved the delegation of federal legislative power to provincial executive bodies – an astonishing practice that the Court had already accepted as being fully constitutional in earlier decisions.[124] Second, the main legislation at issue in the decision is, as the Chief Justice frankly acknowledges with no reservations, "skeleton legislation."[125] In skeleton legislation, very broad goals are set out and then extensive powers are delegated and sub-delegated to various executive bodies to actively achieve these goals. As the name implies, the statutes themselves can be remarkably void of standards or substance, and really just serve as vehicles to delegate naked law and policy-making powers. The English public law scholars Gabriele Ganz and Paul Craig observe that this type of legislation,

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[123] [1978] 2 S.C.R. 1198 at 1226.

[124] In *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, the Court ruled that neither Parliament nor the provincial legislatures could delegate powers to each other, as such a practice would violate the division of powers provisions of sections 91 and 92 of the *Constitution Act, 1867*. In subsequent decisions such as *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392, and the *Agricultural Products Reference*, the Court held that the constitutional prohibition on legislative inter-delegation is not triggered where legislative power proceeds directly from one legislature to executive bodies of the other level of government. This practice is also endorsed without question in *Morgentaler* at 129, 157; *R. v. Furtney*, [1991] 3 S.C.R. 89; and *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292.

[125] *Agricultural Products Reference* at 1221. Skeleton legislation is also accepted by the Chief Justice without question in *Brant Dairy Co. v. Milk Commission of Ontario*, [1973] S.C.R. 131 at 136.

which is common in the U.K., signifies a constitutionally important "shift in the balance of power between Parliament and the Executive," and is of "especial concern."[126] C. K. Allen comments acerbically that

> The name itself is not of very good omen for constitutional principles; for a skeleton, besides being a lugubrious object, is the very symbol of lifelessness, and bony structure does not make an organism. It is a dangerous doctrine that the legislature is concerned only with that osseous framework and is incapable of understanding the organs and the flesh and the blood-not to mention the soul.[127]

The absence of standards and the power to sub-delegate ("delegation in depth," as Chief Justice Laskin calls it) is evident in the following provision of the legislation at issue in the *Agricultural Products Reference*:

> 2. (1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.[128]

This type of legislation does not delegate "ancillary" authority to the executive (Lord Fitzgerald's now comparatively tame wording from *Hodge*), but rather delegates the entire regulatory project, including the making of policy, the setting of standards, and the determining of priorities. The role of the legislature here is essentially to allocate normless power. This is the scope of delegation sanctioned under *War Measures Act*, but translated into the area of agricultural production. On the authority of the *Chemicals Reference*, Chief Justice Laskin, in the passage quoted from the *Agricultural Products Reference* above, expressly rejects any constitutional requirement that the delegating legislation contain standards to control subordinate law-making. Thus agricultural producers will ultimately be confronted with coercive laws that they had no meaningful input in formulating through their elected representatives. This

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[126] Gabriele Ganz, "Delegated Legislation: A Necessary Evil or a Constitutional Outrage?" in Peter Leyland and Terry Woods (eds.) *Administrative Law Facing the Future: Old Constraints and New Horizons* (London: Blackstone, 1997) 60 at 63-64; Paul Craig, *Administrative Law* (6th ed.) (London: Sweet & Maxwell, 2008) at 718 ("***Administrative Law***").

[127] *Bureaucracy Triumphant* (London, Oxford University Press, 1931) at 122, quoted in Alf Ross, "Delegation of Power" (1958) 7 Am. J. Comp. L. 1 at 9 ("**Delegation of Power**").

[128] *Agricultural Products Marketing Act*, R.S.C. 1970, c. A-7, as quoted in *Agricultural Products Reference* at 1220-21.

situation is particularly exacerbated in an inter-delegation situation, for a vote cast in a federal election leads to coercion stemming from a provincial instrumentality. While there is much to be said for co-operative efforts between the levels of government, the transmission of authority should not be so bereft of legitimizing content.

In *Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan* ("***Canada Potash***"), Chief Justice Laskin again expressed no reservations about the ability of a legislature to delegate power in the broadest terms imaginable.[129] The skeleton legislation in question was the Saskatchewan *Mineral Resources Act*:

> 3. The purposes of this Act are:
> (a) to promote and encourage the discovery, development, management, utilization and conservation of the mineral resources of Saskatchewan;
> (b) to regulate the disposition of Crown mineral lands;
> (c) to protect the correlative rights of the owners of surface rights and of mineral rights;
>
> . . . . .
>
> 9. The minister may do such things as he deems necessary to discover, develop, manage, utilize and conserve the mineral resources of Saskatchewan and, without limiting the generality of the foregoing, the minister may . . . .
>
> . . . . .
>
> 10. (1) The Lieutenant Governor in Council may make such regulations and orders not inconsistent with this Act as he may deem necessary for the purpose of carrying out its provisions according to their obvious intent or to meet cases that may arise and for which no provision is made therein and without limiting the generality of the foregoing may make regulations and orders . . . .[130]

What is of particular note here is the relationship between the vague purposes of the statute and the un-cabined powers devolved on the Minister and the Lieutenant Governor in Council (both authorized to act as they "deem necessary"). Section 3 lists potentially conflicting interests – public and private rights – but offers no prioritization of these interests. This prioritization will be done entirely through regulatory decisions made by the Lieutenant Governor in Council and the Minister. The role of making primary public policy, in other words, has been abdicated by the legislature. In the Supreme Court decision, certain

[129] [1979] 1 S.C.R. 42. The Chief Justice notes in passing that the statute is skeleton legislation (at 49).
[130] R.S.S. 1965, c. 50.

regulations emanating from these particular enabling provisions (but not the provisions themselves) were found to be *ultra vires* as impermissibly trenching on federal jurisdiction.[131] The fact that there is no trace of such a violation in the enabling legislation testifies to just how broad the delegation in this statute really is.

Skeleton legislation is essentially delegation pushed as far as it can go without removing the need for a legislature altogether. The people's representatives simply allocate naked power to selected instrumentalities. This threatens the structure of the constitution – the distribution of power between the branches of government is rearranged (as Ganz and Craig observe, there is a "shift in the balance of power between Parliament and the Executive"), and the generation of law is relocated. Courts cannot endorse this practice and remain custodians of the Constitution.

b. Legislative Evasion of Conflict Resolution in Environmental Legislation

Under a pluralist conflict-based theory of democracy, legislatures are to resolve disputes and disagreements prior to allocating power. Competing social interests should be prioritized before, and not after, subordinate bodies are given authority to act. This sequencing is demanded by the principle of democracy, and also by the principle of the rule of law, which ensures that citizens and executive actors proceed pursuant to clear and public statements of law and policy. Broad delegations of legislative power – for example, in skeleton legislation – reverse the appropriate processes of government: power is allocated first, and conflicts are managed and interests are prioritized through subsequent executive action.

Passing an undigested conflict to the executive is not only an abdication of responsibility on the part of legislators, but also a strategy that can lead to a failure to resolve the conflict at all, manifest in inchoate

[131] *Canada Potash* at 63-76.

executive rulings. Alternately, the conflict may be resolved, but in a manner hidden from public view, possibly favouring interests with unfair access to decision-makers. The entire system of democratic decision-making depends on clear, public, representative decisions. Habermas' "fallibilist proviso" requires that any decision in a democracy is both open for criticism by citizens whose preferences were not reflected in the final choice, and open for reconsideration by those citizens who later change their minds on the matter. This process is fundamentally undermined where conflicts are not clearly resolved in the public and representative legislature.

One pressing area of public policy that is riddled with an evasion of conflict-resolution responsibilities is environmental regulation.[132] At the root of virtually any environmental statute should be a decision about where a specific line is to be drawn. This line could be viewed as one between protection and conservation, on the one hand, and economic development, on the other hand, or between competing rights – rights to exploit property and rights to be free of the negative effects of exploited property.[133] The decision about where to draw the line should be concretized in any enabling provisions such that executive instrumentalities are left to perform clearly outlined policies.

[132] The general theoretical approach that I take to environmental regulation in the following paragraphs has profited immensely from conversations with my advisor, Bruce Pardy, and also from a review of his publications, some of which are cited below. Professor Pardy has stressed that environmental decision-making across a range of regulatory strategies is overly discretionary and overly politicized, and he has urged for a clarification of these strategies through the enactment of clear legislated rules. For an overview of the inchoate nature of Canadian environmental regulation, see his *Ecolawgic: The Logic of Ecosystems and the Rule of Law* (Fifth Forum Press, 2015) at 77-107, and *passim* ("***Ecolawgic***") and "The Pardy-Ruhl Dialogue on Ecosystem Management, Part V: Discretion, Complex-Adaptive Problem Solving, and the Rule of Law" (2008) 25 Pace Environmental Law Review 341. For an example of how environmental regulation could proceed through clearly legislated rules, see Bruce Pardy, "In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1 International Journal of Sustainable Development Law and Policy 29 ("**Holy Grail of Environmental Law**").

[133] Professor Pardy advances a compelling argument for a rights-based approach to environmental protection in numerous writings, including "Environmental Law and the Paradox of Ecological Citizenship: The Case for Environmental Libertarianism" (2005) 33(3) Environments 25; and "Eviscerating Property in the Name of Sustainability" (2012) 3 Journal of Human Rights and the Environment 292.

Canadian environmental regulation has not proceeded through statutes that make clear policy choices and draw clear lines. Instead, it has followed the path of the Delegation Case Law, with broad discretion conferred on the executive authorities to make law and policy choices, generally in an *ad hoc* manner. Consider the following section of the *Fisheries Act* ("***Fisheries Act***"):

> 36 (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.[134]

This appears to be a rule, and thereby evinces a legislative policy choice. The relevant qualifications, however, are substantial, and reveal that a choice has not really been made:

> (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
> (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act;
> (b) a deleterious substance of a class and under conditions — which may include conditions with respect to quantity or concentration — authorized under regulations made under subsection (5) applicable to that water or place or to any work or undertaking or class of works or undertakings; or
> (c) a deleterious substance the deposit of which is authorized by regulations made under subsection (5.2) and that is deposited in accordance with those regulations.
>
> (5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing
> (a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);
> (b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;
> (c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;
> (d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;
> (e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and
> (f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.
>
> (5.1) The Governor in Council may make regulations establishing conditions for the exercise of the Minister's regulation-making power under subsection (5.2).
>
> (5.2) If regulations have been made under subsection (5.1), the Minister may make regulations
> (a) authorizing the deposit of deleterious substances specified in the regulations, or substances falling

[134] R.S.C. 1985, c. F-14.

> within a class of deleterious substances specified in the regulations;
> (b) authorizing the deposit of deleterious substances into waters or places falling within a class of waters or places;
> (c) authorizing the deposit of deleterious substances resulting from a work, undertaking or activity falling within a class of works, undertakings or activities;
> (d) establishing conditions, which may include conditions with respect to quantity or concentration, for the deposit of deleterious substances referred to in paragraphs (a) to (c).

No legislative rule can survive this level of potential executive qualification and still remain a meaningful rule. There is no legislative choice made here. Instead, many individual executive choices are authorized, and no coherent policy. There are currently more than half a dozen regulations in place that authorize exceptions to the rule in section 36(3), exceptions that are considerably less visible to the public than the legislated rule.[135] Indeed, citizens might be surprised to find that mercury can be deposited in waterways under the *Chlor-Alkali Mercury Liquid Effluent Regulations*.[136]

It is worth noting that in *Sandy Pond Alliance to Protect Canadian Waters Inc. v. Canada (Attorney General)* ("***Sandy Pond***"),[137] an environmental group attempted to challenge regulations made under the *Fisheries Act* on the basis that they contravened the conservation goals of the legislation. This contention, however, could gain no traction both because the regulation-making power is too broadly drawn, and because the legislation in fact has no stated purposes.[138] The Federal Court concluded a fairly superficial analysis with the following comments:

> The fact that regulations enacted pursuant to the Act may have negative environmental consequences does not, *per se*, render those regulations invalid. Parliament legislated the provisions allowing the enactment of the Regulations in question here. There is no basis for judicial intervention. The will of the people, with respect to legislation, can be expressed at the ballot box.[139]

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[135] See, for example, *Pulp and Paper Effluent Regulations*, S.O.R./1992-269; *Metal Mining Effluent Regulations*, S.O.R./2002-222; *Wastewater Systems Effluent Regulations*, S.O.R./2012-139; *Petroleum Refinery Liquid Effluent Regulations*, C.R.C. c. 828; *Potato Processing Plant Liquid Effluent Regulations*, C.R.C. c. 829; and *Meat and Poultry Products Plant Liquid Effluent Regulations*, C.R.C. c. 818.
[136] C.R.C. c. 811.
[137] (2013), 81 C.E.L.R. (3d) 175 (F.C.).
[138] The statute had a "Purposes" section at one point, but this provision was repealed (*Sandy Pond* at para. 69).
[139] *Sandy Pond* at para. 88.

This is of course consistent with the control theory enunciated in the Delegation Case Law: political, not judicial oversight is evidently the appropriate remedy in the area of executive legislation. But this requirement leaves the executive-made law very hard for citizens to access. A citizen's recourse is through the electoral process, but that process simply leads to legislators enacting broad enabling provisions. Perhaps a different government would implement a different set of regulations, but the same empty shell of a statute would authorize those regulations as well. The fact that a single statute can give rise to regulations pursuing entirely different policy choices is ample proof that the legislation itself is faulty. The appropriate legal action against regulations enacted under section 36 of the *Fisheries Act* is to challenge the broad enabling provisions themselves as violating the unwritten principles that structure Canada's Constitution. This style of legislative drafting is unconstitutional.

I note three other Canadian environmental statutes where crucial policy choices and decision-making of the highest importance are left to the executive branch through broad enabling provisions. Under the Alberta *Environmental Protection and Enhancement Act* ("***EPEA***"),[140] environmental assessment, which is a cornerstone of modern environmental regulation, is subject to the following power:

> 59 The Lieutenant Governor in Council may make regulations
> (a) designating mandatory activities;
> (b) exempting proposed activities or classes of proposed activities from the application of the environmental assessment process.

The power to designate "activities" that are subject to assessment, or exempt "classes of proposed activities," are major public policy choices that should be made by the legislature. A similar broad power to exempt can be found in the Ontario *Environmental Assessment Act*.[141] The *EPEA* also provides for a series of normless prohibitions and exemptions from the prohibitions, the details of which are left to executive instruments such as regulations and codes of practice:

[140] RSA 2000, c E-12.
[141] R.S.O. 1990, c. E.18, s. 39(f).

> 61 No person shall commence or continue any activity that is designated by the regulations as requiring an approval or registration or that is redesignated under section 66.1 as requiring an approval unless that person holds the required approval or registration.
>
> . . . . .
>
> 109(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
> (2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
> (3) Subsections (1) and (2) apply only where the amount, concentration, level or rate of release of the substance is not authorized by an approval, a code of practice or the regulations.

This type of legislation appears to set up a licence-to-pollute system. The prohibitions, as in the *Fisheries Act*, are in highly visible form in the legislation, but the exceptions, qualifications, codes, and regulations are all less visible, and can grant individuals or industries the ability to operate outside the prohibitions. The policy choice as to what kind of enterprise can have a license to pollute, or the amount of toxic materials that engage a statutory prohibition, are all determined by the executive.

A final statute worth noting is the Canada *Species at Risk Act* ("***SARA***").[142] This very complex legislation contains a maze of enabling provisions authorizing the creation of various plans, agreements, codes of practices, standards, guidelines, and strategies to protect endangered wildlife.[143] Stripping aside this maze, it is possible to isolate a relatively simple core: a series of strong prohibitions against harming listed species or their habitats.[144] The following provision is typical of the prohibitions, which are, for the most part, stated in clear and unambiguous language:

> 32 (1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

However, the clarity of the prohibitions is subject to two very important and discretionary qualifications. First, the "List" of protected species, which appears in a Schedule to the legislation, is ultimately controlled by the Governor in Council, who has total discretion as to whether to amend the list, subject only to a

[142] S.C. 2002, c. 29.
[143] *SARA* at ss. 10.1, 11, 24, 37, 47, 56, and 65.
[144] *SARA* at ss. 32, 33, 36, 58, 60, and 61.

requirement to provide reasons for the decision in a public "Registry."[145] While there is a complex process leading to recommendations regarding amendments to the List, there are no norms governing the actual listing decision itself.[146] A legislative decision to give the executive total discretion over a list or schedule governing the internal operation of a statute is actually a relatively common drafting technique, and I will return to it in Chapter 9. For now, I note that there is no obvious reason why this essential law-making power in *SARA*, which can be used to eviscerate the prohibitions in regard to any particular species, is not either controlled solely by the legislature, or at least delegated to the Governor in Council accompanied by norms governing its exercise.

The second qualification to the clarity of the central prohibitions in *SARA* is a series of complex provisions authorizing exceptions and exemptions:

> 73 (1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals
>
> 73 (2) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that
> (a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons;
> (b) the activity benefits the species or is required to enhance its chance of survival in the wild; or
> (c) affecting the species is incidental to the carrying out of the activity.
>
> (3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that
> (a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
> (b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
> (c) the activity will not jeopardize the survival or recovery of the species.[147]

Section 73(2) is of particular interest here, for one can see the individual qualifications gradually increasing in size. Offering an exemption for conservation purposes is generally in line with the overall purpose of protecting species at risk. But offering an exemption for activities that only incidentally affect such species

[145] *SARA* at s. 27.
[146] *SARA* at ss. 14-27.
[147] See also ss. 74-78, and 83.

opens the door for economic and industrial ventures, at the discretion of the "competent minister," revealing, once again, a statute where conflicts have not been resolved and firm choices have not been made. The requirement in subsection (3)(c), that "the activity will not jeopardize the survival or recovery of the species," likewise leaves ample room for discretionary exemptions that run counter to prohibitions on killing or harming a species at risk or damaging its habitat.

I should note that the exemptions in *SARA* appear as executive administrative activities rather than executive legislative activities. By this I mean that the exemptions apply to single individuals, or entities, and do not establish general exemptions (such as are evident in regulation-making powers in the *Fisheries Act*). Nevertheless, the absence of adequate norms in the enabling provisions has the effect of turning the *SARA* exemptions into a form of law-making: the law is defined in the moment of its application, by virtue of the missing legislated standards and specifics. I will return to this very important, very common, and very objectionable form of enablement in Chapters 8 and 9.

What results from the form of environmental regulation outlined in the above statutes? To some extent, as already noted, the various regulatory regimes become systems for licensing pollution, with the licensing occurring out of public sight, through executive regulations, orders, codes, permits, etc. This approach to regulation undermines democratic legitimacy by removing choices, and the responsibility for making such choices, from the public realm of the legislature. Statutes contain vague exemptions, and those exemptions are then populated through exercises of executive discretion.

An additional concern arising from regulatory regimes that function through very broad enabling clauses is that a mechanism is set in place allowing a new government to radically change the direction of regulation without requiring any formal alterations to the existing legislation. This possibility can frustrate a legislature that has made a choice to pursue a particular path in a given regulatory field, but has opted for broad enabling provisions, either because it wishes to give executive bodies the flexibility to complete

the regime, or because it proceeds on the basis that employing broad enabling clauses is simply the way that regulation is normally done. To clarify the above point, suppose that a legislature, formed with a strong mandate to protect the environment, enacted a regime that left broad decision-making to the executive, fully intending that those subordinate decisions would in fact rigorously pursue environmental protection goals. A subsequent change in government could bring a regime to power that opposes the goal of environmental protection, but without a mandate to dismantle the regulations put in place by its predecessor. The wide berth granted for discretion under the existing statute could accommodate a dramatic change in government policy without necessitating any change in the legislation. The ability of any broadly drafted statute to accommodate either vigorous regulation or de-regulation makes a mockery of the attempt to govern through subordinate legislation. If a future government wishes to pursue a path of de-regulation, in any specific field, it should be forced to make fundamental and public changes to governing legislation, and not simply use the ample power granted in an existing statute to change course. The key to ensuring that government by regulation does not frustrate legislative intention is to ensure that choices and priorities are clearly expressed in the legislation itself, and not in a general intention to use broad enabling provisions to achieve certain aims. Until legislative choices are firmly embodied in legislation itself, in other words, they are not really made, regardless of the intentions of the enacting body. A legislature acts by legislating, not by intending to make law through subordinates.

c. Judicial Review, Purposivism, and the Further Distortion of the Role of the Courts

My chief goal in this final section is to explore a significant distortion of the judicial role that occurs under the current approach to the administrative law judicial review of delegated legislation. Administrative law review, I should clarify, proceeds on the basis that enabling legislation is valid, and thus is directed only against the actions of the executive pursuant to such legislation. The distortion of the judicial role that occurs under administrative law review is distinct from the primary abdication, or distortion, of the judicial role that I have already discussed above. The primary abdication arises when broad delegations

of power that undermine the "legitimate sphere of activity" (*New Brunswick Broadcasting*) of the legislature are allowed to proceed in the first place. This is a passive process: courts accede to the wishes of the legislature, and in so doing, abdicate their role as "guardian of the Constitution." A secondary distortion of the judicial role arises when the courts actively assist both the legislature and the executive in achieving public policy goals through an application of "purposive" methods of statutory interpretation to broad enabling clauses.

It is also convenient in this section to provide a brief overview of the various written constitutional grounds of judicial review applicable to both delegating and delegated legislation. I consider constitutional judicial review under subsection i, and administrative law judicial review under subsection ii. Current administrative law review is organized by the unwritten principle of the rule of law. Delegating legislation, of course, is impervious to review on unwritten grounds pursuant to *Hodge*, *Gray*, and the *Chemicals Reference*. It remains to be seen, however, whether the review of delegated legislation on the basis of an unwritten principle can proceed in a cogent fashion when the governing legislation is exempted from such review.

i. Constitutional law review

Under the first heading below, I consider the three main written grounds of review: the division of powers, the *Charter*, and sections 53 and 54 of the *Constitution Act, 1867*. Under the second heading, I note three decisions where Canadian Courts have, on constitutional grounds, either refused to follow the strictures of the Delegation Case Law, or expressed discomfort with these strictures.

Written grounds of review

The proposition that the written Constitution cabins the delegation of legislative power is stated in the primary authorities. In the *Chemicals Reference*, Chief Justice Duff observes that the validity of any

regulation is subject to the requirement that "it could be enacted as a statute, by Parliament, in execution of its emergency powers, or otherwise."[148] Similarly, in *Gray*, Justices Anglin and Davies state that

> At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them [emphasis added].[149]

The requirement that a delegating legislature must have initial jurisdiction to deal with a matter is largely common sense, and explains the restrictions on delegation stemming from both the division of powers under sections 91 and 92 of the *Constitution Act, 1867* and the *Charter*. In *R. v. Hydro-Québec*, in the course of division of powers analysis, the Court stated that

> It is clear that the Interim Order will be of no force or effect if the enabling provisions pursuant to which it was adopted are themselves found to be *ultra vires*. As stated by Professor Hogg: "The invalidity of a statute which is *ultra vires* the enacting legislative body will of course destroy any powers which the statute purported to delegate to the government."[150]

This same logic must apply to the *Charter*: if legislation contravenes the *Charter*, no delegation can proceed from it.[151]

Assuming enabling legislation passes muster, courts must still review resulting regulations to ensure that they do not violate the written Constitution on their own. In *Canada Potash*, as noted previously, regulations enacted under skeleton legislation were found to violate the division of powers even though the delegating authority did not. The same scenario is possible under the *Charter*.[152]

While the primary written grounds for interrogating delegations of legislative power are the division of powers and the *Charter*, mention must also be made of sections 53 and 54 of the *Constitution Act, 1867*:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

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[148] *Chemicals Reference* at 10.
[149] *Gray* at 182.
[150] [1997] 3 S.C.R. 213 at para. 98, internal quotation cited to P.W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at 14-7.
[151] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 20-21 ("***Eldridge***").
[152] *Eldridge* at para. 21.

> 54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

In *Eurig Estate (Re)*, ("***Eurig***"), the Supreme Court read section 53 as having a nondelegation purpose:

> It has been suggested that the purpose of s. 53 is to prevent the introduction of taxation legislation in the Senate, and that with the abolition of bicameral legislatures in the provinces it has become redundant.
> In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.
>
> . . . . .
>
> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation.[153]

The Court also found that section 53 applies to the provincial legislatures as well as Parliament, and that it is judicially enforceable.[154] *Eurig*, however, does not clarify the extent to which "the details and mechanism of taxation" can be delegated. The above comments came from a bare majority of five Justices, while four members of the Court (two in dissent; two concurring) read section 53 as offering only limited strictures on the power of legislatures to delegate money matters.[155] In *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)* ("***English Catholic Teachers***"), the unanimous Court read section 53 narrowly:

> The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation. The animating principle is that only the legislature can impose a new tax *ab initio*. But if the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of "no taxation without representation" will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature. The democratic principle is thereby preserved in two ways. First, the legislation expressly delegating the imposition of a tax must be approved by the legislature. Second, the government enacting the delegating legislation remains ultimately accountable to the electorate at the next general election.[156]

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[153] [1998] 2 S.C.R. 565 at paras. 29-32.
[154] *Eurig* at 28-34.
[155] *Eurig* at paras. 50-61, *per* Justice Bastarache, dissenting; and paras. 62-69, *per* Justice Binnie, concurring.
[156] [2001] 1 S.C.R. 470 at para. 74.

Under current law, s. 53 thus offers only a moderate nondelegation requirement: the delegation must be clear, but the actual decision of if and when to impose the authorized the tax can be left to the executive, as can the rate of the tax. In the final three sentences of the above passage, the Court invokes the control theory to account for its reading of section 53: the "democratic principle" is "preserved" if ultimate authority and responsibility remains with the legislature. Within these broad parameters, significant practical authority can be devolved on subordinate instrumentalities. The Court's reading (I would respectfully suggest hollowing out) of section 53 is thus consistent with the Delegation Case Law itself – a point expressly noted by the Court.[157]

Peter Hogg discusses *Eurig* and *English Catholic Teachers* in terms that are critical of the Court's narrow reading of section 53, and indeed, in terms that mirror exactly my central argument regarding the threat to the democratic principle that arises from the practice of delegation in Canadian law:

> [The] view that the taxing power (apart from details and mechanism) cannot be delegated, in my opinion, is the better one. Once a taxing power has been delegated, the resulting taxes do in practice escape the democratic accountability that occurs when a bill is introduced in the legislative assembly. Ontario's probate fee, for example, has been increased tenfold since 1950 when the power was vested in the Lieutenant Governor in Council, and the last increase, which was a tripling of the rate in 1992, had been quietly imposed after the government of the province had publicly announced that there would be no further increases in taxation! [emphasis added].[158]

I should stress that Professor Hogg's comments here apply only to the taxing power under section 53. There is no suggestion that he disapproves of the practice of delegation generally. I find no principled reason, however, to limit his comments either to the field of taxation or to express provisions. A violation of the democratic principle is impermissible in a legal system that recognizes and enforces an unwritten principles approach to constitutionalism such as that mandated by the Supreme Court of Canada in the decisions discussed in Chapter 3.

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[157] *English Catholic Teachers* at para. 77: "The same principles apply to the delegation of powers to the executive." The Court cites *Hodge* in support of this statement.

[158] *Constitutional Law of Canada*, 5th ed. (Scarborough: Carswell, 2007) at 402 ("***Constitutional Law***").

Both *Eurig* and *English Catholic Teachers* accepted that section 53 could be amended or repealed by individual provinces or by Parliament pursuant to the amending procedures of the *Constitution Act, 1982*, which provide that

> 44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.
>
> 45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.[159]

I suggest that there is a significant tension between the great weight that both *Eurig* and *English Catholic Teachers* place on the constitutional significance of the principle of "no taxation without representation" and the notion that section 53 can be so easily repealed. Under the unwritten principles approach to delegation that I am advocating in this project, the written text of section 53 would not be an exhaustive authority on the ability of legislatures to delegate elements of their taxing power. The Court in *English Catholic Teachers* expressly left open the possibility that there are unwritten restrictions on the delegation of taxation power arising from the Preamble.[160]

I conclude this discussion of the taxation and appropriation provisions of the *Constitution Act, 1867* with two final points. First, although section 54 was not at issue in *Eurig* or *English Catholic Teachers*, that provision can be read as adding publicity requirements to the section 53 nondelegation clause: taxation and appropriations must be matters of clear public record, originating in a Throne Speech.

Second, any attempt to use sections 53 and 54 to advance an *expressio unius* argument against a freestanding nondelegation doctrine (i.e. the framers expressly dealt with the issue of delegation in these

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[159] *Eurig* at paras. 34-35; *English Catholic Teachers* at para. 68. In the latter decision, the Court observed that British Columbia has indeed repealed section 53 to the extent that it applies to that province (at para. 68).

[160] *English Catholic Teachers* at para. 72:

> I need not comment on whether the preamble of the *Constitution Act, 1867* also protects this principle, as s. 53 continues to apply to Ontario. Whether the preamble may be relied on to import the principle of no taxation without representation into jurisdictions that have repealed s. 53 is best decided in a case directly raising that question.

provisions, and thus a larger nondelegation prohibition is precluded[161]), would have to contend with two difficulties. First, there is a reasonable basis on which to conclude that these particular provisions originally had a bicameral rather than a separation of powers purpose – that is, the provisions may have been originally concerned with preserving the supremacy of the House of Commons over the Senate, rather than the executive, in money matters and appropriations. Four members of the Court in *Eurig* accepted this bicameral interpretation,[162] and even the majority of the Court alludes to this possibility in the above quoted passages and elsewhere.[163] Second, and even more pressing, the *Constitution Act, 1867* is far too fragmentary a document, particularly in regard to the institutions of government, to give *expressio unius* much of a foundation. Only the division of powers in sections 91 and 92 can reasonably give rise to an argument of exhaustiveness.

