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Article Submissions
Patricia Paradis
Managing Editor
Faculty of Law, Room 448E
University of Alberta
Edmonton, AB T6G 2H5

pparadis@ualberta.ca
Phone: (780) 492-8281

Book Review Submissions
Dwight Newman, Professor
College of Law
University of Saskatchewan
15 Campus Drive
Saskatoon, SK S7N 5A6

dwight.newman@usask.ca
Phone: (306) 966-4847

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"Our Time has Come": Reconciliation in the Wake of *Manitoba Metis Federation Inc. v. Canada (Attorney General)*

*Janique Dubois and Kelly Saunders**

In 2016, the Manitoba Métis Federation (MMF) signed an historic Framework Agreement with Canada. A response to the Supreme Court of Canada's 2013 ruling in Manitoba Metis Federation v. Canada*, the Framework Agreement outlines a process for the negotiation of a modern day treaty between Canada and the Manitoba Métis. Unlike most land-related agreements, negotiations between the Métis and Canada are unfolding at a rapid pace. Drawing on the work of Christopher Alcantara to explain variations in the success and failure of land claims negotiations, we argue that developments towards reconciliation between the MMF and Canada can be attributed to the strategies, incentives and preferences of both parties, combined with Canada's current judicial and political context. In particular, we highlight such factors as the existence of clear objectives on the part of the MMF and Canada, the role of the Supreme Court in reconciling preferences and providing incentives for negotiation, and the favourable political context created by the Trudeau government's 2015 campaign pledge for a renewed nation-to-nation relationship with the Métis in Canada. We also note the ability of the MMF to speak with a unified voice and its willingness to accept the official discourse of the state and advance goals compatible to those of the Crown as further supporting factors. Despite these successes, however, we caution that the Métis have been down this path before. Reconciliation will depend on the ability of the Métis to convince Canada to negotiate in good faith and to make good on past promises.*

En 2016, la Manitoba Métis Federation (MMF) signa une entente-cadre historique avec le Canada. Cette entente, une réponse à l'arrêt Manitoba Metis Federation c. Canada *de la Cour suprême du Canada en 2013, expose les grandes lignes d'un processus de négociation d'un traité modernes entre le Canada et les Métis du Manitoba. Contrairement à la plupart des ententes territoriales, les négociations entre les Métis et le Canada se déroulent rapidement. En nous appuyant sur l'œuvre de Christopher Alcantara afin d'expliquer les variations de réussite et d'échec en matière de négociations sur les revendications territoriales, nous soutenons que les changements en vue d'une réconciliation entre la MMF et le Canada peuvent être attribués aux stratégies, aux motivations et aux préférences des deux partis, ainsi qu'au contexte judiciaire et politique actuel du Canada. Nous attirons notamment l'attention sur des facteurs comme l'existence d'objectifs clairs de la part de la MMF et du Canada, le rôle joué par la Cour suprême pour concilier les préférences et encourager la négociation, ainsi que le contexte politique favorable créé par la promesse électorale du gouvernement Trudeau en 2015 concernant le renouvellement de la relation de nation à nation avec les Métis du Canada. Nous constatons également la capacité de la MMF à s'exprimer d'une voix unifiée et son empressement à accepter le discours officiel de l'État et faire progresser des buts compatibles avec ceux de la Couronne comme éléments de soutien supplémentaires. Cependant, malgré ces succès nous avertissons que les Métis sont déjà passés par ce chemin. La réconciliation dépendra de la capacité des Métis à convaincre le Canada de négocier en bonne foi et de tenir ses anciennes promesses.*

* Janique Dubois is an Assistant Professor in the School of Political Studies at the University of Ottawa. Kelly Saunders is an Associate Professor in the Department of Political Science at Brandon University. The authors would like to acknowledge the diligent research assistance of Adam Leo Paul. They also thank the anonymous reviewers for helpful suggestions.

Our land claims is the key to the future prosperity of our nation. It is our true inheritance that we must preserve and protect for generations to come.

David Chartrand, President, Manitoba Métis Federation[1]

On November 15, 2016, the Manitoba Métis Federation (MMF) signed an historic Framework Agreement with Canada. A response to the Supreme Court of Canada's 2013 ruling in *Manitoba Metis Federation Inc. v Canada (Attorney General)*[2] (hereafter *MMF v Canada*), the Framework Agreement outlines a process for the negotiation of a modern-day treaty between Canada and the Manitoba Métis. The timing of the Agreement — one day short of the 131st anniversary of the execution of Louis Riel at the hands of the Canadian government — could not have been more significant.

As they completed the signing ceremony, the signatories to the agreement, MMF President David Chartrand and Minister of Crown-Indigenous Relations and Northern Affairs Carolyn Bennett, each spoke of reconciliation. Beaming with pride, President Chartrand stated, "[a]fter many long years of struggle, our partner has returned to the negotiating table to settle the long outstanding claim of Manitoba's Métis in a spirit of renewal and reconciliation."[3] Bennett responded in kind, affirming, "[t]his is a truly historic undertaking and we are firmly committed to working in partnership to reach a balanced solution that advances reconciliation for everyone's benefit."[4] Unlike most land-related agreements involving Indigenous peoples and the Crown, negotiations between the Métis and the federal government are unfolding at a rapid pace.[5] What explains the apparent speed at which the MMF and Canada are moving forward on a land claims agreement?

In this article, we use Christopher Alcantara's heuristic framework on the success and failure of land claims negotiations to explain how the preferences,

1 "State of the Nation — President's Report" (last visited 20 December 2017) at 10, online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/docs/aga/President_Report_2015.pdf>.

2 2013 SCC 14 [*MMF v Canada*].

3 "Canada and Manitoba Métis Federation Celebrate Key Milestone on Road to Reconciliation" (15 November 2016), online: *Manitoba Métis Federation* <www.mmf.mb.ca/news_details.php?news_id=204>.

4 *Ibid.*

5 Pending a change in government in the 2019 federal election, President Chartrand anticipates that a final settlement between the MMF and the Trudeau government will be reached by 2022, six years after negotiations began in 2016. Interview of David Chartrand, MMF President (8 May 2019), Winnipeg.

incentives and strategies of the parties involved, along with the larger institutional context, impacted the development of negotiations of a land claims agreement between Canada and the Manitoba Métis. We argue that the speedy progress towards a negotiated land claims agreement can be attributed to the specific strategies adopted by the MMF, along with the favourable legal and political context that emerged in the wake of the Court's ruling on *MMF v Canada* and the election of the Trudeau government. We begin by providing a historical background regarding the key issues at the heart of *MMF v Canada* — namely the promises of land made to Métis families in section 31 of the *Manitoba Act, 1870*,[6] subsequent to which the federal government failed to uphold. In the second section, we assess the progress on land claim negotiations between Canada and the Manitoba Métis by considering the particular preferences, incentives, and strategies of both parties, along with the institutional context within which negotiations are occurring. We conclude with a critical assessment of the opportunities and obstacles that lay ahead as the Manitoba Métis and Canada move forward with these historic negotiations.

The Promise of Land Rights at the Heart of *MMF v Canada*

In 1869, a deal was struck between Canada and the provisional government led by Louis Riel to bring Manitoba into Confederation. This deal, outlined in the *Manitoba Act, 1870*, included the provision of 1.4 million acres of land for the benefit of the resident "half-breed" families.[7] This promise of land, contained in section 31 of the *Act*, was at the heart of the Supreme Court's decision in *MMF v Canada*. Turning to the courts, the Manitoba Métis sought a declaration that the lands they were promised in the Manitoba Act were not provided in accordance with the honour of the Crown or its fiduciary obligations. In response, Canada argued that the obligations flowing from the *Manitoba Act* were discharged in good faith since the purpose of section 31 was to provide "individual Métis residents with land on which to settle, if they chose."[8] To understand the gap between these positions, we turn to historical records and academic publications that ascertain the purpose of section 31. Our objective

6 SC 1870, c 3, reprinted in RSC 1985, Appendix II [*Manitoba Act*].

7 The term "half-breed" was often used in government documents to refer to inhabitants who were of dual heritage (Indian and European). Throughout the paper, we use Métis and, in particular, the Manitoba Métis to refer to those affected by the *Manitoba Act*. The lands in question in section 31 of the *Manitoba Act* were ungranted or waste lands deemed to be vested in the Crown by the Act. See *Manitoba Act, ibid* for details.

8 *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, (Factum of the Respondent at para 127).

here is not to retell the story of the birth of Canada's fifth province, a subject that has been discussed at length by historians and presented in evidence submitted to the Court in *MMF v Canada*.[9] Instead, we highlight the promises made to the Métis at the time of Confederation in order to better identify the issues at stake in the current negotiations between Canada and the Manitoba Métis Federation.

In the discussions that led to the adoption of the *Manitoba Act*, the question of land was hotly debated. For Riel, securing land was essential to the survival of the Métis Nation. Testifying to this, the Métis repeatedly petitioned the federal government for the recognition of their rights to land.[10] Canada initially resisted the idea that the Métis might have Aboriginal title or what was referred to at the time as "the privileges granted to Indians."[11] Father Ritchot, who negotiated Manitoba's entry into Confederation on behalf of the Métis-led provisional government, insisted that the recognition of rights to land was necessary for Red River residents to join Canada. Prime Minister John A. Macdonald and his counterpart, George-Étienne Cartier, eventually agreed.

As D.N. Sprague recounts, the only sticking point remained the appropriate compensation. Historians have explained that the agreement reached between Canadian negotiators and Father Ritchot initially proposed 1.5 million acres, to be chosen throughout the province, to ensure the continuance of land amongst Métis families.[12] However, Canada presented a revised text that promised 1.4 million acres with no mention of the timing or method for how the land was to be distributed. Commenting on how the agreement had become "very much modified," Ritchot demanded that the original language be adopted.[13]

On May 23, 1870, Father Ritchot obtained a letter signed by Cartier, with the following postscript:

9 See e.g. Alexander Begg, *History of the North-West*, vol 1 (Toronto: Hunter, Rose & Co, 1894); Gerhard J Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century,* (Toronto: University of Toronto Press, 1996); WL Morton, *Manitoba: A History,* 2nd ed (Toronto: University of Toronto Press, 1967); George FG Stanley, *The Birth of Western Canada: A History of the Riel Rebellions,* (London: Longmans, Green, and Co, 1936); GFG Stanley, *Manitoba 1870: A Métis Achievement,* (Winnipeg: University of Winnipeg Press, 1972); *MMF v Canada*, *supra* note 2.

10 AH de Trémaudan, *Hold High Your Heads: History of the Métis Nation in Western Canada,* translated by Elizabeth Maguet (Winnipeg: Pemmican Publications, 1982) at 116.

11 DN Sprague, *Canada and the Métis, 1869-1885*, (Waterloo: Wilfrid Laurier University Press, 1988) at 57-58.

12 *Ibid* at 60.

13 Cited in Sprague, *ibid* at 60.

> I have, moreover, the high honour of assuring you,… that regarding the subject of the 1,400,000 acres of land reserved by the 31st Section of the Manitoba Act for the benefit of half breed families, the regulations which ought to be established…will be of a nature for recognizing the desires of the half breed residents, and for guaranteeing, in a manner that is at once efficient and just, the division of this expanse of land among the children of the heads of breed families.[14]

Upon his return to the Red River settlement, Ritchot relayed Cartier's assurances to the Legislative Assembly of Assiniboia, concluding: "… as the Canadian Government seem really serious, they have to be believed, and we can trust them."[15] This statement was received with cheers from Red River inhabitants. Reassured by the strength of the promises of land in the *Manitoba Act*, the Assembly of Assiniboia voted unanimously to join Canada.[16]

The purpose of section 31 of the *Manitoba Act* was to provide a permanent land base for the Métis to adjust to the new agricultural economy that accompanied Canada's westward expansion.[17] Analyzing the lower courts' comments regarding the purpose of the land settlement scheme, Thomas R. Berger points out that both trial judges found that the promise of land was intended to give the Métis a "head start" before the expected arrival of settlers.[18] At the same time, Canada did not seem especially concerned with the long-term preservation of Métis rights to land and instead encouraged the rapid settlement of the prairies. In a letter dated October 14, 1869, Prime Minister Macdonald predicted that, "[i]n another year the present residents [in Red River] will be altogether swamped by the influx of strangers."[19]

The text adopted in section 31 of the *Manitoba Act* provides direction as to the framework for the settlement scheme which, as Chartrand describes, was to consist of two phases. First, the Lieutenant Governor of the province was to select the lands at his discretion and to divide them amongst the children of the heads of families. Second, while the lands were to be granted to the children, this would occur according to conditions imposed by the federal government. As a result, the implementation of section 31 required the federal government

14 "Appendix 6: Report of the Select Committee on the Causes of the Difficulties in the North West Territory in 1869-70" *Journals of the House of Commons of Canada* VIII (1874) at 74, cited in Sprague, *ibid* at 61.

15 Speech from Ritchot to Assembly of Manitoba, 24 June 1870, cited in Thomas R Berger, "The Manitoba Métis Decision and the Uses of History" (2014) 38:1 Man LJ 1 at 8.

16 Sprague, *supra* note 11 at 67-68.

17 Paul LAH Chartrand, "Aboriginal Rights: the Dispossession of the Métis" (1991) 29:3 Osgoode Hall LJ 457 at 463.

18 Berger, *supra* note 15 at 9.

19 Letter from Macdonald to J.W. Bown, October 1869, cited in Berger, *supra* note 15 at 2.

to determine the number of Métis children to which land would be allotted — a task that would prove to be controversial.

Three successive allotments were arranged by the federal government.[20] The first, in 1873, was cancelled because it erroneously included heads of families in addition to children. The second allotment was completed in 1875 but was subsequently cancelled due to a flawed estimate of the total number of eligible children. This led the Minister of the Interior to recommend, in January 1875, the appointment of a commission to address the delay, which marked the beginning of the third allotment.[21] The Machar-Ryan Commission was tasked with establishing the identity and entitlement of Métis eligible to receive a patent under section 31. By early 1876, the commissioners had completed a list of eligible Métis. However, the commission only managed to establish entitlement; no actual land had been granted. It was not until the early 1880s that the Crown would begin to allot parcels of land. By this time, the Métis were already marginalized in Red River with the rapid influx of settlers, just as Macdonald had envisioned.

Consistent with Canada's racist efforts to avoid the formation of communities consisting of large concentrations of Indigenous peoples, disregard for the provisions outlined in the *Manitoba Act* ultimately led to the dispossession of the Métis.[22] During the third allotment, it became apparent that the Métis children had not been properly counted. This was in large part due to the estimate of a Dominion Lands Agent in 1875 that there could be no more than 5,814 Métis children in Red River. He proposed the estimate be increased to 5,833 which, if each were given a quarter section and a half (240 acres), would add up to 1.4 million acres. As Berger notes, in its quest for "bureaucratic convenience" the federal government miscalculated the number of Métis children.[23] Eventually admitting that 993 children were left out of the third allotment, the federal government decided in 1885 that — in lieu of land — these children would receive $240 worth of "scrip," a voucher for land or money offered by the federal government that was considered to extinguish outstanding

20 See Berger, *supra* note 15 at 12.

21 See *ibid* at 15-19. Berger explains that the Dominion Lands Agent adjusted the estimated number of children from 7,368 children identified in the 1870 Census to 5,814 "purely for bureaucratic convenience." This adjustment would result in allotments of 240 acres or a quarter-section and a half, which was a more convenient size to administer than 190 acres. The federal government's acceptance of this proposal led to the cancellation of the second allotment.