Dissenting voices

While compliance with written requirements such as the division of powers, the *Charter*, and sections 53 and 54 appear to exhaust the constitutional review available under the Delegation Case Law, there are a few Canadian courts that have expressed strong dissatisfaction with this limitation. I consider two decisions below, one from the British Columbia Supreme Court in 1937 and one from the Ontario Court of Justice in 1997, that criticize broad delegations on unwritten grounds. I also consider a third decision, from the Alberta Court of Appeal in 1937, that criticizes broad delegations based on specific provisions of the *Constitution Act, 1867* other than those outlined above. The two 1937 decisions in fact overrule

[161] The principle of *expressio unius est exclusio alterius*, which provides that "to express one thing is to exclude another," is discussed by Mark Carter in connection with *Imperial Tobacco* and the *Judges Reference*: New Positivism at 465-68. See also Mullan, Legacy of Justice Rand at 87. Professor Black states his antipathy to this principle: "I learned so to fear the maxim *expressio unius*": *Structure and Relationship* at 31.

[162] Justice Bastarache is particularly compelling on this point:

> The purpose of s. 53 of the *Constitution Act, 1867*, in my view, is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. The section was enacted because of a concern in English history about taxation bills being introduced in the House of Lords rather than in the Commons (*Eurig* at para. 54; see also para. 64 (*per* Justice Binnie)).

[163] See *Eurig* at para. 32.

legislation on nondelegation grounds, and appear to be the only nondelegation decisions in Canadian law. The Ontario decision accepts rather than rejects the Delegation Case Law (the earlier decisions had to contend only with *Gray* and *Hodge*, and not the more formidable *Chemicals Reference*), but does register strong dissatisfaction with the absence of unwritten controls on one particularly troubling form of delegation.

In *Hayward v. British Columbia Lower Mainland Dairy Products Board* ("***Hayward***"),[164] Justice Manson of the British Columbia Supreme Court measured broad delegations of legislative authority under a provincial agricultural marketing statute against unwritten standards underlying the written Constitution. He found that it was unacceptable for the legislature to create a "skeleton Act" and delegate to the "Lieutenant-Governor in Council . . . the power to clothe the skeleton":

> In my view the scheme of our Constitution makes it obligatory that the elected representatives of the people in the Legislature assembled shall do the legislating, subject, of course, to the assent of the Crown. Important matters in our economic life were before the Legislature and it was a departure from the law that the Legislature should hand over to the Executive Government the power to perform its duty. The Legislature cannot delegate its legislative functions to the Executive Council, nor can it delegate to the Executive the power to delegate to boards established by the Executive what, in substantial respects at least, are matters for legislation.[165]

Justice Manson subscribes to the principle of the separation of powers here, and also to an understanding of the legislature as a democratic body responsible for dealing actively with public policy conflicts ("shall do the legislating"; "perform its duty"), rather that delegating the wholesale performance of these tasks to a subordinate body. The legislation was overruled.

In *Credit Foncier Franco-Canadien v. Ross* ("***Credit Foncier***"),[166] the Alberta Court of Appeal also found provincial legislation unconstitutional on the basis of an overly broad delegation of power. The enabling provision in question was a normless grant of power in depression-era debt-restructuring legislation:

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[164] [1937] 2 W.W.R. 401 (B.C. S.C.).
[165] *Hayward* at para. 50.
[166] [1937] 3 D.L.R. 365 (Alta. C.A.).

> The Lieutenant Governor in Council may from time to time declare that any kind or description of debt is a debt to which this Act does not apply.[167]

The Court found that this authorized the executive to make an enactment independent of the legislation, and was thus *ultra vires*.[168] Unlike Justice Manson in *Hayward*, who looked to unwritten principles to justify his ruling, the Alberta Court relied on technical readings of specific provisions of the *Constitution Act, 1867*. Under section 92, the Court reasoned, legislative powers are given "exclusively" to the provincial legislatures, and thus cannot be exercised by the executive branch.[169] Additionally, under s. 90, a power of disallowance is granted to the Queen's representative. This power, however, applies only to "Acts" of the legislature, and thus would be circumvented where broad legislative powers are exercised by the executive branch.[170]

In my view, the reasoning of the British Columbia Court is considerably more compelling than the technical points offered in *Credit Foncier*. Furthermore, the (unwritten principles) reasoning of the British Columbia Court could be equally applied to the legislation at issue in the Alberta decision.

Both Courts had to manage precedents, and chose similar strategies. They viewed *Hodge*, the higher authority, as authorizing a limited delegation of powers that are "ancillary to legislation," whereas the impugned grants of power at issue went far beyond this standard.[171] As the Alberta Court put it,

> It is apparent that the authority to make regulations in order to make legislation enacted by the Legislature completely effective is a quite different thing from authority to make an independent enactment. That is not ancillary to legislation but is legislation itself.[172]

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[167] *Credit Foncier* at para. 10.
[168] *Credit Foncier* at paras. 16-18, 20.
[169] *Credit Foncier* at para. 18.
[170] "If there could be legislation by Orders in Council or in some other way than by Act of the Legislature there would be no power reserved in the Governor-General to disallow it": *Credit Foncier* at para. 18.
[171] *Hayward* at paras. 34, 39; *Credit Foncier* at para. 18.
[172] *Credit Foncier* at para. 18.

Turning to *Gray*, both Courts distinguished it as a wartime emergency decision dealing with federal and not provincial legislation,[173] and *Hayward* went further and implied that *Gray* was divided, inconsistent with *Hodge*, and wrongly decided.[174] Justice Manson also hedged his bets by observing that the British Columbia legislature had engaged in the very act of abdicating authority that the various Justices in *Gray* found to be impermissible.[175]

John Willis strongly criticizes both *Hayward* and *Credit Foncier* as decisions from conservative judges opposed to the institutional requirements of the modern welfare state.[176] There is likely some truth to this charge, but the ideological predispositions of the judges do not affect the constitutional propriety of their rulings. This is particularly true of the British Columbia decision, which is based on the unwritten principles of democracy and the separation of powers, whereas the Alberta decision relies on technicalities in the written text of the Constitution. I will have more to say about the non-constitutional nature of Willis' instrumentalist approach to the delegation of power in Chapter 7.

While *Hayward* and *Credit Foncier* are effectively nondelegation decisions, they are isolated – neither has had any effect on subsequent Canadian law. Following the *Hayward* ruling, the provincial government submitted a reference to the British Columbia Court of Appeal on the constitutionality of the impugned legislation, and that Court found the marketing scheme to be fully legal, and rejected any suggestion of impermissible delegation of authority to the executive.[177] The decision of the Court of Appeal was upheld by the Privy Council in *Shannon v. Lower Mainland Dairy Products Board* ("***Shannon***"), with Lord Atkin commenting that

> Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion

[173] *Hayward* at paras. 36-39; *Credit Foncier* at para. 18.
[174] *Hayward* at paras. 38-39.
[175] *Hayward* at paras. 37-38.
[176] British North America Act at 258-59, and see generally 252-61.
[177] *British Columbia v. Lower Mainland Dairy Products* (1937), 4 D.L.R. 298.

> and Imperial, have entrusted various persons and bodies with similar powers to those contained in this *Act*.[178]

Hayward was thus effectively overruled even though it was not appealed.[179] Unlike *Hayward*, *Credit Foncier* has not been overruled.[180] It is, however, the weaker decision of the two, given its reliance on technical provisions of the Constitution.

The third example of a dissenting voice from the dominant practice of delegation is the much more recent decision of *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* ("***Ontario Public School Boards***"),[181] in which the Ontario Court of Justice was confronted with legislation containing "massive powers of delegation and subdelegation"[182] in service of Conservative Premier Mike Harris' attempt to drastically reduce the size of government. This is not a nondelegation decision. Justice Campbell comments on the dimensions of the delegation, but he also acknowledges that they are constitutional:

> It is true that the Act contains very few objective standards or guidelines for the exercise of the commission's virtually unbridled powers. It lacks any coherent statement of regulatory purpose and it lacks the kind of principled guidelines, to structure and contain the power of government officials, that one might expect in a statute of this nature.
>
> . . . . .
>
> As to overbreadth of delegation, the statutory powers of delegation and subdelegation are very explicitly set out in the statute and this is all that is legally required to support them.[183]

However, while accepting the parameters of delegation defined by the authorities, he does register a rare and very strong criticism of the legislature's use of a "Henry VIII" clause:

> Section 349(2) of the Act gives the government the power, except in situations dealing with trustees' terms of office, to make regulations that override the Act itself. It provides that except in matters dealing with trustees' terms of office

[178] [1938] A.C. 708 at 722 (P.C.).
[179] Willis observes that the B.C. government proceeded through a reference to avoid waiting for an appeal of the decision of the lower court: British North America Act at 259.
[180] There was no appeal, and the Supreme Court of Canada has not commented on the Alberta Court's findings on the delegation issue, despite referring to the decision on various occasions.
[181] (1997), 151 D.L.R. (4th) 346 (Ont. C.J.), overruled on other grounds (1999), 175 D.L.R. (4th) 609 (C.A.), leave to appeal dismissed [1999] S.C.C.A. No. 425.
[182] *Ontario Public School Boards* at para. 22.
[183] *Ontario Public School Boards* at paras. 33, 36.

> ... in the event of a conflict between a regulation made under this Part and a provision of this Act or of any other Act or regulation, the regulation made under this Part prevails.
>
> This is the opposite of the usual rule, that if there is any conflict between the statute and the regulation which relies for its authority on the statute, the statute enacted by the Legislative Assembly prevails over the regulation made by the government. The usual rule is that legislative power is vested in the democratically elected Legislative Assembly to make laws after full public debate. This provision reverses that usual rule.
>
> This breathtaking power, to amend by regulation the very statute which authorizes the regulation, is known to legal historians as a "King Henry VIII" clause because that monarch gave himself power to legislate by proclamation, a power associated since the 16th century with executive autocracy.
>
> . . . . .
>
> This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority.
>
> . . . . .
>
> However offensive this kind of power may be to our traditional sense of legality and public accountability, the constitutional capacity of legislative bodies to confer it has been upheld by the Supreme Court of Canada in the case of *Re Gray*. That precedent upheld the war measure powers of the Dominion government to levy war during World War I.
>
> This war measures precedent is the only basis on which the government can defend the power it gave itself in this case. On the basis of this precedent, technically and legalistically, the government has not exceeded its constitutional powers. While it may appear startling that an Ontario government in peacetime is driven to rely on a constitutional precedent associated with the power to levy war, the precedent does support the power of the government to do what it has done [emphasis added] [internal citation elided].[184]

These passages are significant in two respects. First, they offer a strongly worded criticism of the current ideology of governance that tolerates the "constitutionally suspect" practice (set out in *Gray*) of authorizing the executive to overrule or amend legislation. This criticism must be directed as much at the Supreme Court's acceptance of this practice as at legislatures and governments availing themselves of the freedom.[185] The basis of this criticism in *Ontario Public School Boards* is the unwritten principle of the rule

[184] *Ontario Public School Boards* at paras. 44-51.

[185] Under current Canadian law, a "Henry VIII" clause, that is, a clause authorizing the executive to amend or overrule legislation, is legal provided that it is explicit: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489 at para. 78. For a contemporary example of such a provision, see the *Patent Act*, R.S.C. 1985, c. P-4, s. 55.2(5). Drawing on Justice Campbell's comments, David Mullan has endorsed a nondelegation restriction on the use of Henry VIII clauses: Role of the Judiciary at 375.

of law, which rejects arbitrary state action, and which is discussed earlier in the decision.[186] The second reason that Justice Campbell's criticisms are important is that they offer a needed corrective, or at least a qualification, to Professor Willis' comments regarding reactionary judges opposing delegation and welfare state reforms. While such comments may have had currency when Willis wrote them, in subsequent decades, broad executive power has been shown to service government initiatives without regard to ideology. The reforms made by the Conservative Government of Mike Harris do not fall into the pattern of progressive welfare state legislation that John Willis supported, but the use of the vehicle of broad delegations of power is the same.[187] Delegation is ultimately an unbridled practice of government that knows no politics. It moves power from an accountable legislature to a less accountable executive, and in the latter's hands, it can service an agenda of any political stripe – regulation or de-regulation. Today, broad delegations are a threat to the constitutional state, regardless of whether they are used to pursue a progressive or a reactionary ideology.

ii. Administrative law review

Coming out of the Delegation Case Law, the administrative law review of regulations was fairly straightforward. Jurisdictional review was available; content review for either reasonableness or merit was not:

> needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.[188]

> I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country — the Executive Government itself, under, I repeat, its responsibility to Parliament. The words

[186] *Ontario Public School Boards* at paras. 27-30.

[187] Michael Taggart observes the irony that arises when progressives such as Willis champion unrestrained delegation and then find themselves helpless when this practice of governance is deployed in the service of a conservative agenda: Chequered History at 625-26. On this point, particularly in the context of Mike Harris' reforms, see also Mullan, Willis v. McRuer at 573-74. Taggart maintains that the de-regulation agenda of recent governments has increased rather than decreased the volume of delegated legislation: Chequered History at 626-627.

[188] *Gray* at 157, per Chief Justice Fitzpatrick.

> are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.[189]

The restrictive approach to content review was largely reaffirmed in the 1983 decision of *Thorne's Hardware Ltd. v. The Queen* ("***Thorne's Hardware***"), although the Court left open the possibility of review in an "egregious" case:

> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council.[190]

In 1995, Justice La Forest summarized the available heads of review as follows:

> Traditionally, the primary question in reviewing the validity of subordinate legislation has been whether the delegate has authority under the empowering statute to make the impugned enactment. Any regulation, rule or order must be consistent with the purposes of the empowering statute, and cannot be designed to achieve some collateral purpose, extraneous to the statute's objectives. Provided that the subordinate legislation is within the bounds or "sphere" of statutory authority, it will be valid, and will not be reviewable on its merits.[191]

Unlike the restrictive approach for content review, courts have appeared to apply a strict correctness standard for matters of jurisdiction, or "vires."[192] I say "appeared" here because, as I discuss in more detail below, it is not entirely clear that the broad and normless grants of power sanctioned on a constitutional basis by the Delegation Case Law are entirely amenable to a correctness review.

The above basic framework for the review of delegated legislation – correctness review for jurisdiction; minimal review for content – has not survived the enormous changes in administrative law judicial review over the last decade. Two of the most recent Supreme Court of Canada decisions on the judicial review of delegated legislation suggest that the categories of jurisdiction and content have collapsed into a single

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[189] *Chemicals Reference* at 12, per Chief Justice Duff.
[190] [1983] 1 S.C.R. 106 at 111-113.
[191] *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895 at para. 19 (concurring opinion for three of the seven Justices on the decision).
[192] *Canadian Council for Refugees v. Canada*, 2008 FCA 229, leave to appeal dismissed [2008] S.C.C.A. No. 422; *Canada (Canadian Wheat Board) v. Canada (Attorney General)*, 2009 FCA 214, leave to appeal dismissed [2009] S.C.C.A. No. 366.

deferential category of review inquiring into whether the substantive content of the subordinate enactment is consistent with the governing legislation. These decisions are the 2012 *Catalyst Paper Corp. v. North Cowichan (District)* ("***Catalyst Paper***"),[193] and the 2017 *Green v. Law Society of Manitoba* ("***Green***").[194]

As recently as *Dunsmuir*, the leading modern decision on judicial review (not specifically addressing delegated legislation), the category of jurisdictional review appeared to be intact and to mandate a correctness approach.[195] The Court cited its own 2004 decision of *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* ("***Taxi Drivers***") for this proposition.[196] *Taxi Drivers* was a municipal bylaw decision, and thus dealt with a form of delegated legislation, and the Court in *Dunsmuir* did not hesitate to draw this precedent into its general discussion of the judicial review of executive action.[197] In the 2011 decision of *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, however, the Court strongly questioned the utility and even the coherence of jurisdictional review, and downplayed its role in the analysis of executive action (this decision, like *Dunsmuir*, did not deal expressly with delegated legislation).[198] *Catalyst Paper* and *Green* appear to follow this more recent approach of abandoning jurisdictional review and instead conducting a single review for substantive reasonableness. It is useful to briefly consider passages from these two decisions as they define what appears to be the current approach to the review of delegated legislation.

[193] [2012] 1 S.C.R. 5.
[194] 2017 SCC 20.
[195] *Dunsmuir* at para. 59.
[196] [2004] 1 S.C.R. 485.
[197] *Dunsmuir* at para. 59.
[198] [2011] 3 S.C.R. 654 at paras. 33-43.

In the unanimous *Catalyst Paper*, the Court expressly adopts the *Dunsmuir* modern framework for substantive judicial review of delegated legislation, and abandons the restrictive approach to content evident in *Thorne's Hardware*:

> A court conducting substantive review of the exercise of delegated powers must first determine the appropriate standard of review. This depends on a number of factors, including the presence of a privative clause in the enabling statute, the nature of the body to which the power is delegated, and whether the question falls within the body's area of expertise. Two standards are available: reasonableness and correctness. See, generally, *Dunsmuir*. If the applicable standard of review is correctness, the reviewing court requires, as the label suggests, that the administrative body be correct. If the applicable standard of review is reasonableness, the reviewing court requires that the decision be reasonable, having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power.
>
> Against this general background, I come to the issue before us — the substantive judicial review of municipal taxation bylaws. In *Thorne's Hardware*, the Court, referring to delegated legislation, drew a distinction between policy and legality, with the former being unreviewable by the courts:
>
> > The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.
>
> However, this attempt to maintain a clear distinction between policy and legality has not prevailed. In passing delegated legislation, a municipality must make policy choices that fall reasonably within the scope of the authority the legislature has granted it. Indeed, the parties now agree that the tax bylaw at issue is not exempt from substantive review in this sense.
>
> Unlike Parliament and provincial legislatures which possess inherent legislative power, regulatory bodies can exercise only those legislative powers that were delegated to them by the legislature. Their discretion is not unfettered. The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted. The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner. Numerous cases have accepted that courts can review the substance of bylaws to ensure the lawful exercise of the power conferred on municipal councils and other regulatory bodies.
>
> This brings us to the standard of review to be applied. The parties agree that the reasonableness standard applies in this case. The question is whether the bylaw at issue is reasonable having regard to process and whether it falls within a range of possible reasonable outcomes (*Dunsmuir*) [emphasis added] [internal citations elided and abridged].[199]

The underlined sentence is of particular note here for it appears to bring the review of subordinate legislation under the control of the unwritten principle of the rule of law, which is central to *Dunsmuir*'s restatement of the governing propositions of administrative law.[200]

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[199] *Catalyst Paper* at paras. 13-16.
[200] *Dunsmuir* at paras. 27-31.

In *Green*, a majority of five members of the Court also adopted the *Dunsmuir* framework and proceeded to review subordinate law-making (rules of the Manitoba Law Society) for its reasonableness:

> The standard of review framework from *Dunsmuir* applies in this case because it is applicable to "all exercises of public authority" and to "those who exercise statutory powers" [internal citations elided].[201]

There is no doubt in *Green* that the Court is conducting a substantive review of the overall content of the impugned rules in light of the governing legislation, and not simply a (now apparently out of date) *vires* review:

> A law society rule will be set aside only if the rule "is one no reasonable body informed by [the relevant] factors could have [enacted]": *Catalyst Paper*. This means "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature": *Catalyst Paper*.[202]

Before moving on, I should note the unanimous 2013 decision of *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)* ("***Katz***"),[203] which stands between *Catalyst Paper* and *Green*, and adopts a very restrictive approach to the review of regulations, emphasizing that only very unusual situations will lead to overruling delegated legislation based on its content:

> This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.)). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources*) (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):
>
> > . . . the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant.
>
> It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware*). Nor does the vires of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2). They must be "irrelevant," "extraneous" or "completely unrelated" to the statutory purpose to be found to be ultra vires on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*) [internal citations elided and abridged].[204]

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[201] *Green* at para. 19. The dissenting Justices do not appear to take issue with the interpretative framework – noting that "The real issue is the reasonableness of the Law Society's rule" (at para. 72), and concluding that "[The rule] is, as a result, unreasonable" (at para. 96).
[202] *Green* at para. 20, see also the analysis at paras. 43-67.
[203] [2013] 3 S.C.R. 810.
[204] *Katz* at paras. 27-28.

This extract appears to operate as if *Catalyst Paper* never happened (it is not cited in *Katz*), and the *Thorne's Hardware*/Delegation Case Law restrictive approach to the review of regulations is still the governing law. Because *Catalyst Paper* dealt with municipal bylaws, it was theoretically possible, following *Katz*, that the earlier decision could be contained in that area of subordinate legislation.[205] This strategy, however, would have involved ignoring the clear signals in *Catalyst Paper* that the Court was addressing delegated legislation generally, and not just municipal bylaws ("The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted"). *Green* adopts the *Catalyst Paper* approach, and even though *Green* dealt with law society rules rather than pure regulations, as was the case in *Katz*, the more recent decision again is cast in language that suggests very strongly that it applies to <u>all</u> delegated legislation ("The standard of review framework from *Dunsmuir* applies in this case because it is applicable to 'all exercises of public authority'"). I respectfully submit that the comments in *Katz* are out of step with the movement toward a more unified and modern approach in *Catalyst Paper* and *Green*, and should be disregarded unless and until the Court restates them and deliberately explains their intended ambit. Unfortunately, both the majority and dissenting Justices in *Green* cite *Catalyst Paper* and *Katz* together as authorities for the interpretation of regulations, and thus do not address the inconsistency of *Katz*. It is evident from the above excerpts that *Katz* does not mandate a review of regulations for their substantive reasonableness. In the interests of clarity (and to avoid the awkwardness of contradictory citations[206]), it would have been preferable if the Court in *Green* either expressly adopted the *Catalyst Paper* approach over *Katz*, or not mentioned *Katz* at all.

[205] On this point, see Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52 Alta L. Rev. 799 at 803-806).

[206] See, for example, the portions of *Catalyst Paper* and *Katz* briefly referenced in *Green* at paras. 20, 66-67, and 77-78. The passages from the earlier precedents cannot be reconciled, and, with respect, should not be cited together without some explanation.

While a movement away from the restrictive approach to review outlined in *the Chemicals Reference*, *Thorne's Hardware*, and *Katz* is a positive development, it does not follow that the integrated approach of *Catalyst Hardware* and *Green*, in which the review of delegated legislation is integrated into a universal framework of review of executive action, is necessarily desirable. There are, I would argue, very strong reasons working against applying the same approach to legislative and adjudicative decisions by executive bodies. Perhaps most importantly, the constitutionally unprincipled basis of the Delegation Case Law renders the practice of delegated legislation in Canada unfit for assimilation into a principled approach to administrative law. A significant distortion of the judicial role has emerged in the review of regulations, augmenting the distortion in that role brought about by the Delegation Case Law itself.

To substantiate these observations, I consider four judgments reviewing delegated legislation, two before and two after *Dunsmuir*. I begin with the Federal Court of Appeal's 2004 decision of *Sunshine Village Corp. v. Canada (Parks)* ("***Sunshine Village***").[207] The question at issue was whether the following provision of the *Canada National Parks Act*[208] authorized the creation of different rates for permits in different national parks:

> 16. (1) The Governor in Council may make regulations respecting
>
> . . . . .
>
> (r) the determination of fees, . . . for . . . the issuance . . . of permits, licences and other authorizing instruments pursuant to subsection (3).

The claimants faced a rate for a building permit in Banff National Park that was higher than that imposed in other parks, and sought review on the basis of discrimination. Justice Rothstein (as he then was), writing for the Court, maintained that the issue was one of *vires*, and the standard of review was correctness.[209] Yet his remarkably brief reasons reveal such enormous deference to the power of the legislature to

[207] [2004] 3 FCR 600.
[208] S.C. 2000, c. 32.
[209] *Sunshine Village* at para. 10.

delegate without norms that the process of review of the resulting regulations appears to be an empty exercise:

> these words, on their face, confer broad authority on the Governor in Council. There is no indication that they are subject to any limitation. The Court must take the statute as it finds it. In the absence of limiting words in the statute, the Court will not read in limitations.
>
> . . . . .
>
> Given the grant of general fee setting authority in paragraph 16(1)(r) of the Act, therefore, it follows that the Governor in Council may set different building permit fees for different national parks, regardless of whether doing so is discriminatory in the administrative law sense.[210]

With respect, this analysis renders judicial review virtually meaningless. The total deference granted on the constitutional question of normless delegations leaves nothing for an administrative law judicial review to grasp onto.[211] To speak of correctness review, or any review, in this sense, seems inapt.

A very different approach to the review of delegated legislation can be found in the 1979 Supreme Court of Canada decision of *R. v. CKOY Ltd.* ("***CKOY***").[212] The Canadian Radio-Television Commission ("**CRTC**") enacted regulations prohibiting broadcasters from airing interviews without a subject's consent. While this enactment may seem desirable from a privacy perspective, none of the following enabling provisions from the *Broadcasting Act* considered relevant by the Court expressly grant the CRTC power to regulate in this area:

> 16. (1) In furtherance of its objects, the Commission, on the recommendation of the Executive Committee, may
> . . . . .
> (b) make regulations applicable to all persons holding broadcasting licences, or to all persons holding broadcasting licences of one or more classes,
> (i) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph 3(d),
> . . . . .
> (ix) respecting such other matters as it deems necessary for the furtherance of its objects.[213]

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[210] *Sunshine Village* at paras. 18-19.

[211] On this point, Michael Taggart observes that

> Parliament has often delegated such wide legislative powers that the empowering provisions contained few, if any, express or implicit limitations that a court could enforce by way of judicial review (Chequered History at 621).

[212] [1979] 1 S.C.R. 2.

[213] R.S.C. 1970, c. B-11.

The Court reasoned that the opening words ("In furtherance of its objects") justified reading the enabling provisions through the purposes of the legislation. Thus open-ended grants of authority essentially become conduits through which equally broad statutory objectives can fill the executive body with jurisdiction to make law. Consider the following objectives set out in the legislation:

> 3. It is hereby declared that
>
> (a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;
>
> (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
>
> c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;
>
> (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources.

Drawing on these very open provisions, none of which speak to privacy issues, the majority of the Court found that the impugned regulations were fully enabled. Of particular interest is the weight that the Court placed on the basket clause, section 16(1)(b)(ix), which of course has no content at all: "respecting such other matters as it deems necessary for the furtherance of its objects." Justice Spence, writing for himself and five other members of the Court, reasoned as follows:

> I find a basis for the enactment of Regulation 5(k) also in s. 16(1)(b)(ix) of the statute. It is to be noted that its very broad words are not, as are those of s. 16(1)(b)(i), confined to the policy expressed in s. 3(d) and, therefore, authorize one enactment of regulations to further any policy outlined in the whole of s. 3. . . . Such regulation would, of course, have to be to further the "Broadcasting Policy of Canada" but it might be difficult to fit it under any of the other numbered paragraphs of s. 16(1)(b). I find it of some importance that the broad words appearing in s. 16(1)(b)(ix) "as it deems necessary" emphasize the discretion granted to the Commission in determining what is necessary for the furtherance of its objects. Therefore, even if the word "programming" were to receive the narrow meaning advanced by counsel for the appellant, then s. 16(1)(b)(ix) would authorize the enactment of Regulation 5(k). So, the said regulation may well be in furtherance of the policy set out in, for instance, s. 3(c), that is, responsibility for the programmes which the licensee broadcasts [emphasis added].[214]

[214] *CKOY* at 13-14.

With respect, I suggest that this is judicial review virtually running amok. In *Sunshine Village*, the Federal Court of Appeal, operating within the constitutional terms of reference established by the Delegation Case Law, offered virtually no review at all. Here, the Supreme Court, likewise operating within the terms of reference of the Delegation Case Law, offers plenty of review, but it is completely unrestrained. A basket clause is by definition naked – it is devoid of content. To fill it, Justice Spence looks to the entire statute, and also does so through the very permissive lens afforded by the language "as it deems necessary." Thus even though "it might be difficult to fit" the impugned regulation under one provision, it "may well be in furtherance" of another. This is broad and untrammelled executive discretion, supported by equally broad judicial discretion, creating a situation where constitutional structure is obliterated. Court, executive, and legislature all work together to fabricate public policy. This is not the form of governance established by the architecture of the Canadian Constitution. Courts are to interpret the law and the actions of the executive, not to assist the executive and the legislature in putting together a coherent statute. The Constitution distributes power, and this distribution supports and orders the generation of law, and provides for the review of this law. *CKOY* threatens this structure, and reveals a very troubling escalation of the type of judicial abdication at work in the Delegation Case Law. In those decisions, the courts passively accept broad delegations of power from the legislature to the executive. In *CKOY*, this passive acceptance is still clearly on display, but it is augmented by an active construction of statutory meaning by the courts.

While the regulations enacted by the CRTC, protecting citizens' privacy rights, may be ultimately consistent with Canadian public policy, that is not the point of a judicial review of executive action. Legality is the point: the question is whether the executive body had lawful authority to act as it did. It is worth noting that three members of the Court in *CKOY* dissented, not on the basis that basket clauses are impermissible, but rather on the basis that the scope of the purposes of the legislation was not wide

enough to take the basket clause as far as the CRTC took it.[215] The fact that the Court divided 6-3 on the question of whether a broad statement of statutory purposes could support action taken under a naked enabling provision underlines the uncertainty emanating from the practice of delegation as it descends from the Delegation Case Law, and also reveals the fundamental difficulties facing courts attempting to review enabling provisions. *Sunshine Village* and *CKOY* reveal two very different and very problematic options. More recent decisions suggest that the dangerously activist *CKOY* approach has become dominant.