22 DN Sprague, "Government Lawlessness in the Administration of the Manitoba Land Claims, 1870-1887" (1980) 10:4 Man LJ 415. See also Tricia Logan, "Settler Colonialism in Canada and the Métis" (2015) 17:4 J of Genocide Research 433 at 442.

23 Berger, *supra* note 15 at 17.

Métis land claims. Since the price of land had increased, Métis children who received scrip in 1885 could only buy between 96 and 120 acres of Dominion land with these funds, as compared to the 240 acres granted in the allotment.[24]

Described by the Supreme Court of Canada as "a sorry chapter in our nation's history," the scrip system failed to give the Métis the head start that had been promised to them as part of the deal they made to enter into Confederation.[25] As Chartrand aptly concludes, "[g]overnment officials were implicated in one of the most highly-placed extortion rackets in Canadian history."[26] The broken promises of the *Manitoba Act*, which the Crown failed to rectify in the intervening years, remained a gaping wound in Canada-Métis relations and contributed to the growing displacement and marginalization of the Métis. Frustrated with the ongoing refusal of the federal government to politically negotiate a resolution to their outstanding claims — or to even acknowledge that they had any claims against the Crown — the Métis had little choice but to turn to the courts. John Morrisseau, former president of the MMF and one of the key leaders who initiated the land claim, remembers that, "[t]he work to file the land claim helped to re-kindle pride in Métis. It was time to lift our heads again and feel good about ourselves and it helped us to build strong Métis communities."[27]

In 1981 the MMF, along with seventeen Métis individuals, initiated legal proceedings against the Crown to redress the wrongs that had occurred 111 years previously. The Plaintiffs sought declaratory relief against Canada and the Province of Manitoba based on the promises made in the *Manitoba Act*.[28] Importantly, the Plaintiffs sought this declaratory relief in order to assist them in extra-judicial negotiations to achieve their constitutional rights.[29] This case, like many others, is part of longstanding efforts by the Métis to have their rights recognized and implemented through negotiations with the Canadian state.[30]

24 *Ibid* at 21.

25 *R v Blais*, 2003 SCC 44 at para 34.

26 Chartrand, *supra* note 17 at 471.

27 Métis National Council, "John Morrisseau", (last visited 21 December 2017), online: *Métis Nation* <www.metisnation.ca/index.php/who-are-the-metis/order-of-the-metis-nation/john-morrisseau>.

28 Michael Barry, "The Honour of the Crown in Aboriginal Land Issues: Manitoba Métis Federation Inc. v. R., 2013" (2015) 69:1 Geomatica 65 at 66.

29 Sacha R Paul, "A Comment on Manitoba Métis Federation Inc v Canada", Case Comment, (2013) 37:1 Man LJ 323 at 324.

30 For a discussion of these efforts, see Kelly Saunders & Janique Dubois, *Métis Politics and Governance in Canada,* (Vancouver: UBC Press, 2019).

The case brought forward by the MMF concerned sections 31 and 32 of the *Manitoba Act*, which introduced the obligation of the Crown to address land grants for Métis children.[31] The Plaintiffs argued that Canada had a fiduciary duty to implement section 31 of the *Act*. As Sacha Paul explains, the Court deliberated the issue of whether the Crown's fiduciary duty was raised by section 31 in two ways. First, it considered whether the fiduciary duty unique to Aboriginal law was relevant to the case. Second, it examined general law of fiduciary duties to determine if the Crown undertook to act as a fiduciary. On both accounts, the Court found that section 31 did not impose a fiduciary duty on the Crown.[32] This was primarily because the Court did not find the existence of a specific, cognizable Aboriginal interest, which in the case law to date depends on a communal Aboriginal interest in the land.[33] Instead, the Court held that the facts showed "that the land at issue was not held collectively, but individually, and that the Métis permitted the sale of land" in this case.[34]

While the Court did not find a fiduciary duty, it nevertheless determined that a Crown-Métis fiduciary relationship exists. The Court argued that section 31 contained a promise made to the Métis people collectively as a distinct community that engaged the honour of the Crown.[35] As a result, section 31 gave "rise to a duty of diligent, purposive fulfillment" of that promise.[36] In examining the evidence, the Court found that the Crown did not act honourably in carrying out the promises of section 31. Contrary to Cartier's assurance that lands would be divided "in the most effectual and equitable manner," the Crown repeatedly delayed the distribution of land.[37] The Court held that the ten-year delay "in issuing the 1.4 million acres violated … [the] duty of diligence, which forms part of the honour of the Crown."[38] As the Supreme Court of Canada confirmed, the "ineffectual and inequitable [implementation] … was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade."[39] The Court thus allowed the

31 Barry, *supra* note 28 at 68.
32 Paul, *supra* note 29 at 334.
33 Barry, *supra* note 28 at 70.
34 Paul, *supra* note 29 at 334.
35 Darren O'Toole, "Section 31 of the Manitoba Act, 1870: A Land Claim Agreement" (2014) 38:1 Man LJ 73 at 74.
36 *MMF v Canada, supra* note 2 at para 94.
37 See *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, (Factum of the Appellant at para 35); See also *MMF v Canada, supra* note 2 at paras 101-102.
38 Paul, s*upra* note 29 at 324.
39 *MMF v Canada, supra* note 2 at para 128.

claim in part by acknowledging that Canada failed to comply with the honour of the Crown when it failed to act diligently in implementing section 31.[40]

The Supreme Court of Canada's declarations in *MMF v Canada* forced the issue of Métis land rights in Manitoba onto the political agenda. Contrary to the past where judges felt that they could neither order parties to negotiate nor influence negotiations, there is a growing recognition that negotiation and adjudication processes must jointly contribute to resolve disputes over Indigenous lands.[41] While court decisions remain imperfect tools in resolving such disputes, *MMF v Canada* is one amongst many decisions that has helped to foster political solutions by incentivizing parties to enter into political negotiations.[42] In the next section, we consider how the confluence of preferences and incentives between Canada and the Manitoba Métis, assisted by the conducive strategies adopted by the MMF, helped to advance the negotiation of a modern land claim agreement.

Explaining the Fast-Paced Negotiations between Canada and the Manitoba Métis

The Supreme Court of Canada's *MMF v Canada* decision helped set the stage for the first land claim negotiation with the Métis south of the 60th parallel.[43] Scholars have examined the political and contextual factors that affect the process, evolution and implications of land claims negotiations.[44] Within this

40 See Barry, *supra* note 28 at 68.

41 Shin Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41:4 Osgoode Hall LJ 587 at 589.

42 See Kent Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21:3 Man LJ 498. For a discussion of the ways in which the specific decisions provide incentives and disincentives to negotiate, see Shin Imai, "Creating Disincentives to Negotiate: *Mitchell v. M.N.R.'s* Potential Effect on Dispute Resolution" (2003) 22 Windsor YB Access Just 309.

43 The Canadian government has engaged with Métis collectivities north of the 60th parallel. See Larry Chartrand, "Métis Land Claim Participation in the North: Implications for Southern Canada" (2016) 4:2 Northern Public Affairs 56.

44 See e.g. Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States*, (New York: Routledge, 2006); Frances Abele, Katherine A Graham & Allan M Maslove, "Negotiating Canada: Changes in Aboriginal Policy over the Last Thirty Years" in Leslie A Pal, ed, *How Ottawa Spends 1999-2000: Shape Shifting: Canadian Governance Toward the 21st Century,* (Toronto: Oxford University Press, 1999); Christopher Alcantara, "Old Wine in New Bottles? Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements" (2009) 35:3 Canadian Public Policy 325; Michael Asch & Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, (Vancouver: UBC Press, 1997).

literature, Christopher Alcantara has proposed a useful theoretical framework to explain variations in the success and failure of land claims negotiations, which is of particular benefit in understanding the specific case study of the Manitoba Métis.[45] He argues that differences in negotiation outcomes can best be explained by taking into account the preferences, incentives, and strategies of the negotiating parties, along with the larger institutional framework within which negotiations occur. Since negotiations between Canada and the Manitoba Métis are still underway, our objective here is not to assess the ultimate success or failure of this process, but rather to consider how the particular variables identified by Alcantara (preferences, incentives, strategies, and context) helped shape this process. We argue that it is the specific strategies that have been adopted by the MMF, along with the favourable legal and political context that emerged in the wake of the Court's ruling on *MMF v Canada* and the election of the Trudeau government, that account for the fast-paced negotiation of a land claims agreement between Canada and the Manitoba Métis.

Aligning Preferences through Reconciliation

The first element in Alcantara's framework involves assessing how preferences affect negotiations. Working within a rational choice framework, he assumes that each party enters into deliberations with a set of goals, or preferences, which they seek to realize. In advancing this argument, Alcantara draws on the work of scholars, such as Richard Simeon, who examine the bases and dimensions of conflict and consensus between different actors in a political system. As Simeon notes, "goals on specific issues can be seen as intimately bound up with a broader set of overall goals."[46] Given that the goals of each party in a negotiation rarely align with each other, Alcantara suggests that what matters more is the distance between goals.[47] Variations in the outcomes of land claims negotiations can be attributed to the presence of a shared commitment to a larger goal, which helps to mitigate any differences that might exist between the parties in terms of specific goals.

45 Through empirical research, Alcantara sketches the outlines of a heuristic theoretical framework to better understand the outcomes of land claims negotiations. While it remains limited, it offers a useful framework from which to assess different negotiation outcomes. Christopher Alcantara, *Negotiating the Deal: Comprehensive Land Claims Agreements in Canada*, (Toronto: University of Toronto Press, 2013) [Alcantara, *Negotiating the Deal*].

46 Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada*, (Toronto: University of Toronto Press, 2006) at 15.

47 Alcantara, *Negotiating the Deal*, *supra* note 45 at 6. Fisher, Ury and Patton argue that the parties' willingness to let go of inflexible positions depends on the willingness of their negotiating partner to accommodate joint preferences; Robert Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In,* 2nd ed (New York: Penguin, 1991).

By way of illustration of how preferences can help explain differences in outcome of land claims agreements, Alcantara points to the Inuit and the Innu in Labrador. Although both groups submitted statements of intent to begin negotiations on a comprehensive land claims agreement with Canada at the same time, only the Inuit were able to successfully conclude an agreement. [48] This difference, Alcantara suggests, can be explained in part by a common desire for certainty with respect to land rights shared by both the Inuit and Canada in order to avoid future conflict, protests, and litigation. While the Inuit demonstrated a willingness to be flexible on other, lesser goals, the Innu refused to move from their position that any agreement had to recognize Innu sovereignty over the entirety of their traditional lands.

For the federal government, the primary goal or objective of land claims negotiations, regardless of the Indigenous group involved, is to ensure certainty and finality for the purposes of fostering economic development. It is also interested in empowering Indigenous peoples to increase their capacity for governance and self-sufficiency.[49] As stated in Canada's Interim Comprehensive Land Claims Policy, the negotiations process is designed to "advance reconciliation in both the short and long term, so that Aboriginal communities can access the economic benefits that meet their immediate needs as well as those of future generations."[50] The federal government thus views the promotion of a secure climate for economic and resource development as contributing to the objective of reconciliation by balancing Aboriginal rights with broader societal interests.[51]

For the Manitoba Métis, their preferences were broad but clear: negotiate land and political rights with Canada. The MMF's goal has always been to negotiate and achieve a land claims agreement with the Crown as expressly contemplated under section 35(3) of the *Constitution Act, 1982*. For the MMF, an agreement of this nature would "resolve our outstanding claim in relation to section 31 of the *Manitoba Act, 1870* as well as establish a forward-looking, nation-to-nation, government-to-government relationship between the Crown and the Manitoba Métis Community for generations

48 Alcantara, *Negotiating the Deal*, *supra* note 45 at 57-59. For Alcantara, this was at the time of writing; the Innu would conclude a successfully negotiated Agreement in Principle with the Crown in 2011.

49 *Ibid* at 21.

50 Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, (Ottawa: AADNC, 2014) at 6, online: <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_renewing_land_claims_policy_2014_1408643594856_eng.pdf>.

51 *Ibid.*

to come."[52] These objectives ultimately serve the purpose of reconciliation, which, in the MMF's view, starts with the recognition of the Métis as partners in the building of Canada rather than "wards of the state."[53] It involves acknowledging that the Crown did not fulfill its obligations to the Métis and making amends to enable Métis citizens to become full participants in Canada's economy and society.

The federal government's longstanding denial of Métis land and political rights has been a significant barrier to the fulfillment of this goal. The federal government historically argued that Métis people south of the 60th parallel do not have Aboriginal title or other Aboriginal entitlements to land, and even if such rights had existed historically, they were terminated through valid federal scrip distribution. Moreover, the federal government has long refused to recognize Métis political organizations as legitimate representatives of the Métis for rights purposes.[54] The Supreme Court of Canada's decision in *MMF v Canada* played a determining role in undermining the federal government's historical position. In so doing, it contributed to lessening the gap between the preferences of the negotiating parties in two significant ways.

First, the Court brought the parties closer together by ruling that the scrip process had not honourably terminated Métis land rights. Specifically, this finding contributed to aligning the parties' preferences by associating the respect of promises of land with reconciliation.[55] The principle of reconciliation, as defined by the Minister's Special Representative on Reconciliation with the Métis, Thomas Isaac, involves settling past grievances with a plan to collabora-

52 "Understanding the Manitoba Métis Federation Land Claims: Frequently Asked Questions", (last visited 15 May 2019), online: *Manitoba Métis Federation* <www.mmf.mb.ca/land_claims_FAQ.php>.

53 Interview of David Chartrand, MMF President (8 May 2019), Winnipeg.

54 This is primarily due to the fact that, since the Métis were not historically recognized as falling under section 91(24) of the *Constitution Act, 1867*, and hence outside of the *Indian Act*, they were left to devise their own governance structures. While this enabled the Métis to create their own systems of governance unfettered by state control, it also resulted in the government's subsequent refusal to recognize them as legitimate representative bodies for the purposes of negotiation.

55 In his analysis of the development of the concept of reconciliation within Canadian jurisprudence, Hewitt maintains that reconciliation does not lie solely within section 35 or within Aboriginal laws, given the complex realities that have resulted from the presence of non-Indigenous peoples in Canada. Jeffrey G Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67:1 SCLR 259 at 262. See also Michael McCrossan, "Shifting Judicial Conceptions of 'Reconciliation': Geographic Commitments Underpinning Aboriginal Rights Decisions" (2013) 31:2 Windsor YB Access Just 155; and Dwight G Newman, "Reconciliation: Legal Conception(s) and Faces of Justice", in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice*, (Saskatoon: Purich Publishing, 2008).

tively move forward in accordance with Canadian law.[56] In *MMF v Canada*, the Court acknowledged that the purpose of the MMF's claim was to secure a declaration that would facilitate negotiations with the federal government in order to advance the constitutional goal of reconciliation and, in particular, to address the Métis' constitutional grievance with respect to land. As the Court noted, "[s]o long as the issue [of land] remains outstanding, the goal of reconciliation and constitutional harmony, recognized in section 35 of the *Constitution Act, 1982* and underlying section 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that section 31 was adopted to cure remains unremedied."[57]

In addition to linking the fulfillment of the promise of land (the MMF's preferred goal) to reconciliation and providing certainty for the purposes of economic development and capacity-building (Canada's preferred goal), the Court also brought the two parties together in a second important way by granting the MMF standing in the case. The federal government initially contested this, arguing that the MMF had no interest in the litigation insofar as the matter was strictly about individual entitlements rather than land set aside for a representative body.