In the 2012 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* ("***Broadcasting Reference"***),[216] the Court again divided, this time 5-4, on whether a proposed regulation could be brought within the combined ambit of a basket clause and a broad statement of purposes. The question this time was whether the CRTC had authority to institute a "value for signal regime" that would effectively create novel legal relations between broadcasters and cable and satellite providers, and effectively allocate proprietary rights in and access to signals. While the *Broadcasting Act* has changed since *CKOY*, it is unnecessary to reproduce the provisions at issue in the more recent decision. The legislation still contains very broad statements of policy and very broad enabling provisions, none of which speaks directly to the fairly invasive powers at issue.[217]

Four members of the Court, relying heavily on *CKOY*, found the requisite authority in the "very broad words" of the basket clause combined with the statute's broad policy objectives:

> The CRTC's broad jurisdiction derives from the fact that each of ss. 5(1), 9(1)(b)(i) and 10(1)(k) confer generally-worded powers, along with a discretion to use them as the CRTC deems appropriate to implement the objects set out in s. 3(1). Courts have consistently determined the validity of the CRTC's exercises of power under any of these provisions by applying the *CKOY* test: <u>was the power used in connection with a policy objective in s. 3(1)</u>? In *CKOY*, Spence J. dealt with the use of the regulation-making power, and noted

[215] *CKOY* at 6-7.
[216] [2012] 3 S.C.R. 489.
[217] S.C. 1991, c. 11. Section 3 sets out the purposes of the legislation, and sections 9 and 10 are licensing and regulation-making enabling provisions. All of the relevant provisions are set out in the *Broadcasting Reference*.

> that the section's "very broad words ... authorize one enactment of regulations to further any policy outlined in the whole of s. 3" [emphasis added].[218]

This passage confirms *CKOY*'s holding that all that is really needed from a *vires* point of view is a basket clause ("respecting such other matters as it deems necessary for the furtherance of its objects"). Legal meaning can flow into this provision from the statute's statement of purposes. Justice Rothstein, writing for the majority, recognized that this approach would violate the rule of law, and stated so in strong terms:

> Were the only constraint on the CRTC's powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in s. 3(1), the only limit to the CRTC's regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion.[219]

The majority of the Court appears to say here that a policy objective by itself cannot enable executive power. However, the lack of constitutional standards required by the Delegation Case Law inexorably draws a reviewing court away from enabling language and into the larger realm of statutory purposes. Resisting this pull can be difficult. A careful reading of Justice Rothstein's judgment in the *Broadcasting Reference* suggests that the difference separating the majority and minority is not approaches to enablement but rather simply interpretations of the stated statutory purposes. Justice Rothstein leaves little doubt that he does not find the basket clauses (one a licensing basket clause; the other the regulation-making power quoted above) able support the CRTC's attempt to rearrange stakeholder relations, but this is because he reads the purposes of the legislation more narrowly than the minority, and not because he rejects using broadly stated purposes to "enrich" the normless enabling provisions:

> A broadly drafted basket clause, such as s. 10(1)(k), or an open-ended power to insert "such terms and conditions as the [regulatory body] deems appropriate" (s. 9(1)(h)) cannot be read in isolation. Rather, "[t]he content of a provision 'is enriched by the rest of the section in which it is found . . . .'" In my opinion, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.
>
> . . . . .

[218] *Broadcasting Reference* at para. 101, citing *CKOY* at 13.
[219] *Broadcasting Reference* at para. 28.

> The *Broadcasting Act* has a primarily cultural aim. The other powers enumerated in s. 10(1) deal with such matters as the allocation of broadcasting time and the setting of standards for programs. In addition, the objectives of the *Broadcasting Act*, declared in s. 3(1), when read together, target "the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse." While such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act: Sullivan, at pp. 388 and 390-91. Parliament must be presumed to have empowered the CRTC to work towards implementing these cultural objectives; however, the regulatory means granted to the CRTC to achieve these objectives fall short of creating exclusive control rights.
>
> In sum, nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act* [emphasis added] [internal citations abridged].[220]

While stating here that a policy provision cannot be turned into an enabling provision, the Court allows ample room to read the latter through the former ("Reading the *Broadcasting Act* in its entire context"). The primary danger of *CKOY*, which moves a reviewing court toward an active interpretive stance, and threatens the institutional neutrality demanded by the architecture of the Constitution, survives the *Broadcasting Reference*, despite the Court's apparent rejection of both the minority's reasoning and the CRTC's proposed regulation. A telling footnote to the *Broadcasting Reference* can be found in *Bell Canada v. Canada (Attorney General)*, a 2016 Federal Court of Appeal decision that reads regulation-making powers in the same legislation, including the basket clause, very broadly to uphold regulations imposing penalties on cable television providers who commit substitution errors.[221] This decision adopts a very liberal *CKOY* approach to reading enabling provisions through statutory purposes.[222] The legislation does not appear to support the impugned regulations here any more than it did in either the *Broadcasting Reference* or *CKOY*. The crucial point, however, is an activist (i.e. constructivist) judicial approach to the task of reviewing the legality of delegated legislation.

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[220] *Broadcasting Reference* at paras. 29, 32-33, internal quotation and references cited to *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 64, citing *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 647-48; and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5 ed. Markham, Ont.: LexisNexis, 2008.
[221] 2016 FCA 217 ("***Bell Canada***"). Such errors can arise when a cable provider substitutes local Canadian broadcast signals for foreign signals of identical programming.
[222] See especially *Bell Canada* at paras. 50-52.

The final decision I wish to consider is *Katz*, in which the unanimous Supreme Court made fairly substantial amendments to Ontario legislation to complete the legislature's unexpressed intentions. But first it is important to observe that the strategy of reading enabling provisions through general purposes provisions is consistent with the dominant method of statutory interpretation in Canada, often referred to as "purposive" analysis.[223] Purposivism reads statutory language in light of the perceived purposes of the entire enactment, and thus can range quite far from the specifics of a given provision and can address not only the purposes of the legislation as gleaned from other provisions or even other statutes, but also extrinsic sources such as legislative debates. The Supreme Court formally endorsed a purposive approach to statutory interpretation in decisions such as *Rizzo & Rizzo Shoes Ltd. (Re)* ("***Rizzo***"),[224] *Bell ExpressVu Limited Partnership v. Rex* ("***Bell ExpressVu***"),[225] and *Bristol-Myers Squibb Co. v. Canada (Attorney General)* ("***Bristol-Myers***").[226] In *Rizzo*, Justice Iacobucci, writing for the Court states that

> Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[227]

In *Bell ExpressVu*, Justice Iacobucci, again writing for the Court, refers to the "contextual and purposive approach set out by Driedger" as "the preferred approach to statutory interpretation across a wide range of interpretive settings."[228]

There is much to be said for a judicious use of purposive analysis in situations of statutory ambiguity. In *Rizzo* and *Bell ExpressVu* the Court wrestled with ambiguity in a statute, and in *Bristol-Myers*, the Court

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[223] John Keyes observes that "Purposive analysis has many proponents and is firmly entrenched in Canada and other Commonwealth countries" (*Executive Legislation* at 89, and see the many commentators cited therein).
[224] [1998] 1 S.C.R. 27.
[225] [2002] 2 S.C.R. 559.
[226] [2005] 1 S.C.R. 533.
[227] *Rizzo* at para. 21.
[228] *Bell ExpressVu* at paras. 26, 30.

wrestled with ambiguity within a regulation. I say "judicious" use because this type of analysis threatens to lead the court outside of its role of interpreting the law and into the role of making law. While an exact line between these two activities is impossible to draw, when a purposive inquiry is applied to enabling provisions, as it was in *CKOY* (years before the Court explicitly recognized this form of analysis), the danger of judicial law-making becomes very real. Courts are drawn by the very nature of the broad and normless practice of delegating law-making power that emanates from *Hodge*, *Gray*, and the *Chemicals Reference* toward the very activity that Justice Rothstein warned against in the *Broadcasting Reference*: "declarations of policy may not be invoked as independent grants of power." How is this to be meaningfully prevented where there no judicial controls on the information that must be provided in enabling provisions? Lack of constitutional control by the courts (a passive stance) paradoxically invites courts engaged in judicial review of delegated legislation to assume an activist and facilitative stance, working with regulators and legislatures to bring policy initiatives to fruition. The Supreme Court forcefully and explicitly mandates a purposive approach to the interpretation of delegated legislation in all of the *Broadcasting Reference*, *Taxi Drivers*, *Katz*, and *Green*.[229] As the Court states in *Katz*:

> Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach . . . consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*).[230]

Katz itself provides a very good example of judicial law-making through the purposive analysis of delegated legislation. This decision, it will be recalled, endorses an extremely deferential approach to

[229] *Broadcasting Reference* at paras. 11-12; *Taxi Drivers* at paras. 6-8; *Katz* at para. 26; and *Green* at para. 28. *Taxi Drivers* involved a challenge to municipal bylaws. A strong and principled argument can be made that municipal enabling legislation should be interpreted under different standards than other forms of enabling legislation on the basis that municipalities have elected governments. The break in the circle of democratic legitimacy that occurs when executive bodies make regulations based on broad enabling clauses may not be as pressing where the body in question is elected by citizens. In other words, there may be room for a broad and purposive analysis in interpreting municipal enabling legislation. Furthermore, although I do not pursue this point in my project, I should observe that it well may be appropriate to recognize a carve-out for municipal bylaws from a nondelegation doctrine on the basis of the elected nature of municipal governments. In *Catalyst Paper*, the Court observes the greater deference due to municipalities because of the democratic basis of their law-making activities (at paras. 19, 24, 29).

[230] *Katz* at para. 26.

regulations out of step with *Catalyst Paper* and *Green*. At issue before the Court was the legality of two separate sets of Ontario regulations that limited the degree of corporate control that drug retailers could have over either generic drug manufacturers or companies supplying products made by such manufacturer.[231] There was evidence that the retailers were making use of corporate structure as a vehicle to get around the pricing controls imposed by the province's pharmaceutical regulation regime, including its drug benefit program, which guaranteed free medication to elderly patients.[232] The retailers' corporate structuring schemes clearly burdened the public system, and indeed, all taxpayers in the province. While the moral lines are thus fairly easily drawn in this case, the legal lines are considerably more troubling. In order to end the retailers' evasion of the regulatory scheme, the government enacted identical regulations under two statutes. Both sets of regulations were required to close the loophole. The relevant enabling provisions read as follows:

> *Drug Interchangeability and Dispensing Fee Act* ("***Interchangeability Act***"):[233]
>
> > 14.(1) The Lieutenant Governor in Council may make regulations,
> > (a) prescribing conditions to be met by products or by manufacturers of products in order to be designated as interchangeable with other products.
>
> *Ontario Drug Benefit Act* ("***Drug Benefit Act***"):[234]
>
> > 18.(1) The Lieutenant Governor in Council may make regulations,
> > . . . . .
> > (b) prescribing conditions to be met for a drug product to be designated as a listed drug product.
> > . . . . .
> > (m) respecting any matter considered necessary or advisable to carry out the intent and purposes of this Act.

The difficulty here is that none of these provisions address corporate structure. Indeed, there is no reference to corporate structure anywhere in either statute. It would take a very generous reading of the phrase "or by manufacturers" of section 14(1)(a) of the *Interchangeability Act* to allow regulations under

[231] *Katz* at para. 17.
[232] *Katz* at paras. 10-17.
[233] R.S.O. 1990, c. P.23.
[234] R.S.O. 1990, c. O.10.

a drug substitution statute to prohibit certain forms of corporate ownership. But even if this broad reading were accepted, the same is simply not possible for the corresponding *Drug Benefit Act* enabling provision, which does not mention "manufacturers" at all, and instead speaks only to "conditions to be met for a drug product." The enablement here is simply a bridge too far.

The unanimous Court, however, employed a purposive reading to establish that one of the goals of the two statutes, working together, was to control retailer profits and limit avoidance schemes. The Court cited legislative history, and provided quotes from legislative debates and regulators to support its reading. The conclusion was ultimately that the regulations were properly enabled.[235]

It is interesting to note that the Court made no reference in its analysis to the basket clause in the *Drug Benefit Act*, other than to quote it. Using the basket clause would have brought this decision directly in line with the dissenting Justices in the *Broadcasting Reference*, decided only a year earlier, in which, as discussed above, a basket clause was added to the purposes of the legislation at issue, *CKOY*-style. Perhaps Justice Rothstein's rebuke in the earlier decision ("such declarations of policy may not be invoked as independent grants of Power"/"This would be akin to unfettered discretion") regarding turning the purposes of the legislation into an enabling clause was too sharp to make explicit reference to the basket clause desirable for the *Katz* Court. The *Broadcasting Reference* itself is not cited in *Katz*, despite the fact that both deal with delegated legislation.

There is little doubt that the Ontario legislature intended to control retailer prices, and furthermore, intended to prevent avoidance schemes. There is also very little doubt that if the Court had struck down the regulations as being improperly enabled, the government would have immediately responded with either legislation enacting the substance of the impugned regulations, or modified enabling provisions

[235] *Katz* at paras. 10-20, 31-38.

authorizing regulations preventing corporate governance schemes on the part of the retailers. Nevertheless, the uncomfortable fact remains that the legislation actually enacted did not enable interference with corporate governance. The Court effectively rewrote the legislation. I respectfully submit that this is a violation of the fundamental architecture of a democratic constitution. Democratic governance is not a project whereby courts, legislators, and executive officials work together to enact public policy initiatives. Public policy initiatives are the purview of the legislature. The role of the courts is not to complete or facilitate these initiatives, but to interpret them to ensure they are in accordance with constitutional norms. The constitutional norm violated by the Court in *Katz* is the separation of powers, stated so succinctly and powerfully by Justice McLachlin in *New Brunswick Broadcasting*:

> It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

Earlier I suggested that the constitutionally unprincipled basis of the Delegation Case Law renders the practice of delegated legislation in Canada unfit for assimilation into a principled approach to administrative law. The courts' passive approach to the constitutionality of delegating legislation sucks a court conducting administrative law review into a vortex, and encourages *Katz*-like situations where courts actively assist regulators in their appointed tasks. Modern administrative law judicial review is built around the principle of the rule of law, as stressed by the Court in *Dunsmuir*:

> As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.[236]

The concept of "deference" has been central to modern judicial review's attempt to reconcile the competing demands of the rule of law and legislative initiatives:

[236] *Dunsmuir* at para. 27, and see also paras. 28-31.

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers." We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" [internal citations elided].[237]

But the Delegation Case Law places the rule of law at a substantial initial disadvantage when subordinate law-making is at issue, for the courts are already "subservient" and "show blind reverence" to decisions to delegate. Without any constitutional scrutiny of decisions to delegate, that is, scrutiny that would force determinative rather than untrammelled delegations, reasonableness review of subordinate legislation will likely remain elusive. Constitutional review to ensure that delegations are genuinely respectful of the "foundational democratic principle" would go a long way toward reconciling the tension between legislative initiatives and the rule of law in this area of executive activity.

I conclude this chapter by noting briefly the concept of fairness, which I have not discussed at all, and which is the other main ground of modern administrative law judicial review. Genevieve Cartier has observed that the evolution of the concept of procedural fairness in judicial review has not been accompanied by an application of such review to delegated legislation, and she comments on

> the persistent refusal on the part of the courts to impose procedural obligations on administrative decision makers exercising powers of a 'legislative nature,' absent statutory indication to that effect.[238]

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[237] *Dunsmuir* at para. 48, internal quotations cited to *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 596; and David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in M. Taggart (ed.) *The Province of Administrative Law* (1997) 279 at 286. On deference and judicial review, see also Dyzenhaus, Fundamental Values at 489-97, and *passim*; and Paul Daly, "The Struggle for Deference in Canada," in Mark Elliott and Hanna Wilberg (eds.) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart, 2015) 297.

[238] Procedural Fairness at 218 and *passim*. While Cartier's comments were made in 2003, there is little evidence of a significant shift beyond the "judicial abstinence" that is the subject of her article. There are brief and inconclusive comments made in each of *Catalyst Paper* (at paras. 12, 28-29, 32) and *Green* (at para. 54), but neither decision offers any guidance as to where procedural fairness review is or is going in the post-*Dunsmuir* world of administrative law judicial review.

Cartier makes a compelling argument that the fairness requirements that the common law imposes on executive officials making administrative decisions should be extended to subordinate legislation.[239] This is an argument that I accept but with one very crucial qualification. In my view, subordinate law-making should be significantly curtailed under a nondelegation doctrine to bring this practice into line with the fundamental unwritten principles at the core of the Canadian Constitution. I strongly differ from Cartier on the ability of procedural fairness obligations to compensate for the "democratic deficit" that she acknowledges accompanies current delegations of power in the administrative state.[240] As I discuss in more detail in the next chapter, inserting democratic processes into executive law and policy-making decisions is not a viable substitute for the democratic legitimacy that emanates from the legislature. Only a nondelegation doctrine can remedy the "democratic deficit" that plagues the exercise of subordinate law-making in the modern state. Ultimately, I agree that procedural fairness obligations should be assessed against executive law-makers, as Cartier suggests, but only against those delegations of power that have passed constitution muster under a nondelegation analysis. The volume of executive legislation giving rise to the need for a procedural fairness inquiry would be significantly reduced under my proposed doctrine.

[239] Procedural Fairness at 235-48 and *passim*.
[240] Procedural Fairness at 243.

Chapter 7

Instrumentalism, Control, and Compensation: Managing Legislative Delegation

In this chapter I consider the three main justifications that have been advanced by commentators to account for the delegation of legislative power in the constitutional state. These strategies are not exclusive, and thus it is not uncommon to find a single theorist ascribing to more than one, even though each takes a different stance toward the constitutional demands of democratic governance.

The three strategies are instrumentalism, which subordinates constitutional structure to the achievement of public policy goals; control, which provides that the delegation of legislative power to the executive poses no challenge to constitutionalism because the legislature always remain supreme; and compensation, which acknowledges the serious challenge posed by delegation, but maintains that this challenge can be met by introducing democratic mechanisms into the ever-expanding executive branch.

I consider each theory separately below. I begin my discussion by considering the most commonly recognized explanation for delegation in the modern state, which is necessity. This explanation should be distinguished from a justification in that on its own it makes no attempt to integrate a practice of governance into a theory of governance.

1. Necessity

Necessity is regularly cited by both academic commentators and courts as the dominant explanation for the phenomenon of the delegation of legislative power. John Willis states this proposition succinctly when he observes that

> The delegation of legislative power to a government department, a practice of very respectable antiquity, is now universally recognized by responsible persons as a practical necessity if the work of government is

> to be carried on at all. Why waste the time of parliament on details or on technical matters which it cannot understand?[241]

The disparaging comment at the conclusion of this passage suggests that Willis may have no great respect for democratic institutions, but for now I wish to concentrate on the necessity proposition. Necessity is cited as a primary rationale in each of the decisions of the Delegation Case Law,[242] and has also been cited by the United States Supreme Court as a primary rationale in one of its more noted delegation decisions:

> our jurisprudence has been driven by a practical understanding that, in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.[243]

Pursuant to the necessity thesis, modern legislatures have been overwhelmed by what Roderick Macdonald calls "new public managerial functions,"[244] and what William Scheuerman refers to as the "unavoidable expansion of the administrative apparatus."[245] One of the primary institutional ramifications of the increased size and complexity of modern governance is thus that legislatures have availed themselves extensively of executive instrumentalities. As Macdonald explains,

> The practical demands of administration in the modern state make it unfeasible to enact individually normative legislation only in statutes. Hence the delegation of subordinate legislative powers to bodies (the governor-in-council, ministers, specialized agencies), which then impart individually normative details to statutes which are themselves institutionally normative (i.e. mere shells).[246]

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[241] Three Approaches to Administrative Law at 55. Willis' views are echoed approvingly by Professor Corry in a passage noted in my Introduction:

> Those who are charged with the task must have expert knowledge of its interrelations as well as freedom to fashion measures in the very light of the concrete situation to which they are to apply. Parliament cannot meet these requirements but the Executive, through the Civil Service, can. Parliament must therefore relinquish this task to the Executive, being content, in respect of these matters, to debate general policy, outline the ends which the Civil Service is to reach, and then to provide a forum for criticism of the Executive in its choice of means (Problem of Delegated Legislation at 61).

[242] See *Hodge* at 132; *Gray* at 181-182 (*per* Justice Anglin), and 169 (*per* Justice Duff); and the *Chemicals Reference* at 12 (*per* Chief Justice Duff), 30 (*per* Justice Kerwin), and 37 (*per* Justice Hudson).

[243] *Mistretta v. United States*, 488 U. S. 361 at 372 (1989) ("***Mistretta***"). The Court upheld a delegation of power to an independent Sentencing Commission authorizing the creation of binding guidelines for courts passing sentences for federal offenses. Incarceration is one of the most invasive forms of state action, and should be dealt with by the legislature. The fact that a broad delegation in this area survived judicial scrutiny suggests that the U.S. has no meaningful controls on delegation. I discuss the dismal performance of the U.S. nondelegation doctrine in Part C.

[244] Regulation by Regulations at 129.

[245] *Between the Norm and the Exception* at 3.

[246] Regulation by Regulations at 119.

This passage nicely captures the important reallocation of power within government and its practical relationship to the addressees of the law: normative guidance to citizens tends to come primarily from regulations, while legislation focuses more on delegating power to government bodies through "shells." Alf Ross, commenting on the significant shift from the "laissez-faire state" of the 19th century to the "public service state" of the 20th century, places the entire phenomenon of delegated legislation in a larger social and historical framework:

> Even where the economic life of a country is not directly socialized, it is superintended, regulated, and directed by the state by control of prices and production, control of foreign trade, currency exchange restrictions, the financing of building, credit and finance policy, etc. etc. Social welfare measures have assumed enormous proportions and have gradually encompassed the whole population. The machinery of the state has developed into a gigantic organization covering practically every aspect of life, and whose staff of civil servants make up a goodly part of the population. A state of this type cannot be governed by the same methods as the liberal state. The relation between legislation and administration must of necessity take on a radically different form. A tremendous expansion of governmental authority is inevitable. It is not possible for the legislator from his lofty position to direct this giant machine effectively. To a considerable extent, the constructive initiative has to pass from the parliament to the government offices and a series of semi-autonomous boards and commissions. In terms of law this trend manifests itself in numerous more or less comprehensive acts of authorization or full-powers. Delegated legislation, as it is called, assumes a proportion that departs completely from classic legislative principles and necessarily raises a number of political and constitutional problems.[247]

Ross's understanding of the practice of delegation, and its "constitutional problems," is echoed by Habermas, who emphasizes a shift between "liberal" and "social-welfare" paradigms of law.[248] Under the former paradigm, the separation of powers and the democratic principle operate together to demand that "administrative power regenerates itself solely from the communicative power that citizens engender in common," and that "the administration is not permitted to deal with normative reasons in either a constructive or reconstructive manner."[249] But this "elegant" formulation of the transmission of democratic will into state power, Habermas maintains, has succumbed to the reality of the latter paradigm, which is "oriented exclusively toward the problem of the just distribution of socially produced

[247] Delegation of Power at 4.
[248] *Between Facts and Norms* at 388-446.
[249] *Between Facts and Norms* at 173, 192.

life opportunities," and in which "the implementation of programmatic goals requires the administration to perform organizational tasks that at least implicitly require a further development of law."[250]

Is the widespread acknowledgement of the necessity thesis unassailable? Peter Hogg begins his discussion of delegation under the Canadian Constitution by stating that

> It is impossible for the federal Parliament or any provincial Legislature to enact all of the laws that are needed in its jurisdiction for the purpose of government in any given year.[251]

My primary interest is in the coherence of the claims made to justify rather than explain the practice of legislative delegation, but it is worth briefly noting several points on the latter front. While it is not at all difficult to find courts and commentators that make the necessity claim, it is quite rare to find significant attempts made to substantiate this claim. Instead, necessity appears to operate as the undeniable fact of modern governance. The matter may be considerably more complex, however, than comparing the thousands of pages of regulations enacted annually with the hundreds of pages of legislation. Willis asks "Why waste the time of parliament on details or on technical matters which it cannot understand?" This question captures two common necessity-based claims supporting delegation: the complexity of the matters to be regulated and the lack of time on the part of legislators to deal with such matters.[252] But are legislators in fact unable to expand their workload or gain more specialized knowledge? Are current workloads and resources adequately prioritized and funded? I have no intention of exploring these practical matters, but I note them as necessary assumptions contained in the necessity thesis that should be addressed before this thesis is advanced with such rigour. There is room for at least some doubt in these areas. Hermann Pünder, in an analysis of the practice of delegation in the U.K., the U.S., and Germany, suggests that legislators may lack the will to decide contentious and difficult matters, and that

[250] *Between Facts and Norms* at 190, 193, 418. Habermas is sharply critical of the tendency of the "social-welfare" paradigm to undermine crucial elements of individual autonomy (see, for example, *Between Facts and Norms* at 418-19). I consider his institutional response to this problem in the final section of this chapter.
[251] *Constitutional Law* at 395.
[252] See, for example, Ross, Delegation of Power at 4-5; Green, Dilemma of Delegation at 339-40.

this shirking of responsibility may be a crucial driving force behind decisions to delegate rather than a lack of time or ability:

> This would well suggest that members of Congress are – as the British MPs – more unwilling than unable to decide 'hard cases' themselves. . . . For the UK Paul Craig explains that for a government with an onerous legislative timetable, or only a small majority, there is always the temptation to pass skeleton legislation with important aspects to be sketched in by the Minister. There are considerable objections voiced in Britain against ample delegations of legislative powers. The Procedure Committee concluded that there was "too great a readiness in Parliament to delegate wide legislative powers to Ministers, and no lack of enthusiasm on their part to take such powers."[253]

An additional important consideration that needs to be addressed in assessing the viability of the necessity thesis is whether the dominant use of subordinate legislation is in fact an efficient approach to managing the regulatory demands on the modern state. Bruce Pardy offers compelling critiques of both the cogency and the efficiency of modern environmental regulation through delegation,[254] and Theodore Lowi provides a fairly scathing critique of the modern interventionist state in the U.S. by comparing the efficiency of certain welfare state statutes from the 1930s, which employed legislated rules and standards, with the normless and chaotic welfare regimes enacted in the 1960s and 1970s.[255] I also note that virtually all of the legislation and associated regulations discussed in Chapter 6 were well within the capability of Canadian legislatures. The impugned regulations in *Katz* were in fact enacted at the exact same time as amendments to the governing legislation.[256] There was no reason why the much-needed controls on corporate structure at issue in that decision could not have been formally enacted by the Ontario legislature itself. These regulations were neither technically dense nor very time-consuming.

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[253] "Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law" (2009) 58 International & Comparative L. Q. 353 at 362 ("**Comparative View**"), citing Paul Craig, *Administrative Law* (5th ed. 2003) at 370, and the U.K. Procedure Committee *Fourth Report* (1995–6) HC 152, at para 14. On cogency of the "unwilling" versus "unable" distinction, see also the numerous authorities cited by Pünder at 362, note 66, as well as David Schoenbrod's detailed examination of the problem of delegation in relation to American environmental legislation in "Goals Statutes or Rules Statutes: The Case of the *Clean Air Act*" (1983) 30 UCLA L. Rev. 740 at 751-756, 793-803, 819-820.

[254] See especially *Ecolawgic* at 77-107; and Holy Grail of Environmental Law, *passim*.

[255] *End of Liberalism* at 204-207, 212-16, 232-33, and generally 198-236. See also Lowi's analysis of the advent of the delegation style of modern U.S. governance at 92-106, suggestively entitled "Policy without Law."

[256] *Katz* at paras. 16-17.

A final consideration that needs to be factored into the necessity thesis is the presence of nondelegation regimes in numerous sophisticated modern jurisdictions. More than a dozen U.S. states have judicially enforced restrictions on legislative delegation, and this includes large states such as Texas, Florida, New York, Massachusetts, Pennsylvania, and Ohio.[257]

While none of the points that I have raised above is decisive, they all suggest that a simple statement of necessity is inadequate to ground a practice of governance that shifts law-making away from the collegial institution specifically structured to make legislative decisions. I turn now to consider the cogency of the theoretical arguments advanced to justify the practice of delegation.

2. Instrumentalism: Making a Virtue of Necessity

Regardless of whether the necessity thesis is accurate, it is not a constitutional argument. The essence of constitutionalism is the establishment of rational principles ordering and controlling government.[258] Necessity cannot provide structure, and it cannot be constitutional. Necessity is the obverse of constitutionalism. This point is usefully illustrated by the following comments made by the Donoughmore Committee on Ministers' Powers ("**Donoughmore Committee**"), which was established by the U.K. Parliament to investigate the legitimacy of the extensive delegations of authority to the executive made during the First World War and the economic crises of the 1920's:

> There is in truth no alternate means by which strong measures to meet great emergencies can be made possible; and for that reason, the means is constitutional.[259]

[257] Gary J. Greco, "Standards or Safeguards: A Survey of the Delegation Doctrine in the States" (1994) 8 Admin. L.J. 567 at 580-88; Alexander Volokh, "The New Private-Regulation Skepticism: Due Process, Non-delegation, and Antitrust Challenges" (2014) 37 Harvard J. L. & Public Policy 931 at 963-965.
[258] See the authorities cited in Part A, Note 4.
[259] *Report of the Committee on Ministers' Powers* (London: Parliamentary Papers, 1932) Cmd. 4060 at 51-52 ("***Report of the Committee***").

The final part of this sentence is a *non-sequitur*, and the Donoughmore Committee itself acknowledges this when it goes on to observe that

> But the measure of the need should be the measure alike of the power and of its limitation. It is of the essence of constitutional government that the normal control of Parliament should not be suspended either to a greater degree, or for a longer time, than the exigency demands.[260]

Significantly, the "exigency" has never ceased. The "great emergencies" of the early 20th century (World War I; Great Depression; World War II) have come and gone, but the institutional reconfigurations have remained – an allegedly necessary response to the increased pressures of administration and the "new public managerial functions" noted above. The modern administrative state is evidently in permanent crisis mode, and "exigency" has become normalized. This recognition, however, does not render any kind of constitutional legitimacy to the practice of delegating legislative power. That legitimacy must come from a theory placing delegation within a structured and principled framework.