Moreover, the government maintained that as the MMF's membership was broader than the descendants of section 31 beneficiaries, the MMF's legitimacy as the Plaintiff in the case should be dismissed. Recognizing that this case involved a collective claim for declarations that sought to advance reconciliation, the Court rejected the notion that it was a series of claims for individual relief.[58] Isaac concludes that, "[t]here can be no doubt that based on the [Supreme Court of Canada]'s statements in the MMF Decision, that the MMF represents the Métis in Manitoba and can forthrightly represent Métis interests in respect of any discussions or negotiations relating to the implementation of [this declaration]."[59]

By connecting the respect of promises of land with reconciliation and recognizing the MMF as the de facto representative body of the Manitoba Métis with which the federal government can engage to foster reconciliation, the

56 Indigenous and Northern Affairs, *A Matter of National and Constitutional Import: Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the* Manitoba Métis Federation *Decision*, by Thomas Isaac (14 June 2016) at 29, online (pdf): <http://publications.gc.ca/collections/collection_2016/aanc-inac/R5-123-2016-eng.pdf>.

57 *MMF v Canada, supra* note 2 at para 140.

58 *Ibid* at para 44. The MMF was also recognized as "the governing body of Métis people in Manitoba" in *R v Goodon,* 2008 MBPC 59 at para 52.

59 Indigenous and Northern Affairs, *supra* note 56 at 38.

Court contributed to aligning the preferences of the negotiating parties. As Kent Roach argues, declarations about the general nature of Aboriginal rights like that issued in *MMF v Canada* are "manageable" remedies for courts since they do not purport to provide a final settlement to what are often complex problems.[60] Consistent with the call of the Royal Commission on Aboriginal Peoples to design remedies that foster negotiations, the Court's objective in this case was to induce the parties to negotiate a political solution to the issue at hand. [61]

Providing Incentives to Negotiate

Along with preferences, Alcantara argues that actors involved in land claims negotiations are subject to incentives that organize their strategic interactions with one another.[62] Incentives can provide opportunities to work towards a completed agreement, or alternatively, constrain successful outcomes. The Comprehensive Land Claims (CLC) process serves both as an incentive for negotiations by setting out a formalized mechanism through which talks can occur as well as a disincentive, by imposing rules that exclude and/or discourage Indigenous groups from entering the process.[63] For Alcantara, a successfully completed land claims treaty ultimately depends on the ability of Indigenous groups to convince the Crown that an agreement is in its best interests, and to incentivize state governments to come to the bargaining table.[64] This is because the federal, provincial and territorial governments act as "veto players" in land claims negotiations, holding more power relative to Indigenous groups.[65] Key factors that can encourage state actors to negotiate with Indigenous groups, as Alcantara identifies, are judicial decisions on Aboriginal rights and the Duty to Consult as well as a growing awareness of Aboriginal rights.[66]

60 Roach, *supra* note 42 at 543.

61 Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship,* vol 2 (Ottawa, 1996), at 564. See also Imai, *supra* note 42.

62 Alcantara, *Negotiating the Deal*, *supra* note 45 at 6.

63 The Comprehensive Land Claims process allows Indigenous communities that had never signed treaties with the Crown, but that have a valid claim to their traditional lands, to begin negotiations with the federal government. Indigenous groups must prove to the state that their claims are valid and adopt Western standards of proof if negotiations are to proceed. The Métis south of the 60th parallel are explicitly excluded from this process. In April 2015, the federal government announced its intention to develop a new framework for addressing section 35 Aboriginal rights, including a renewed Comprehensive Land Claims Policy. See Aboriginal Affairs and Northern Development Canada, *supra* note 50.

64 Alcantara, *Negotiating the Deal*, *supra* note 45 at 72.

65 George Tsebelis, *Veto Players: How Political Institutions Work*, (Princeton: Princeton University Press, 2002) at 19.

66 Alcantara, *Negotiating the Deal*, *supra* note 45 at 28-29.

The Supreme Court of Canada's decision in *MMF v Canada* provided an incentive for the federal government to negotiate a land claims agreement aimed at reconciliation with the Manitoba Métis by implying a duty to act diligently on the part of the Crown.[67] This duty requires the Crown to carry out promises — in this case, the constitutional promise of land to the Métis — in such a way as to ensure an Indigenous group not be left "with an empty shell of a treaty promise."[68] Importantly, the Court established a connection between this duty and reconciliation. As Bell and Seaman argue, this case "stands for the proposition that a promise aimed at reconciliation of Aboriginal interests, in that case s. 31 of the *Manitoba Act*, engages the honour of the Crown which in turn gives rise to a duty of purposive, diligent fulfillment."[69]

Specifically, the Court held that the promise to provide land to Métis children engaged the honour of the Crown and had to be fulfilled with due diligence since it was a promise to an Aboriginal group entrenched in an act that has constitutional status.[70] In *R. v Powley*, the Court ruled that section 35 of the *Constitution Act, 1982* gives rise to duties flowing from the Crown's honour. In that case, the Court confirmed that the Métis have Aboriginal rights under section 35. While case law has made clear that the Crown has fiduciary obligations as well as duties that flow from section 35, *MMF v Canada* acknowledges that such duties also flow from other sources, in this case section 31. Significantly, section 31 provides a constitutional foundation to compel broader rights-based recognition. Such recognition, Bell and Seaman explain, includes negotiations towards reconciliation with the Métis.[71]

The obligation to negotiate with the Métis flows from the duty of purposive, diligent fulfillment. As Paul explicates, citing *MMF v Canada* at paragraph 79, "the duty of diligence requires that when the Crown promises to confer a benefit to Aboriginal people it must take reasonable steps to ensure that the promise is kept."[72] In this case, the Court ruled that Canada's commitment to provide land to the Métis was not fulfilled and so remains, "unfinished business."[73] In addition, the Court clarified that judicial declarations

67 Paul, *supra* note 29.

68 *MMF v Canada, supra* note 1 at para 80, citing *R v Marshall*, [1999] 3 SCR 456 at para 52. For a discussion of the disagreement between the majority and the dissent with respect to the link between a solemn promise and the duty to act diligently, see Paul, *supra* note 29 at 326.

69 Catherine Bell & Paul Seaman, "A New Era for Métis Constitutional Rights? Consultation, Negotiation and Reconciliation" (2014) 38:1 Man LJ 29 at 42.

70 Berger, *supra* note 15 at 11.

71 Bell & Seaman, *supra* note 69 at 5.

72 Paul, s*upra* note 29 at 325.

73 *MMF v Canada, supra* note 2 at para 140.

on matters of constitutional law, including the constitutionality of Crown conduct, can be pursued to facilitate negotiation.[74]

The first decision that seeks restitution by the descendants of Métis, *MMF v Canada* lays the foundation for a new approach towards rights and obligations that are outside of section 35, but nonetheless engage the honour of the Crown.[75] Paul contends that the case serves as a powerful incentive for Canada to move quickly on the political front, given that the failure to address the repeated mistakes and setbacks in the distribution of land to the Métis carries with it the possibility for damages based upon delay, lost rental income, or lost business opportunities.[76] By situating the negotiation with the Métis on matters of land as a means to reconciliation, the case provides an incentive for the federal government to come to the negotiation table. Failure to do so would signal a further breach of the Crown's duty of purposive, diligent fulfillment.

Asserting Agency through Strategy

Alcantara's framework acknowledges the agency of Indigenous leaders in shaping the outcome of negotiations based on their response to the requirements imposed by dominant government actors. Just as Indigenous groups can seek to align their preferences more closely with those of state governments and to strategically use incentives to advance negotiations, so too can they adopt strategies to mitigate the effects of historical, cultural, and institutional constraints. Examples of "winning" strategies referenced by Alcantara include: adopting the official discourse of the state; negotiating only those issues that the federal government wants to negotiate; avoiding confrontational tactics; maintaining internal cohesion; fostering a positive perception of their group; creating a fruitful working relationship with government negotiators; demonstrating financial accountability; and exhibiting ability to successfully navigate the negotiation process.[77] Together, Alcantara argues, these factors can play a critical role in determining whether an agreement will be completed in the short or long term — or, indeed, if at all. In the case at hand, we identify three strategies adopted by the MMF that have been particularly effective in moving forward the negotiation of a land claims agreement.[78]

74 Bell & Seaman, *supra* note 69 at 42.

75 *Ibid* at 52. See also Barry, *supra* note 28 at 66.

76 Paul, s*upra* note 29 at 332.

77 Alcantara, *Negotiating the Deal*, *supra* note 45 at 8.

78 By pointing out some of the specific strategies that the MMF has engaged in to encourage Canada to enter into land claims negotiations, we are not suggesting that these strategies are unique to the Métis. Rather, our goal here is to highlight what we see as some of the particular factors accounting for the speediness of land claims negotiations in the case of the Manitoba Métis.

The first is the strategic pursuit on the part of Métis leaders to find avenues within the Canadian state framework to resolve grievances related to their constitutional rights to land. From the outset, the strategy of the MMF in bringing legal proceedings forward was to force the federal government to the negotiation table in order to pursue a political resolution to outstanding Métis land rights in Manitoba.[79] While unwavering in their commitment to fulfilling their land and political rights, the Métis have purposefully done so in a way that is compatible with larger state interests. The Métis take pride in Louis Riel's historic role in bringing Manitoba into Confederation; just as Riel pursued the protection of Métis land and political rights within an expanded Canada, the MMF sees the fulfillment of their rights within the parameters of Canadian federalism.[80] This positioning of the Métis Nation as a part of, rather than separate from, a united Canada is crucial, for, as Alcantara notes, "an Aboriginal group will only be able to complete a treaty if it is willing to accept a final agreement that situates its administrative, legal and self-governing institutions within the Canadian constitutional order."[81]

At the same time, the MMF was adamant that negotiations be distinctions-based to account for the specificity of Métis rights, history, and culture. This strategy led the Manitoba Métis to negotiate "a new kind of treaty" with Canada that is separate from the Comprehensive Land Claims process established for First Nations and Inuit groups.[82] MMF President Chartrand argues that this Métis-specific process has allowed for "new kinds of thinking" about what is possible in Indigenous-Crown relations and how treaties can evolve in a more effective, expeditious, and respectful manner. He adds that the promise of this innovative model, and the positive and mutually beneficial relationships it has helped foster, has allowed federal officials to see new opportunities for effective change towards reconciliation.

The second purposeful strategy of the MMF leadership has been the mobilization of Métis citizens around a common political vision that links the constitutional promise of land rights to reconciliation. As President Chartrand noted in his opening address at the MMF's 2013 annual general assembly, the victory of the Manitoba Métis in *MMF v Canada* goes beyond the issue of land. It is about the Métis Nation's larger struggle for self-government, he

79 Speech by David Chartrand, MMF President (10 March 2017), MMF Government Summit, Winnipeg.

80 Interview of David Chartrand, MMF President (8 May 2019), Winnipeg.

81 Alcantara, *Negotiating the Deal*, *supra* note 45 at 98.

82 Interview of David Chartrand, MMF President (8 May 2019), Winnipeg.

argued, that began in 1816 with the Battle of Seven Oaks.[83] With this victory, "the Government is being called back to the table to finish the business of Confederation and to right the wrongs and create a legacy for our children, grandchildren, and future children."[84] These efforts contributed to the signing of a Memorandum of Understanding (MOU) in May 2016 between the MMF and Canada to advance reconciliation. The first step towards the negotiation of a land claims agreement, the MOU set out a process for the establishment of an exploratory discussion table to develop a mutually acceptable framework agreement to advance reconciliation in a manner consistent with the Court's direction in *MMF v Canada*.

The third strategy has been the steady and consistent strengthening of the MMF's governance structures under the leadership of President Chartrand and his cabinet. The MMF proudly promotes itself as a "mature, responsible, and accountable" representative government of the Métis community in the province.[85] Over the past two decades, in order to prepare itself for self-government, the MMF has taken active measures to improve its governance functions, enhance its programming and services to Métis citizens, expand its financial accountability processes, seek out new opportunities for revenue generation, and gain respect for the inherent rights of the Manitoba Métis — all with the objective of establishing a recognized, self-sufficient, and sustainable Métis government in Manitoba.[86] As President Chartrand explains, "our strong democratic institutions, modern philosophy of governance, and ability to speak with a united and clear voice not only gives us greater autonomy but has made the federal government willing to negotiate a land claim agreement with our government, the government of the Métis people in Manitoba."[87]

To demonstrate not only the readiness of the MMF to enter into self-government negotiations but also the internal unity of the Métis community in Manitoba around a shared vision for reconciliation, delegates to the 2013 general assembly unanimously passed a resolution that all monies received through a negotiated land claims settlement with Canada be put into a collective trust to

83 This battle to protect their ability to trade freely is one of the first instances that brought the Métis together as a people to advance a political agenda. David Chartrand, "Office of the President Annual Report, 45th MMF General Assembly", (28 September 2009) at 14, online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/aga_annual_report_2013.pdf>.

84 *Ibid* at 15.

85 "2018 Annual Report", (21 September 2018) at 28, online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/docs/aga/2018/2018_AGA_Report_Web.pdf>.

86 "2017 Office of the President Report", (September 2017) at 5, online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/docs/aga/2017_AGA_President_Report.pdf>.

87 Interview of David Chartrand, MMF President (8 May 2019), Winnipeg.

benefit future generations.[88] Following the passage of this resolution, President Chartrand convened a committee of "all-star" individuals, including former Prime Minister Paul Martin and other Canadian business leaders, to advise the MMF on the investment of an anticipated settlement to "support the aspirations of the Métis people for generations to come."[89]

While there were many strategic decisions undertaken by successive leaders of the MMF since the inauguration of their land claims case in 1981, the following factors played a determining role in bringing Canada to the bargaining table: the resolve to find a Métis-specific solution within the context of the Canadian state; the development of a shared vision for reconciliation that is connected to the constitutional promise of rights to land; the collective designation of land claims proceedings for future generations; and the positioning of the MMF as a democratic, responsible, and representative government. Together, these purposive strategies on the part of the MMF helped make a "win" on the Liberal government's Indigenous file all the more possible, and fostered the trust necessary for negotiations on a land claims agreement to advance.[90]

The Institutional Context: Making the Most of the Federal Political Climate

Our analysis of the events that unfolded in the wake of the Court's decision in *MMF v Canada* illustrate how preferences, incentives and strategies contributed to the development of fruitful negotiations between Canada and the MMF. The Court's declaration contributed to aligning preferences and providing incentives to foster reconciliation between the parties. At the same time, the tactical decisions of the MMF have been especially noteworthy in incentivizing the federal government to enter into talks on a land claims agreement. The MMF's strategic positioning of itself as a representative, accountable, and credible negotiating partner within the federation, whose goals for reconciliation correlated with those of the federal government, helped create the favourable conditions necessary for land claims negotiations to advance at a rapid pace.

88 "Minutes of the 45th Annual General Assembly, September 28 & 29, 2013", Resolution #14, cited in Annual General Assembly Report, 2014 at 18-19, (last visited 20 December 2017), online (pdf): *Manitoba Métis Federation* < www.mmf.mb.ca/docs/AGA_2014_OCT28.pdf>.

89 "Land Claims Strategic Investment Committee" (31 July 2013), online: *Manitoba Métis Federation* <www.mmf.mb.ca/news_details.php?news_id=100>. See also "Métis eye opportunities from massive land claim settlement", *CBC News* (31 July 2013), online: <cbc.ca/news/canada/manitoba/metis-eye-opportunities-from-massive-land-claim-settlement-1.1399419>.