One prominent theory that fails to provide a principled framework is instrumentalism. Instrumentalism looks to results, and not to methods. Constitutional concerns over the propriety of the use of governmental power take a back seat to the achievement of public policy goals. As Professor Pardy observes, "legal instrumentalism" involves the "proposition that law is a tool to achieve desirable ends," and is a very common and essentially utilitarian approach that "manifests as a rough calculus of benefit and burden assessed at a community level."[261] Within an instrumentalist "calculus," institutional structure is strictly a means to an end.

The two most influential instrumentalists in Canadian public law are John Willis and Harry Arthurs.[262] Arthurs has a suggestively titled article, "Regulation-Making: The Creative Opportunities of the

[260] *Report of the Committee* at 51-52.
[261] *Ecolawgic* at 1, 4.
[262] On the instrumentalism of Willis and Arthurs, see Dyzenhaus, Lessons from Willis at 703-713.

Inevitable,"[263] that captures the lack of concern that instrumentalism has for disruptions in constitutional structures brought about by the administrative state. Indeed, Arthurs expressly rejects the institutional framework of the separation of powers as being not only unpractical but also undesirable:

> I suggest that while in strict theory all law must be made by the legislature, while in strict theory judicial and quasi-judicial bodies merely interpret and apply the law, while in strict theory ministers and other lower-level administrators simply execute instructions given by parliament, it is time to recognize that theory does not, cannot, and indeed should not accord with actual practice [emphasis added].[264]

In place of a principled and controlled transformation of "communicative power" into "administrative power," to borrow Habermas' "elegant" version of the separation of powers, Arthurs suggests that executive government can, and should, respond to the exigencies of modern social needs without the hampering effects of detailed legislative processes:

> There ought to be the broadest possible mandate for regulation-making, and parliament ought to confine itself (so far as possible) to the announcement of broad policy lines within which regulations may operate, and to the scrutiny of those regulations.[265]

Willis likewise appears to be uninterested in theoretical or principled restraints on state action, and advocates a "functional approach":

> The problem put is, how shall the powers of government be divided up? The problem is neither one of law nor of formal logic, but of expediency. The functional approach examines, first, the existing functions of existing governmental bodies in order to discover what kind of work each has in the past done best, and assigns the new work to the body which experience has shown best fitted to perform work of that type. If there is no such body, a new one is created *ad hoc* [emphasis added].[266]

Willis' "functionalist" distribution of power amongst the institutions of government on the utilitarian lines of "expediency" is strongly endorsed by Arthurs, who maintains that the executive branch should be afforded substantial latitude in responding to social needs, and furthermore advocates that "concessions to context" rather than conformity with overarching legal principles should be the touchstone of state action.[267] The executive, in its pursuit of "creative" responses to pressing needs, should not be forced to

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[263] "Regulation-Making: The Creative Opportunities of the Inevitable" (1970) 8 Alta. L. Rev. 315 ("**Creative Opportunities**").
[264] Creative Opportunities at 315.
[265] Creative Opportunities at 315.
[266] Three Approaches to Administrative Law at 75; and see generally 75-81.
[267] Dicey Business at 29-33, 39-41, and *passim*. Arthurs defines "functionalism" as a position that is

conform to "legalist" interpretations of fundamental common law legal principles emanating from the courts,[268] or to clearly defined legislative choices regarding law and policy.[269]

The instrumentalist approach to governance advocated by Arthurs and Willis is perhaps best understood as being non-constitutional, rather than unconstitutional. Under a constitutionalist approach, the state is means of social ordering – it allows a plural group of citizens to coexist. Conflicts inevitably arise, and the results of those conflicts can direct state power to solve problems, but the purpose of the state itself is not to solve problems, but rather to facilitate the interaction of free individuals.[270] Under the instrumentalism of Arthurs and Willis, on the other hand, the state is viewed as a machine for solving problems, endlessly coping with the "emergencies" that the Donoughmore Committee saw as being temporary. Institutions are configured around achieving goals, and constitutional controls are out of place: "it is time to recognize that theory does not, cannot, and indeed should not accord with actual

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> prepared to allow the specific tasks at hand to shape the particular legal-administrative response, and to countenance the emergence of largely autonomous systems in various sectors of administrative activity (Dicey Business at 29).

[268] Dicey Business at 29-33 and *passim*.

[269] Professor Dyzenhaus suggests that Arthurs expresses a greater concern for constitutionalism than Willis: Lessons from Willis at 709-713. At one point in his critique of "legalist" (i.e. conservative common law) approaches to the administrative state, Arthurs briefly acknowledges that "clearer statements of legislative purpose" would be a desirable component of public law reform (Dicey Business at 44). This acknowledgment, however, is at odds with the dominant thrust of his "functionalist" agenda, with its prioritization of the "creative" expertise and judgment of executive officials. His suggestion in the above quoted passage that "parliament ought to confine itself (so far as possible) to the announcement of broad policy lines within which regulations may operate, and to the scrutiny of those regulations" [emphasis added], has the paradoxical effect of limiting and subordinating the source of all legislative power (i.e. the people). I should note that Arthurs' article on regulation-making (Creative Opportunities) pre-dates his article on judicial review (Dicey Business) by a decade.

[270] The notion that constitutionalism and instrumentalism present radically different conceptions of the role of the state (the one positing a framework for peaceful coexistence and decision-making; the other positing a problem-solving mechanism) is evident in the following passages in which T.R.S. Allan distinguishes Lon Fuller's theory of the rule of law from instrumentalism and from Joseph Raz's approach to the rule of law:

> . . . the purposes of the law are not, solely or even primarily, the attainment of governmental objectives, but rather the provision of a stable constitutional framework for interaction between citizens, as well as between citizen and state . . .
>
> . . . . .
>
> Raz overlooks the value that law serves quite independently of its utility to government: it provides the means for cooperation between citizens, enabling all to further their own interests within the constraints of justice (*Constitutional Justice* at 57-58).

See also Dyzenhaus, Lessons from Willis at 705-706.

practice." The Delegation Case Law and the purposivism of *CKOY* and *Katz* can be seen as operating in an instrumentalist orbit. As I discussed in Chapter 6, there is a dangerous confluence of the courts, the legislature, and the executive all working together to manage public policy initiatives. These authorities are inconsistent with the Tetralogy and the concept that the Canadian Constitution offers a principled and structured approach to the distribution of governmental power and the generation of law.

One final instrumentalist theorist worth noting is the American commentator Edward L. Rubin, who has written an influential article on legislation in the administrative state.[271] Rubin stresses the "sheer impossibility, given the vast size of the modern state and the highly technical nature of its operations," for legislatures to make precise law.[272] He rejects the view that legislatures are primarily law-makers as being "premodern."[273] A nondelegation rule is nothing but a "nostalgia for governmental relationships that we have long outgrown."[274] In place of such outdated concepts, Rubin advances an understanding of modern legislation not as a set of rules, standards, or concrete choices, but rather as "directives issued to implementation mechanisms."[275] Legislation is thus not "law" in any traditional sense of choices about rules and policies resolving conflict, but rather choices about "the mobilization of governmental power to achieve particular results."[276] To recall the visual descriptor I employed in Chapter 5 to describe the circle of democratic legitimization, Rubin accepts a thin authorization (indeed a naked authorization) as being a sufficient and legitimate exercise of legislative power. The same is true of both Arthurs and Willis.

Rubin's interest in legislation, reconfigured as "directives issued to implementation mechanisms," is notably not accompanied by an interest in democracy. Indeed, the whole notion of legislation as

[271] "Law and Legislation in the Administrative State" (1989) 89 Columbia L. Rev. 369 ("**Law and Legislation**")
[272] Law and Legislation at 395.
[273] Law and Legislation at 385-87, 391, 393, 395-96.
[274] Law and Legislation at 387.
[275] Law and Legislation at 389.
[276] Law and Legislation at 372.

"directives" oriented toward governmental instrumentalities seems to ignore citizens. Legislation must speak first and foremost to its authors and addressees. It is perhaps not surprising that Rubin elsewhere characterizes democracy itself as an essentially "premodern" concept,[277] and in his "directives" theory does not appear to welcome vigorous conflicts over public policy:

> Given the political forces that act upon a legislature, the legislature may be better able to control an administrative agency than to control itself. Efforts to draft detailed provisions may engender political battles that could otherwise be avoided.[278]

It is precisely the role of the collegial legislature in a democratic society to be the forum for "political battles." The creative essence of democracy, as virtually all of the theorists discussed in Chapter 5 such as Mouffe, Kelsen, Habermas, and Waldron affirm, comes from its provisional resolution of conflicts. Under Rubin's theory, many conflicts go to the executive branch to be resolved by experts. This is Arthur's "creative opportunities of the inevitable," and also Willis' perception that "Parliament is the heart, the Civil Service the head and hands, of our government."[279]

Rubin advances three values governing modern legislation: fairness, control, and effectiveness.[280] However, fairness, a primary democratic value, is given only a vague treatment in his analysis, and is subordinated to the instrumentalist value of effectiveness,[281] as is control:

> The final norm [governing legislation], in many ways the most important one, is that legislation should be effective, that it should achieve the purpose for which it was designed. This is the essential basis of a legislative theory for the modern state. Unlike traditional legal scholarship and legal doctrine, which are

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[277] See "Getting Past Democracy" (2001) 149 U. Pennsylvania L. Rev. 711 at 714.

[278] Law and Legislation at 394.

[279] *Parliamentary Powers* at 171.

[280] Law and Legislation at 408-410.

[281] Law and Legislation at 409:

> Legislation is the mechanism by which these positive norms of fairness are implemented; if we cannot legislate effectively, we shall fail to produce a regime that we regard as just.

It is instructive to note that Rubin's underdeveloped concept of fairness makes reference (albeit vaguely) to resolved conflicts, rather than conflicts to be resolved:

> In a modern, administrative state, the conception of fairness is that the government must take positive action to change social conditions in a variety of ways: to decrease inequality, protect the environment, alter the conditions of the marketplace, and manage the economy (Law and Legislation at 409).

A conflict-resolution approach to democracy would require placing all of these alleged aspects of fairness within the political decision-making process (i.e. the legislature), to be quantified by the citizens who are the authors and addressees of all state action.

> concerned with the constraints on legislation, this norm focuses on the task itself, the qualities of excellence in the design of modern statutes. Its significance is underscored by the extent to which it incorporates our other norms. Political control can be regarded as an aspect of effectiveness; the point of such control is not the symbolic assertion of superiority by legislators, but the purposive direction of implementation mechanisms so that the statutory goal will be fulfilled [emphasis added].[282]

In a vision of legislation that foregrounds "the purposive direction of implementation mechanisms," the focus is on the achievement of statutory goals by executive decision-makers, that is, by the legion of experts populating the modern bureaucracy. The role of the legislature as the site of public political dispute-resolution is obscured.

3. The Control Theory: Parliamentary Sovereignty, Positivism, and the Myth of Legislative Oversight

As noted above, instrumentalism is a non-constitutional approach. It operates outside of the constraints imposed by constitutionalism. The delegation of legislative power offers no difficulties from a purely instrumentalist point of view because this theory effectively reorganizes the priorities of governance away from a principled framework and towards the realization of pressing public policy goals. It is obvious that instrumentalism and the necessity thesis are closely linked.

The prospect of eschewing constitutionalism altogether, however, is not one that is palatable to many theorists, so instrumentalism is often linked in some fashion to a constitutional theory that can at least claim to offer a principled framework. The strategy of joining a basically instrumentalist approach with some kind of legitimating construct is particularly pressing in Canada, given that the Supreme Court has affirmed in such strong terms that "The Constitution of Canada is 'a comprehensive set of rules and principles' that provides 'an exhaustive legal framework for our system of government.'"[283]

[282] Law and Legislation at 409.
[283] *Senate Reference* at para. 23, quotations cited to the *Secession Reference* at para. 32.

The control theory is the approach most often invoked to provide a principled constitutional construct to justify legislative delegation. As discussed in Chapter 6, the control theory proceeds on the basis that a democratically elected legislature both initiates and at any time can rescind executive law-making activities. The legislature is thus the fount of power and the overseer of that power. Justice Duff captures both of these claims in the passage from *Gray* discussed previously:

> There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law.[284]

Professor Arthurs makes overtures toward the control theory in the passage cited above, but he notably (and ironically) does so even while subordinating the legislature:

> There ought to be the broadest possible mandate for regulation-making, and parliament ought to confine itself (so far as possible) to the announcement of broad policy lines within which regulations may operate, and to the scrutiny of those regulations [emphasis added].

There is maximal room here for executive recipients of power to make law as they see fit, with a subordinated but still supposedly supreme legislative holding the reins.

Neither plank of the control theory – foundational legislative command; continual legislative oversight – can pass muster under a pluralistic account of democracy stressing conflict resolution. The command proposition is fundamentally flawed in that the allegedly legitimating command is devoid of the informational content that can evince a resolved conflict by its authors or provide a basis for recognition to its addresses. The circle of democratic self-government is broken. Professor Rubin, however, integrates the control theory and instrumentalism in the following passage in which he insists that a potentially content-less command, or "directive," can fulfill the constitutional task of the legislature:

[284] *Gray* at 170.

> When the legislature directs an agency to implement a program of some sort, the legislature is exercising its power, not giving that power away. The "legislative power" does not consist of a monopoly on the enactment of a certain set of preexisting rules. Rather, it is the power to issue directives that allocate resources among citizens and government agencies, form public and private organizations, and authorize regulatory action by administrative agencies. When the legislature takes such actions, when it creates an agency, allocates resources to it, or authorizes it to act, the legislature is simply carrying out its basic task: it is exercising the legislative power it possesses.[285]

When legislation is stripped of its legitimating information, and reduced to a thin line of authorization to subordinate instrumentalities, there is no genuine democratic control at work, only machinery of government. The alleged constitutionality of the originating command is illusory.

While I submit that my discussion of the institutional corollaries of the conflict theory of democracy in Chapter 5 effectively answers the command plank of the control theory, revealing it unable to hold the weight that is placed on it, I do consider under separate headings below two relevant subjects that are worth elucidating further: parliamentary sovereignty and positivism. I then conclude this section with a consideration of the oversight plank of the control theory.

a. Parliamentary Sovereignty

Professor Hogg usefully summarizes the parliamentary sovereignty version of the control theory:

> It was settled in England in the seventeenth century that the King had no power to make new laws. Only the elected Parliament had the power to make new laws. But Parliament, as a sovereign body, could enact any law that it chose, and therefore it could enact a law delegating law-making power to the King or to his ministers or to any other official or body.[286]

Parliamentary sovereignty, Sir William Wade observes in his influential essay on the subject, commands "judicial obedience to statutes" and "is one of the fundamental rules upon which the legal system depends."[287] The legislature is the supreme democratic law-making body, and thus a decision to delegate law-making power to a subordinate is authoritative and unimpeachable. Yet as I discussed in Chapter 3,

[285] Law and Legislation at 389, and see also 391-94, and 408-409 for Rubin's discussion of the control function of the legislature.
[286] *Constitutional Law* at 396.
[287] Legal Sovereignty at 187-88.

parliamentary sovereignty is ultimately an unwritten rule, and thus it must be subject to the same qualifications and strictures placed on other unwritten rules. This must be the case in Canada, where the process of reasoning from constitutional essentials is enshrined in the Tetralogy, and where decisions such as *OPSEU*, the *Judges Reference*, and *MacMillan Bloedel* have already qualified parliamentary sovereignty through the application of other pressing unwritten rules. The same qualifications should also apply in other common law jurisdictions such as the U.K., as I note below.

Parliamentary sovereignty is one of three closely related unwritten rules derived from the principle of democracy. First, a democratic system of popular decision-making requires a decision that flows from a process of free and informed political debate. Second, a democratic system of popular decision-making requires a decision that contains substance. Third, a democratic system of popular decision-making requires a decision that is authoritative. Parliamentary sovereignty, the third rule, depends for its cogency on the other two, both of which I discussed in detailed theoretical terms in the final section of Chapter 5.

Parliamentary sovereignty makes no sense without the fundamental political freedoms that nourish democracy (rule #1). Without these political freedoms, nothing that the legislature does has any warrant. The centrality of this rule accounts for its deep history in Canadian constitutional jurisprudence, leading back to the "implied bill of rights" cases and through to *OPSEU* and the *Judges Reference*. Most of the content of this rule is now covered by enacted constitutional text, through section 2 of the *Charter*, but Vincent Kazmierski has made a compelling argument for extending the reach of the unwritten rule protecting fundamental political freedoms beyond the express ambit of the *Charter*.[288] The primacy of

[288] See Draconian but not Despotic at 282-85, arguing on the basis of the "implied bill of rights" logic that the democratic principle should give constitutional protection to access for information beyond whatever protection may be found in the text of the *Charter*. Kazmierski's very insightful discussion supports most of the claims that I make in this paragraph regarding the political freedoms rule and its relationship to the rule of parliamentary

the fundamental freedoms rule, which limits parliamentary sovereignty, has also been stressed by influential British commentators such as Sir John Laws and T.R.S. Allan, who, as I noted in Chapter 3, have argued that the rule must apply even in U.K., where parliamentary sovereignty has rarely been formally questioned by the courts. Laws states the point with great clarity in the following passage:

> Ultimate sovereignty rests, in every civilised constitution, not with those who wield governmental power, but in the conditions under which they are permitted to do so. The constitution, not the Parliament, is in this sense sovereign. In Britain these conditions should now be recognised as consisting in a framework of fundamental principles which include the imperative of democracy itself and those other rights, prime among them freedom of thought and expression, which cannot be denied save by a plea of guilty to totalitarianism [emphasis added].[289]

A nondelegation rule (rule #2) requires that a legislative decision contains substance, that is, information sufficient for it to be recognized by its authors when it returns to impinge on their rights or otherwise coerce or affect them. This rule, like the fundamental political freedoms rule, is a constituting condition for parliamentary sovereignty. To adopt Laws' language, the rule against delegation is also one of "the conditions under which [legislators] are permitted to do so." Only when a legislative decision flows from a process of free and informed political debate (rule #1), and contains substance (rule #2), is it authoritative (rule #3).

b. Positivism and the Chain of Norms

Pursuant to a nondelegation rule, grounded in the institutional logic of democracy, legislation is authoritative by virtue of it having content. This statement, however, does not violate the fundamental requirements of legal positivism, stated by Kelsen, that the "validity of a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value."[290] A nondelegation rule does not mandate any particular content in legislation, only content in general. The legislature, through the "dynamic" norm-producing political process, is free to will any political or moral content that

sovereignty, and furthermore, does so in the context of unwritten principles and constitutional structure: see Draconian but not Despotic at 258-69, 276-77, 282, and *passim*.

[289] Law and Democracy at 92; see also Allan, *Constitutional Justice* at 41, and 201-42.

[290] *General Theory* at 113.

it wishes into a given statute (subject of course to entrenched requirements), but it must will content sufficient to resolve the underlying conflict. This requirement for content flows from the "static" structural demands of the entire constitutional system, demands that enable and facilitate the dynamic political process itself. A thin, naked authorization of power – one of Professor Rubin's "directives issued to implementation mechanisms" – is not sufficient.

While I maintain that legal positivism needs to be understood as operating within the architectural requirements of a constitutional democracy rather than dictating those requirements, it would appear that positivism has actually been influential in justifying and facilitating delegations of legislative power. David Dyzenhaus,[291] John McCormick,[292] and Roderick Macdonald[293] have all observed that positivist legal theory bolsters the institutional reconfigurations of the administrative state.[294] A judge trained to accept a positivist understanding of law is well-placed to rule delegations of legislative authority fully constitutional.

The strongest judicial statement of the nexus between legal positivism and the delegation of legislative power in Canadian constitutional law is the passage from Chief Justice Duff's judgment in the *Chemicals Reference* quoted in my discussion of that decision:

> It is possible that in what has been said above it has not been sufficiently emphasized that every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from the *War Measures Act*, or some other Act of Parliament. All such instruments "derive their validity from the statute which creates the power, and not from the executive body by which they are made."

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[291] Legitimacy of Legality at 141-44; and see "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 South African J. Human Rights 11 at note 63 and surrounding text. Dyzenhaus' comments are directed to the positivist theories of Kelsen and Hart.

[292] Crises of the State at 304, 311. McCormick's comments are directed to Kelsen's theories. See also J. Walter Jones, who observes that Kelsen's hierarchical theory of norms

> seems to have been designed to appeal to administrative lawyers. Statute ceases to be the normal type of law, for in the case of both statutes and *actes administratifs* law is applied as well as made (*Historical Introduction to the Theory of Law* (Oxford: Clarendon Press, 1956) at 229-230 ("***Theory of Law***")).

[293] Regulation by Regulations at 117-20, 145-46. Macdonald discusses positivism generally.

[294] See also Rubin's discussion of the positivist elements of Max Weber's legal theory: Law and Legislation at 377-78.

As discussed in Chapter 3, legal positivism privileges the public "sources" of law as definitive evidence of legal authority:

> The sources of a law are those facts by virtue of which it is valid and which identify its content.[295]
>
> A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only.[296]

Chief Justice Duff outlines a positivist pedigree for delegated legislation rooted in the public "fact" of a statutory enabling clause.[297] This power-conferring chain of "valid" law is given its supreme theoretical expression in Kelsen's "dynamic" system of positive norms," and fits like a glove over the alleged necessity of executive law-making in a complex interventionist state. As Macdonald observes, the "delegation of discretions is no more than the response of necessity to legal form."[298] In Kelsen's theory, a hierarchical chain connects the highest "basic norm" to constitutional law, constitutional law to the general norms of statutory law and customary law, and finally the general norms of statutory and customary law to individual norms as applied by courts and administrators.[299] In this system, administrators can be authorized by statute to create general norms, and these norms can be individualized by the courts or by other administrators.[300] Peter Caldwell provides the following useful description of Kelsen's hierarchical system:

> The doctrine, borrowed from his colleague Adolf Merkl, conceived of the legal system as a hierarchical set of stages of authority. Each level derived the authority to issue norms from a higher level; and each level was capable of issuing norms that would enable a lower level to exercise authority. The new doctrine (termed the *Stufenbaulehre*) allowed Kelsen to examine how a normative system "produced" itself, or regulated its own development. The theory provided the legal scholar with a way of "recognizing" lower-level legal norms as part of a more general legal system. A given norm was to be judged legal only if it was in accord with all higher-level legal norms, up to and including what Kelsen termed the "originary norm" (*Ursprungsnorm*) of the entire legal system. A city ordinance, for example, was legally valid only if it was issued pursuant to an enabling statute from a higher authority such as the state.[301]

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[295] Raz, Sources of Law at 47.
[296] Kelsen, *General Theory* at 113.
[297] As I noted in Chapter 3, Jules Coleman suggests that "pedigree" provides a "noncontentful criterion of legality" (Positive Positivism at 140).
[298] Regulation by Regulations at 119. Macdonald also observes that "from a theoretical perspective, the concept of jurisdiction is the means for subsuming public administration into legalism" (Regulation by Regulations at 119).
[299] *General Theory* at 115-16, 123-131.
[300] *General Theory* at 130-31.
[301] *Popular Sovereignty and the Crisis of German Constitutional Law* (Durham: Duke UP, 1997) at 91.

The final example of a city ordinance reveals the position of delegated legislation in the chain of norms. Lower forms of law-making become "legally valid" by virtue of higher order norms in an enabling statute. As Chief Justice Duff puts it,

> All such instruments "derive their validity from the statute which creates the power, and not from the executive body by which they are made."

This convenient legal theory – convenient in that it enables the administrative state – breaks down when it is placed in the context of a pluralist conflict-resolution understanding of democracy, such as the one that Kelsen himself advances in the works discussed in Chapter 5. These works appear to exist in a separate compartment than his hierarchical chain of norms, although it is a relatively simple matter to render his two theories complimentary: a nondelegation norm can be inserted into the constitutional law of a democratic system. Kelsen himself briefly hints at the appropriateness of such a qualifying norm:

> The distinction between statutes and regulations (ordinances) is evidently of legal importance only when the creation of general norms is, in principle, reserved to a special legislative organ which is not identical with the chief of State or the cabinet ministers. The distinction is especially significant where there is a popularly elected parliament and the legislative power is in principle separated from the judicial and the executive powers. Disregarding customary law, general legal norms then must have a special legal form: they are to be the contents of parliamentary decisions, these decisions sometimes need the consent of the chief of State and require sometimes publication in an official journal to have legal force. These requirements constitute the form of a law [emphasis added].[302]

Kelsen does not develop these brief comments, and thus it would be a stretch to suggest that he is calling for a nondelegation rule here. Nevertheless, there does appear to be an acknowledgement that democratic decision-making places some strictures on the reproduction of law in the chain of norms. Needless to say, the insertion of such a limiting constitutional norm into a positivist hierarchy would limit the latter's utility for the administrative state.

[302] *General Theory* at 131.

c. Legislative Oversight

While the concept of legislative oversight is often mentioned by advocates of delegated legislation as a legitimating mechanism, it is difficult to find either an enthusiastic endorsement or a demonstration of efficacy. Consider the role of oversight in the following passage by Jeffrey Goldsworthy:

> Nor do we regard as undemocratic the delegation of extensive law-making power to unelected officials, provided that elected officials retain the power to override them. Much modern law-making consists of regulations made by executive governments, which elected legislatures can scrutinize before they come into operation, and disallow if they see fit. Even if it were the case that legislatures seldom disallow such regulations, that would not in itself demonstrate a diminution of democracy.[303]

The language and tone here is significantly defensive – this is an apology. Goldsworthy is relying on oversight not to trumpet a practice, but rather to salvage it as being not "undemocratic." This defensive stance may to some extent be symptomatic of any appraisal of the democratic credentials of the delegation of legislative power in the administrative state. Instead of celebrating a fulfillment of popular sovereignty, the best that one can say is that a thin line of democratic authorization remains intact.

Legislative oversight is the second plank of the control theory, and it provides very unsteady support, both theoretically and practically. I comment below on both the formal and informal modes of oversight that are characteristic of parliamentary regimes.

i. Formal oversight

At the end of Chapter 5, I observed that several Canadian jurisdictions have legislative oversight committees in force whose mandate is to review delegated legislation. I also noted that the guidelines governing some of these committees contain a political version of a nondelegation rule. I reproduce the relevant guideline governing the Ontario Standing Committee on Regulations and Private Bills here for convenience:

> Regulations should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.

[303] "Judicial Review, Legislative Override, and Democracy" (2003) 38 Wake Forest L. Rev. 451 at 458-459. This article, I should observe, is not dedicated to the issue of oversight. Professor Goldsworthy's comments are made in passing.

Legislative oversight committees emerged in the U.K. following recommendations of the Donoughmore Committee, and were later instituted in various Canadian jurisdictions following the reports of similar bodies investigating administrative law issues in the 1960s such as the Parliamentary Special Committee on Statutory Instruments and the Ontario Royal Commission Inquiry into Civil Rights.[304] Under Ontario, Manitoba, and Federal legislation, all regulations stand permanently referred to special oversight committees for examination, and under the Ontario and Federal statutes, the committees make period reports to the legislature.[305] There is little evidence, however, that these committees provide any meaningful review of legislation to control the delegation of law and policy-making responsibilities to the executive. Indeed, the case law and legislation discussed in Chapter 6 reveals that effective oversight is non-existent, and commentators have in fact complained about the weakness of committee scrutiny for decades. In 1982, J.R. Mallory wrote in favour of more effective oversight in Canada, observing that "many regulations are made to give effect to policies not embodied in any statute and which Parliament has never considered or even had the opportunity to consider."[306] John Keyes, in the current leading text on the practice of executive legislation in Canada, suggests that the available mechanisms of review are inadequate and unimpressive.[307]

Committee oversight in Ontario is directed to "the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the

[304] The struggle to secure legislative oversight in Canada is discussed in some detail by J.R. Mallory in Curtailing Divine Right, *passim*. See also Macdonald, Regulation by Regulations at 92-97.
[305] *Legislation Act*, 2006, S.O. 2006, c. 21, Sched. F, s. 33 ("***Legislation Act***"); *Statutes and Regulations Act*, C.C.S.M. c. S207, s. 22; *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 19 ("***Statutory Instruments Act***").
[306] Curtailing Divine Right at 142. See also 137-42 for Mallory's criticisms of existing oversight practices.
[307] *Executive Legislation* at 501-525, and see especially 501-502, 509, 511-513, and 518-519. The prevailing practice of legislative scrutiny by committee in the U.K. has also been characterized as being "woefully inadequate": "Shifting the Balance: Select Committees and the Executive" (London, 2000), Liaison Committee of the U.K. House of Commons at 24. For other criticisms of the U.K. oversight process, see Pünder, Comparative View at 365-66, 368-369; T. Bates, "Parliament, Policy and Delegated Power" (1986) Statute L. Rev. 114 at 117-118 ("**Delegated Power**"); and Craig, *Administrative Law* at 724-27.

regulations or enabling Acts,"[308] thereby curtailing the supposed corrective offered by the control theory. How can *ex post* review preserve democracy if the review is unable to address the substance of the decisions made pursuant to enabling acts? It is also instructive to note that the Federal *Statutory Instruments Act* places fairly draconian limitations on any oversight debate. In the (relatively rare) event that the oversight committee recommends that a regulation be revoked, and in the (likewise uncommon) event that this recommendation leads to debate on the floor of the Senate or House of Commons, the following provision applies:

> The motion shall be debated without interruption for not more than one hour, during which time no Senator or member may speak for more than ten minutes. On the conclusion of the debate or at the expiration of the hour, the Speaker shall immediately, without amendment or further debate, put every question necessary for the disposal of the motion.[309]

It is difficult to square this totally unreasonable restriction with any kind of meaningful control theory.[310] Debate is the only feature of the oversight process that could possibly approximate a democratic decision-making process.