90 Interview of John Weinstein, Metis National Council Advisor (November 2018), Winnipeg.

While these factors are important, Alcantara maintains that the larger institutional framework within which Indigenous and state actors operate can also have a significant impact on the success or failure of land claims negotiations. This context does not pre-determine the political outcomes of negotiations; rather, it helps to determine the range of possible outcomes and the likelihood of certain outcomes occurring over others by shaping power relations between the negotiating parties.[91] Along with judicial decisions such as *MMF v Canada*, political developments can play a decisive role in shaping the institutional context. Depending on how groups strategically position themselves, changes in the political environment can act as opportunity structures that constrain and/or enable the behaviour of the federal government, on the one hand, and the Indigenous group seeking a treaty, on the other. In our discussion of the political developments that surrounded the Court's decision in *MMF v Canada*, we show how the MMF acted strategically to capitalize on this context to advance negotiations on a land claims treaty.

The 2015 federal election provided the MMF with an opportunity to advance their goal of a negotiated settlement on their outstanding claim to land. In anticipation of the Court's decision in *MMF v Canada*, the MMF sought a commitment from the major federal political parties that, should they form government, they would settle the outstanding claim with the Manitoba Métis. Both the NDP and the Liberal Party agreed in 2013. When the federal writ was dropped in late 2015, the MMF again approached the federal parties for a commitment.[92] Liberal leader Justin Trudeau's 2015 electoral promise for "real change" provided a political context favourable to the MMF's demands. Trudeau pledged to "complete the unfinished work of Confederation by establishing a renewed Nation-to-Nation relationship with the Métis Nation, based on trust, respect and cooperation."[93] He also promised to "immediately establish a negotiations process … in order to settle the outstanding land claim of the Manitoba Métis" as mandated by the Supreme Court of Canada's decision in *MMF v Canada*.[94]

91 Christoph Knill & Andrea Lenschow. "'Seek and Ye Shall Find!': Linking Different Perspectives on Institutional Change" (2001) 34:2 Comparative Political Studies 187 at 195.

92 "2016 Annual Report" (September 2016), online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/docs/aga/2016_AGA_Report_web.pdf> at 27.

93 Liberal Party of Canada, "Métis National Council" (21 September 2015), online (pdf): *Métis Nation* <www.metisnation.ca/wp-content/uploads/2015/09/Liberal-Party-Response-Sept-21-2015-.pdf>.

94 Liberal Party of Canada, "Real Change: Advancing and Achieving, Reconciliation for the Métis Nation" (20 December 2017), online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/docs/elections/Liberal_Advancing-and-achieving-reconciliation-for-the-Metis-people.pdf>.

With persistent pressure from Métis leaders and allies, the Liberal government remained true to their commitment to begin negotiations, which aligned with their larger commitment to reconciliation with Indigenous peoples. On May 27, 2016 — 7 months after taking office — the Minister of Indigenous-Crown Relations and Northern Affairs and MMF President signed a Memorandum of Understanding (MOU) on Advancing Reconciliation.[95] Commenting on this historic signing, Minister Bennett stated, "[t]he court decided there needed to be a relationship, and so today we have agreed that we will sit down and develop a framework for what that actually will mean in breathing life into the rights of the Métis people that are in section 35 of the constitution."[96] Recognizing that the federal government's longstanding position that denied Métis rights and contested the representative legitimacy of Métis political organizations was no longer tenable, Canada set out on a new path of relationship-building with the Métis.

Negotiations led the parties to complete a Framework Agreement in November 2016, 6 months after the signing of the MOU — a record achievement in terms of federal-Indigenous land claims negotiations.[97] Reaffirming Canada's commitment to work on a nation-to-nation, government to government basis with the Métis Nation in order to advance reconciliation, the Framework Agreement outlines the shared objectives of Canada and the MMF that will inform a final agreement. These objectives include the recognition and support of a Manitoba Métis government with law-making authority and acknowledged jurisdiction, Métis participation in an economy that is sustainable, innovative, integrated, and prosperous, and a commitment to improving the cultural, social, physical, emotional, and economic wellbeing of the Manitoba Métis community.[98]

With these objectives in mind, the Agreement specifies a series of subject matters that are to form the basis of a negotiated final agreement. These in-

95 "Memorandum of Understanding on Advancing Reconciliation ('MOU')" (last modified 15 July 2016), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1467055681745/1539711559006>.

96 "Canada and Manitoba Métis Federation sign MOU following historic Supreme Court land ruling", *CBC News* (27 May 2016), online: <www.cbc.ca/news/canada/manitoba/metis-federation-of-manitoba-signs-mou-1.3604370>.

97 Guiding these discussions on the MMF side were a series of community consultation workshops held in Métis communities throughout the province, the purpose of which was to determine what Métis citizens would like to see included in a modern-day treaty with Canada. The 2016 Annual General Assembly of the MMF also included a land claim consultation meeting with delegates.

98 Government of Canada and the Manitoba Métis Federation, "Framework Agreement for Advancing Reconciliation" (last modified 31 August 2017), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1502395273330/1539711712698>.

clude: the strengthening and building of Manitoba Métis government institutions including citizenship and registration processes; the application and enforcement of Métis laws; financial transfer arrangements; closing of the gaps in areas such as education and training, child and family services, health and economic development; addressing issues related to land, including water and subsurface rights, wildlife, fishing, forestry, and protected areas; the creation of a "Lasting Place Trust;" and other issues including a formal apology from Canada, transboundary claims, and clarity on the Manitoba Métis community's Aboriginal rights and claims.[99]

In keeping with the stated commitment to a "results oriented" negotiation process, the focus of initial efforts will be on the conclusion of incremental agreements within two years focused specifically on core governance functions, fiscal arrangements, legal status and capacity, and Métis harvesting laws. These agreements are intended to build self-government in separate phases. Negotiators for the MMF have commented on the need to rebuild trust with the federal government one step at a time.[100] This involves finding concurrence on key issues and ensuring that the mechanisms are in place to support agreements in the long term. While the idea of a quickly completed final agreement is attractive, Métis leaders repeatedly state that the priority is to achieve common ground and build capacity to secure the ongoing future of the Métis Nation.

Conclusion: Reconciliation at Last?

On November 16, 2016, at a graveside ceremony marking the 131st anniversary of the hanging of Louis Riel by Canada, President Chartrand symbolically presented the signed Framework Agreement to the father of the Métis Nation. Speaking to this momentous occasion, Chartrand noted that after more than 140 years of struggle, three decades of court battles, and numerous consultations with Métis citizens, the solemn promise made to Riel at the time of the *Manitoba Act* would finally be respected. Seen as a precursor to the negotiation of a modern-day self-government treaty with Canada, for the MMF, Riel's vision has come full circle. As Chartrand declared, "[t]his Agreement is the culmination of the hope, hardship and struggle of the Métis. We never quit fighting for what Riel gave his life for."[101]

99 *Ibid*.

100 Interview of senior advisor to the MMF (May 2018), Winnipeg.

101 "President Chartrand presents signed Framework Agreement to Riel during ceremony" (16 November 2016), online: *Manitoba Métis Federation* <www.mmf.mb.ca/news_details.php?news_id=206>.

The reconciliation of Canadian sovereignty with the inherent rights of the Métis, which include rights to land and to self-government, is part of a long, arduous, and unfinished battle. The signing of the Framework Agreement is undeniably historic. As Chartrand reiterated, "[t]his is a monumental and historic time for Manitoba's Métis."[102] In an update to delegates at the 2017 annual general assembly, Chartrand noted that negotiations on the Framework Agreement were progressing well, and announced two initiatives illustrative of the renewed, nation-to-nation relationship that the Métis have forged with Canada. The first involved Canada's "full financial support" for the establishment of a Métis National Heritage Centre. The first cultural and historic institute of its kind, the Centre will be built at Upper Fort Garry, where Riel's Provisional Government founded the Province of Manitoba and negotiated its entrance into Confederation with Canada.[103] The President and Minister of Health for Canada also announced their joint commitment to explore new opportunities in health services, including a new prescription drug program for vulnerable Métis seniors living at or below the poverty line.[104]

Canada's willingness to engage with the Métis in productive negotiations on advancing reconciliation took a substantive step forward in the fall of 2018. In September, at the MMF's 51st annual assembly in Winnipeg, President Chartrand and Crown-Indigenous Relations Minister Bennett announced $154 million in funding under the Framework Agreement. The monies will be used to support the MMF's transition from its current corporate structure to a self-governing Métis government, and to facilitate work towards reaching "a self-government agreement in a timely manner that recognizes the Manitoba Métis Federation's legal status, role and jurisdiction as a Métis government and … the Manitoba Métis Community's vision of greater self-determination."[105]

Despite the challenges that lay ahead, the Métis of Manitoba are more optimistic than ever that reconciliation with Canada might be possible. Yet, the Métis have been down this road before. In 1869, 1982, and again in 1992, Canada committed to bring the Métis into Confederation and respect their inherent rights, only to subsequently renege on these promises. As the Supreme

102 "President's Message" (24 November 2016), online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/docs/presidents_message_2016_11_24.pdf?v=20170811181439>.

103 Le Métis, "President's Message" (18 October 2017), online (pdf): *Manitoba Métis Federation* <www.mmf.mb.ca/docs/LeMetis_2017_10_18.pdf?v=20180221121740>.

104 "Prescription Drug Program" (16 November 2017), online: *Manitoba Métis Federation* <www.mmf.mb.ca/pdp_health.php>.

105 Manitoba Métis Federation & Crown-Indigenous Relations and Northern Affairs Canada, "Manitoba Métis Federation and Government of Canada announce joint action plan on Advancing Reconciliation", (22 September 2018). Document in authors' possession.

Court of Canada declared in *MMF v Canada*, reconciliation with the Métis remains "unfinished business."[106] The Court's declaration opened the door for the federal government to revisit its constitutional relationship with the Métis, and to achieve reconciliation at last. By acknowledging that section 31 provides a constitutional foundation to compel broad rights-based recognition, the Court played a seminal role in inviting the federal government to return to the negotiation table with Métis leaders. This decision created a space for the MMF, through its strategic decisions and its positioning as a credible, responsible, and trustworthy partner, to incentivize the federal government to enter into negotiations on a land claims agreement.

Reflecting on how the goals of the case were to honour the pledges made by Riel and his compatriots, former MMF president and Métis elder John Morrisseau contends, "we never changed our path."[107] Then, as now, the Métis are seeking to have their rights to land and to self-government respected by the Canadian state. Alcantara argues that when the relationship between parties in a negotiation is unequal, a successful outcome will depend on the ability of the Indigenous group to convince the state that a completed agreement is the preferred outcome. In this sense, reconciliation will depend on the Métis' ability to convince Canada to negotiate in good faith to make good on past promises. Given Canada's history of failed promises, the enormity of this task should not be underestimated. At the same time, it is important to note that the ability of the Métis to force the federal government to the negotiation table through judicial action is a significant development and a success to be noted.

For President Chartrand, as for many of the leaders that preceded him, the ultimate goal of the MMF in its land claims negotiations is to make amends for the "head start" that was denied to the Manitoba Métis as a result of Canada's broken promises of land 150 years ago.[108] Yet, while a final settlement remains the penultimate measure of success, in the eyes of the Manitoba Métis, they have already won. As Chartrand concluded, "we spent 32 years in the court room in *MMF v Canada* in order to tell our story. What Canada did to us by failing to uphold their promises put our people into a state of despair for over 150 years. Now that story has been told and what Riel gave his life for has not been in vain. For us, that is our victory."

106 *MMF v Canada, supra* note 2 at para 140.

107 Interview of John Morrisseau, former MMF President (November 2009), Vancouver.

108 Interview of David Chartrand, MMF President (8 May 2019), Winnipeg.

Section 16 of the *Constitution Act, 1867*: The Queen, the Capital, and Canadian Constitutionalism

*Michael Da Silva and Andrew Flavelle Martin**

Section 16 of the Constitution Act, 1867 *states that "[u]ntil the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa." This is one of the least-studied provisions in the Constitution of Canada. The legal criteria for exercising the section 16 power to move the capital, which could have important consequences for Canadian politics and national identity, are unclear. Our understanding of the content of Canadian constitutional law accordingly remains incomplete. While section 16 appears on its face to mean that the Queen alone can move the capital of Canada, the minimal judicial and academic commentary on the section provides competing interpretations of how to understand it. The section 16 power to move the capital could conceivably be exercised by the Queen herself, the Governor General alone, the Governor General in Council (GGIC), or Parliament — or may even be defunct. This article resolves this issue by determining the meaning of "Seat of Government," "Ottawa," and "the Queen" in section 16 and considering the provision's relationship to other constitutional provisions and texts. It ultimately argues that the power to move the capital of Canada resides in the GGIC, at least by convention, if not by law, and that any remaining royal right to reclaim the power can only be exercised, again at least by convention, in consultation with the GGIC. It also considers and analyzes potential amendments to section 16 and the requirements for such amendments.*

L'article 16 de la Loi constitutionnelle de 1867 *affirme que « [j]usqu'à ce qu'il plaise à la Reine d'en ordonner autrement, Ottawa sera le siège du gouvernement du Canada. » Il s'agit d'une des dispositions les moins étudiées de la Constitution du Canada. Les critères juridiques liés à l'exercice du pouvoir visé dans l'article 16 de déménager la capitale, qui aurait des conséquences importantes pour la politique et l'identité canadiennes, ne sont pas clairs. Par conséquent, notre compréhension du fond du droit constitutionnel canadien demeure incomplète. Bien que l'article 16 semble à première vue signifier que la Reine seule puisse déménager la capitale du Canada, le commentaire judiciaire et universitaire minimes sur cet article offre des interprétations contradictoires quant à la façon de le comprendre. Le pouvoir de l'article 16 de déménager la capitale pourrait, en théorie, être exercé par la Reine elle-même, le gouverneur général seul, le gouverneur général en conseil (GGC) ou le Parlement, ou encore, peut même être révolu. Ce résumé résout cette question en déterminant le sens de « siège du gouvernement », « Ottawa » et « la Reine » dans l'article 16 et en examinant le rapport de la disposition à d'autres dispositions et textes constitutionnels. Les auteurs de cet article soutiennent en fin de compte que le pouvoir de déménager la capitale du Canada est entre les mains du GGC, du moins selon l'usage, sinon selon la loi, et que tout droit royal restant de reprendre le pouvoir peut uniquement être exercé, encore une fois, du moins selon l'usage, avec l'accord du GGC. Ils examinent et analysent également les modifications éventuelles à l'article 16 ainsi que les conditions liées à de telles modifications.*

* Michael Da Silva is Canadian Institutes for Health Research Banting Postdoctoral Fellow, Institute for Health and Social Policy/Faculty of Law, McGill University. Andrew Flavelle Martin is Assistant Professor, Schulich School of Law, Dalhousie University.
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Introduction

Section 16 of the *Constitution Act, 1867* is commonly understood as providing the constitutional authority for Ottawa's status as the capital of Canada. It reads:

> Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.[1]

Yet there is very little in case law or scholarship on section 16. The Supreme Court of Canada (SCC) only made one substantive statement on section 16 to date. That statement in *Munro v National Capital Commission* was obiter and did not contain much reasoning:

> The only reference to the National Capital of Canada contained in the *British North America Act* is in s. 16. … The authority reserved by this section to the Queen to change the location of the Seat of Government of Canada would now be exercisable by Her Majesty in the right of Canada and, while the section contemplates executive action, the change could, doubtless, be made by Act of Parliament in which Her Majesty acts with the advice and consent of the Senate and House of Commons of Canada.[2]

This passage suggests that the power to move the capital could be used by Parliament. It is decades old, non-binding, and, for reasons discussed below, unpersuasive. Leading textbooks, in turn, only briefly discuss section 16 (if at all).[3] A late nineteenth-century casebook interpreted section 16 as stating

1 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

2 *Munro v National Capital Commission*, [1966] SCR 663 at 669-670, 57 DLR (2d) 753 [*Munro*].