But weaknesses in the practice of oversight are mirrored by even greater weaknesses in theory. The *ex post* review of executive law-making is an all-or-nothing affair: the legislature can either accept or reject, through a resolution, what has been done elsewhere.[311] This is not a process conducive to working out conflicts and disagreement about social policy initiatives. It is at best a debate and a vote. Thus the central task of the legislature is not performed. This point is underlined by Jeremy Waldron's statement, quoted in Chapter 5, that

> Legislating is not the same as passing a <u>resolution</u> or issuing of a decree; it is a formally defined act consisting of a <u>laborious process</u> [emphasis added].[312]

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[308] *Legislation Act*, s. 33(3).
[309] *Statutory Instruments Act*, s. 19.1(7)
[310] On the unreasonable restriction of debate in the U.K. oversight process, see Bates, Delegated Power at 118.
[311] On this point, see Hermann Pünder, who observes, regarding British legislative oversight practices, that parliamentary control of delegated legislation is severely restricted as executive norms can normally only be approved or disapproved in their entirety and without amendment (Comparative View at 368).
[312] Waldron, Legislation at 107.

Under legislative oversight, and indeed, under the control theory generally, the primary features of Waldron's "legislative due process" are largely absent.[313] It is the intense scrutiny of proposed measures within the complex context of legislative processes that focuses public attention and opinions on contested matters of policy. Neither an authorization to send a contested matter elsewhere, nor a virtual plebiscite on the resulting surrogate decisions, constitutes the "laborious process" of legislating. Formal mechanisms of legislative oversight are a canard.

ii. Informal oversight

I observed in Part A that the Canadian Constitution contains unwritten political rules as well as unwritten legal rules. The former are not inherent to the structure of a democratic constitution, but rather are political practices that have been regularized and enshrined through the development of the parliamentary system of government in the United Kingdom and Canada. The most important cluster of these political rules involves the practice of responsible government,[314] which Professor Hogg explains requires that the senior members of the executive, both individually and collectively, "must have the confidence of the legislative assembly in order to continue in office."[315]

Responsible government was instituted in early 19th century Britain as part of a general movement of democratic reform, which saw changes in suffrage, the restructuring of electoral districts, and an increase in the control of parliament over the senior members of the executive, known as the "Cabinet."[316] It is worth backing up momentarily. The constitutional crises in England during the 17th century, culminating

[313] Legislation at 107.
[314] The Supreme Court of Canada identifies responsible government as a "constitutional convention" of "fundamental" importance in *OPSEU* (at para. 85).
[315] Hogg, *Constitutional Law* at 268. See also George Burton Adams, *Constitutional History of England* (New York: Henry Holt, 1951) [first published 1921; revised by Robert L. Schuyler 1934] at 446-47 ("***Constitutional History of England***").
[316] Adams, *Constitutional History of England*, see Chapter XVIII ("The Age of Reform"); F.C. Montague, *Elements of English Constitutional History from the Earliest Times* (London: Longmans, 1938) [first published 1901] at 195, 203-18.

in the Glorious Revolution of 1688-1689, definitively subordinated the King to Parliament, and established a hierarchical legal relationship between legislative and executive branches.[317] This achievement remains the bedrock rule of law legal principle in the U.K., the U.S., and Canada.[318] Under the Cabinet system of the 18th century, however, while the legal relationship of the legislature and the executive was clearly defined (a hierarchy), the political relationship remained fluid, and was subject to the extensive corruption and patronage.[319] Responsible government, which was outlined in the writings of theorists such as James Mill, Lord John Russell, Earl Grey, and John Stuart Mill in the first half of the 19th century, gradually emerged as a mechanism to give the legislature greater political control over the executive.[320] The new mechanism clarified the political relationship of the legislature and the executive, effectively instituting a secondary hierarchy, which now existed alongside the legal control exerted by the primacy of legislation (i.e. the rule of law). The Cabinet, and the individual ministers of the Crown, were "responsible" to Parliament in the sense that their hold on the actual reins of government depended on support from a majority of legislators. It follows that there is an informal system of oversight over delegated legislation manifest through the mechanism of responsible government. Legislative power is delegated to executive bodies under the supervision of ministers, and those ministers must answer to the legislature for their actions.

The system of informal oversight, however, is fundamentally flawed, both in theory and in practice. On the theoretical level, the same all-or-nothing problem arises encountered with formal review. The

[317] Adams, *Constitutional History of England* at 357-359; Vile, *Constitutionalism* at 58-59; and Verkuil, Rule of Law at 305, 308.
[318] Allan, *Constitutional Justice* at 56; Vile, *Constitutionalism* at 58-59, 69, 252; Verkuil, Rule of Law at 305, 308; *Secession Reference* at paras. 70-71; and *Judges Reference* at para. 139.
[319] On the fluidity of the political relationship and the problem of corruption, see Vile, *Constitutionalism* at 118-19; and Edward Jenks, *Parliamentary England: The Evolution of the Cabinet System* (New York: Putnam's, 1903) at 150-53, and more generally 120-323.
[320] See Vile's treatment of these theorists in *Constitutionalism* at 238-253. Lord Russel and Earl Grey were both instrumental in the passage of the "Great Reform Act" of 1832 (*Representation of the People Act 1832*, 1832, 2 & 3 Will. IV, c. 45), which event is considered to be a crucial milestone in the development of the system of responsible government: Adams, *Constitutional History of England* at 434-447.

legislature can either express confidence or lack of confidence in a minister. There is no deliberation on the details of law-making here: Waldron's "legislative due process" is again entirely absent. Genevieve Cartier stresses that it is the democratic processes behind the enactment of legislation, and not the elected nature of ministers that provides the legitimacy for legislative activities:

> one may question the assumption that being elected is in itself sufficient to conclude that the decisions taken have already benefited from citizen input. We usually consider that the legislative process is democratic because all the persons democratically elected sit in Parliament and are allowed and required to deliberate and to vote on proposed legislation. What we have in mind when we consider the democratic nature of that process is not solely the fact that members of Parliament are elected, but the fact that all members of Parliament can deliberate publicly. When decisions of a highly discretionary nature are taken by government ministers who, although elected through democratic processes, do not act in a 'democratic way,' these criteria are not met. Democracy requires not only that individuals be elected but also that processes respect democratic values.[321]

On a practical level, Cartier observes that the processes of ministerial accountability are relatively ineffective in contemporary parliamentary practice,[322] and David Mullan also comments on "the frailties, indeed fiction, of such concepts of collective and ministerial responsibility as sufficient disciplines on the exercise of executive power."[323] M.J.C. Vile maintains (regarding the practice of parliamentary government in the U.K.) that ministerial responsibility and collective cabinet responsibility have become "constitutional myths."[324]

In his extremely nuanced treatment of the relationship between British parliamentary government and the separation of powers – a mechanism of political control is superimposed onto a legal hierarchy – Vile identifies ministerial and cabinet responsibility as <u>essential</u> to the coherence of a system of extreme fragility and "delicacy."[325] With the demise of these protective mechanisms, he observes that the present-

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[321] Procedural Fairness at 242-43.

[322] Procedural Fairness at 243.

[323] Evolving Concepts of Responsibility at 158. Mullan also observes that

> the stark reality is that Canadian governments do not fall and Ministers seldom resign because of the mistakes that they make and the abuses they commit in the exercise of statutory authority. Moreover, what is true in relation to decisions actually made by Cabinet or individual ministers is far more so in the case of actions by subordinates within departments (Evolving Concepts of Responsibility at 158).

[324] *Constitutionalism* at 395.

[325] *Constitutionalism* at 234, 245-46, 251-52, 254, and see more generally, 233-62.

day "system of 'government by party' . . . can no longer be described, by any stretch of the imagination, as 'parliamentary government.'"[326] The reality of contemporary parliamentary government has become "the predominance of the cabinet over the Commons, or indeed of the Prime Minister over both":

> The close links which have been forged between the government and majority in Parliament seemed to destroy all idea of balance between cabinet and legislature, and even to throw doubt upon the possibility of a general control of government business. The assumption underlying the system of parliamentary government has been destroyed, and the reality of ministerial responsibility was therefore thrown in doubt. Once this essential principle was questioned the whole edifice began to show cracks.[327]

Professor Dyzenhaus trenchantly observes an inversion of the notion of responsible government such that "legislative supremacy" has been replaced by "executive supremacy."[328] Under the theory of "legislative supremacy," Dyzenhaus observes, "the legitimacy of law comes from the fact that its content is hammered out on the anvil of public opinion, with the hammers wielded by the people's representatives to whom government is accountable."[329] Yet in modern parliamentary systems,

> instead what we have is the growth of governmental power, so that law becomes the vehicle by which the government delegates back to itself the power to make policy for which it will be accountable only at the next election. Rather than legislative supremacy, we have executive supremacy.[330]

It becomes close to meaningless to talk of legislative oversight over delegated legislation, or indeed, to talk of a control theory at all, in a system of "executive supremacy."

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[326] *Constitutionalism* at 251, 254, and 395. Vile observes that in the 19th century, for a brief time, a genuine balance between legislature and government was possible under the parliamentary system: *Constitutionalism* at 393.

[327] Vile, *Constitutionalism* at 251, 255.

[328] David Dyzenhaus, "Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security" (2003) 28 Austl. J. Leg. Phil. 1 at 21 ("**Humpty Dumpty Rules**").

[329] Humpty Dumpty Rules at 21.

[330] Humpty Dumpty Rules at 21. For other discussions of the dangerous centralization of power in the modern executive, in both Canada and the U.K., see Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: U of Toronto P, 1999); Donald J. Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: U of Toronto P, 2008); and Jeffrey Simpson, *The Friendly Dictatorship* (Toronto: McClelland & Stewart, 2001).

4. The Compensation Theory: Democratizing the Executive

Instrumentalism proceeds on the basis that the institutional requirements of a democratic constitution are of secondary importance to the primary goal of achieving public policy initiatives. The control theory proceeds on the basis that the delegation of legislative power is a fully constitutional practice, both because of the (thin) line of authorization extending from the legislature to the executive, and because of the legislature's (alleged) ability to supervise executive activities. The compensation theory, by contrast, proceeds by acknowledging the serious danger that executive law-making poses to democracy and constitutionalism. What the compensation theory offers to offset this danger is a reconfiguration of executive legislative activities to accommodate democratic values, largely by affording greater opportunities for citizen involvement.

In this section, I consider the fundamental barrier to the compensatory approach: institutional structure. The executive cannot house the collegial decision-making processes that are definitional to democratic law-making. I should stress that the following analysis is directed only against proposals to democratize the executive in the area of legislative activities. Democratizing the executive as far as adjudicative and administrative decision-making is concerned – that is, decisions by boards, tribunals, and other officials applying the law – strikes me as a wholly desirable enterprise.[331]

[331] Various theorists have advanced compelling arguments in favour of increasing participation by citizens in executive adjudicative and administrative decisions, and further, have argued that such changes are mandatory in order to fulfill the requirements of both democracy and the rule of law. Professor Dyzenhaus argues that a greater transparency and openness in this form of executive decision-making is needed to complete the circle of legitimate law-making, for when the law addresses its authors, it must do so guided by the "fundamental values" of the rule of law, especially fairness and transparency: Fundamental Values at 453, 491-93, and 501-502. See also Dyzenhaus and Fox-Decent, Rethinking the Distinction at 224-28, 238-41, and *passim*. Professor Allan expressly aligns the mechanisms of procedural fairness (in executive decision-making) with democratic participation:

> the fairness of legal procedures, providing full opportunity for each party to present his case, provides moral grounds for accepting the outcome, just as the possibility of political action, protected by basic civil and political rights, affords grounds for obedience to duly enacted law (*Constitutional Justice* at 79, and see generally 36-37, 77-87, and 133-48).

Habermas provides a useful point of departure for a consideration of the compensation theory. On the one hand, as noted in my Introduction, Habermas is a strong proponent of the welfare state project of "socially containing capitalism" through the intelligent application of "political and administrative power" [emphasis added].[332] On the other hand, he has also been an outspoken critic of the excesses of "administrative power," emphasizing in particular a stultifying paternalism that has undermined individual autonomy, and a proliferation of mechanisms of government surveillance and control.[333] These trends

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Eoin Carolan has also stressed the importance of mechanisms of procedural fairness and citizen participation to secure the "process values" that he associates with the rule and law and democracy: *The New Separation of Powers: A Theory for the Modern State* (New York: Oxford UP, 2009) at 130-34, 171-75, 226-28, and 234-37 ("***New Separation of Powers***"). All of these theorists argue that one important mechanism for enhancing democratic and rule of law values in executive decision-making is the requirement that all decisions be accompanied by written reasons. Reasons force decision-makers to demonstrate that the legitimate interests of citizens have played a meaningful role in the decision-making process. As Allan observes:

> giving reasons expresses respect for those affected by an adverse decision, just as the failure to do so may express contempt where it evinces disregard for a person's opinion of the justice of his treatment (*Constitutional Justice* at 79).

With the exception of Carolan, however, the above theorists focus on the area of administrative and adjudicatory decision-making (Carolan expressly extends his "process values" approach to executive legislative activities: *New Separation of Powers* at 116-18). In my view, as discussed below, the project of democratizing the executive cannot compensate for the constitutional infirmities of delegated legislative activities, and thus this project should remain primarily directed to the area of adjudication and administration. It is worth noting that Allan appears to subscribe to some form of a nondelegation doctrine. Although he does not expressly use this terminology, his discussion of the enabling and the controlling of executive action through general rules leads in a nondelegation direction:

> The requirement that executive powers must be clearly authorized by a prior general rule, enacted by the legislature, is an essential safeguard against their abuse" [emphasis added] (*Constitutional Justice* at 48, and see also 36-40, 47-49, and 56-57).

[332] New Obscurity at 13.

[333] For Habermas, the legal core of the welfare state project is a "freedom-guaranteeing juridification" that transfers rights from the private sector to the public sector (Law as Institution at 208-210). These transfers are necessary so that all citizens have a minimum level of material needs met in order to meaningfully participate in the political arena and exercise their freedom and autonomy (*Between Facts and Norms* at 403, and see generally 392-409). But the theoretical basis of the welfare state project has been undermined by the growth of overly paternalistic relationships between the state and its "clients" – dependency relationships (particularly typified by potentially enervating financial benefits to compensate for a range of perceived inequalities) that have undermined the "freedom-guaranteeing" goal of securing greater autonomy for those citizens who were left behind by industrial capitalism (*Between Facts and Norms* at 390, 397-98, 407-409). He characterizes this problem even more forcefully by noting that in some respects the modern welfare state functions as a debilitating "therapeutocracy," that is, as a kind of massive hospital ministering to its citizen/patients:

> To the degree that the welfare state goes beyond the pacification of class conflict arising in the immediate sphere of production and spreads a network of cliental relationships over the spheres of private life spheres, the more strongly appear the anticipated pathological side-effects of a juridification, simultaneously signifying a bureaucratization and a monetarization of core areas of the lifeworld. The *dilemmatic structure of this type of juridification* consists in the fact that, while the welfare state

have led him to conclude that the "development of the social state has arrived at an impasse," that its "utopian energies" have been "exhausted," and that the entire project of "socially containing capitalism" must now itself be "socially contained."[334]

The complexity of Habermas' view of the welfare state is directly mirrored by the complexity of his view of the institutional configurations of democratic constitutionalism. As I have noted previously, he recognizes the legitimacy of both the separation of powers and a nondelegation limitation on executive law-making:

> the institutional differentiation displayed in the separate branches of government has the purpose of binding the use of administrative power to democratically enacted law in such a way that administrative power regenerates itself solely from the communicative power that citizens engender in common. . . . The *priority of laws* legitimated in democratic procedures has the cognitive meaning that the administration does not have its own access to the normative premises underlying its decisions. In practical terms, this means that administrative power may not be used to intervene in, or substitute for, processes of legislation and adjudication.
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> . . . . .
>
> Political legislators alone enjoy unlimited access to normative, pragmatic, and empirical reasons, including those constituted through the results of fair compromises, though they have this access only within the framework of a democratic procedure designed for the justification of norms. . . . the administration is not permitted to deal with normative reasons in either a constructive or reconstructive manner [italics in original; underlining added].[335]

Yet despite these very eloquent appraisals of the structural force of what he refers to as the "principles of the constitutional state,"[336] Habermas ultimately bows to the necessity thesis, acknowledging that "the

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> guarantees are intended to serve the goal of social integration, they nevertheless promote the disintegration of life relations [emphasis in original] (Law as Institution at 211).

As far as the issue of surveillance and control is concerned, Habermas notes that with the interventionist state, a "tighter net" of "governmental and supporting bureaucracies has been drawn over the everyday existence" of citizens, leading to a "regulated, analyzed, controlled, and watched-over life-world" that has compromised the utopian goal of the "establishment of forms of life which are structured according to egalitarian standards and which at the same time open up arenas for individual self-fulfillment and spontaneity" (New Obscurity at 9).

[334] New Obscurity at 2, 10, 13-14, and *passim*.

[335] *Between Facts and Norms* at 173,74, 192.

[336] See generally, *Between Facts and Norms* at 168-193.

implementation of programmatic goals requires the administration to perform organizational tasks that at least implicitly require a further development of law."[337]

The solution to the institutional problem, and thus at least part of the solution to the dilemma of the modern administrative state, he maintains, is to introduce democratic procedures directly into the echelons of executive decision-making:

> procedural law must be enlisted to build a legitimation filter into the decisional processes of an administration still oriented as much as ever toward efficiency. . . . Insofar as the administration cannot refrain from appealing to normative reasons when it implements open legal programs, it should be able to carry out these steps of administrative lawmaking in forms of communication and according to procedures that satisfy the conditions of constitutional legitimacy. This implies a "democratization" of the administration that, going beyond special obligations to provide information, would supplement parliamentary and judicial controls on administration from within. But whether the participation of clients, the use of ombudspersons, quasi-judicial procedures, hearings, and the like, are appropriate for such a democratization, or whether other arrangements must be found for a domain so prone to interference and dependent on efficiency, is, as always with such innovations, a question of the interplay of institutional imagination and cautious experimentation. Of course, participatory administrative practices must not be considered simply as surrogates for legal protection but as procedures that are *ex ante* effective in legitimating decisions that, from a normative point of view, substitute for acts of legislation or adjudication.[338]

The claim that such vaguely defined mechanisms as the "participation of clients, the use of ombudspersons, quasi-judicial procedures, hearings, and the like" can meaningfully build a "legitimation filter" into executive legislative decision-making processes is frankly unsatisfying. Habermas fails to provide any detail as to how the administrative apparatuses of the state, with their hierarchical structure, can accommodate the collegial processes of democratic, politically accountable legislative bodies.[339] Legislatures are designed to house what he so memorably refers to as "anarchic, unfettered communicative freedom" of the "democratic procedure." In the absence of a clear program as to how this procedure is to be resituated in the hierarchical institutional context of the executive, this part of his reconstructive project cannot proceed. We are left with the inescapable normativity of his earlier point:

[337] *Between Facts and Norms* at 190, 193.
[338] *Between Facts and Norms* at 440-41.
[339] His discussion of this matter in *Between Facts and Norms* is remarkably brief – it covers only one page (one half of which is reproduced in the above quotation): see 440-41.

"administrative power regenerates itself solely from the communicative power that citizens engender in common."

Habermas' (inadequate) proposal for a compensatory "democratization" of executive law-making processes has analogues in the U.S. and Canada. Thomas Sargentich has isolated a "democratic process" model in U.S. administrative law that seeks to turn executive decision-making bodies into "surrogate legislatures,"[340] and Richard Stewart has discussed the U.S. practice of "interest representation," which proceeds on the premise that

> if agencies were to function as a forum for all interests affected by agency decisionmaking, bargaining leading to compromises generally acceptable to all might result, thus replicating the process of legislation. Agency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation and therefore the fact that statutes cannot control agency discretion would become largely irrelevant [emphasis added].[341]

The "surrogate legislatures" phrase nicely captures the core of the compensation theory. But it is ultimately a false "surrogate," for legislatures represent the entire society. The language employed by Stewart is telling, for the phrase "all affected interests" is commonly used in the context of administrative (as opposed to legislative) decision-making. An administrative decision-maker can, in theory at any rate, aspire to hear from "all" interests, because the decision is demarcated and particularized. A legislative decision, by contrast, often lacks this particularity, and thus the concept of an "adequate consideration of all affected interests" seems out of place. I return to the relevance of the representative matrix of legislative decision-making below.

In Canada, the compensation theory has been advocated most strongly by Professor Cartier:

> When legislative assemblies delegate lawmaking powers to administrative agencies, I contend, the latter face a democratic deficit, which needs to be filled through ensuring that, in any given case, the decisions

[340] Reform of Administrative Process at 426, and see generally 425-31. Sargentich is largely critical of the "democratic process" approach.

[341] Reformation of Administrative Law at 1712, and see also 1759-60, 1775-76, and more generally 1711-90. Like Sargentich, Stewart finds the "interest representation" model to be flawed. See also Merrick B. Garland, "Deregulation and Judicial Review" (1985) 98 Harvard L. Rev. 505 at 581-86.

> taken are the result of a truly democratic process. This is a process that needs to comply with two main values: participation and accountability [emphasis added].[342]

Like Habermas, Cartier does not clarify how the nebulous concept of citizen "participation" in the context of executive law-making can compensate for the detailed and very concrete process requirements of legislative law and policy-making:

> As for attentiveness to the democratic nature of discretion, it implies citizens' participation: any decision maker endowed with collective discretionary power must ensure that his/her choices are made at the close of a process of deliberation and dialogue, adapted to the particulars of each case. Deliberation and dialogue could take the form of oral or written submissions (public meetings at which citizens would be invited by announcements in newspapers to comment on proposed regulations, smaller groups that could be asked to present written submissions in the form of reports, etc.) but could also simply require transparency in the decision-making process (through detailed reasons accompanying legislation or disclosure of policy recommendations and reports).[343]

I suggest that no amount of executive-based deliberation, dialogue, transparency, reason-giving, or public meetings can make up for the "legislative due process" that Professor Waldron stresses is the formalized hallmark of legislation:

> Bicameralism, checks and balances (such as executive veto), the production of a text as the focus of deliberation, clause-by clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates, successive layers of deliberation, and the sheer time for consideration-formal and informal, internal and external to the legislature-that is allowed to pass between the initiation and the final enactment of a bill: these are all features of legislative due process that are salient to an enactment's eventual status as law.[344]

Indeed, it is worth recalling Waldron's observation that

> [the executive's] shape is appropriately managerial rather than dialectical and, however much we believe in deliberative democracy, we should be wary of trying to transform it into a mode of discussion more appropriate for one of the other branches.[345]

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[342] Procedural Fairness at 243. The Canadian public law scholar Lorne Sossin has also strongly advocated bringing administrative power under the control of legitimizing democratic forces by creating opportunities for citizen participation in administrative decisions, including administrative legislative decisions: see "The Politics of Discretion: Toward a Critical Theory of Public Administration" (1993) 36:3 Canadian Public Administration 364 at 382-83, and generally 377-384; and "Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State" (1994) 26 Ottawa L. Rev. 1 at 7-13, 35-46. Sossin cites Jerry Frug ("Administrative Democracy" (1990) 40 U. Toronto L.J. 559); and Carolyn Tuohy ("Bureaucracy and Democracy" (1990) 40 U. Toronto L.J. 598) as authorities for the project of democratizing the executive.

[343] Procedural Fairness at 259, 260-61.

[344] Legislation at 107.

[345] Separation of Powers at 464.

Waldron's work arguably stands as the strongest indictment of the proposals advanced by Habermas, Cartier and others who seek to democratize the executive and thereby accommodate the executive law and policy-making ushered in by the administrative state. All of the "procedural virtues" – the forms of "legislative due process" – that Waldron maintains are definitional to the ability of democracy to resolve pluralist disagreements are the distinctive collegial properties of legislatures alone. These formalized procedures give legislation its public legitimacy and authority:

> Modern legislatures do not just respond to disagreement; they internalize it. For us, it matters that legislation should emerge from a process that is *deliberative*, a process distinguished not just by its Hobbesian decisiveness, but also by the engagement with one another in parliamentary debate of all of the views that might reasonably be thought competitive with whatever legislative proposal is under consideration. Modern legislatures are structured to secure this, with rules about representation (of parties as well as interests and localities), rules about hearings, rules about debates, rules about amendments, and above all rules about voting [italics in original; underlining added].[346]

In place of these formal characteristics, Cartier proposes a totally contextualized approach to democratic procedures within the executive. Thus, in the above quoted passage, she states that

> any decision maker endowed with collective discretionary power must ensure that his/her choices are made at the close of a process of deliberation and dialogue, adapted to the particulars of each case [emphasis added].

This floating requirement for some degree of "participation" is adequate where executive administrative decisions affect individuals, but cannot compensate for the "democratic deficit" of executive lawmaking. There are, in particular, two very specific democratic principles that cannot be accommodated by the executive. The first is voting, and the second is representation. I consider each in turn.

One of the absolutely fundamental attributes of democracy is the absence of an individual decision-maker imposing his or her will on citizens. This attribute distinguishes democracy from authoritarian systems. Voting is the impersonal mechanism that is employed by democracy to prevent an imposed decision, and it is the only method to coordinate groups of free individuals in a manner that respects freedom, equality,

[346] *Law and Disagreement* at 40.

and fairness. Thus Waldron emphasizes, in the above passage, "above all rules about voting." Indeed, he observes elsewhere that

> majority-decision respects the individuals whose votes it aggregates. . . . it embodies a principle of respect for each person in the processes by which we settle on a view to be adopted as *ours* even in the face of disagreement.
>
> . . . . .
>
> The method of majority-decision . . . involves a commitment to give *equal* weight to each person's view in the process by which one view is selected as the group's. Indeed, it attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others [emphasis in original]. [347]

The presence of an individual decision-maker renders executive forms of legislative decision-making inescapably undemocratic. No amount of citizen participation in the debate and no amount of reason-giving from the decision-maker can alter the non-collegiality of the final result of the process, unless of course the decision-maker is willing to cede authority to the citizens participating. This, not surprisingly, is exceedingly rare. Decisions are normally made executively – in keeping with the hierarchical nature of that body. Cartier herself is forced to recognize the imposed nature of the final decision when states, in the above passage, that

> any decision maker endowed with collective discretionary power must ensure that his/her choices are made at the close of a process of deliberation and dialogue [emphasis added].

There is an insurmountable power imbalance in the structure of executive law-making even when it occurs with a degree of public consultation, a power imbalance that is foreign to the equality that Waldron observes is central to democracy. Professor Sargentich aptly observes that

> the grand terms of the participatory vision inevitably seem only thinly realized in the proposals to reform the administrative process in its name. The creation of formal rights of participation, which basically are rights to express views to decisionmakers who remain as free as before in substantive terms to do as they will, seems hardly an adequate means of capturing in its fullness the power of the participatory model [emphasis added].[348]

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[347] *Law and Disagreement* at 109, 114, and see generally 108-18. See also Jeremy Waldron, "Principles of Legislation," in Tsvi Kahana and Richard Bauman (eds.) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge UP, 2006) 15 at 29-31 ("**Principles of Legislation**").

[348] Reform of Administrative Process at 429-30. As noted previously, Sargentich is critical of the viability of attempting to endow administrative decision-making procedures with democratic legitimacy.

Executive decision-making bears more in common with judicial decision-making than with the choices made by a legislature precisely due to the imposition of a decision on those subject to it by an external (ideally neutral) higher authority. That authority may have to answer for his/her/its decision with reasons, and may be subject to appeal/judicial review, but regardless the decision is not made by the people affected. Consultations, notice and comment procedures, reasons – none of these capture the essential attribute of democracy, which is a mechanism through which the people decide for themselves, on a basis of equality, how to resolve a conflict.

The second crucial aspect of democracy that cannot be adequately housed in the structure of the executive is representation. Cartier's "procedural fairness" model for democratizing executive law and policy-making proceeds on the basis that those affected by a decision should be afforded some opportunity to participate.[349] Yet even in the most citizen-friendly executive decision-making contexts, such as those that arise under the "notice and comment" provisions governing some U.S. and Canadian rule- and regulation-making processes, there is no possibility for widespread representation of citizens on divisive issues. At best, several well-funded and opposing interest groups may meet and make submissions to executive decision-makers.[350] This can never be a truly representative process along the lines of a legislature, which, Waldron stresses, brings together a broad section of the populace to interact, discuss, and debate on a given issue.[351] Furthermore, in many circumstances, the actual constituency that

[349] Procedural Fairness at 258-64.

[350] John Keyes emphasizes that actual participation in executive law-making is for the most part limited to certain "relatively sophisticated regulated communities": *Executive Legislation* at 199, 203. See Stewart, Reformation of Administrative Law at 1775-76 for further criticisms of "notice and comment" procedures as a viable form of democratic decision-making. Canadian "notice and comment" provisions apply only to a limited number of executive instruments, are not consistent across jurisdictions, and give little more than an opportunity for interested parties to make written submissions: Alice Woolley, "Legitimating Public Policy" (2008) 58 U. Toronto L.J. 153. For examples, see *Canadian Environmental Protection Act*, *1999*, S.C. 1999, c. 33, s. 168; and *SARA*, ss. 43, 50, 68.

[351] Waldron emphasizes the importance of the representative nature of legislatures in Representative Lawmaking at 345-54, *Law and Disagreement* at 73-75, and Principles of Legislation at 24-25. See also Urbinati, Representation as Advocacy, *passim*.

should be consulted on a given proposed piece of executive law or policy-making is in fact the entire population. Important and highly contested areas of executive decision-making such as environmental regulation, immigration, and communications policy implicate all Canadians, and not just a limited group of people allegedly directly affected. The only way to adequately democratize the executive is to turn it into a legislature.

The compensation theory is ultimately infinitely preferable to the control theory or instrumentalism in that it acknowledges the constitutional infirmity (the "democratic deficit") of executive law-making that the other two approaches fail to take seriously. But the compensation theory is flawed in positing a solution within the realm of executive governance. A nondelegation doctrine is the appropriate response to the "democratic deficit." The courts must prevent the legislature from alienating its most fundamental responsibility: resolving conflict. A properly formed and enforced nondelegation rule will substantially reduce the volume of executive law-making by removing all matters that require prior resolution in the genuinely collegial institution of government. Any delegations that pass muster under the rule should then indeed be subject to enhanced forms of citizen participation as advocated by the above commentators. I turn now to consider in more detail the content of the Canadian nondelegation doctrine.