3 See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) vol 1; Bernard W Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell*, 4th ed (Toronto: Carswell, 2013); Adam Dodek, *The Canadian Constitution*, 2nd ed (Toronto: Dundurn, 2016); Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017); and Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017). The leading French textbook also does not discuss it: Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6e éd (Cowansville, QC: Yvon Blais, 2014). Historical examples include: JEC Munro, *The Constitution of Canada* (Cambridge: Cambridge University Press, 1889); JR Mallory, *The Structure of Canadian Government* (Toronto: Macmillan, 1971); John D Whyte & William R Lederman, *Canadian Constitutional Law: Cases, Notes and Materials on the Distribution and Limitation of Legislative Powers Under the Constitution of Canada*, 2nd ed (Toronto: Buttersworth, 1977); and WH McConnell, *Commentary on the British North America Act* (Toronto: Macmillan of Canada, 1977). Joseph Doutre, *Constitution of Canada* (Montreal: John Lovell & Son, 1880) was one of the earliest analyses of the then-*British North America Act* and included substantial commentary on the terms of that Act, but it provided no commentary on section 16. The section on the Queen's powers in the recent handbook of Canadian constitutional law does not discuss this power: Marcella Firmini & Jennifer Smith, "The Crown in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford UP, 2017) 129.

that "[t]he seat of the Government can be altered only by the Crown."[4] Adam Dodek highlights the provision as a rare case where the "Queen directly exercises power" under the Constitution of Canada.[5] Nonetheless, J.R. Mallory does not include moving the Seat of Government as a matter "dealt with by the Queen, and not by the Governor General."[6] W.H. McConnell suggests that "authority to change the seat of government, according to the section, would fall within the Queen's authority, but there would seem to be no reason why such authority could not now be assumed by parliament [sic] by a simple statute or even by the Cabinet acting through an order-in-council or an instrument of advice."[7]

Only one major French textbook treats the issue in detail; Gérald-A. Beaudoin, in collaboration with Pierre Thibault, spends multiple pages on the topic.[8] Beaudoin initially concludes that the power remains with the Queen but must be exercised, at least per constitutional convention, in consultation with others, including some unspecified number of federal ministers.[9] But he then suggests that the Governor General may have the power before finally accepting the Court's obiter in *Munro* as an equally valid legislative means of movement as royal consultation.[10] As we discuss below, however, there is reason to think that the Queen may need to consult with others as a matter of law, rather than convention,[11] and the other options that Beaudoin identifies are likely not legal means of moving the capital at present. Moreover, Beaudoin suggests that the Prime Minister is "the first" of the Queen's advisors ("le premier de ses conseillers") and that it is thus especially plausible that the Queen must consult with the Prime Minister,[12] but the proposed primacy for this form of consultation may be questioned.[13]

4 Munro, *supra* note 3 at 266.

5 Dodek, *supra* note 3 at 43 [italics removed]. Per Dodek, the other sections are sections 10, 15, 26, and 56.

6 Mallory, *supra* note 3 at 37.

7 McConnell, *supra* note 3 at 53.

8 Gérald A Beaudoin with the collaboration of Pierre Thibault, *La Constitution du Canada: institutions, partage des pouvoirs, Charte canadienne des droits et libertiés*, 3e éd, (Montréal: Wilson & Lafleur, 2004) at 61, 788-789.

9 *Ibid* at 61, 788.

10 *Ibid* at 788 citing *Munro*, *supra* note 2.

11 As will become clear below, the *Letters Patent Constituting the Office of Governor General and Commander in Chief of Canada*, 1 October 1947, (1947) C Gaz II, Vol 81, reprinted in RSC 1985, Appendix II, No 31 [*Letters Patent, 1947*] muddy the question of whether the Governor General must, as a matter of law, act only as the Governor General in Council.

12 Beaudoin with Thibault, *supra* note 8 at 61.

13 See our discussion of the Prime Minister in Part II below. Note further that the exact measure of consultation required to move the capital is unclear even in Beaudoin with Thibault: *ibid* at 61, 788-789.

We are not aware of other major legal works discussing the provision in any detail. Non-legal commentary on the provision is also rare and underdeveloped. For instance, David B. Knight suggests that the legal question of how one can move the capital of Canada is simple:

> [W]ho would actually make the decision if a new capital is ever needed? … The British North American Act states that 'until the Queen otherwise directs, the seat-of-government shall be Ottawa.' The 1947 Letters Patent and *The Constitution Act, 1982* do not delegate this authority to the Governor-General or any other authority, therefore, the Monarch retains the right to make the all-important decision.[14]

Yet the issue is more complicated than Knight or other earlier commentators suggest.

Further analysis of the text of section 16, other parts of the *Constitution Act, 1867*, other foundational legal documents like the *Letters Patent, 1947*,[15] and case law is necessary to determine how, as a matter of constitutional law, the capital of Canada could change. This work provides the necessary legal analysis. Actual movement of the capital would be highly politicized and political requirements may exceed strict legal requirements, or those of constitutional conventions (to the extent they differ), but that is beyond the scope of this work.

Part I explains the project's scholarly and practical relevance. Parts II-IV address three sub-questions necessary to explain how section 16 could be invoked or changed. Part II examines the meaning of "Seat of Government" and "Ottawa" in section 16, interpreting the provision to understand its scope. We argue that the Seat of Government is the location of the headquarters of the three branches of government in Canada and that Ottawa refers to the 1867 limits of the city. Part III examines who can exercise the power under the best understanding of section 16. We argue that the power belongs to the Governor General in Council (GGIC), at least by convention, but likely not by convention alone. While the Queen may maintain some constitutional authority to move the capital, she can (again *at least* by convention) only exercise it in consultation with the GGIC. This answer may be politically unpalatable. Part IV thus examines how one could amend section 16 to change who holds the constitutional power to move the capital or directly change the capital, concluding that the constitutional amendment procedure under section 38 of

14 David B Knight, *Choosing Canada's Capital: Conflict Resolution in a Parliamentary System*, 2nd ed (Ottawa: Carleton University Press, 1991) at 346.

15 *Letters Patent,* 1947, supra note 11.

the *Constitution Act, 1982* likely suffices and discussing the merits of different amendment options.[16]

I. Why This Matters

Why does analysis of section 16 matter? Barring the unexpected, section 16 is not going to be invoked soon. Critics may charge that our project is untimely at best and irrelevant at worst. We thus begin by explaining why that concern is understandable but non-fatal to our aims.

Analysis of section 16 has theoretical and practical import — though it is admittedly more theoretically important at present. First, analysis of section 16 is important for constitutional law scholarship. Section 16 is one of the most ignored provisions in the written component of the Constitution of Canada. Comprehensive understanding of the content of Canadian constitutional law requires analysis of this provision. Where the Constitution is to be interpreted holistically,[17] the importance of section 16 is further supported by the fact that it provides a classic constitutional interpretation exercise. As the analysis below makes clear, examining the idiosyncratic section 16 raises important questions not only about the often-overlooked issue of how to understand powers explicitly provided to the Queen under the Constitution of Canada, but also, for instance, about reading possibly conflicting statements of constitutional law, how constitutional powers can change over time, and the Queen's ability to reclaim powers that she has granted to other entities.

Second, the capital has an important role in Canadian self-understanding and serious political implications. Ottawa, for better or for worse, has become a symbol of, and shorthand for, the way central Canada is seen to impose its will on, and disparage, not only the West — particularly Alberta — but also the Maritimes and the territories. The presence of Ottawa in Ontario is symbolic of that province's status as the most populous province and, in the past, the unquestioned economic engine of the country. To move the capital to another province would telegraph, intentionally or not, that Ontario has lost its status and power. Our collective ignorance as to who can exercise a power of such symbolic and political importance is glaring.

16 *Constitution Act, 1982*, s 38, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]

17 See *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385; *Reference Re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 [*Supreme Court Act Reference*].

Third, there could be reasons to move the capital in the future and there are few principled reasons to keep the capital in Ottawa. Imagine that a Prime Minister with a significant Western power base seeks to move the capital of Canada to Calgary. Or that rivers begin to irreversibly overflow and envelop Ottawa, threatening government infrastructure and providing reasons to move government officials and offices from the city. These scenarios are not wholly without an air of reality. Strong Western political blocs led to many changes in Canadian governance in recent years. Some supporters of such blocs likely retain antipathy towards Ottawa, Ontario, and Quebec that was at least partially contributory to the success of those political entities. It is not difficult to imagine a party with a strong Western base seeking to make a symbolic and practical decision to move the capital (and, by extension, the political centre of Canada) further West. The potential sinking of Jakarta, in turn, prompted recent calls to move the capital of Indonesia.[18] Water concerns in Ottawa are not unprecedented,[19] though the potential sinking of Ottawa is admittedly very remote, with pessimists alone feeling the air of reality. It would be helpful to know what needs to be done before a politician tries to move the capital to Calgary, disasters force us to move the capital inland, or some other scenario leads a government official to want or need to move the capital elsewhere, be it Calgary, Montreal, or another city.

Furthermore, reasons to put the capital in Ottawa in the first place arguably no longer apply, raising questions about why it should remain there. Per the Library of Parliament,

> In 1857, there were a few cities competing to be the capital city. … Queen Victoria chose Ottawa because it was centrally located between the cities of Montreal and Toronto, and was along the border of Ontario and Quebec (the centre of Canada at the time). It was also far from the American border, making it safer from attacks."[20]

But Ottawa is no longer equidistant between Canada's power centers. Canada has not been attacked by the USA for a long time. This is unlikely to change. Modern weaponry means that distance from the American border no longer

18 Michael Kimmelman, "Jakarta Is Sinking So Fast, It Could End Up Underwater" (21 December 2017), online: *The New York Times* <www.nytimes.com/interactive/2017/12/21/world/asia/jakarta-sinking-climate.html>.

19 See e.g., "'Our Worst Nightmare is Coming': Water Levels Expected to Rise in Ottawa Region", *CBC News* (5 May 2017), online: <www.cbc.ca/news/canada/ottawa/flooding-may-5-west-quebec-eastern-ontario-1.4100803>.

20 Canada, Library of Parliament, *Our Country, Our Parliament* (Guide), (Ottawa: Library of Parliament, 2009) at 37.

provides protection from any such attack. The military and social benefits of water access no longer clearly make Ottawa a preferable Canadian capital.

Serious consideration has not been given to moving the capital despite the reasons for choosing Ottawa back in 1867 no longer holding. There was no sustained discussion of section 16 in any post-1982 attempts to amend the Constitution.[21] Yet quixotic (likely unserious) proposals for moving the capital of provinces occasionally arise in the news.[22] If anyone takes a serious stance at the federal level in the future, they should know the burden they will have to meet to realize their proposal. Knowing how to meet the relevant burden requires answers to the questions in Parts II-IV.

II. Question 1: What does section 16 mean by "the Seat of Government of Canada" and "Ottawa"?

In this part, we interpret the terms "the Seat of Government of Canada" and "Ottawa" in section 16. This is necessary to understand the constitutional requirements on the existence of the capital and the content of the power to move the capital, as well as to identify non-constitutional legal procedures that would need to accompany exercise or amendment of section 16. We argue that the terms require that all three branches of government be headquartered in the 1867 boundaries of Ottawa. Moving branches of government outside the 1867 boundaries of Ottawa thus requires exercise of the power to move the capital under section 16 or a constitutional amendment.[23]

21 See the discussion surrounding and text of e.g., *1987 Constitutional Accord*, 1987, online: *Government of Canada* <www.canada.ca/en/intergovernmental-affairs/services/federation/1987-constitutional-accord.html>; *Consensus Report on the Constitution: Final Text, Charlottetown*, 1992, online: Secrétariat du Québec aux relations canadiennes <www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document27_en.pdf> [*Charlottetown Accord*]; *The Calgary Declaration*, 1997, online: Newfoundland and Labrador Executive Council <www.exec.gov.nl.ca/currentevents/unity/unityr1.htm>.

22 In 2010, Member of Provincial Parliament Bill Murdoch suggested that people in Toronto do not understand the rest of the province and proposed that Toronto form its own province with London as the capital of Ontario: "Toronto Should Separate From Ontario: MPP", *CBC News* (16 March 2010), online: <www.cbc.ca/news/canada/toronto/toronto-should-separate-from-ontario-mpp-1.878679>. In 2018, Toronto mayoral candidate Jennifer Keesmaat proposed Torontonian "secession" on self-representation grounds: Tristin Hopper, "How Hard Would It Actually Be for Toronto to Become Its Own Province?", *The National Post* (3 August 2018), online: <nationalpost.com/news/canada/how-hard-would-it-actually-be-for-toronto-to-become-its-own-province>. Ontario would need a new capital in those circumstances too.

23 We bracket the question of whether one must move all three branches simultaneously.

A. The Seat of Government

Section 16 does not discuss the "capital" of Canada, but only "the Seat of Government of Canada."[24] This phrase has no clear plain meaning. At minimum, it would appear to require that the headquarters of the branches of government that existed in 1867 be headquartered in the capital city of "Ottawa" (as defined below). The "Seat of Government" clearly did not refer to the residence of the Queen in 1867. Her primary residence remained in Westminster and was unlikely to change to London, let alone Ottawa. Yet "Government" must have had some intended referent in section 16. Attending to other parts of the constitutional text helps identify said referent. The *Constitution Act, 1867* established the Governor General (GG), the GGIC, and Parliament as entities with executive and legislative power in Canada.[25] These entities were almost certainly considered government in 1867. They should unquestionably be considered government in 2019. The "Seat of Government" most likely always referred to the "Seat" of the GGIC, Parliament, or both. It is implausible to think that either or both could be headquartered in another city if section 16 is going to have any substantive meaning. While the GGIC or Parliament could conceivably fulfill some functions outside city limits while keeping the "Seat" of government in Ottawa, it is hard to see how there can be a "Seat" of government in Ottawa if the only identified government actors in the Constitution are free to organize and exercise their primary government functions outside the city of Ottawa in non-exceptional circumstances.[26]

There is also reason to believe that the headquarters of the SCC must be in Ottawa under section 16. The *Constitution Act, 1867* admittedly did not create a final appellate court for Canada. It only recognized the inchoate possibility of Parliament creating such a court.[27] The drafters could not have intended for the "Seat of Government" in 1867 to include a then-nonexistent branch. But the Constitution of Canada is not frozen in 1867. The "Seat" should be understood as applying to the headquarters and site of the primary exercises of the powers of any branch of the state. This is consistent with both our best understanding

24 *Constitution Act, 1867*, *supra* note 1, s 16.

25 *Ibid*, Parts III, IV.

26 The fact that the non-Royal sovereign government officials in the United Kingdom also sat in the same capital city, London, offers some minimal further support for this interpretation. The Preamble to the *Constitution Act, 1867*, *ibid*, famously states that Canada's constitution will be "similar in Principle to that of the United Kingdom." This could be read as suggesting that governments in both countries should be similarly headquartered. But the stronger argument for our position here is that it is the only one that makes sense of the existence of the "Seat of Government" requirement in the context of the "Government" constitutionally operating in Canada in 1867.

27 *Ibid*, s 101.

of the closest synonym, the capital, and the common practices of world governments. Indeed, the fact that the drafters of the *Constitution Act, 1867* acknowledged the possibility of a judicial branch of the Canadian government arguably provides reason to think that they did not intend for the meaning of "Seat of Government" to be static and that they acknowledged that other branches of the Canadian government could develop over time.

We accordingly believe that the "Seat of Government" most likely refers to the location of the headquarters of all three branches of the federal government: the Executive (in Canada meaning the GG and Cabinet), the Legislative (Parliament), and the Judicial (SCC). This approach is consistent with the view that each branch can operate, within limits, outside Ottawa such that, for instance, the SCC can have hearings outside the city.[28] But the headquarters and regular exercise of the powers of each must remain in Ottawa under section 16.

Statutes establishing further requirements on the location of the capital do not undermine this reading as such requirements are minimal and not part of the Constitution. The *Supreme Court Act* contains provisions that directly refer to some of its activities occurring in (or at least near) Ottawa.[29] If these provisions were constitutionalized and required that the SCC sit in Ottawa, they could limit movement of the capital. However, it is highly unlikely that the SCC in the *Reference Re Supreme Court Act, sections 5 and 6*, which constitutionalized at least some sections of the *Supreme Court Act*, meant to constitutionalize the entire *Act*.[30] Section 16 actually helps to explain why the SCC could not have meant to do so. Doing so would have imposed undue restrictions on the exercise of the section 16 power, which would contradict basic norms of constitutional interpretation that require holistic interpretation whereby provisions reinforce, rather than undermine, one another.[31] Even if the whole *Supreme Court Act* were constitutionalized, moreover, it would not require the SCC to sit in Ottawa. That legislation only requires that "[t]he

28 The Supreme Court of Canada has nascent plans to do so: Sean Fine, "Supreme Court of Canada Considers Holding Hearings Outside of Ottawa", *The Globe and Mail* (21 June 2018), online: <www.theglobeandmail.com/canada/article-supreme-court-of-canada-considers-holding-hearings-outside-of-ottawa/>. Plans to hold occasional hearings outside of Ottawa would not contradict section 16 on our view. We only require that the headquarters of all three branches be in 1867 Ottawa's contours. Contrary interpretations that would make occasional travelling sessions illicit face the problem that the Supreme Court of Canada sat elsewhere in the 1800s and should be able to do so now given the Preamble and the fact that, as Fine notes, the UK Supreme Court recently held hearings outside its London headquarters.

29 *Supreme Court Act*, RSC 1985, c S-26, ss 11, 14, 30, 32 ("Ottawa"), 8, 14 ("National Capital Region") [*Supreme Court Act*].

30 *Supreme Court Act Reference*, *supra* note 17.

31 See note 17.

judges shall reside in the National Capital Region … or within forty kilometres thereof" and that members' Oath of Office "be administered to the Chief Justice before the Governor General in Council, and to the puisne judges by the Chief Justice or, in the case of absence or illness of the Chief Justice, by any other judge present at Ottawa."[32]

The *Parliament of Canada Act* does not even explicitly state that Parliament must be *near* Ottawa.[33] Its only references to Ottawa are in relation to eligible expenses for Parliamentary Secretaries[34] and to define the term "Parliament Hill" for the purposes of provisions on the Parliamentary Protective Service.[35] These too are minimal requirements. No one argues that they are constitutionalized. While one could argue that there is a constitutional convention that Parliament meets in the "Seat of Government," there is little indication that this must be Ottawa.

The *Supreme Court Act* and *Parliament of Canada Act* thus do not change the fact that the Seat of Government of Canada must be in Ottawa. Those provisions only make moving the capital impracticable. The lack of constitutional status for the potentially problematic statutes means that changing, for instance, the residence requirements of the judges alongside the site of the capital, would not require a constitutional amendment if section 16 were exercised, as such changes would not seem to alter the Court's essential features.

B. Ottawa

The fact that all three branches of government must be in "Ottawa" under section 16 raises questions about the meaning of "Ottawa" in that section. Neither the *Constitution Act, 1867* nor other components of the Constitution of Canada recognized in the *Constitution Act, 1982* define "Ottawa."[36] As a municipality in Ontario, the legal boundaries of Ottawa are a matter for the government of Ontario.[37] For example, in 1999, the Ontario legislature amalgamated the existing City of Ottawa with several

32 *Supreme Court Act*, *supra* note 29, ss 8, 11.

33 *Parliament of Canada Act*, RSC 1985, c P-1.

34 *Ibid*, s 66(a).

35 *Ibid*, s 79.51.

36 *Constitution Act, 1982*, *supra* note 16.

37 See *Constitution Act, 1867*, *supra* note 1, s 92(8); *Public School Boards' Assn of Alberta v Alberta (AG)*, 2000 SCC 45 at para 33. On municipal reorganization, see *Mississauga (City) v Peel (Municipality)*, [1979] 2 SCR 244 at 253, 97 DLR (3d) 439; *East York (Borough) v Ontario (AG)* (1997), 153 DLR (4th) 299 at paras 11-13, 36 OR (3d) 733 (CA), leave to appeal to SCC refused, [1997] SCCA No 647.

cities/townships (e.g., Cumberland, Gloucester, Kanata, and Nepean) into a new City of Ottawa.[38]

While we generally interpret terms in a dynamic manner in Canada, we support a static reading of the term "Ottawa" in which it refers to the boundaries of Ottawa as constituted in 1867. On this reading, section 16 precludes the normal spread of the government within the boundaries of Ottawa as the city's boundaries expanded over time. Federal government branches cannot be headquartered in Nepean, for example. The alternative has more implausible implications. A "dynamic" interpretation of "Ottawa" in section 16 would essentially grant the Ontario legislature the power to amend the Constitution by expanding, contracting, or moving Ottawa. This flatly contradicts Canadian constitutional amendment norms.[39] Dynamic interpretation is meant to be "purposive."[40] No plausible reading of section 16 lets its purpose give new powers to the province or allows the absurd results that could follow. A dynamic reading can present Ontario with powers to change, shrink, or even eliminate the Seat of Government for Canada. Separation of powers aside, Ontario shrinking the boundaries of "Ottawa" to the area around "Parliament Hill" would allow the Seat of Government to remain in place. Yet changing the boundaries to a small location in another part of town would move the capital in a manner contradictory to the intent of section 16, effectively exercising the section 16 power, and could result in massive federal expenditures.

38 *City of Ottawa Act, 1999*, SO 1999, c 14, Sched E, ss 1(1), 2(1) [*Ottawa Act*], referring to *Regional Municipality of Ottawa-Carleton Act*, RSO 1990, c R.14, s 1 (definition of "area municipality"), as repealed by *Fewer Municipal Politicians Act, 1999*, SO 1999, c 14, ss 5(2), 7(2).

39 As detailed below, *Constitution Act, 1982*, *supra* note 16, Part V establishes the rules of Canadian constitutional amendment. In most cases, per s 43, even when a constitutional amendment only impacts a single province, it requires acceptance by the federal Senate and House of Commons and by the Governor General. The claim in *Ottawa Act*, *supra* note 38, s 5(2) that "[t]he city stands in the place of the old municipalities for all purposes" thus cannot include the purpose of serving as the capital: a province cannot unilaterally change constitutional matters that impact others, which would include the capital, and often cannot even unilaterally impact constitutional measures that do not impact others. Section 45 of the *Constitution Act, 1982*, *supra* note 16, provides that provincial legislatures "may exclusively make laws amending the constitution of the province." A good faith argument that this may entail a province's power to make unilateral amendments to parts of the Constitution of Canada is available: See e.g. Hogg, *supra* note 3 at 4.7. However, nothing concerning the capital plausibly fits under "the constitution of the province."

40 On the necessity of purposive interpretation of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, see *Hunter v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321. These cases provide reason to believe that the Constitution generally must be interpreted purposively. *Rizzo* & *Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 21-23, 154 DLR (4th) 193 requires purposive interpretation of *all* Canadian legal documents. On purposive interpretation generally, see Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton UP, 2005) at 88-92, 288.

Ontario's power to eliminate cities could even eliminate the site for the Seat of Government.

Our static interpretation raises questions about the relationship between 1867 Ottawa and the modern capital region. If the Seat of Government must be in 1867 Ottawa and the Canadian public likely views the capital of Canada as encompassing areas outside of even modern Ottawa — as the establishment of the National Capital Region, which includes parts of Quebec suggests[41] — might this challenge our previous identification of the capital of Canada and its Seat of Government? In a word, "No." The act establishing the National Capital Region explicitly states that it extends beyond the "Seat of Government."[42] It defines the region as follows: "***National Capital Region*** means the seat of the Government of Canada and its surrounding area, more particularly described in the schedule."[43] The capital is the Seat of Government. The capital and the area around it form the capital region. Recognizing 1867 Ottawa as the capital and the surrounding area as the greater capital is consistent with the text of the *Constitution Act, 1867* and the *National Capital Region Act*. While scholars discuss attempts to move some government institutions to Gatineau/Hull as attempts to move "the capital",[44] they are better understood as the creation of a national capital region in which national identity markers (viz., institutions that help to forge a common identity through e.g., shared history[45]) surround the capital proper.

One passage in *Munro* could challenge our interpretation but does not undermine it. The justification of the federal takings necessary to establish the National Capital Region in both Ontario and Quebec was justified under the Peace, Order and good Government (POGG) power in *Munro*, partly so "the nature and character of the seat of the Government in Canada may be in accordance with its national significance."[46] Yet the statement that the National Capital Region as a whole is the seat of the Government in Canada is not directly on point and likely obiter.[47] It is also a matter of POGG interpretation, not section 16 interpretation. The SCC likely did not mean to make substantive statements on the contours of section 16. It did not need to recognize

41 *Description of National Capital Region*, being Schedule to the *National Capital Act*, RSC 1985, c N-4.
42 *Ibid*, s 2.
43 *Ibid*.
44 E.g., Knight, *supra* note 14 at 338.
45 The Canadian Museum of History in particular is now in Gatineau, partly because of the development of the National Capital Region; online: *Canadian Museum of History* <https://www.historymuseum.ca/>.
46 *Munro*, *supra* note 2 at 671.
47 *Ibid* at 669.

Gatineau as part of the capital or grant Gatineau a power to host a branch of government to decide the case. Moreover, the term "Ottawa" in section 16 does not plausibly include other cities on its face. The fact that the relevant act does not simply make the other cities part of Ottawa suggests the *National Capital Act* is not meant to change the constitutional status of Gatineau. The broader point in the *Munro* passage is a good one, but the court should have said and likely meant to say that the takings are necessary "in order that the nature and character of the seat of government *and the surrounding capital region* may be in accordance with its national significance."

C. Conclusion

For the purposes of section 16, then, "the Seat of Government" refers to the location of the headquarters of all three branches of government and "Ottawa" refers to the 1867 boundaries of Ottawa. The question of whether someone can exercise the power to move the capital implicit in section 16 is thus a question of whether one can move all or part of the headquarters of the three branches of government to a location outside the 1867 boundaries of Ottawa, whether it be as close as Nepean, which is part of contemporary Ottawa under provincial law, or as far away as Iqaluit. We now turn to analyze whether anyone has that power.

III. Question 2: Can the power in section 16 be used and, if so, by whom?

Section 16, in conjunction with modern constitutional convention, suggests three options for the entity that can legally exercise the power to move the capital: (a) the GGIC; (b) the Queen herself[48]; and (c) the GG herself. We argue that (a) is the correct interpretation of section 16 and then explain why (b) and (c) are less plausible interpretations of the relevant law. We then address the less plausible possibilities that (d) the power could be exercised by Parliament and (e) the power is defunct, so no one can move the capital absent constitutional amendment.

The most plausible position is that the power to move the capital belongs to the GGIC, *at least* by convention if not by law, but likely by law.[49] As we

48 *Constitution Act, 1867*, *supra* note 1, s 16.

49 As noted in note 11 and discussed below, the exact level — whether legal or conventional — and scope of the devolution in the *Letters Patent, 1947*, *supra* note 11, is less clear than is sometimes appreciated. We provide reason to think that the Queen is legally bound to move the capital only in consultation with the GGIC in this work that are grounded not only in texts and practices that are

will now explain, the plain language of section 16 gives the power to move the capital to "the Queen," but almost all powers of the Queen and GG are understood, again at least by convention if not by law, to be exercised by the GGIC.[50] *The Letters Patent, 1947* suggests that the section 16 power in particular has legally devolved to, at minimum, the GG and the *Statute of Westminster, 1931* is then understood to require that the GG act on advice on some Canadian entity with few exceptions that are not analogous to the present case, likely requiring consultation with the GGIC.[51] While we do not go as far as some scholars who believe it is "unthinkable" ("impensable") that the Queen could exercise this power absent consultation with some other entity,[52] we believe that there is good legal reason to believe that the Queen is actually required to consult the GGIC prior to a move.

The plain language of section 16 admittedly suggests that the Queen alone possesses the power to move the capital of Canada. The provision literally specifies "the Queen."[53] Some context supports the idea that "the Queen" should be interpreted narrowly. Dodek's brief discussion of section 16, one of the few scholarly discussions thereof, notes that section 16 is "one of only five [provisions] where the Queen directly exercises power under the [*Constitution Act, 1867*]."[54] The fact that the *Constitution Act, 1867* gives other powers theoretically belonging to the Queen to other entities also suggests that the powers of the GGIC and the Queen are meant to be separate.

Other language is used to refer to the Queen's representatives acting on her behalf. The GG and GGIC both have specific powers under the *Constitution Act, 1867*. If the founders meant for the power to move the capital under section 16 to belong to the GG or GGIC, they could (and one can argue would) have said so. They explicitly gave other powers to those bodies. Giving this particular power to another entity without amending the original *Constitution Act, 1867* appears prima facie suspect. Knight suggests that this narrow interpretation should continue to govern given that other documents delegating the Queen's powers do not explicitly delegate this power. He says neither the

arguably conventional, but in clear provisions of documents with constitutional status. If, however, one believes that all our discussions of the devolution of powers and the Queen's agreement to bind her own authority are conventional, then this weaker claim about de facto power remains true.

50 *Constitution Act, 1867, supra* note 1, s 16; Hogg, *supra* note 3 at 9.4(b).

51 *Letters Patent, 1947*, *supra* note 11, art II; *Statute of Westminster, 1931*, 22 Geo V, c 4 (UK), reprinted in RSC 1985, Appendix II, No 27 [*Statute of Westminster*].

52 Beaudoin with Thibault, *supra* note 8 at 788.

53 *Constitution Act, 1867, supra* note 1, s 16.

54 Dodek, *supra* note 3 at 43.

Letters Patent, 1947,[55] which otherwise delegate the Queen's powers in Canada to other entities (e.g., the GG or the GGIC), nor the *Constitution Act, 1982*,[56] which moves constitutional authority in Canada from the United Kingdom to Canada, explicitly delegates the power to move the capital under section 16 to any other entity, GG or otherwise.[57] In the absence of explicit delegation, the argument goes, the power must remain with the Queen.

With respect, however, the *Letters Patent, 1947* do delegate the section 16 power and other legal documents further suggest that a literal reading of section 16 errs and the power to move the capital belongs to the GGIC. Again, almost all powers of the Queen and GG are understood to be exercised by the GGIC, by convention if not by law.[58] The devolution of the section 16 power in particular to either the GG or the GGIC appears in the *Letters Patent, 1947*. Article II states:

> **II.** We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise **all** powers and authorities lawfully belonging to Us in respect of Canada, **and for greater certainty but not so as to restrict the generality of the foregoing** to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him….[59]

However, the following phrase muddies the waters as to whether the GG's powers are exercisable by the GGIC as a matter of law or only as a matter of convention: "Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, *as the case requires*."[60] At minimum, exercise is by the GGIC by convention. But, as discussed below, there is also a reasonable argument for the claim that the Queen is legally required to consult. In either case, the *Letters Patent, 1947* are part of the Constitution of Canada.[61] They are accordingly to be read in concert with other constitutional documents, including section 16, and can qualify the same.

55 *Letters Patent, 1947*, *supra* note 11.

56 *Constitution Act, 1982*, *supra* note 16.