PART C

Recognizing the Canadian Nondelegation Doctrine

Introduction

I have argued in the preceding chapters that legislative decision-making must occur in the collegial institution of the legislature. This conclusion follows from the foundational unwritten principles structuring the Canadian Constitution, and the methodology of reasoning from constitutional essentials, mandated by the Supreme Court of Canada. I have also argued that the practice of Canadian governance does not respect the required institutional configurations, is not supported by arguments that can withstand a principled analysis, and poses a serious threat to the architecture of the Constitution.

In this final Part of my project, I consider the scope of a workable and judicially enforceable nondelegation doctrine that can control the delegation of legislative power to the executive, and thereby protect the framework of Canadian democratic governance. The appropriate rule must flow from the foundational unwritten principles, and must avoid the dismal failure of the United States nondelegation doctrine, which is one of the few attempts in common law jurisdictions to control the delegation of legislative power to the executive through a formal judicial rule.[1] The U.S. rule was employed in two high-profile Supreme Court decisions in the 1930s to strike down portions of New Deal economic restructuring legislation.[2] Since that time, however, the doctrine has not been successfully used to invalidate federal legislation, even though the U.S. Congress engages in delegation practices as broad and normless as those used in Canada, and discussed in Chapter 6. U.S. Supreme Court decisions on the doctrine reveal a debilitating over-reliance on literal readings of the text of the U.S. Constitution, which provides, in Article I, that "All

[1] The other notable jurisdiction is the Republic of Ireland, discussed below.

[2] *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." As should be evident from my analysis in this project, nondelegation derives its force from unwritten principles, and not written prohibitions. Arguments around the meaning of the textual provision in the U.S. have clouded and obscured the vital issues at play. The analysis in both of the New Deal decisions noted above does not engage significantly with the underlying principles, and the same is true of more recent leading decisions on the subject in which the Court focuses overwhelmingly on shallow statements of text and precedent.[3] Ironically, in the U.S., a kind of normative vagueness has become the hallmark of a doctrine that itself addresses the problem of legislative vagueness.[4] The Canadian Constitution, with no written provisions prohibiting delegation but with a rich body of unwritten principles case law, is better situated today to support a meaningful nondelegation rule.

[3] See especially the leading recent case of *Whitman v. American Trucking Associations*, 531 U.S. 457 at 472-76 (2001), which is almost entirely devoid of principled analysis. See also the *Mistretta* judgment noted in Chapter 7, which provides a particularly stark illustration of the uselessness of the U.S. doctrine, for the Court dealt with nondelegation arguments in a brief and formulaic fashion, but then spent considerably more time on a separate analysis focusing on the separation of powers. In a powerful dissent, Justice Scalia also provided a brief and perfunctory treatment of the nondelegation doctrine, in which he agreed with the Court that the impugned legislation passed the applicable standards, but he then proceeded with an analysis of institutional structure and the separation of powers in which he described the Commission as a "a sort of juniorvarsity Congress" (*Mistretta* at 414). Justice Scalia ultimately found the impugned delegation of legislative power unconstitutional based on unwritten principles arguments – arguments that had to proceed outside of the hollow and lifeless shell of the over-textually reliant nondelegation doctrine.

[4] The commentary on the U.S. doctrine is immense. For an excellent overview, situating the doctrine in the context of the separation of powers and administrative law, see Cynthia Farina, Balance of Power at 478-488. See also Cass Sunstein, "Nondelegation Canons" (2000) 67 U. Chicago L. Rev. 315. For two recent arguments criticizing the Supreme Court for hollowing out the doctrine, see Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress" (2015) 90 N.Y.U. L. Rev. 1463; and Kathryn A. Watts, "Rulemaking as Legislating" (2015) 103 Georgetown L.J. 1003. See also David Schoenbrod, "The Delegation Doctrine: Could the Courts Give It Substance?" (1985) 83 Michigan L. Rev. 1223. For arguments rejecting the doctrine altogether, see Jerry L. Mashaw, "Prodelegation: Why Administrators Should Make Political Decisions" (1985) 1 J. L. Econ. & Org. 81; and Eric A. Posner and Adrian Vermeule, "Interring the Nondelegation Doctrine" (2002) 69 U. Chicago. L. Rev. 1721.

In order to avoid the U.S. experience, the Canadian nondelegation doctrine must remain closely tied to the informing unwritten principles: democracy, the rule of law, and the separation of powers.[5] These principles mandate the institutionally specific nature of conflict resolution that the doctrine is intended to protect. In Chapter 8, I consider the Supreme Court of Canada's treatment of the separation of powers, and from this analysis, I extract one of the central concepts that governs the Canadian nondelegation doctrine. I then situate the doctrine in the Canadian constitutional landscape. In the final chapter, I outline the essentials of a nondelegation analysis, and apply this analysis to a prominent and particularly normless federal statute.

[5] The Irish nondelegation rule, like the American one, has not followed a principled path, and must also be considered a failure even though it has been used in several decisions, including a very recent one, to invalidate broad and normless delegations. In the leading case of *Cityview Press v An Chomhairle Oiliuna*, the Irish Supreme Court stated that subordinate legislation must do no more than provide details for the "principles and policies" established in the governing legislation ([1980] IR 395 at 399). But the Court did not apply this interpretive framework with any rigour, for a very broad and normless delegation of power, and a resulting executive order, were found to be constitutional, largely based on a purposive analysis drawing on the long title of the enactment. In the recent decision of *Bederev v. Ireland*, [2015] IECA 38 ("***Bederev***"), the Irish Court of Appeal used the putative "principles and policies" test to strike down a provision not much broader than that at issue in the earlier case. The Irish nondelegation experience appears to reveal judicial discretion, operating under the guise of a test. For critical treatments of the Irish doctrine, see Eoin Carolan, "Democratic Control or 'High-Sounding Hocus Pocus'? A Public Choice Analysis of the Non-Delegation Doctrine" (2007) 29 Dublin U. L.J. 111 at 115-118; and Ferenc Jari, "The Article 15.2 Non-Delegation Doctrine - A Crumbling Bastion of Bunreacht na htireann?" (2011) 1 King's Inns Student L. Rev. 1, *passim*. Carolan is skeptical of both the viability of a nondelegation rule and the democratic processes that the rule is intended to protect (the latter insight is expanded in his *New Separation of Powers*, which argues for a restructuring of the modern administrative state based on the principle of non-arbitrariness: see 82-134). Jari, by contrast, argues strongly for restraints on delegation, and urges a revitalized rule.

Chapter 8

The Separation of Powers and the Scope of the Nondelegation Doctrine

1. The Separation of Powers at the Supreme Court of Canada

The separation of powers is a constitutional theory advocating the distribution of functions across different institutions (or branches) of government in order to control the exercise of power and thereby prevent tyranny and promote individual liberty.[6] The Supreme Court of Canada has recognized the central importance of the separation of powers in well over a dozen decisions in the last several decades. In the *Judges Reference*, it will be recalled, the Court describes the separation of powers as "a fundamental principle of the Canadian Constitution."[7] The principle is affirmed as "an essential feature of our

[6] The classic expressions of the theory are provided by 17th and 18th theorists such as John Locke, the Baron de Montesquieu, William Blackstone, and James Madison. Locke, writing in the aftermath of the English Civil War, famously recommended a separation of the legislative and executive powers, observing that in "well-framed Governments" the "Legislative and Executive Power are in distinct hands," a separation necessary because

> it may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government (*Two Treatises of Government*, Book II, Peter Laslett (ed.) (Cambridge: Cambridge UP, 1967) [first published 1689] at paras. 159, 143).

In Locke's lifetime, England experienced two distinct forms of executive tyranny (the first under Charles I and the second under Oliver Cromwell), and one form of legislative tyranny (the Long Parliament). Numerous writers in this period advanced a functional separation of these two branches of government as a rational solution to these violent and unstable extremes: see Vile, Constitutionalism at 42-75; and William Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origins to the Adoption of the United States Constitution* (New Orleans: Tulane University, 1965) at 37-81 ("***Origins***"). By the time of Montesquieu, Blackstone, and Madison, an independent judiciary was added, leading to the famous tripartite theory that stresses that each of the three branches of government has its own proper functions. On the addition of the judiciary in the writings of Montesquieu and Blackstone, see Vile, *Constitutionalism* at 96-98, and 113-114; and see also Gwyn's account of the origins of the concept of a separate judicial power in the 15th century, and the crystalizing of judicial independence in the *Act of Settlement* of 1701 (1701, 12 & 13 Will. III, c. 2) following the abuses of the Stuart Kings: *Origins* at 5-8. For Montesquieu's complex treatment of the separation of powers, see Vile, *Constitutionalism* at 83-106; Gwyn, *Origins* at 100-113; and Iancu, *Legislative Delegation* at 59-61. Vile's treatment of Madison and the history of the separation of powers in the U.S. is very detailed: *Constitutionalism* at 131-192.

[7] *Judges Reference* at para. 138.

constitution" in *Wells v. Newfoundland* ("***Wells***"),[8] "a cornerstone of our constitutional regime" in *Doucet-Boudreau*,[9] and "One of the defining features of the Canadian Constitution" in *Cooper*.[10]

The appearance of explicit acknowledgements of the separation of powers in Canadian constitutional law appears to correspond roughly with the enactment of the *Constitution Act, 1982*. Prior to 1982, there are very few references to the principle by name,[11] and on one of those few occasions, the Court downplayed its significance:

> As Professor Hogg has noted in his work on *Constitutional Law of Canada*, there is no general "separation of powers" in the *British North America Act, 1867*. Our Constitution does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only its own function [internal citation abridged].[12]

It may well be that the best explanation for the emergence of the separation of powers as an expressly acknowledged "fundamental principle" is that the *Constitution Act, 1982* (through the *Charter*, the section 52 supremacy clause, and the section 35 aboriginal rights and treaty provision) has increased the Court's understanding of the importance of its own institutional role, and has thereby encouraged a greater emphasis on institutional separation generally.[13] This explanation should not be taken, however, to suggest that the constitutional changes of 1982 created a separation of powers in Canada. Whatever changes in this regard that resulted from the positive textual enactments of 1982 were changes in

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[8] [1999] 3 S.C.R. 199 at para. 52.

[9] *Doucet-Boudreau* at para. 107 (dissenting judgment of four members of the Court; the majority also acknowledges the importance of the separation of powers to the Canadian Constitution at para. 33).

[10] *Cooper* at para. 10 (concurring judgment of Chief Justice Lamer). Only the Chief Justice stresses the separation of powers in this decision.

[11] As discussed in Chapter 6, the principle is invoked, but not by name, in *Gray* at 156-57 (*per* Chief Justice Fitzpatrick), and in the *Chemicals Reference* at 24 (*per* Justice Davis).

[12] *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 at 728 ("***Residential Tenancies***").

[13] This interpretation, correlating the explicit emergence of the separation of powers in Canadian constitutional law with the enactment of the *Constitution Act, 1982*, finds some support in an article by Philip Resnick, "Montesquieu Revisited, or the Mixed Constitution and the Separation of Powers in Canada" (1987) 20:1 Can. J. Pol. Sc. 97 at 110-12, which addresses the influence of Montesquieu and the concepts of the separation of powers and mixed government on 19th and early 20th Canadian political culture. See also Corbett, Reading the Preamble at 46; and Leclair, Unfathomable Principles at 392 (Leclair suggests that the advent of the *Charter* led to an increase in the judiciary's sense of its own power, and to the emergence of the unwritten principles approach to Canadian constitutional law generally, but he does not single out the principle of the separation of powers; Corbett's discussion is focused on the separation of powers and judicial power).

emphasis only, changes ultimately involving a greater recognition of the inherent structural features of the constitutional order.

It is important to observe that the Court has cautioned that the separation of powers is not "strict," "rigid," or "absolute" under the Canadian Constitution.[14] Nevertheless, this qualification should be placed within the larger context of the history of the principle itself. M.J.C. Vile, author of the most comprehensive and authoritative scholarly work on the subject, has stressed that a "pure" application of the principle, with a rigid tripartite institutional separation, has never been successful.[15] Thus the Supreme Court's cautions are hardly surprising. Instead of pure incarnations, the principle has rather been mixed with other constitutional theories that provide additional means of facilitating the processes of government while also ensuring that "power should be a check to power."[16] In the U.S., the separation of powers is mixed

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[14] *Secession Reference* at para. 15; *Wells* at para. 54; *Residential Tenancies* at 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at paras. 53, 56 ("***Douglas/Kwantlen***").

[15] Vile defines the "pure" theory as follows:

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch (*Constitutionalism* at 14).

The failure of a "pure" application of the separation of powers was spectacular and violent in revolutionary France under the Constitution of 1791, but was also evident in those American colonies that attempted relatively "pure" attempts to apply the theory in the period between the Declaration of Independence in 1776 and the signing of the U.S. Constitution in 1787: see Vile, *Constitutionalism* at 207-219 (on the experience in revolutionary France), and 131-63, and especially 149-54 and 158-60 (on the experience in the American colonies). The major difficulty in both France and Colonial America was legislative tyranny, for the "pure" theory lacks firm institutional controls on the separated branches that would effectively force them to remain within the bounds of their prescribed functions. Legislative power tended to expand and encroach on the other branches. As Vile notes, "the pure separation of powers depended upon an intellectual distinction between the functions of government for its safeguard" [emphasis added] (*Constitutionalism* at 161). Self-restraint is an incongruous ingredient in a theory based generally on the need to control the exercise of power. Bogdan Iancu aptly observes that "precatory functional admonitions" are not adequate, and that the "best check on political power is always power itself" (*Legislative Delegation* at 61-62).

[16] Charles Louis de Secondat, Baron de Montesquieu, *De L'Esprit des Lois*, F. Neumann (ed.), Thomas Nugent (trans.) (New York: Hafner, 1949) [first published 1748], Book XI, section 4.

with an elaborate series of checks and balances designed to both control and blend separated power.[17] In parliamentary systems, following the British example, the separation of powers is mixed with the theory of responsible government – in essence, a layer of political control (legislature over executive) is superimposed over the basic framework of legal control demanded by the rule of law (again, legislature over executive).[18] A rigid separation of persons is enforced in the U.S. system, but not in the parliamentary system. In parliamentary systems, the all-important separation of functions (which secures the priority of both democracy and the rule of law) is achieved with a degree of overlap of personnel between the legislative and executive branches.[19] In any system, attenuation of the "pure" theory of the separation of

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[17] On the importance of the system of checks and balances as a limitation on the theory of the separation of powers in the U.S., see Farina, Balance of Power at 495; Vile, Constitutionalism at 168; and Thomas Sargentich, "The Limits of the Parliamentary Critique of the Separation of Powers" (1993) 34 Wm. & Mary L. Rev. 679 at 732.

[18] For the complex interlacing of responsible government and the separation of powers in the British parliamentary system, see Vile, *Constitutionalism* at 251-52, and more generally at 233-62. As discussed in Chapter 7, Vile characterizes the parliamentary system as one of extreme fragility and "delicacy," in which ministerial and Cabinet responsibility plays a crucial role: *Constitutionalism* at 234, 245-46, 254.

[19] Peter Hogg has argued that the

> close link between the executive and legislative branches which is entailed by the British system [of responsible government] is utterly inconsistent with any separation of the executive and legislative functions (*Constitutional Law* at 399).

Hogg contrasts the Canadian Constitution with the U.S. Constitution in this regard, a comparison that has been made by other authorities as well, including the Federal Court of Appeal. In a 2000 decision, the Court upheld legislation granting judicial powers to the executive branch of government, and rejected a separation of powers argument by contrasting the "U.S. Constitution where a true separation of powers is prescribed" with Canada's system of responsible government, which is "the antithesis of separation of powers" (*Singh* at para. 28; see also *Vanguard Coatings and Chemicals Ltd. v. M.N.R.*, [1988] 3 F.C. 560 at para. 9 (F.C.A.), in which the Court stated that "the principle of the separation of powers inherent in the U.S. Constitution . . . can have no relevance to a constitution based on responsible government"). With respect, both Hogg and the Federal Court of Appeal have failed to distinguish between the separation of persons, which is an attribute of the "pure" theory that is entrenched in the U.S. Constitution in Article I, section 6, and the separation of functions, which is the core feature of the separation of powers. Parliamentary systems have opted for what Vile refers to as a "partial separation of persons" in which "some people may be allowed to be members of more than one branch of the government, although a complete identity of personnel in the various branches will be forbidden" (Vile, *Constitutionalism* at 20, see also 21, 248-53, and 355). In parliamentary systems, the senior members of the executive – the Cabinet – can sit in the legislature, answer questions on government activities, and initiate legislation, as long as they remain numerically only a small proportion of the assembly. As Vile observes,

> it would be a very different system of government if *all* members of the House were ministers or civil servants; then truly the <u>function</u> of the House in regard to rule-making would be purely formal. It is this consideration that makes the further increase in the number of ministers in the House of Commons inimical to our constitutional traditions and interests [italics in original; underlining added].

The determinative element of the separation of powers is a separation of functions, as this upholds the rule of law (established, as noted in Chapter 7, by the Glorious Revolution of 1688-1689) by subordinating executive power to legislative power. Frederic Burin and T.R.S. Allan have both strongly affirmed the application of the separation of

powers should not proceed beyond the point where the underlying principles of the rule of law and democracy are threatened.[20] To do so would be to undermine the architecture of the constitution.

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powers to the British parliamentary system, stressing the central importance of a separation of functions and the rule of law, not the separation of persons:

> But if the legal state does not require the separation and equality of the legislative and executive powers, all the more does it demand that the law-making and administrative processes and functions be rigidly differentiated from one another. Only in this way can the primacy of law be assured. The best example, perhaps, is the present-day role of the British Cabinet. The Cabinet is undisputed factual master of both the legislative and executive powers of the state. Yet, contrasted with the fusion of these powers in the person of an absolute king or a dictator, it is not only that they are exercised by politically responsible men; they are cast also into differentiated and clear-cut organizational molds and procedural channels. In short, there exists a separation of functions.
>
> It is in this separation of functions that we find the second "organizing principle" of the legal state. While the judges must be independent, it is immaterial how legislative-executive relations are organized and whether, in practice, the same persons exercise both powers, as they do in Great Britain so long as there is a single-party majority in the House of Commons. What is indispensable, on the other hand, is a fixed and rational delimitation of state functions to insure the existence of calculable "competences." Uncertainty and confusion regarding the relationship between legislation and execution, between norm and measure, is incompatible with the Rule of Law (Burin, Structure of the Constitutional State at 325; see also Allan, *Constitutional Justice* 31, and generally Chapter 2 ("First Principles: The Rule of Law and Separation of Powers")).

The separation of powers is not "utterly inconsistent" (as Hogg puts it) with the theory of parliamentary government, but through broad delegations of legislative power, as discussed and itemized in Chapter 6, the separation of powers does become inconsistent with the practice of parliamentary government. Broad delegations of legislative power threaten the separations of functions, the fragility and "delicacy" of the system of parliamentary government, and the architecture of the constitutional state.

[20] The main area where the Supreme Court of Canada has expressly attenuated the separation of powers is in the bestowing of judicial functions on executive bodies (see *Residential Tenancies* and *Douglas/Kwantlen*). The Court has held that executive bodies can perform certain core judicial activities provided that such activities are sufficiently integrated within an administrative scheme as to be "merely subsidiary or ancillary to general administrative functions assigned to the tribunal" (*Residential Tenancies* at 734-736), and provided also that judicial review remains available (see *MacMillan Bloedel* at para. 83, *per* Justice McLachlin (as she then was) (writing in dissent, but not on this point)). One important separation of powers concern that has not yet been adequately addressed in the area of the executive performance of judicial roles, however, is the question of the level of independence necessary for a decision-maker considering constitutional matters. In *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 33-48, the Court definitively affirmed the ability of executive decision-makers to address constitutional questions where the governing statute provides an implied authorization to do so. But if the *Judges Reference*, drawing on the separation of powers, requires courts to be independent when they perform their "constitutional role," it is not exactly clear how an executive tribunal can address constitutional matters without also having a degree of independence beyond the minimal levels currently prescribed by *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781. On this point, see Mullan, Legacy of Justice Rand at 89-90; and see also Justice La Forest's observation that the majority's position in the *Judges Reference* may have far-reaching applications to administrative law (*Judges Reference* at para. 323). Professor Dyzenhaus, in a forceful critique of "formalist" approaches to the separation of powers that try to limit executive decision-makers' ability to interpret the law (and especially the *Charter*), acknowledges that the issue of institutional independence remains pressing (Fundamental Values at 503-504).

Most of the Supreme Court of Canada decisions applying the separation of powers have involved the judiciary and its relationship to the other branches of government.[21] The Court has, however, strongly affirmed the application of the classic tripartite theory to the Canadian Constitution in several judgments. Indeed, the authority most often cited by the Court itself, the 1985 *Fraser* decision, noted near the end of Chapter 5, outlines a tripartite approach:

> There is in Canada a separation of powers among the three branches of government – the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.[22]

In the relatively recent 2013 decision of *Ontario v. Criminal Lawyers' Association of Ontario* ("**Criminal Lawyers' Association**"), the Court cites *Fraser* and then proceeds to affirm a three-way separation of powers in very strong terms, drawing on the language of Justice McLachlin from *New Brunswick Broadcasting*:

> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial

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The Court has made two other express statements regarding the attenuation of the separation of powers worth noting. First, in the *Secession Reference*, as discussed briefly in Chapter 3, the Court rejected the proposition that the separation of powers prevents the judiciary from undertaking advisory functions when questions are submitted by governments on a "reference" (at para. 15). Second, in *Wells*, the Court observes that under a parliamentary system of government, executive control of legislative functions is often a political reality, and hence the separation of powers is qualified. The Court, however, does not clarify the extent of this qualification or its legal ramifications. As discussed above, any qualification of the separation of powers resulting from the overlap of personnel in parliamentary systems should not extend to the area of the separation of functions. The ability of the executive to control the legislature is a political reality that places great stress on the underlying legal separation of legislative and executive functions, and thereby threatens both the rule of law and the democratic principle. The appropriate response to this threat, I maintain, is a nondelegation rule. While such a rule may not prevent an executive-dominated legislature from passing legislation, it will force such legislation to declare its content clearly and publicly.

[21] In addition to the *Judges Reference*, discussed in detail in Chapter 3, see *Operation Dismantle Inc. v. Canada,* [1985] 1 S.C.R. 441 at paras. 55-67; *Power* at paras. 28-29, 34; *Mackin* at paras. 39; 69; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 at paras. 31-32; *Doucet-Boudreau* at paras. 33-34, 120; and *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 at paras. 2, 9-10, 46-47.

[22] *Fraser* at para. 39. This passage is cited as authority in the *Judges Reference* at para. 108; *Wells* at para. 52; *Doucet-Boudreau* at paras. 33, 108; *Power* at para. 29; and *Cooper* at para. 10.

> adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bonds, that each show proper deference for the legitimate sphere of activity of the other" [internal citation abridged].[23]

Criminal Lawyers' Association provides the Court's most sophisticated statement of the separation of powers, and with *Fraser*, it supports the institutional configurations mandated by a system of democratic conflict resolution. A nondelegation rule is required to protect these configurations.

In Chapter 2, I defined the architecture of a constitutional democracy as a) a decision-making process that channels politically contentious matters into a forum where citizens can make binding decisions, and b) a network of institutional relationships that provides the mechanisms through which the decisions are interpreted and implemented. In Chapter 5, I outlined a theory of democracy, supported by Canadian constitutional law, in which major social conflicts in a pluralist society find their way into the political process which is centred in the collegial forum of the legislature. *Criminal Lawyers' Association* and *Fraser* both situate the legislature where it must be within this structure – at the core of the political process. These two decisions define the necessary institutional relationship of the legislature and the executive to support this process. The "legitimate sphere of activity" of the legislature is to "decide upon and enunciate": it is to make the "policy choices" and "laws" that (temporarily) resolve the conflicts that arise from the association of free individuals. The Canadian nondelegation doctrine ensures that this process

[23] [2013] 3 S.C.R. 3 at paras. 27-29. *Criminal Lawyers' Association* involved judicial orders mandating the disbursement of public funds. The Ontario courts had ordered compensation for *amici curiae* in excess of that offered by the Attorney General. The Supreme Court of Canada, finding these orders violated the separation of powers, reversed the Court of Appeal. *Criminal Lawyers' Association* was thus a *Judges Reference* in reverse, with the separation of powers protecting the legislative and executive branches from the courts. *Criminal Lawyers' Association* did not expressly engage the relationship of fundamental legislative and executive activities. In *Fraser*, the Court dealt with the need for neutrality in the civil service. This decision also did not expressly engage the relationship between fundamental legislative and executive functions.

remains centered in the legislature, and prevents the vital activity of conflict resolution from being shunted off to executive bodies. The primary role of the managerial executive is to "administer and implement."

The nondelegation doctrine requires that legislatures make a substantive choice before allocating power to subordinates. Professor Rubin's naked "directives issued to implementation mechanisms" do not pass constitutional muster. A broad and normless enabling provision does not pass constitutional muster. Indeed, most if not all of the enabling provisions discussed in Chapter 6 do not pass constitutional muster. These are all too thin to qualify as legislative enactments, and serve to debase the legislature from the role of law-maker and policy-maker to the role of manager. A substantive choice is required to complete the act of legislating. Such a choice contains information sufficient to enable both citizens and a reviewing court to recognize any resulting executive action, thereby completing the circle of democratic legitimacy that defines self-government.

In the final chapter of my project, I consider in more detail the central features of the nondelegation analysis that will be performed by a reviewing court. I turn now to delineate the scope of the doctrine in relation to the various forms of legislative activity.

2. Surveying the Legislative Terrain: Between "Void for Vagueness" and *Baker*

Legislatures engage in a wide range of activities, some of which can be itemized as follows:

1. The establishment of general rules governing conduct, entitlements, and duties.
2. The delegation of power to the executive to establish general rules governing conduct, entitlements, and duties.
3. The delegation of power to the executive to make decisions applying rules, entitlements, and duties to particular cases.
4. The allocation of funds.

My interest in the present section is with the first three categories.[24] It is possible to view the activities in these categories as being contiguous, and together covering a considerable portion of the legislative terrain:

1.	2.	3.
The establishment of general rules governing conduct, entitlements, and duties	The delegation of power to the executive to establish general rules governing conduct, entitlements, and duties	The delegation of power to the executive to make decisions applying rules, entitlements, and duties to particular cases

The nondelegation doctrine supervises the central area of this terrain, and forbids delegations that lack sufficient information or content to evince a substantive choice resolving a conflict. There are two types of delegations in category #2 that can pass muster under a nondelegation doctrine and be allowed to proceed. First, there are rule-making activities that are clearly ancillary or subordinate to a coherent legislative choice, and are referred to by Alf Ross under the labels of "pure machinery provisions" and "subordinate technical administrative regulations."[25] Second, there are more substantive rule-making powers that are controlled by clearly outlined standards and instructions from the legislature. To the extent that a conflict has been adequately resolved, and a choice has been made, the legislature is free to seek the assistance of executive law-making activities. None of the enabling provisions considered in Chapter 6 fall into this class of permissible delegations. Nevertheless, the nondelegation doctrine does leave room for a careful and diligent legislature to seek the aid of subordinate instrumentalities. Any delegated legislative activities that pass muster under the doctrine could, in appropriate circumstances,

[24] The fourth category, the allocation of funds, is of great importance, but often the use of the funds will require some further elaboration through other legislation.

[25] Delegation of Power at 9, citing C. K. Allen, *Bureaucracy Triumphant* (London: Oxford UP, 1931) at 46-47. Ross offers the following examples of "subordinate technical administrative regulations":

> instructions as to the forms to be filled out by applicants, the manner of making returns and the times within which they are to be rendered, the composition, place, and times of meeting of a tribunal authorized by statute, and so on.

be subject to the procedural controls advocated by Professor Cartier and others and discussed in Chapter 7.

While the nondelegation doctrine ensures that legislation falling into category #2 contains sufficient information to protect the integrity of the democratic process and the rule of law, what about legislation falling into category #1 or #3? Canadian law currently recognizes a "void for vagueness" doctrine under which a limited class of legislation falling into category #1 can be scrutinized for lack of content. In its current form, however, this doctrine is not satisfactory, both because the range of subject legislation is too narrow, and because the applicable test is too weak. Vagueness constraints apply only to legislation affecting interests protected by the *Charter*,[26] and to date, the doctrine has been applied primarily in the areas of criminal law and regulatory offences.[27] The current test under the vagueness doctrine asks only "whether the law so lacks precision that it fails to give sufficient guidance for legal debate."[28]

In his detailed treatment of the subject, Marc Ribeiro argues that the ambit of the vagueness doctrine should be extended, potentially to all legislation, and that the test should be strengthened.[29] I fully agree with these propositions. In the leading decision of *Nova Scotia Pharmaceutical*, the Supreme Court states that two rule of law concerns are at the core of the vagueness doctrine: "the principles of fair notice to

[26] Vagueness can ground a challenge under section 7 of the *Charter* (a vague law offends the "principles of fundamental justice"), and also under section 11(e), which provides for the right "not to be denied reasonable bail without just cause." Additionally, a section 1 analysis requires that a limitation on a protected right be "prescribed by law" and be minimally impairing of that right. A vague provision cannot satisfy either requirement. On these points, see *Nova Scotia Pharmaceutical* at paras. 18-41; and Ribeiro, *Vagueness Doctrine* at 1-2, 125-142, and 144-48.

[27] In *R. v. Levkovic*, the Supreme Court observed that

> The rule against unconstitutional vagueness is primarily intended to assure the intelligibility of the criminal law to those who are subject to its sanctions and to those who are charged with its enforcement ([2013] 2 S.C.R. 204 at para. 37 ("***Levkovic***")).