57 Knight, *supra* note 14 at 346.

58 Hogg, *supra* note 3 at 9.4(b).

59 *Letters Patent, 1947*, *supra* note 11, art II [emphasis added].

60 *Ibid* [emphasis added].

61 Analysis of this point is mixed. Contrast Régimbald & Newman, *supra* note 3 at 1.16 and Funston & Meehan, *supra* note 3 at 31, who include them on lists of constitutional documents, with Monahan, Shaw & Ryan, *supra* note 3 at 3-6 and The Constitutional Law Group, *Canadian Constitutional Law*, 5th ed (Toronto: Emond Montgomery, 2017) at 4-8, who do not. Hogg, *supra* note 3 at 1.2, views the *Letters Patent, 1947* as an exercise of the prerogative power, in contrast to powers formally granted in the written constitutional text. He writes that a definition of "constitutional" that relied on section 52(2) alone would not include the *Letters Patent, 1947* or several other documents with

One could argue that the word "all" in Article II is only meant to refer to powers like those in the text of various Letters Patent and powers under the *Constitution Act, 1867* generally or section 16 particularly do not qualify.[62] Contemporaneous commentary suggests that it was unclear at the time of passage whether the provisions meant to provide the powers "to confer honors" or "declare neutrality, war or peace" and that it did not actually change the office of the GG, leaving him or her subject to British law.[63] Everyone still recognizes that the Queen retains the power to appoint the GG.[64] The same could be true of the capital-moving power. These considerations provide some evidence of a qualified domain restriction on "all."

However, none of this entails that section 16 should be read literally today or that the Queen alone possesses the power to move the capital. Article II's reference to "all powers" remains unequivocal.[65] The listed powers are explicitly not intended to be exhaustive or qualify the "all powers" language, suggesting that the list of powers granted to the GG, with advice, was non-exhaustive. Section 16 is within the ambit of "all" the Queen's powers. Delegation likely includes that of the section 16 power.

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candidate constitutional status: *ibid* at 1.4. Yet scholarship contemporaneous to the issuance of the *Letters Patent, 1947* viewed Letters Patent from Britain as constitutional documents for other British colonies: Martin Wight, *British Colonial Constitutions, 1947* (Oxford: Clarendon, 1952). They do not appear in the list of sources of *British* constitutional law (AW Bradley & KD Ewing, *Constitutional & Administrative Law,* 15th ed [Harlow, UK: Pearson Education, 2011]), but were intended colonial constitutional laws and retain that status. Moreover, Letters Patent were included in Appendix II to RSC 1985, reflecting (at minimum) their general import. Yet leading collections of constitutional documents in both English and French include the 1947 letters as constitutional documents: See Bernard W Funston & Eugene Meehan, eds, *Canadian Constitutional Documents Consolidated 2nd Edition* (Toronto: Thomson Carswell, 2007) at 346; André Tremblay, ed, *Droit constitutionnel canadien et Québécois : documents* (Montreal: Themis, 1999) vol 1 at 563.

62 *Letters Patent, 1947*, *supra* note 11, art II. For an introduction to this phenomenon of implied domain restrictions, which notes the common occurrence thereof, see Wylie Breckenridge, *Visual Experience: A Semantic Approach* (Oxford: Oxford University Press, 2018) at 77-79.

63 WPM Kennedy, "The Office of the Governor-General in Canada" (1948) 7:2 UTLJ 474 at 474. The press release accompanying the *Letters Patent, 1947* stated that the letters were not to be understood as impacting the then-King's prerogative powers; Mallory, *supra* note 3 at 37 n 8. 1889 commentary on the nineteenth-century versions of the *Letters Patent*, most notably the BNA-contemporaneous 1867 version and the 1878 version highlight that drafters accepted that since "Canada possessed more extensive powers of self-government than had been conceded to any other colony, and consisted not of one province but of seven provinces, the widest possible powers consistent with the British North America Act should be conferred on the Governor-General": Munro, *supra* note 3 at 162. That same commentary placed the power under section 16 in the Crown, not the GGIC; *ibid* at 266. The list of powers granted by the Letters Patent to the GGIC does not include a power to move the capital; *ibid* at 163-167.

64 See e.g. Firmini & Smith, *supra* note 3 at 136.

65 *Letters Patent, 1947*, *supra* note 11, art II.

An alternative reading of the *Letters Patent, 1947* would keep the power in the hands of the Queen even notwithstanding the residual language. Legally, the effect would be that both the GG and the Queen hold the section 16 power. Nonetheless, GGIC involvement would likely remain necessary. In *Leblanc v Canada*, the Ontario Court of Appeal rejected the argument that the delegation under the *Letters Patent, 1947* meant that the section 26 power — to increase the size of the senate — "could no longer be exercised by [the Queen]" and instead found that "the general rule is that a delegation of power does not imply parting with the authority and the delegating body retains the power to act concurrently within the area of delegated authority."[66] This decision is legally persuasive. However, at minimum as a matter of convention, the Queen would not exercise the power absent a recommendation from the GG. As we argue below, the *Statute of Westminster, 1931* and other documents suggest that any remaining section 16 powers belonging to the Queen requires her to exercise these powers in consultation with other entities, effectively requiring the consent of that other entity — whether the GG or GGIC — in any case.

The question is then whether the Queen requires the consent of the GG or GGIC to exercise section 16 powers. To the extent that the *Letters Patents, 1947* devolved the capital-moving power under section 16, for instance, the question is whether devolution was to the GG or GGIC. It is highly unlikely that section 16 is one of the rare powers of the GG exercised by the GG alone. Peter W. Hogg describes the GG-exclusive powers as the GG's "personal prerogatives" or "reserve powers."[67] He argues that these only apply where the government has lost, or may have lost, the confidence of the House of Commons.[68] These include the power to appoint the Prime Minister,[69] dismiss the Prime Minister,[70] or refuse a dissolution of Parliament.[71] The latter two are rarely used (and controversial when used). All other powers of the GG, whether formally ascribed to the GGIC or to the GG herself in law, are exercised by the GG

66 *Leblanc v Canada* (1991), 80 DLR (4th) 641 at paras 25-26, 3 OR (3d) 429 [*Leblanc*]. We note that the British Columbia Court of Appeal was more tentative. See *Reference Re Sections 26, 27 and 28 of Constitution Act, 1867* (1991), 78 DLR (4th) 245 at para 64, 53 BCLR (2d) 335 (BCCA) [*Reference Re Sections 26, 27 and 28*]: "I digress here to note that an argument could be made based on the Letters Patent of 1947 that, as well as the Queen having this authority, so too does the Governor General." An argument for Beaudoin with Thibault, *supra* note 8 at 788's claim that both the Queen and the GG could move the capital could appeal to this case law for support (though they better support the Queen and the *GGIC* both having section 16 powers).

67 Hogg, *supra* note 3 at 9.7(a).

68 *Ibid*.

69 *Ibid* at 9.7(b).

70 *Ibid* at 9.7(c).

71 *Ibid* at 9.7(d).

on the advice of Cabinet or the Prime Minister. For example, Hogg writes of sections 24 and 96 that "[t]he Governor General's power to appoint senators (Constitution Act, 1867, s. 24) and judges (s. 96) is *of course* exercised on the advice of the cabinet."[72] The section 16 power is unlike the aforementioned reserve powers of the GG: the section 16 power has no connection to whether the government has lost the confidence of the House. The powers exercised by the GG on the advice of the Prime Minister alone are also quite narrow and relate to the Cabinet itself and Parliament.[73] The GG's exercise of the section 16 power appears extraordinary and without precedent. Devolution to the GG in section 16 should be understood as devolution to the GGIC.[74]

Further support for the idea that GGIC and not the Queen possesses the power to move the capital under section 16 comes from the *Statute of Westminster, 1931*, which limits the Queen's ability to make decisions for Canada without consulting some Canadian entity.[75] The *Statute*, which granted many powers to the Canadian government, is one of the most important sources of Canadian self-governance. Even if the *Letters Patent, 1947* are not part of the Constitution of Canada within the meaning of subsection 52(2), as critics may charge,[76] the *Statute of Westminster, 1931* would still bind the relevant authorities. It is widely understood to grant "full independence and autonomy to Canada."[77] It is unlikely that something as significant to national self-understanding and political functioning as the power to make decisions about the location of the capital is not part of that autonomy. As part of said autonomy, the Queen should only make decisions for Canada in consultation with Canada.[78] Thus, Hogg writes that the Queen has "delegated all of her powers over Canada to the Canadian Governor General, except of course for the power to appoint or dismiss the Governor General,"[79] which is exercised

72 *Ibid* at 9.7(e) [emphasis added] [footnotes omitted].

73 *Ibid* at 9.4(c).

74 But see Beaudoin with Thibault, *supra* note 8 at 788 for a somewhat confusing statement on the GG alone.

75 *Statute of Westminster*, *supra* note 51. The *Statute* is identified as forming part of the Constitution of Canada in the Schedule to the *Constitution Act, 1982*, *supra* note 16.

76 See note 61.

77 Régimbald & Newman, *supra* note 3 at 1.14. The wide recognition point is ours. A narrow reading of the *Statute* would not devolve the power to move to the capital as the *Statute* does not give the Queen's powers to Canadian Parliament, but places restrictions on the British Parliament: *Statute of Westminster, supra* note 51, s 4. This reading is highly non-standard.

78 The British Parliament can *only* make laws on the request and with the consent of Canada: *Statute of Westminster*, *supra* note 51, s 4. As noted in the preceding footnote, the restrictions on Parliament here plausibly also apply to the Queen.

79 Hogg, *supra* note 3 at 9.3. In an omitted note, Hogg qualifies this statement with the possible exception of s. 26 of the *Constitution Act, 1867*, *supra* note 1.

by the Queen on the advice of the Prime Minister of Canada. Yet again, the GG's powers are then (*at least* conventionally) only rarely exercisable by the GG alone.

The *Statute of Westminster, 1931* thus supports the idea that the section 16 power does not belong to the Queen or GG alone. While the *Statute of Westminster, 1931* does not overrule other constitutional provisions like section 16, it is part of the Constitution of Canada and suggests that the power to move the capital can only be exercised after consultation with some Canadian government entity (even if the *Letters Patent, 1947* contain a residual power to exercise the power or a residual right of reclamation discussed below). The *Statute* may not be able to formally take a power from the Queen, but all constitutional documents must be read together in concert and reading section 16 in tandem with the *Statute of Westminster, 1931* (and, indeed, a plausible interpretation of *Letters Patent, 1947*) suggests that the Queen can no longer exercise her power alone. Given the impact of an exercise of the section 16 power, it is unlikely that advice from the Prime Minister will suffice for moving the capital: other than the appointment of the GG, the main powers of the Prime Minister alone are to advise the GG to appoint and dismiss the members of Cabinet and to dissolve or summon Parliament.[80] The power to move the capital under section 16 of the *Constitution Act, 1867* likely belongs to the GGIC instead, by convention and likely by law.

Requiring the Queen to consult with other entities to exercise her section 16 powers is also consistent with limitations placed on the exercise of her other constitutional powers. As a matter of conventional and actual practice, other constitutional powers belonging to the Queen are not clearly exercised by the Queen alone anymore. The fact that the *Constitution Act, 1867* explicitly gives other powers to the GG or GGIC while stating "the Queen" here suggests original intent to have the Queen decide the location of the capital. Yet other instances of powers vested in the Queen in the *Constitution Act, 1867* appear either spent or no longer solely within the domain of the Queen alone. Section 3 authorizes "the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council," to unite by proclamation Canada, Nova Scotia, and New Brunswick into the Dominion of Canada.[81] This power is clearly spent. So too is the power to admit other enumerated provinces that are now part of Canada.[82] The Queen plays no formal role in military affairs despite

80 Hogg, *supra* note 3 at 9.4(c).

81 *Constitution Act, 1867*, *supra* note 1, s 3.

82 This explains why Dodek, *supra* note 3 at 43, only lists five, rather than seven, direct powers.

section 15, which states that "The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen."[83] This is best understood as a consequence of another status directly given to the Queen: section 9 vests in the Queen the executive power "of and over" Canada.[84] That executive power is now exercised through a combination of the GG and the Prime Minister, though whether this is legally required is open for interpretation. The specific numerical limitations in the section 26 power to add seats to the Senate raises questions about its continuing significance, but it requires the Queen to act in concert with the GG in any case: "If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), **representing equally the Four Divisions of Canada**, add to the Senate accordingly."[85] Nearly all other mentions of the Queen appear to be with respect to powers that the GG specifically possesses under the text of the *Constitution Act, 1867*, such as the right to use the Great Seal. The only possible exception is the "power of disallowance" allowing the Queen to annul laws that were otherwise valid passed, and even that power is understood to have "disappeared" by convention such that its limitation on colonial authority no longer operates.[86]

Retaining the section 16 power in the Queen alone, then, does not appear to be consistent with the operation of other direct powers belonging to the Queen in the *Constitution Act, 1867*. As a matter of convention, the Queen retains few (if any) powers that she will exercise on her own. An exception whereby she alone retains the section 16 power would be unwarranted.

As a matter of formal law, the Queen likely retains a residual power to move the capital, but this power is now legitimately exercised by the GGIC

83 *Constitution Act, 1867*, *supra* note 1, s 15.

84 *Ibid*, s 9.

85 *Ibid*, s 26 [emphasis added]. On one reading, its most compelling recent use was made by the Prime Minister with the assent of the Queen, rather than the other way around. See "Mulroney Stacks Senate to Pass the GST" (27 September 1990), online (video): *CBC Digital Archives* < www.cbc.ca/archives/entry/1990-mulroney-stacks-senate-to-pass-the-gst>. This reading is admittedly controversial.

86 Hogg, *supra* note 3 at 3.1, discussing the power in *Constitution Act 1867*, *supra* note 1, s 56. Hogg says it has been "nullified by convention" at 9.3 n 11. Yet *Reference Re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] SCR 71 at 79, [1938] 2 DLR 8, states that the power remained effective due to its formal status in the constitutional text and so could not be annulled when Alberta sought a formal declaration of its nullification. *Charlottetown Accord*, *supra* note 21, s 38 thus says that formal repeal of the provision remains constitutionally desirable.

and the Queen has bound herself to exercise this power only on advice of a Canadian entity so the Queen alone likely cannot actually exercise a power to move the capital. The argument for the GGIC above relies on the aforementioned devolution of Article II of the *Letters Patent, 1947* and a constitutional understanding that the powers devolved there — which include the power to move the capital — are exercised by the GGIC (in accordance with norms also recognized in the *Statute of Westminster, 1931*). It must contend with the full text of the *Letters Patent, 1947*, including:

> **XV.** And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem fit.

The Queen, then, can "revoke, alter, or amend" the *Letters Patent, 1947*, including devolution of the section 16 power. One could build on this to argue that even if the section 16 power now lies with the GGIC due to the *Letters Patent, 1947*, it is incorrect to call the claim that the GGIC has the power to move the capital correct from a constitutional law perspective.

We think the better way to approach this is to say that a constitutional power has been constitutionally delegated to another entity. All the relevant documents form part of the Constitution. Moreover, the Queen likely cannot exercise any claimed residual power in any case. Discussion of the *Statute of Westminster, 1931* above suggests the power needs to be exercised through some entity other than the Queen. Given the stakes, the GGIC is, again, the most plausible candidate. The Prime Minister will not suffice. The GGIC thus remains the de facto and de jure holder of the section 16 power. While the Queen may still hold an on-paper constitutional power to move the capital, the GGIC retains the power to move the capital for current practical purposes and consultation with the GGIC remains necessary if the Queen can and does exercise her residuary right to reclaim and exercise the section 16 power.