The leading decisions under the doctrine all appear to be either criminal or regulatory offence-related: see, for example, *Nova Scotia Pharmaceutical*; *R. v. Morales*, [1992] 3 S.C.R. 711; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; and *R. v. Hall*, [2002] 3 S.C.R. 309 ("***Hall***"). The more recent *Levkovic* decision also involved a criminal law provision.

[28] *Hall* at para. 34. See also *Levkovic* at para. 37.

[29] *Vagueness Doctrine* at 61, 102-103, 107-108, and 144-155.

citizens and limitation of enforcement discretion."[30] These concerns have application beyond the *Charter* and beyond the area of criminal and regulatory offences, and cannot be met with a test that looks only to whether legislation provides "sufficient guidance for legal debate." Ribeiro draws on Tetralogy decisions concerned with the rule of law such as the *Manitoba Language Reference* and the *Judges Reference* to argue for extending and strengthening the vagueness doctrine.

Given that the vagueness doctrine and the nondelegation doctrine both engage similar rule of law concerns, it is worth considering whether the nondelegation standard that I am proposing may have application in the area of general vagueness as well. Under the nondelegation doctrine, enabling legislation must contain a substantive choice resolving a conflict, and thereby close the circle of democratic legitimacy so that the authors of a law can recognize that law when it coerces or affects them. Legislation that passes this standard will provide fair notice to citizens and limit enforcement discretion.

The distinction between the two doctrines, it should be stressed, is that the nondelegation doctrine applies only to enabling provisions that are vague, normless, or otherwise lack precision, while the vagueness doctrine applies to the category #1 legislation outlined above. My project is focused on scrutinizing the lack of substantive content in enabling provisions, and thus I do not intend to pursue the general vagueness issue further, other than to observe that an expanded and revitalized vagueness doctrine, combined with a nondelegation doctrine, could supervise a vast expanse of legislated law, ensuring that all enactments under both category #1 and #2 pass muster under the informing principles of the Canadian Constitution.

[30] *Nova Scotia Pharmaceutical* at para. 28. See also Ribeiro, *Vagueness Doctrine* at 80-86 for a discussion of the rule of law, and more broadly at 71-102 for a consideration of the development of the vagueness doctrine, and the two rule of law concerns, in both the U.S. and Canada.

What about category #3 legislation? This category contains delegations of power to apply the law to particular cases, and is of central importance to the operation of the modern administrative state. I maintain that such delegations should also be covered by a rule requiring clear legislative content, and indeed, should be brought under the scrutiny of either a revitalized and expanded vagueness doctrine or the nondelegation doctrine. This would render the entire panoply of legislation covered by the three categories outlined above subject to rigorous constitutional control to ensure democratic and rule of law concerns are addressed.

There is some authority suggesting that the vagueness doctrine would cover category #3 legislation if *Charter* interests are implicated. In *Morgentaler*, two members of the Court found that criminal law provisions authorizing a medical committee to decide whether a pregnancy should be terminated lacked the requisite standards to give the decision any legal guidance, and thus violated section 7 of the *Charter*. Chief Justice Dickson observed that

> A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section.[31]

Given the narrow ambit of the vagueness doctrine as it now stands, and given that category #3 involves delegations of authority, I submit that this category should be brought under the scrutiny of the nondelegation doctrine. This proposal can be defended on the basis that a category #3 enabling provision that lacks normative content effectively turns an exercise of executive administrative power into a *de facto* law-making power: the decision-maker makes and applies the law at the same moment in an exercise of pure arbitrariness.

[31] *Morgentaler* at 68. The Chief Justice wrote for himself and Justice Lamer (as he then was). Four members of the Court expressly disagreed with the Chief Justice's conclusion on the vagueness of the word "health" (see *Morgentaler* at 107-109 (*per* Justices Beetz and Estey), and 153-54 (*per* Justices McIntyre and La Forest)).

I conclude this chapter, and clarify my proposal to include normless category #3 legislation within the ambit of the nondelegation doctrine, by referring to one of the landmark decisions of Canadian administrative law, *Baker v. Canada (Minister of Citizenship and Immigration)* ("***Baker***").[32] The Supreme Court's attention in *Baker* was focused particularly on the following passage from the notes of a junior immigration officer who was charged with making an initial assessment of whether Mavis Baker, an illegal resident of Canada, should be granted a discretionary exemption from a deportation order made pursuant to valid immigration laws:

> [Ms. Baker] is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region [emphasis in the original notes].[33]

Based on this passage, the Court concluded that the decision not to grant Ms. Baker an exemption from the deportation order was made under a reasonable apprehension of bias.[34] The Court also broadened (essentially modernized) its approach to the substantive review of discretionary decision-making, leading to the conclusion that the Ministry's decision was unreasonable.[35] This decision is also important in that the Court introduced, under the rubric of procedural fairness, a requirement that decision-makers provide reasons in certain circumstances.[36] But despite these very important conclusions on administrative law issues, the source of the problem in *Baker* was arguably the normless grant of power in the governing

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[32] [1999] 2 S.C.R. 817. For scholarly treatments of this decision, see Dyzenhaus, Fundamental Values; Dyzenhaus and Fox-Decent, Rethinking the Distinction; and Cartier, Procedural Fairness.

[33] *Baker* at para. 5.

[34] *Baker* at paras. 45-48. While the actual decision to deny the request for an exemption was made by a higher-ranking official, when Ms. Baker's counsel requested reasons for the decision, the Ministry provided the notes of the junior intake officer. The Supreme Court thus proceeded on the basis that the reasons of the junior officer were the reasons for the final decision (*Baker* at paras. 44-45).

[35] *Baker* at paras. 51-56, 73-75. The Court determined that the review of discretionary decision-making should proceed on the basis of the "pragmatic and functional" contextual analysis developed for the review of errors of law on the part of boards and tribunals.

[36] Baker at paras. 35-44. The importance of the Court's ruling on the reason-giving issue is strongly stressed in Dyzenhaus, Fundamental Values, *passim*; and Dyzenhaus and Fox-Decent, Rethinking the Distinction, *passim*.

immigration statute, a grant of power that was quoted twice by the Court but was subjected to no analysis or commentary:

> 114(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.[37]

Immigration legislation plays a critical role in the modern state. It separates those who can take advantage of the benefits of a society from those who cannot, and thus marks a decision by Parliament about the allocation of scare public resources. Yet the above provision sets in motion a process whereby a single public official can declare an exception to the entire statutory regime and suspend the normal operation of the law. The only condition precedent to the declaration of this exception is the "existence of compassionate or humanitarian considerations." Significantly, these "considerations" are not defined in the statute (much like "health" was undefined in the enabling provision at issue in *Morgentaler*), thereby creating a situation where the executive has discretion not only about when an exception to the legislative scheme is to be declared, but also about what constitutes the circumstances giving rise to such an exception in the first place. In other words, underlying the administrative decision, there is a legislative void.

Baker underlines the far-reaching effects of the dynamic of the passive legislature and the active executive set in motion by decisions such as *Hodge*, *Gray*, and the *Chemicals Reference*. Had the legislature performed the law-making and policy-making task of defining the intended scope of the "compassionate or humanitarian" exemption, Ms. Baker, who got lost in the legislative void created by the normless grant of authority, may well have been saved the trouble of going all the way to the Supreme Court of Canada to find relief from an unlawful executive decision.[38] Indeed, there is nothing inherently complex about

[37] *Immigration Act*, R.S.C., 1985, c. I-2 ("***Immigration Act***").
[38] Both the Federal Court ((1995), 101 F.T.R. 110) and the Federal Court of Appeal ([1997] 2 F.C. 127) denied her application for judicial review.

the exemption at the root of the *Baker* decision that suggests a need for the definition of "compassionate or humanitarian circumstances" to occur within the executive, either through Ministerial policy,[39] or simply through *ad hoc* decision-making. The grant of such an enormous administrative power (to declare an exception to the operation of an entire statutory regime) should be accompanied by explicit constraints on that power in the form of legislative standards. The absence of such standards essentially effaces the legal hierarchy of the legislature and the executive, providing the executive the ability to fill in the blanks. Rather than acting pursuant to rules, the executive makes the rules on an *ad hoc* basis.

The effacing of the hierarchy of the legislature and the executive in *Baker* can be usefully approached through a discussion of the intersection of the rule of law and the separation of powers provided by Professor Waldron. Waldron stresses that the rule of law implies an "articulated process" of government in which "the various aspects of law-making and legally authorized action are not just run together into a single gestalt."[40] Waldron finds that the separation of powers provides the needed "articulation" to the processes of government:

> To insist on being ruled by law is, among other things, to insist on being ruled by a process that answers to the institutional articulation required by Separation of Powers--there must be law-making before there is adjudication or administration, there must be adjudication, and the due process which that entails, before there is the enforcement of any order.[41]

Baker reveals a decided lack of an "articulated" government process: *ad hoc* decision-making turns "the various aspects of law-making and legally authorized action . . . into a single gestalt." The tripartite separation of powers proclaimed in *Criminal Lawyers' Association* and *Fraser* eliminates this "gestalt." The sweeping grants of power sanctioned in the Delegation Case Law, by contrast, lead directly to the

[39] The Ministry prepared an "Immigration Manual" that contained some "guidelines" for the exercise of discretion under the "compassionate or humanitarian" exemption: *Baker* at paras. 17, 72. Lorne Sossin has discussed both the uncertain legal status of the Ministerial Guidelines in *Baker*, and the ambiguities in the Supreme Court's handling of "soft law" generally: "The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion," in David Dyzenhaus (ed.) *The Unity of Public Law* (Oxford: Hart, 2004) 87. See also Taggart, Chequered History at 603-605, for general comments on the problems posed by "soft law."

[40] Separation of Powers at 457.

[41] Separation of Powers at 459.

kind of enabling provision at the root of Ms. Baker's legal predicament, and are inimical to an "articulated" process of government.

Baker is a powerful example of the problems arising from violations of the separation of powers and the rule of law, because here one can see an individual person at the receiving end of a violation of the appropriate processes of government. The same is true in *Gray* – in each case, vulnerable persons (a foreign national with dependent children; a man faced with the potential of war) are at the mercy of a style of legislation that replaces the requirements of the separation of powers and the rule of law with a "single gestalt" of arbitrary state power.

My discussion of *Baker* gains considerable support from the more recent Supreme Court decision of *Kanthasamy v. Canada (Citizenship and Immigration)* ("***Kanthasamy***").[42] I have essentially made two related arguments regarding *Baker*: first, that the Court remedied the situation before it through administrative law doctrines rather than looking to the underlying constitutional law problem of a standard-less delegation; and second, that the constitutional law problem is very pressing, revealing significant separation of powers and rule of law concerns. It is instructive to observe that since *Baker*, the "compassionate or humanitarian" exemption has been amended on several occasions, but adequate standards have still not been provided by the legislature. A specific requirement was introduced referencing "the best interests of a child directly affected" (a standard that stems directly from *Baker* itself), and a vague reference to "hardships" has also been added.[43] The exemption, however, has continued to generate considerable litigation, and judicial responses have been conflicting.[44] Indeed, *Kanthasamy* itself was a divided decision, with two members of the Court dissenting on the appropriate

[42] [2015] 3 S.C.R. 909.
[43] For the legislative history of this provision, see *Kanthasamy* at paras. 11-20, and 90.
[44] For a discussion of some of the many judicial decisions that have wrestled with the exemption since *Baker*, see *Kanthasamy* at paras. 23, 29-30, and 93.

test to be applied. The fact that there is still significant controversy in this area more than 15 years after *Baker* further underlines the need for greater legislative involvement in the crafting of standards governing the exercise of executive discretion.[45] A choice with substance is required to end the uncertainty and the human and financial cost (to litigants and to the state) surrounding this provision.

[45] *Kanthasamy* stresses that the exemption is in the nature of equitable relief from a strict application of the statute (at paras. 21, and 63). The necessary flexibility of such relief can nevertheless be guided by legislated standards. Indeed, extensive Ministerial Guidelines have been established to govern the exemption (*Kanthasamy* at paras. 27-28), and these Guidelines themselves have played a part in the conflicting case law arising out of the provision. These "soft law" administrative guidelines should appear in the legislation, reflecting clear democratic decision-making on the important subject of exemptions from Canada's immigration policy, and providing firm guidance to both courts and executive decision-makers.

Chapter 9

Conclusion: The Canadian Nondelegation Doctrine

In the preceding chapters, I have argued that the principles of the separation of powers, democracy, and the rule of law, all recognized as cornerstones of the Canadian constitutional edifice by authoritative decisions of the Supreme Court of Canada, demand substantive content in legislation that delegates power to the executive branch. In this final chapter, I outline the nondelegation analysis that will be performed by a reviewing court. I then apply the doctrine to a range of broad enabling provisions taken from a prominent federal statute. I conclude by considering several decisions from Ontario courts under this statute that summarize the concerns I have addressed throughout my project.

1. The Nondelegation Analysis

a. The Central Question: Has the Legislature Made a Substantive Choice?

The primary target of the Canadian nondelegation doctrine is the common legislative practice of shifting conflict resolution to the executive branch, a practice that turns legislatures into mere managers. The court's task in a nondelegation inquiry is to assess whether the legislature has completed its primary function and finished speaking prior to empowering executive action. The central question for a court is thus the following:

> Does the legislation in question make a substantive choice?

This question is answered by comparing an impugned executive instrument with the relevant enabling provision, and assessing whether an underlying conflict has been resolved. A court will look to see if the enabling provision contains sufficient information to anticipate and control the substance of the resulting executive action.

A resolved conflict can be manifest in one of two ways. On the one hand, the legislature may provide a fixed rule demarcating a choice, a rule which is then applied by the executive to particular cases. On the other hand, the legislature may provide detailed instructions to the executive, enabling government officials to fulfill a clear choice through either administrative action or subordinate rule-making. If either of these two paths has been followed, the court will find that the legislative provision in question has adequate substantive content, and the legislature has finished speaking. Any resulting executive action will be logical, predictable, and properly enabled.

If, however, there is no rule or instructions to guide the executive, then the court will conclude that the legislature has not finished speaking, and there is no legislated law. A vague or naked enabling provision reveals a lack of a clear choice, and any resulting executive action will be necessarily arbitrary and incoherent. Executive action pursuant to law cannot proceed where there is no fully formed law to begin with.

A court conducting a nondelegation inquiry is subject to three important institutional limitations.

First, a deficient enabling clause cannot be repaired by seeking content elsewhere in the statute. The legislature is responsible for populating express power-conferring provisions with express choices. Judicial construction of such choices through a broad and purposive approach to statutory interpretation is an interference with the fundamental separation of institutional roles.

Second, the courts must not evaluate the substantive policy goals underlying an impugned transaction of power between the legislative and executive branches. A merits review of legislation is entirely outside the ambit of the doctrine, which is concerned with ensuring that enabling provisions have content, not specific content that meets with judicial approval. An evaluation of the merits or the reasonableness of legislative provisions and resulting state action may be able to proceed through other forms of

constitutional analysis (for example, under the *Charter*). In a nondelegation inquiry, a court takes the policy choices of the legislature as *prima facie* legitimate, and focuses on whether these choices are clear and determinative, not whether they are reasonable or just.

Third, a court is not competent to tell the legislature how to make law. It is only up to the courts to determine if the legislature has in fact made law. While I noted above two acceptable paths that enabling provisions can follow, these paths present very different options that can be chosen only by the legislature itself. The rule-based approach offers the greatest potential clarity and simplicity, and thereby satisfies rule of law ideals based on the accessibility of laws and the ability of citizens to plan their lives with full knowledge of their rights and obligations. The detailed instructions to the executive approach, conversely, can lead in some cases to complex administrative action or subordinate legislation enabled by highly baroque and lengthy provisions. While this approach can potentially compromise rule of law ideals, such provisions do not necessarily run afoul of a nondelegation doctrine if the courts can discern a clear choice. The virtue of the latter approach may be in compensating for potential over- or under-inclusiveness in stated rules, or in managing highly complex regulatory matters. The trade-offs between these two approaches must be balanced by the legislature.[46] The task for the courts in a nondelegation analysis is to ensure that the necessary choice is made. Either approach, if carefully thought out and executed, can provide sufficient policy content.

b. The Threshold Determination: Is there a Substantive Executive Action at Issue?

The nondelegation doctrine does not test legislation in the abstract, but only when it has crystalized in some form of state action – either in the formulation of subordinate law, or in the exercise of administrative decision-making power.

[46] See Colin S. Diver, "The Optimal Precision of Administrative Rules" (1983) 93 Yale L.J. 65 at 67-79, for a consideration of various arguments in favour of these different approaches to rule-making. Diver also discusses a third option that grants broad discretion to the decision-maker.

In order to come before the court, a claimant in a nondelegation application will have to establish standing pursuant to the rules governing public law litigation,[47] and thus will have to demonstrate a "real stake or a genuine interest" in an executive action stemming from an allegedly deficient enabling clause.[48]

From the above, it follows that a threshold question applies to a nondelegation inquiry:

> Has the relevant legislative provision given rise to substantive executive action?

A "substantive" executive action is one that implicates a claimant's rights or obligations, or, more broadly, the rights or obligations of others for whom the claimant has a legitimate basis to speak.

The threshold requirement serves not only to focus the attention of the court on a concrete transaction of power between the legislative and executive branches, but also to streamline the volume of constitutional challenges under the new doctrine, thereby addressing any floodgates concerns. There will be no open season on the thousands of vague legislative provisions on the books in Canada. A concrete set of facts will be a prerequisite for a claim.

c. Nondelegation Remedies

The nondelegation test consists of the following two questions:

1. Has the relevant legislative provision given rise to substantive executive action?
2. Does the legislation in question make a substantive choice?

I turn now to consider appropriate remedies. Where a court conducting a nondelegation inquiry concludes that executive action is not properly enabled, such action must be ruled invalid. This follows directly from the principle of the rule of law, which provides that executive action must be made pursuant to law. Execution action that is not properly enabled is arbitrary and unconstitutional.

[47] The relevant test for standing is set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524 at paras. 18-52 ("***Downtown Eastside***").
[48] *Downtown Eastside* at paras. 37, 43.

The remedies available under a nondelegation doctrine, however, extend beyond the control of executive action to the control of legislative action as well. Where a legislative provision lacks substantive content, it violates all three of the foundational principles ordering my discussion in prior chapters, and is unconstitutional as a dereliction of legislative responsibility. A court can apply one of two remedies in such circumstances: either a declaration of invalidity or a declaration that the provision must be read down. The first remedy is appropriate where the legislative provision in question enables only one kind of executive action, an unconstitutional one. The second remedy is appropriate in situations where a given enabling provision does not adequately support a specific executive action, but could conceivably give rise to other executive actions of a non-objectionable nature. In such circumstances, the statutory provision should be read down so that it does not apply to the specific executive conduct in question in the nondelegation claim. The reading down remedy may be particularly appropriate in the case of open basket clauses, which can give rise to executive action ancillary to other choices made in the legislation.[49]

2. Applying the Doctrine to the Policy Void of the *Controlled Substances Act*

To demonstrate the application of the nondelegation doctrine, I consider an important Canadian criminal statute, the *Controlled Drugs and Substances Act* ("***Controlled Substances Act***"),[50] which provides many opportunities for the exercise of executive law and policy-making. There are at least five very common delegation strategies employed in this statute, and all appear without any normative guidance from the legislature.

[49] A basket clause is a legitimate exercise of legislative power when it assists executive action that is otherwise properly enabled. *CKOY* and *Katz* scenarios, where these normatively empty clauses are used to facilitate substantive choices, are impermissible.
[50] S.C. 1996, c. 19.

I begin with some general comments about the legislation, and then proceed to consider the suspect delegation strategies. Throughout I indicate how a nondelegation analysis would approach the various enabling clauses.

a. An Incomplete Enactment

While my overall argument is that any un-cabined delegation of legislative power to the executive is unconstitutional, the statute I have chosen to analyze in this section is a criminal enactment. The presence of criminal sanctions serves to underline in particularly stark form the importance of the issues at play in a nondelegation critique of the dominant approach to governance by executive policy-making.

Law and policy choices that can lead to criminal sanctions must be exercised by the people, through their elected representatives, in an open and deliberative forum, and not by executive action under broad enabling provisions. What is thus quite surprising about the *Controlled Substances Act*, a major source of Canadian criminal law, is the enormous scope that it provides for executive policy formation. The chief engine of the legislation is a set of four prohibitions and a series of Schedules listing "substances."[51] The prohibitions govern possession, trafficking, importing and exporting, and production. Where a violation of one of the prohibitions coincides with a Scheduled substance, serious criminal penalties can be imposed. The legislation empowers the executive to modify both the prohibitions and the various Schedules, yet the specific enabling provisions contain no normative content to guide and control these broad powers. Consider, for example, the following parts of the main regulation-making section:

> 55 (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances and precursors and the enforcement of this Act and, without restricting the generality of the foregoing, may make regulations
>
> (a) governing, controlling, limiting, authorizing the importation into Canada, exportation from Canada, production, packaging, sending, transportation, delivery, sale, provision, administration, possession or obtaining of or other dealing in any controlled substances or precursor or any class thereof;

[51] *Controlled Substances Act*, sections 4-7.

> (b) respecting the circumstances in which, the conditions subject to which and the persons or classes of persons by whom any controlled substances or precursor or any class thereof may be imported into Canada, exported from Canada, produced, packaged, sent, transported, delivered, sold, provided, administered, possessed, obtained or otherwise dealt in, as well as the means by which and the persons or classes of persons by whom such activities may be authorized
>
> . . . . .
>
> (z) exempting, on such terms and conditions as may be specified in the regulations, any person or class of persons or any controlled substance or precursor or any class thereof from the application of this Act or the regulations.

The legislative decision to prohibit is itself a policy choice. But these enabling provisions undermine the efficacy of that choice. There is no meaningful legislative guidance here as to the parameters within which the executive should operate in exercising its powers.

The Canadian nondelegation doctrine provides that substantive choices must occur within enabling clauses, and cannot be located by courts in other sections of the legislation and imported into such clauses to legitimize exercises of executive law-making. But even a broad and purposive "modern approach" to this statute would find no substantial policy content beyond the basic decision to prohibit. There is no statement of objective or purposes, and the full title provides simply that "substances" are to be "controlled."[52] The definitions section mechanically states that a "**controlled substance** means a substance included in Schedule I, II, III, IV or V,"[53] and the relevant Schedules themselves simply list items, but do not clarify any purposes behind such listings. The *Controlled Substances Act* is, as far as stated policy choices are concerned, virtually a normative void.[54]

[52] "An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the *Narcotic Control Act* in consequence thereof."
[53] *Controlled Substances Act*, s. 2(1).
[54] Not surprisingly, the courts have read purposes into the legislation, notably "the protection of health and public safety" (see *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at paras. 65, 257). While there may be some contexts in which employing a broad and contextual reading to determine the purposes of a statute is legitimate, as I have discussed previously, providing the basis for interpreting naked enabling clauses is not one of them.

I turn now to consider the various broad delegating strategies at work in this naked enactment. As will be seen, substantive choices are consistently shifted from the legislative to the executive branch.

b. Scheduling Power: A Government "at large"

Section 60 of the *Controlled Substances Act* provides that

> The Governor in Council may, by order, amend any of Schedules I to VIII by adding to them or deleting from them any item or portion of an item, where the Governor in Council deems the amendment to be necessary in the public interest.

Employing schedules to organise a large quantity of information and coordinate a list of items with sanctions or legal consequences is a valid and effective legislative technique. Problems of legitimacy can arise, however, when the executive branch is given the authority to amend a given inventory, particularly when this power is un-cabined. The precise determination of which "substances" are to be illegal is surely one of the most fundamental decisions to be made under a criminal statute controlling the access of citizens to drugs. This type of decision – for example, which of heroin, marijuana, alcohol, or tobacco should be subject to interdiction – engenders considerable conflict in society, and such conflicts should be resolved democratically, not through executive decree. The above provision is of singular concern because it is normatively empty. The signifier "in the public interest" has no specific content capable of steering a listing decision one way or the other. Indeed, strong arguments can be advanced that it would be "in the public interest" to render any of the four noted substances either legal or illegal.

Any citizen faced with the consequences of a listing decision made pursuant to section 60 should be able to commence an application to have the decision set aside pursuant to the Canadian nondelegation doctrine. All the attributes of the nondelegation analysis are in place: severe criminal penalties would follow from a statutory provision lacking a substantive choice. The listing decision would be unconstitutional, and furthermore, because section 60 is naked, and cannot meaningfully guide any executive action in a nonarbitrary way, it has no legitimate application, and should itself be struck down.

This is precisely what happed in the 2015 decision of the Irish Court of Appeal in *Bederev v. Ireland*,[55] which involved a challenge to a naked enabling provision in that jurisdiction's drug prohibition legislation that fulfilled a function very similar to section 60 of the *Controlled Substances Act*.[56] Noting that the empty language of the statute could lead to even alcohol or tobacco being prescribed, the Court concluded that the government had been given virtually "unlimited power of regulation" and was unconstitutionally "at large."[57] Both the enabling provision and a resulting executive order prescribing a particular substance were ruled invalid.[58]

The use of schedules and lists, with the executive granted uncontrolled powers of amendment, is a disturbingly common phenomenon in Canada. I discussed an example from *SARA* in Chapter 6, and the Ontario Royal Commission Inquiry into Civil Rights noted this strategy in Ontario's workers' compensation legislation, and commented critically on the legislature delegating such a broad power to rearrange the application of an enactment.[59] Troubling examples of executive scheduling and listing powers can also be

[55] See my discussion of the Irish nondelegation doctrine near the beginning of Part C at Note 5.

[56] The enabling provision in the Irish legislation allowed the executive to schedulize a substance through executive order:

> The Government may by order declare any substance, product or preparation (not being a substance, product or preparation specified in the Schedule to this Act) to be a controlled drug for the purposes of this Act and so long as an order under this subsection is in force, this Act shall have effect as regards any substance, product or preparation specified in the order as if the substance, product or preparation were specified in the said Schedule (*Misuse of Drugs Act 1977*, 1977, no. 12, section 2(2)).

The Irish legislation lacked the Canadian statute's vague reference to the "public interest," but had a long title that provided slightly more general policy guidance than the *Controlled Substances Act*, referencing "misuse," "dangerous," and "harmful." None of these words, in the Court's view, offered meaningful control on the exercise of executive power: *Bederev* at paras. 68, 70.

[57] *Bederev* at paras. 68, 70.

[58] *Bederev* at para. 75.

[59] *McRuer Report* at 346-48. For current Canadian workers' compensation legislation employing Schedules that can be amended by the executive, see the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, ss. 2(2), 183(2); and *The Workers Compensation Act*, C.C.S.M. c. W200, ss. 76.1(1) and 76.2(1).

found in the new and highly controversial *Security of Canada Information Sharing Act*,[60] as well as in the very serious "Terrorism" offences contained in Part II.1 of the *Criminal Code*.[61]

c. Discretionary Exemptions from the Operation of a Statute

In the previous chapter, I considered the problems raised by legislation empowering the executive to grant a discretionary exemption from a statutory regime where there are no enacted standards or guidance. The *Controlled Substances Act* contains this type of provision:

> 56 (1) The Minister may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

Here is the very similar clause enabling the executive action found unlawful (on administrative law grounds) in *Baker*:

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[60] S.C. 2015, c. 20, s. 2 ("***Information Sharing Act***"). In this legislation, vague words and phrases such as "terrorism" and "security of Canada" are the gateway into a potentially large-scale sharing of information between diverse government institutions (*Information Sharing Act*, ss. 2, 3, 5). Included amongst the relevant law-enforcement institutions benefiting from this legislation are those recently implicated in serious human-rights violations in circumstances where the sharing of information itself played an important and facilitating role (see Terence McKenna, "The Torture Files," *The Fifth Estate*, *CBC* (23 September 2016)). In addition to a naked basket clause empowering the executive to establish regulations governing the disclosure of information in very broad terms ("make regulations for carrying out the purposes and provisions of this Act"), the legislation empowers the executive to change certain Schedules at will, Schedules containing the specific institutions determined by Parliament to be subject to the information sharing regime (*Information Sharing Act*, s. 10). This enabling clause is un-cabined, with the only guidance coming from very vague and broadly worded "Purpose" and "Guiding Principles" provisions elsewhere in the statute (*Information Sharing Act*, ss. 3-4).

[61] R.S.C. 1985, c. C-46. Liability under most of the provisions in Part II.1 of the *Criminal Code* is triggered by some involvement in "terrorist activity," which is defined with a reasonable degree of specificity to include acts of intimidation and/or violence against persons (s. 83.01 (1)). There are also, however, several provisions under which liability arises not because of a connection with "terrorist activity," but rather by virtue of being connected to a "terrorist group." A "terrorist group" is defined as either an "entity" that engages in "terrorist activity" or a "listed entity" (s. 83.01 (1)). The listing mechanism provides as follows:

> 83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that
> (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
> (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

Paragraph (b) is far too broadly worded: the phrase "in association with" does not adequately control executive discretion. The question of which entities should be brought within the ambit of the *Criminal Code* is a matter of public policy that must be dealt with legislatively, and not through executive decree.

> 114(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Those few qualifiers on the exercise of discretion offered in these provisions ("medical or scientific purpose or is otherwise in the public interest"; "existence of compassionate or humanitarian considerations") have no meaningful normative content: they do not evince clear legislative choices as to when discretion should be exercised. Instead, there is only the loosest possible categorization of relevant circumstances offered. A roughly similar provision can be found in the *Broadcasting Act*,[62] while the *Customs Act*,[63] and section 36 of the *Fisheries Act* provide for discretionary exemptions from statutory regimes that have no qualifications whatsoever. In the *Fisheries Act*, as discussed in Chapter 6, Parliament establishes a prohibition on the deposit of "deleterious substances" in fish habitats, but then subtracts from that prohibition with a series of provisions authorizing exemptions for certain persons, substances, and places, all to be determined by the executive.

A nondelegation analysis applied to an exercise of executive discretion under any of the above statutes would result in a finding of invalidity, both for the enabling provision and the exemption decision. This conclusion flows directly from the absence of legislated choices. In *Baker*, for example, there was a substantive executive action, a deficient enabling provision, and ultimately an arbitrary exercise of executive power. The crucial policy choice – what constitutes "compassionate or humanitarian considerations" – is unconstitutionally absent from the legislation. Under the *Fisheries Act* provision, the crucial policy question is what constitutes an adequate reason to allow pollution in fish habitats. Under the *Controlled Substances Act*, the key question is what constitutes an adequate basis on which to exempt

[62] S.C. 1991, c. 11, s. 9(4).
[63] R.S.C. 1985, c. 1 (2nd Supp.), s 35.1(4)(c).

someone from Canada's drug laws. Where the underlying policy conflict has not been resolved by the legislation, executive action cannot be lawfully enabled.

A statutory exemption, by its nature, is designed to relieve possible injustice resulting from a rigid application of rules without regard to contextual factors. The Canadian nondelegation doctrine does not proceed on the basis that there is no legitimate room for discretion in modern governance. Rather, it demands that legislatures make some attempt to provide a specific set of parameters in which such discretion is to operate. The deficiency of the above provisions, which either offer no parameters at all (the *Fisheries Act*) or only vague and empty phrases (*Controlled Substances Act*; *Immigration Act*) is glaring in this respect.

The Ministerial exemption clause in section 56(1) of the *Controlled Substances Act* has received judicial consideration in two high profile decisions. In *R. v. Parker* ("***Parker***"),[64] the Ontario Court of Appeal found the provision lacking along roughly nondelegation lines, while in *Canada (Attorney General) v. PHS Community Services Society* ("***Insite***"),[65] the Supreme Court of Canada found it satisfactory.

In *Parker*, the Court of Appeal found that the prohibition on the possession of marijuana in section 4 of the *Controlled Substances Act* violated section 7 of the *Charter* because there was no exemption for medical need. The Crown attempted to argue that the availability of a Ministerial exemption under section 56(1) satisfied the constitutional requirements of section 7.[66] The Court, in an unanimous opinion written by Justice Rosenberg, rejected this proposition, highlighting the lack of any standards controlling executive discretion under the exemption:

> [Section 56(1)] reposes in the Minister an absolute discretion based on the Minister's opinion whether an exception is "necessary for a medical ... purpose", a phrase that is not defined in the Act. The Interim Guidance Document issued by Health Canada to provide guidance for an application for a s. 56 exemption

[64] (2000), 49 O.R. (3d) 481.
[65] [2011] 3 S.C.R. 134.
[66] *Parker* at paras. 166, 175.

> sets out factors that the Minister "may" consider in deciding whether an exemption is necessary for a medical purpose. This document does not have the force of law and, in any event, merely sets out examples of factors the Minister may consider. It does not purport to exhaustively define the circumstances. In fact, the document explicitly states that the Minister may take into account considerations unrelated to medical necessity such as "the potential for diversion." The document also suggests that the power under s. 56 is only to be exercised in "exceptional circumstances," a qualification not found in the statute itself.
>
> . . . . .
>
> In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered discretion in the Minister, the deprivation of Parker's right to security of the person does not accord with the principles of fundamental justice [emphasis added].[67]

Parker did not involve a challenge to the constitutionality of the exemption clause itself: the provision was only relevant in that it allegedly offered a valid option for medical marijuana use.

In *Insite*, which dealt with safe injection sites for intravenous drug users, the Supreme Court appears to have found exactly what *Parker* did not:

> The availability of [section 56(1)] exemptions acts as a safety valve that prevents the CDSA from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects.
>
> I conclude that while s. 4(1) of the CDSA engages the s. 7 *Charter* rights of the individual claimants and others like them, it does not violate s. 7. This is because the CDSA confers on the Minister the power to grant exemptions from s. 4(1) on the basis, *inter alia*, of health. Indeed, if one were to set out to draft a law that combats drug abuse while respecting *Charter* rights, one might well adopt just this type of scheme — a prohibition combined with the power to grant exemptions.[68]

Strictly speaking, because *Parker* did not involve a challenge to section 56(1), *Insite* did not need to overrule it. This made the higher Court's task easier, and allowed the Ontario Court of Appeal decision to be distinguished along the following lines:

> No decision of the Minister was at stake in *Parker*, and the Court's conclusion rested on findings of the trial judge that, at that time, "the availability of the exemption was illusory."[69]

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[67] *Parker* at paras. 178, 184. The Court's reference to an "Interim Guidance Document" provides a significant parallel with *Baker*. In each statutory context, the absence of an "adequate legislated standard" led to the creation and use of internal departmental materials of an uncertain legal status that guided executive discretion in an uncertain fashion. Clearly legislated standards, demanded by a nondelegation doctrine, would place such documents in their proper place: ancillary resources, but not primary determinants of executive decision-making.
[68] *Insite* at paras. 113-14.
[69] *Insite* at para. 118.

This statement, however, arguably does not deal with *Parker* in a satisfactory manner, and does not clearly acknowledge the significant difference between the two Courts' views of the adequacy of the exemption provision. While Justice Rosenberg does observe and agree with the specific findings of the trial judge on the practical availability of a Ministerial exemption in the circumstances of medical marijuana, the bulk of his lengthy discussion of section 56(1), which extends to almost 20 paragraphs and discusses several important Supreme Court of Canada precedents, operates on the level of legal principle. The dominant thrust of this discussion, which is captured in my quotation above, is on the lack of legal standards controlling exercises of Ministerial discretion, and also on the conclusion that a naked enabling clause renders a statutory exemption unstable and unable to offer a basis on which to prevent a violation of *Charter* rights.[70] By contrast, the Supreme Court's very brief handling of the section 56(1) exemption (five short paragraphs) offers no significant analysis of the problem of "unfettered discretion" isolated by the Court of Appeal.

I would respectfully suggest that the higher Court was unwilling to upset a fragile statutory regime, and furthermore did not absolutely need to do so in the context of the *Insite* appeal. Unlike *Parker*, in *Insite* a challenge to the prohibitions in the *Controlled Substances Act* was accompanied by a challenge to a specific exercise of Ministerial discretion under section 56(1). The Court was thus able to reach its desired result by finding that the specific decision of the Minister governing safe injection sites was unconstitutional (it was arbitrary and grossly disproportionate, and thus violated the principles of fundamental justice under section 7), rather than undoing the entire statute. The costs of this strategy, however, are in my view substantial, for as a precedent, the Supreme Court appears to state that a regime that comes close to violating *Charter* rights can simply insert a naked exemption clause to let off excess

[70] See *Parker* at paras. 172-189, and especially paras. 177-187.

pressure. The nondelegation doctrine would close the door on this short cut. Executive discretion must be cabined by legislative precision.

I conclude this discussion of exemption clauses by noting that 2015 and 2017 amendments to the *Controlled Substances Act* introduced a second Ministerial exemption provision into the legislation to address safe injection sites in the aftermath of the *Insite* decision. The new section 56.1 exemption is populated with information, unlike the barren section 56(1). On more careful inspection, however, it becomes evident that the new details do not provide a policy choice:

> 56.1 (1) For the purpose of allowing certain activities to take place at a supervised consumption site, the Minister may, on any terms and conditions that the Minister considers necessary, exempt the following from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical purpose:
> (a) any person or class of persons in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act; or
> (b) any controlled substance or precursor or any class of either of them that is obtained in a manner not authorized under this Act.
>
> (2) An application for an exemption under subsection (1) shall include information, submitted in the form and manner determined by the Minister, regarding the intended public health benefits of the site and information, if any, related to
> (a) the impact of the site on crime rates;
> (b) the local conditions indicating a need for the site;
> (c) the administrative structure in place to support the site;
> (d) the resources available to support the maintenance of the site; and
> (e) expressions of community support or opposition.

This list can be singled out as an example of legislative detail that fails to achieve the required ends of the nondelegation doctrine: precision governing executive action is not synonymous with word count. Do any of the items in this list indicate a choice clarifying when a safe injection site exemption should be granted? I would argue that they merely restate the outlines of the difficult underlying policy question, and pass that on to the executive. What is needed is legislative prioritization. The resulting exercise of discretion is still "unfettered" by substantive choices.

d. Basket Clauses and Defining Statutory Terms

Section 55(1.2) of the *Controlled Substances Act* combines two broad enabling strategies:

> The Governor in Council may make regulations for carrying out the purposes of section 56.1, including
>
> (a) defining terms for the purposes of that section.

The opening part of this provision is a basket clause, empowering regulation-making uncontrolled by specific policy decisions. Given that section 56.1 itself lacks clarity regarding legislative choices and priorities (as discussed above), any matter that relates to the subject of safe injection sites can fall within this authorization. The legislature has effectively provided the executive with a blank cheque. As discussed in Chapter 6 in my analysis of *CKOY*, the *Broadcasting Reference*, and *Katz*, basket clauses are particularly susceptible to the broad and purposive "modern" interpretive approach to legislation: judicial discretion can allow such clauses to authorize virtually any executive action that comports with the overall goals and objectives of a given statute.

Under the nondelegation doctrine, basket clauses, being normatively empty, cannot enable substantive executive action, and rather must be reserved for ancillary machinery-of-government purposes: the "subordinate technical administrative regulations" noted by Alf Ross.[71] Thus, pursuant to a nondelegation inquiry, a use of a basket clause for substantive purposes would lead to both an invalidation of executive action and a reading down of the legislative provision itself.

While basket clauses have both appropriate and inappropriate uses, the second enabling strategy evident in section 55(1.2) is entirely objectionable. Definitions are the doorway through which statutory power enters and reconfigures a given area of social relations. Through definitions, a statute's ambit can be easily expanded or contracted. To allow the executive to define terms in a parent statute is thus a very broad grant of legislative power. The Alberta Court of Appeal has sanctioned the use of subordinate legislation to define terms in the parent statute on the authority of *Gray* (that cornerstone of the

[71] Delegation of Power at 9.

Delegation Case Law), and has referred to this practice as a mere "detail" of implementation.[72] With respect, I suggest that the power in question is essentially one of statutory amendment, and comes close to removing the "subordinate" quality of subordinate law-making, and is inherently unconstitutional. The Ontario Royal Commission Inquiry into Civil Rights nicely summarized the serious constitutional infirmities of this practice:

> Provisions giving power to define by regulation the meaning of terms used in an Act obviously give the Lieutenant Governor in Council, or other subordinate legislator, wide power to determine the scope and operation of the Act. Such delegation of legislative power provokes the comment that the Legislature was not sure what it meant so to avoid making up its mind it delegated the power to decide to another body.
>
> . . . . .
>
> Powers of definition or amendment should not be conferred unless they are required for urgent and immediate action. Such exercise of power to alter the scope or operation of an Act may vitally affect rights of individuals or classes of individuals coming within its purview.
>
> The rule should be that the normal constitutional process of amending the parent Act should be followed so that the amendment may be publicly debated in the Legislature.[73]

Section 55(1.2) of the *Controlled Substances Act*, combining a completely open-ended basket clause with an equally open-ended power to define terms in the parent statute, authorizes a government to roam "at large," to borrow again the language of the Irish Court of Appeal.

I should note that section 55(1.2) also contains the following regulation-making power:

> The Governor in Council may make regulations for carrying out the purposes of section 56.1, including
>
> . . . . .
>
> (d) respecting the circumstances in which an exemption may be granted.

[72] *Johnson v. Federated Mutual Insurance Co.* (1989), 60 D.L.R. (4th) 417. The Court of Appeal found a definition in an insurance regime, which was provided by the executive and not the legislature, and which denied benefits to a claimant, was nevertheless consistent with the overall purpose of the legislation. Even if the higher Court was correct on this reading (I make no arguments on this point other than to note that the trial judge's position contrary position was well argued), the scale of the change introduced by the definition, directly affecting individual rights and entitlements, should have emanated from the deliberative policy-making organ of government, and not the executive branch.

[73] *McRuer Report* at 346-48.

This power is presumably intended to allow the Cabinet to narrow the ambit of the Minister's discretion under section 56.1. There are, however, no instructions from the legislature narrowing the ambit of the Cabinet's discretion.

e. Exceptions by Regulation: Filling in the Blanks

The incompleteness of the *Controlled Substances Act* is starkly evident in an enormous carve-out in favour of executive law-making evident in three of the four central statutory prohibitions. I reproduce the possession prohibition here:

> 4 (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.[74]

The government has taken advantage of the substantial opportunity afforded here for altering the scope of the statute, most notably in the *Narcotic Control Regulations*,[75] the *Benzodiazepines and Other Targeted Substances Regulations*,[76] and the *Marihuana Medical Access Regulations* ("***Medical Access Regulations***").[77] Each of these regimes, in providing exceptions to the various statutory prohibitions, contains significant policy choices made without legislative input. My concern is not with the abstract concept of a carve-out, nor with the prospect of detailed regulatory decision-making made by experts in various government departments. Narcotics, benzodiazepines, and marijuana play an important role in the Canadian health care system and need to be removed from any blanket prohibition. The problem comes with the absence of any governing norms in the legislation guiding subordinate decision-making

[74] The other two main prohibition carve-outs read as follows:

> 6 (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.
>
> . . . . .
>
> 7 (1) Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III or IV.

It is not surprising that the trafficking prohibition (in section 5) has no carve-out.

[75] C.R.C. c. 1041.

[76] SOR/2000-217.

[77] S.O.R./2001-227. These regulations were later replaced by the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230.

and clarifying the nature of the exemptions. The regulation-making provisions in the statute are simply too sparse to adequately perform these tasks. I reproduce for ease of reference three of the main enabling clauses noted near the beginning of this section:

> 55 (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances and precursors and the enforcement of this Act and, without restricting the generality of the foregoing, may make regulations
>
> (a) governing, controlling, limiting, authorizing the importation into Canada, exportation from Canada, production, packaging, sending, transportation, delivery, sale, provision, administration, possession or obtaining of or other dealing in any controlled substances or precursor or any class thereof;
>
> (b) respecting the circumstances in which, the conditions subject to which and the persons or classes of persons by whom any controlled substances or precursor or any class thereof may be imported into Canada, exported from Canada, produced, packaged, sent, transported, delivered, sold, provided, administered, possessed, obtained or otherwise dealt in, as well as the means by which and the persons or classes of persons by whom such activities may be authorized;
>
> . . . . .
>
> (z) exempting, on such terms and conditions as may be specified in the regulations, any person or class of persons or any controlled substance or precursor or any class thereof from the application of this Act or the regulations.

There is not enough policy guidance here to cabin the numerous decisions that must be made in forging medical use regimes out of the bare bones of the statute. Thus the executive ends up filling in the blanks in the legislation and completing primary choices rather than implementing a well-thought out regime. A nondelegation inquiry would find any substantive executive action made under these provisions to be invalid, and the provisions themselves would need to be read down such that they could only apply to ancillary technical provisions. Substantive elements in the three noted regulatory regimes would have to be either enacted by the legislature itself, or properly enabled with detailed legislative guidance.

3. *Parker* and the Normativity of the Nondelegation Doctrine

I conclude my project by considering several Ontario court decisions made under the *Controlled Substances Act*, decisions that directly implicate delegation and nondelegation concerns.

The Ontario Court of Justice challenged the *Medical Access Regulations* on nondelegation lines in the 2003 marijuana possession case of *R. v. J.P.* ("***R. v. J.P.***").[78] These regulations were introduced in 2001 as a response to the Ontario Court of Appeal judgment in *Parker*, which, as noted previously, found the marijuana possession prohibition in section 4 of the statute to violate the *Charter* rights of those individuals who require the drug for medical needs. The trial judge in *R. v. J.P.* reasoned that

> While Regulations were enacted, but the legislation was not amended, the "gap in the regulatory scheme" (to use the language of Rosenberg J.A. in *Parker*) was not addressed. In my view, the establishment by Parliament of suitable guidelines in legislation fettering administrative discretion was requisite, but lacking. This is simply not the sort of matter that Parliament can legitimately delegate to the federal cabinet, a Crown minister or administrative agency. Regulations, crafted to provide the solution (even were these fashioned to create sufficient standards governing exemptions) cannot be found to remedy the defects determined by the *Parker dicta*. Therefore, since a statutory framework with guiding principles was not enacted within the period of the suspension of the declaration of invalidity, it follows in my view that the declaration is now effectively in place [emphasis added].[79]

Based on the absence of legislation rectifying the unconstitutionality of the marijuana prohibition struck down in *Parker*, the Court of Justice concluded that the charges against the defendant had to be dismissed.

When *R. v. J.P.* reached the Ontario Court of Appeal ("***J.P.***"),[80] however, the higher Court relied solely on the *Charter*-deficiency of the *Medical Access Regulations* in dismissing the charges against the defendant,[81] and expressly rejected the lower court's view that the use of subordinate legislation to

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[78] (2003), 8 C.R. (6th) 170.

[79] *R. v. J.P.* at para. 46. It should be noted that the Ontario Court of Justice has no jurisdiction to make a formal declaration of invalidity, and thus the trial judge was limited to reaching a verdict on the possession charges. On this point, see *Parker* at para. 197.

[80] *R. v. J.P.* (2003), 67 O.R. (3d) 321. The Ontario Superior Court had previously upheld the decision of the Court of Justice, and while taking no issue with the lower court's reasons, pursued a different argument of considerable constitutional interest, although outside of the ambit of my project. The Superior Court held that the *Medical Access Regulations* provided only an exemption, and no prohibition, and thus there was no valid prohibition in effect in Ontario following *Parker's* declaration of invalidity (*R. v. P. (J.)* (2003), 64 O.R. (3d) 757 at paras. 9-15). The Court of Appeal rejected this argument, claiming that the declaration of invalidity did not remove the prohibition from the books, but only rendered it unenforceable until a valid exemption was instituted (*J.P.* at paras. 31-33). The Court of Appeal's analysis appears to be inconsistent with a subsequent judgment of the Supreme Court of Canada, which states that on a declaration of invalidity under section 52 of the *Charter*, a law is "null and void, and is effectively removed from the statute books" (*R. v. Ferguson*, [2008] 1 S.C.R. 96 at para. 65).

[81] In *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104, leave to appeal dismissed [2004] S.C.C.A. No. 5 ("***Hitzig***"), the Ontario Court of Appeal found that the *Medical Access Regulations* were deficient under section 7 of the *Charter*. However, rather than declaring the entire regulations invalid, the Court selectively removed several offensive provisions, and as a result, on the date of the decision, October 7, 2003, created a valid medical exemption (*Hitzig*

respond to the declaration of invalidity was inadequate. Yet *J.P.* raises significant problems, for *Parker* does appear to support the nondelegation reasoning of the Court of Justice. Indeed, even a casual reading of Justice Rosenberg's lengthy and detailed judgment in *Parker* reveals a presumption that the government would respond to the declaration of invalidity with legislation. While the trial judge in the *Parker* litigation concluded that the effective remedy for the *Charter* violation was to read a medical exemption into the statutory prohibitions,[82] Justice Rosenberg expressly rejects this remedy on institutional grounds:

> Even so, reading in will not be appropriate if "the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis": *Schachter*. To read in an exemption in such circumstances would "amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature not the courts."
>
> . . . . .
>
> There is, in my view, no question that a medical exemption with adequate guidelines is possible. The fact that such exemptions exist in some states in the United States is testament to that. However, there are many options to consider and this is a matter within the legislative sphere. There is also a particular problem in the case of marihuana because of a lack of a legal source for the drug. This raises issues that can only be adequately addressed by Parliament.
>
> There is one other factor that is also worth considering. To avoid an undue intrusion into the legislative sphere, any exemption crafted by a court should probably be the minimum necessary to cure the constitutional defect. However, faced with the need to open up the *Controlled Drugs and Substances Act* to address the constitutional defect, Parliament has the resources to address the broader issue of medical use. By way of example only, people without the means to grow marihuana themselves may be dependent upon caregivers to obtain the drug. This is a complex matter that, while not necessarily implicating *Charter* rights (although it may), is not something a court is equipped to deal with. Put another way, Parliament is not bound to legislate to the constitutional minimum. It can adopt the optimal and most progressive legislative scheme that it considers just [emphasis added] [internal citations abridged].[83]

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at paras. 153-170). Pursuant to *Parker* and *Hitzig*, there was no criminal prohibition on the possession of marijuana in effect in Ontario between the point when the one-year suspension of the declaration of invalidity in *Parker* expired (July 31, 2001) and the date that *Hitzig* cleaned up the *Medical Access Regulations* (this timeline is expressly stated in *Hitzig* at para. 170). The accused in the *J.P.* litigation was charged on April 12, 2002, and thus the Court of Appeal in *J.P.* was able to uphold the decision of the lower courts entirely on *Charter* grounds.

[82] *Parker* at paras. 7-11, summarizing the decision of the Ontario Court of Justice in *R. v. Parker* (1997), 12 C.R. (5th) 251.

[83] *Parker* at paras. 198, 201, 204-205, internal quotations cited to *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 705, 707.

While the Court of Appeal does not expressly invoke the separation of powers here, there is little doubt that this constitutional principle directly captures the central point raised in these passages. The following excerpt from *Criminal Lawyers' Association* is directly applicable:

> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bonds, that each show proper deference for the legitimate sphere of activity of the other."[84]

The separation of powers concerns expressed in *Parker* can be said to have both an overt and a latent content. The overt content is the separation of judicial and legislative roles: the courts are not competent to deal with the complex policy questions that need to be answered in order to render the marijuana prohibition regime constitutional. The latent content is the separation of legislative and executive roles: the executive is also not competent to deal with these matters. Justice Rosenberg expressly references "Parliament," "legislature," and "legislative" many times in the above passages, and earlier in his reasons he states that the needed exemption "is a matter for Parliament."[85] Additionally, in his discussion of the section 56(1) exemption, in a passage I quoted previously, he stresses the need for an "adequate <u>legislated</u> standard for medical necessity" [emphasis added].[86]

Parker also enumerates a series of difficult policy questions that should be addressed in creating a medical marijuana exemption regime:

> (a) what constitutes "medically approved use"?
> (b) who may grant medical approval? on what basis? on whose onus? to what standard of proof?
> (c) given that this is a constitutional protection (i.e. the highest form of protection allowed by our law), what degree of illness is required to engage it? must it be life-threatening? chronically disabling? disruptive? generally inconvenient? merely bothersome?
> (d) what quantities of marijuana may an authorized person possess? enough for one day? a week? a year? should there be a presumption that any amount in excess of immediate need is not covered by the exemption? If so, who decides what the threshold amount should be?

[84] *Criminal Lawyers' Association* at para. 29.
[85] *Parker* at para. 11.
[86] *Parker* at para. 184.

> (e) what quantities of marijuana may an authorized person cultivate? how much of the plant should be considered useable for the purpose of that determination? just the flowers? the flowers and the leaves? who decides?
> (f) does the exemption extend in any way to roommates, family members or caregivers? if an unauthorized individual cares for an otherwise 'exempt' plant while its authorized owner is away, is that individual insulated from prosecution for cultivation? on what basis, if the exemption is personal?[87]

These are no mere details of implementation suitable for executive management; these are pressing questions of public policy requiring resolution through the medium of democratic deliberation. *Parker* is thus consistent with my central nondelegation argument that policy choices are institutionally specific: they need to be made legislatively.[88]

Against the backdrop of *Parker*, the later Court of Appeal decision in *J.P.* appears markedly inadequate. The later decision is only able to reject the nondelegation analysis advanced by the Court of Justice in *R. v. J.P.* by evading the substance of Justice Rosenberg's judgment. In the following passages from *J.P.*, worth quoting at some length, the Court of Appeal sidesteps the normative content of *Parker*:

> The breadth of the power to delegate the law of Parliament's lawmaking function is demonstrated in *Re Gray*, a case involving a provision of the *War Measures Act*, which delegated very broad lawmaking powers to the Governor-in-Council. The majority of the Supreme Court upheld the delegation of those sweeping powers to the Governor-in-Council.
>
> . . . . .
>
> Anglin J. described the scope of Parliament's power to delegate in these terms:
>
> > A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction ...
>
> Anglin J. went on to observe that any attempt by the court to limit Parliament's power to delegate its lawmaking function was in fact a court imposed restriction on the legislative powers of Parliament.
>
> Duff J. provided an excellent explanation of subordinate legislation:
>
> > There is no attempt to substitute the executive for Parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the

[87] *Parker* at para. 202.
[88] Most of the policy questions posed by Justice Rosenberg are answered, in one way or another, in the *Medical Access Regulations* themselves, and thus through executive fiat. The dominant strategy of the regulations is to leave the details surrounding medical marijuana to prescribing physicians. This is, in itself, a very substantial policy choice that should (and easily could) have been made by the legislature.

> legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law.
>
> Stripped to their essentials, the [*Medical Access Regulations*] are regulations governing "the possession or obtaining of or other dealing in" marihuana. As such, they are clearly within the regulation making power entrusted to the Governor-in-Council by s. 55(1)(a) of the CDSA. Like any other Government action, those regulations were subject to *Charter* challenge. The outcome of that challenge, however, depended on whether the substance of the regulations were consistent with *Charter* demands and not on the fact that the substance appears in regulations rather than in the statute.
>
> . . . . .
>
> The trial judge read the references by Rosenberg J.A. in *Parker*, *supra*, to Parliament's responsibility to legislate as indicating that any constitutionally acceptable medical exemption had to be in the statute itself. We do not read his reasons that way. As explained by Duff J., in *Re Gray*, *supra*, subordinate legislation in the form of regulations is as much an expression of Parliament's will as is a provision in a statute. When Rosenberg J.A. in *Parker* referred to issues being "addressed by Parliament", he in no way excluded the exercise of lawmaking authority properly delegated to the Governor-in-Council by Parliament. Regulations are also legislation, albeit subordinate legislation. When Rosenberg J.A. referred to a "legislative scheme," he did not exclude the possibility of a scheme brought forward by way of regulation.
>
> Nothing in the order of this court in *Parker*, *supra*, or in the provisions of the CDSA precluded resort to the regulation making power to remedy the constitutional defect identified in *Parker* [internal citations abridged].[89]

The *Parker-J.P.* nexus provides an effective modern statement of the fundamental defects of the positivist ideology that is exemplified in *Gray* and the Delegation Case Law. Authorizing the executive to determine the scope of criminal law and sanctioning an executive rectification of *Charter*-deficient legislation are not examples of a "limited delegation" of "legislative functions," any more than empowering the executive to amend a statute exempting a citizen from military service was in *Gray* itself. The Court of Appeal in *J.P.* is technically correct that Justice Rosenberg did not expressly preclude the possibility of regulations making the changes necessary to render the legislation constitutional. The Court of Appeal in *J.P.* is also technically correct that sections 4 and 55(1) of the *Controlled Substances Act* enable (through a pedigree of power) the *Medical Access Regulations*. But what is missing here is the entire institutional tenor of

[89] *J.P.* at paras. 20-27, citing *Gray* at 157, 170 and 176.

Parker. Justice Rosenberg insists on the appropriateness of a legislative response to complex issues of public policy. His repeated references to "Parliament," the "legislature," and "legislation" are not minor details that can be sidestepped by observing that "Regulations are also legislation, albeit subordinate legislation." *J.P.*'s strategy is to "Strip" everything to its "essentials," and thereby bury what the prior judgment said under a thin legalistic veneer of what it did not say. When *Parker* is excavated from this reductionist reading, the government's resort to the *Medical Access Regulations* is revealed for what it is – a short-cut that in the circumstances is glaringly inadequate. The burden of recasting unconstitutional legislation is more than can be carried by a legalistically sound but normatively empty process of governance. Justice Rosenberg's extensive list of policy concerns demands deliberative, and not simply managerial input.

Both *Parker* and the Court of Justice's decision in *R. v. J.P.* support a nondelegation approach to modern governance – an approach that counters the evasion of constitutional principles characterizing the administrative state and facilitated by decisions such as *Gray* and the Delegation Case Law. The positivistic emphasis on the validity of a chain of norms (explicit both in Justice Duff's comments in *Gray* quoted in the above passage and in his comments in the *Chemicals Reference* discussed in Chapter 7) is predicated on the root norm of parliamentary sovereignty. That root norm, however, is hollow if it does not involve a genuine exercise of democratic choice resolving public conflict. Where a chain of norms delegates power to the executive, the delegation must follow from a clearly enunciated substantive choice, and not anticipate the future making of that choice by the recipient of power. The circle of democratic legitimacy must be closed by legislative choice. Thus the executive is not, as Justice Duff maintains, a valid "agent or organ of the legislature" in all circumstances. Such agency is not legitimate, and hence not effective, where the delegated power contains a task that must be fulfilled deliberatively. The policy questions isolated by Justice Rosenberg in *Parker* reveal the outer limits of the power to delegate. This power stops

short of enabling subordinate decision-making on pressing and complex issues that require community input.

The Court of Appeal in *J.P.* observes that the *Charter* challenge was on "whether the substance of the regulations were consistent with *Charter* demands" [emphasis added].[90] I maintain, however, that the *Charter* does not exhaust the scope of the constitutional responsibilities of law-making by legislation. Where the state seeks to enter into and reconfigure relationships in society, it must also adopt the appropriate legal form. As such, the fact that "the substance appears in regulations rather than in the statute" is indeed a matter for the judiciary, and it is time to discard Justice Anglin's statement to the contrary. The Ontario Court of Justice appropriately and accurately addressed this issue: the *Parker* declaration had to be remedied through legislation. The regulatory response was invalid, although highly symptomatic of a statute, and a style of governance where the fundamental legislative task of law and policy-making is consistently left incomplete.

Under the Canadian nondelegation doctrine, such a dereliction of legislative duty would become unlawful in practice. It is already unlawful in principle.

[90] I should note that there was no *Charter* challenge in *R. v. J.P.* The Court of Appeal may be conflating the facts of the *J.P.* litigation with *Hitzig*, as both decisions were handed down on the same day, and the latter did involve a (successful) *Charter* challenge to the *Medical Access Regulations*.

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