In making our case for the GGIC, we have explained why neither the Queen nor the GG could exercise the section 16 power alone even if they formally possessed it as a matter of law. We should also address the even less plausible possibilities that Parliament could exercise the power in section 16 or that the power is defunct. The Supreme Court of Canada proposed the first possibility in *Munro*,[87] but, respectfully, it is unclear what (if any) support exists for it. Action by Parliament is action by the Queen, in that Parliament is more properly referred to as the Queen-in-Parliament and consists of the

87 See note 2 and accompanying text.

House of Commons, the Senate, and the Queen.[88] Beaudoin thus suggests that federal legislation that is not subjected to a royal veto is like royal action on advice of the House of Commons.[89] One could, of course, extend this to apply to advice from the Senate. However, the *Constitution Act, 1867* refers repeatedly to Parliament, which suggests that the term "Parliament" was used when Parliament was intended.[90] We are aware of no legislation in which "the Queen" has been used to mean the Queen-in-Parliament. As a matter of public legitimacy, Parliament may be better suited than the GGIC to make the decision to move the capital. Parliament would provide transparency, clearer accountability, and public attention to a matter that the GGIC could otherwise deal with arbitrarily and in secret. Our primary concern, however, is the *legal* requirements to move the capital. There is virtually no legal support for the proposition that the section 16 power is exercisable by Parliament, one unsupported line of obiter notwithstanding.

The last argument we must consider, that the section 16 powers are defunct, takes two unpersuasive forms. The first form states that the power is, like other powers of the Queen under *the Constitution Act, 1867*, no longer operative. Yet the power is clearly not spent like the powers to create the Dominion or admit enumerated provinces. One could raise a good faith argument that it has "disappeared" through convention like the power of disallowance and so cannot be used. Still, it is unlikely that disappearance through convention can eliminate formal constitutional powers.[91] Moreover, even if we granted the contentious claim that constitutional powers can so-disappear, the power to move the capital is not a limitation on colonial authority like the power of disallowance, so the grounds for disappearance are not the same. Indeed, the Courts of Appeal of British Columbia and Ontario in 1991 rejected similar arguments that the Queen's power to add senators under section 26 of the *Constitution Act, 1867* "had been repealed by implication or had been rendered constitutionally obsolete."[92] There is little reason to think that section 16 has been rendered obsolete where section 26 has not.

The second form states that Ottawa is now the capital by constitutional convention and so no one can move it. This is false if meant to be a limitation

88 *Constitution Act, 1867*, *supra* note 1, s 17.

89 Beaudoin with Thibault, *supra* note 8 at 788.

90 *Constitution Act, 1867*, *supra* note 1, ss 18, 19, 23(2), 31, 35, 40, 41, 51, 52, 59, 60, 90, 91, 92(10). Section 92A also used the term "Parliament" when added.

91 See note 86 and accompanying text.

92 *Leblanc*, *supra* note 66 at para 24; *Reference Re Sections 26, 27 and 28*, *supra* note 66 at paras 46-56. While some of the arguments for obsolescence were specific to the framing of section 26, the overall point remains.

on the possibility of amending the Constitution to move the capital. An explicit change in the text of the Constitution should be able to supersede a constitutional convention. Likewise, an amended provision of a clear constitutional document that clarifies where the capital will be will no doubt help limit claims that the location of the SCC is constitutionalized in federal legislation. It is also false if meant as a challenge to the possibility of exercising existing section 16 powers. Section 16 surely trumps convention. Indeed, this also undermines the first line of argument for the defunct status of section 16 since a non-binding convention of non-use also cannot eliminate a binding grant of formal power. (None of this undermines our case for the GGIC, which is not sourced in convention alone but linked to clear binding textual requirements under multiple documents that require current practices some will describe as "conventional.")

Ultimately, then, the power to move the capital most likely resides in the GGIC. The Queen retains a residual right to reclaim the power but has agreed not to exercise it without consulting Canada first, effectively placing the power back in the GGIC. While this result conflicts with the plain text of the *Constitution Act, 1867*, an amendment to better reflect the present state of the law is unlikely. Were constitutional amendment possible, moreover, there are more important amendments to make than an amendment to section 16; and if section 16 is to be amended, more meaningful and effective amendments are available than changing "the Queen" to "the GGIC."

IV. Question 3: What amendment formula would apply to prospective section 16 amendments?

The result of our analysis — that the GGIC holds the power to move the capital — may be unacceptable (or at least unpalatable) from a political perspective. Arguably, such an important change should require at least the consent of Parliament and perhaps the consent of most, if not all, of the provinces. If the federal government, Parliament, or both, decided that leaving the power to change the location of Canada's capital city in the hands of the executive branch is inconsistent with democratic values and the role that Parliament plays and should play in making decisions of great importance to the country, and therefore wanted to amend section 16, the question becomes: Which of the rules governing the amendment of the Constitution would apply to such an amendment?

The amendment procedures for the Constitution of Canada appear in Part V of the *Constitution Act, 1982*.[93] The general rule, outlined in section 38, is that amendments to the Constitution of Canada are only possible by agreement of the GG, both houses of Parliament, and 2/3 of the Canadian provinces representing at least 50% of the population of Canada.[94] Section 42 specifies particular powers that can only be amended under these general rules. Nothing concerning the Queen or the capital is specified there.[95] References to "the Supreme Court of Canada," "the powers of the Senate and the method of selecting Senators," and "the extension of existing provinces into the territories" in section 42[96] could, however, be relevant to analysis of "the Queen," "Ottawa," and "the Seat of Government."

There are also stricter and less stringent variations on the general rule. More strictly, under section 41, the GG, both houses of Parliament, and all provinces must agree to amendments concerning "the office of the Queen, the Governor General and the Lieutenant Governor of a province," the ratio between each province's representation in the different houses of Parliament, use of English and French, "the composition of the Supreme Court of Canada," and section 41 itself.[97] Less strictly, under section 43, only the aforementioned national entities and provinces impacted need consent to "in relation to any provision that applies to one or more, but not all, provinces" but all affected provinces must agree,[98] and, under section 44, Parliament has exclusive authority over changes "in relation to the executive government of Canada or the Senate and House of Commons" (subject to qualifications in sections 41 and 42).[99]

The general amendment procedure under section 38 most likely applies to section 16. There is little indication that any phrase in section 16 or interpretation of those phrases trigger any of the special amendment procedures. Whether one attempts to amend "Ottawa,"[100] directly amending the Constitution to recognize a different city as the capital (or expanding or contracting the contours of same) or to amend "Until the Queen otherwise directs"[101] to provide a different entity with the constitutional power to change the capital or even to eliminate the power to move it, the general amending formula under section

93 *Constitution Act, 1982*, *supra* note 16, ss 38-49.
94 *Ibid*, s 38.
95 *Ibid*, s 42.
96 *Ibid.*
97 *Ibid*, s 41.
98 *Ibid*, s 43.
99 *Ibid*, s 44.
100 *Constitution Act, 1867*, *supra* note 1, s 16.
101 *Ibid.*

38 of the *Constitution Act, 1982* most likely applies. While one could argue that the capital is of such great significance that it should be analogous to the composition of the SCC and only be changed with the stronger amending formula, the case for the composition of the SCC has textual support missing in the case of section 16.[102]

We find the argument that the "the Queen" can only be changed with a stronger amending formula unpersuasive. It is unlikely that "the office of the Queen" in section 41[103] should be understood as including each individual power belonging to the Queen. Stripping the Queen of all, or almost all, of her powers would be to change the office of the Queen. But removing one narrow power likely should not be understood as changing the office of the Queen. We see the force of the argument that amending section 16 constitutes a change to the office of the Queen. Politically, moreover, section 41 amending procedures would likely be required to move the capital. We simply find the argument that section 16 amendments only need to conform to the requirements in section 38 more persuasive. Removal of powers that go to the core of the Queen's powers constitutes changes to her office and so those powers can only be amended in accordance with section 41, but not all of the Queen's powers are sufficiently central so as to constitute her office and the section 16 power is peripheral. The correct answer is ultimately uncertain, but we think section 38 likely applies.

In any case, unilateral movement of the capital remains outside the powers of Parliament or any other branch of government. Amendments would require action by other entities — i.e., at least some provincial legislatures — and so Parliament would remain unable to change the capital unilaterally through constitutional amendment. This is clearly not an example where unilateral amendment is possible. The capital appears to be a matter for the union as a whole and is not merely "in relation to" a small subset of provinces. Additionally, or alternatively, many provinces have an interest in and are impacted by the site of the capital, financially, politically, and culturally. Recall the discussion in Part I of the status of Ontario and national identity markers. An argument that moving the capital is a matter "in relation to" the executive, Senate, or House would be weak, as such a move would not change the powers of any of those bodies. Moreover, the unilateral amendment powers under section 44 do not refer to the SCC at all, making it highly unlikely that they allow unilateral amendments that would move the SCC headquarters.

102 *Supreme Court Act Reference*, *supra* note 17.
103 *Constitution Act, 1867*, *supra* note 1, s 41.

Amending the Constitution is unlikely. The federal government and (at least) most provinces need to agree on a constitutional amendment. Political support for a measure thus needs to be very strong in multiple areas of Canada for amendment to occur. We grant that scenarios that could create sufficient support for an amendment — like the sinking of Ottawa above — could plausibly also produce support for the GGIC's exercising of the capital-moving power absent amendment. There is likely good democratic reason to prefer amendment even in these circumstances. Regardless, we argue that if amendment took place, the general amending formula would apply.

Conclusion

Legally, the capital of Canada is the location where all three branches of government are headquartered. This must be within the boundaries of 1867 Ottawa. The power to move the capital of Canada currently resides in the GGIC. Though the Queen retains (at least) a residual right to reclaim the power in the *Letters Patent, 1947*, she could only exercise even that power in consultation with the GGIC. Moving the capital absent GGIC involvement or changing the person who holds the power to move the capital requires constitutional amendment through regular amendment procedures under section 38 of the *Constitution Act, 1982*.

We focused our analysis on the constitutional requirements to move the capital under section 16 (or amend section 16 itself). The political requirements would likely be greater. Any leader who proposed moving the capital would face pressure to also consult with the leaders of other federal political parties, the Premiers, and the public. This consultation might take the form of a national plebiscite or perhaps a national election in which the proposal to move the capital was a party's key campaign commitment. Some could argue that such consultation would be required by constitutional convention on a decision of this magnitude, although that argument would likely be unsuccessful. Similarly, any proposed amendment to section 16 that would, in itself, move the capital would prompt pressure for unanimous consent of the provinces even if we are correct that the general amending formula would be the legal requirement. The legal requirements would thus, in practice, be only part of the effective requirements before such a move was implemented.

If we are correct that section 16 is exercisable by the GGIC, an amendment to section 16 is advisable. Four kinds of amendments could be made. The first and most mild would substitute "the Governor General in Council" for "the Queen", to clarify that the power is exercisable by the GGIC. The second kind

of amendment would move the power to another actor, most likely Parliament. The third kind would truncate the text of section 16 so that it merely stated that "the Seat of Government of Canada shall be Ottawa." This would require a subsequent constitutional amendment to move the capital. A fourth kind of amendment would itself move the capital.

We recommend the third option, which would remove the inherent power to move the capital and recognize that any such move would be so consequential as to appropriately require a constitutional amendment. The level of legal stringency would then match more closely the expected political stringency. Even if the result would make moving the capital practically impossible, it is the most honest option. If there is insufficient public support to meet the legal requirements of the general amending formula in section 38 to move the capital, there is unlikely to be sufficient public support to meet the practical political requirements to move it.

Des Causes et des Conséquences du Dialogue Constitutionnel

*Jean-Christophe Bédard-Rubin**

The dialogue theory between courts and legislatures has been successfully picked up by judges and academics alike since its first articulation in the Canadian context by Hogg and Bushell in 1997. The literature is sometimes unclear, however, as to what kind of theory it is. Is it a causal theory or simply a normative reconstruction based on descriptive inferences? What kinds of empirical claims does it take for granted? This paper reviews the literature on constitutional dialogue to critically assess it from a causal perspective. After presenting the main arguments in favour of dialogic constitutionalism, the paper disambiguates three causal models implicit in the various types of dialogue: the ideational, the socio-cultural, and the institutional models. Taking a comparative approach, this paper questions the validity of the causal inferences of the institutional model of dialogue. It points to the incapacity of institutional dialogue to explain two features of Canadian constitutionalism: the stabilization of the constitutional bargain in the context of mega-constitutional politics and the strategic uselessness of the notwithstanding clause of the Canadian Charter of Rights and Freedoms. *Given the comparative data and the Canadian experience, this paper concludes that caution is warranted before applying dialogic institutions to socio-political contexts other than mature democracies.*

La théorie du dialogue constitutionnel entre les cours et les législatures a connu un important succès depuis sa première formulation dans le contexte canadien par Hogg et Bushell en 1997. Elle a été reprise tant par les juges que par les constitutionnalistes. La littérature universitaire demeure toutefois ambigüe quant à la nature de cette théorie. S'agit-il d'une théorie causale ou simplement d'une reconstruction normative qui se base sur des inférences descriptives? Quels types de présupposés empiriques prend-t-elle pour acquis? L'article passe en revue la littérature sur le dialogue constitutionnel pour en examiner de façon critique la dimension proprement causale. Après avoir présenté les principaux arguments en faveur du constitutionalisme dialogique, l'article distingue trois modèles causaux implicites dans les différentes formes de dialogues : le modèle idéationnel, le modèle socio-culturel et le modèle institutionnel. À l'aide de données empiriques comparatives, l'article remet en question la validité des inférences causales sur lesquels se base le modèle de dialogue institutionnel. L'article souligne finalement que le dialogue institutionnel est incapable d'expliquer deux dimensions importantes de l'expérience constitutionnelle canadienne : la stabilisation du compromis constitutionnel dans un contexte de politique méga-constitutionnelle et l'inutilité stratégique de la disposition de dérogation de la Charte canadienne des droits et libertés. *Compte tenu des données empiriques comparatives peu concluantes et de l'expérience canadienne, l'article conclu que la prudence est de mise avant d'exporter le dialogue institutionnel dans des contextes socio-politiques autres que des démocraties matures.*

* LL.B. (Laval), LL.M., Candidat au doctorat en droit (Université de Toronto). J'aimerais remercier David Schneiderman et Ubaka Ogbogu pour leurs commentaires sur une version antérieure de ce texte ainsi que les deux réviseur(e)s anonymes et les éditeurs de la Revue pour leurs critiques et suggestions. Je demeure évidemment responsable des erreurs qui pourraient subsister.

I. Introduction

Dans les vingt dernières années, la théorie du dialogue constitutionnel est devenue une véritable industrie intellectuelle au Canada et a réussie plus généralement à essaimer comme peu d'autres en droit constitutionnel comparé. On peut en retrouver les origines intellectuelles aux États-Unis dans la seconde moitié du vingtième siècle chez les défenseurs du contrôle judiciaire de la constitutionnalité des lois[1]. Mais son articulation dans le contexte canadien par Peter Hogg, Allison Bushell[2] et Kent Roach[3], au tournant des années 2000, a donné un nouvel élan à un mouvement qui ne s'est pas arrêté depuis[4]. Malgré ses origines américaines, la théorie dialogique du contrôle constitutionnel sert maintenant aussi à décrire les interactions entre la branche judiciaire et les branches législatives et exécutives de l'État dans des contextes constitutionnels qui partagent avec le Canada une certaine structure institutionnelle. Tout comme l'idée d'une version « faible » du contrôle constitutionnel[5], ou de l'émergence d'un « nouveau modèle du Commonwealth de la révision judiciaire »[6], la théorie du dialogue participe à un effort de reconceptualisation des interactions entre le pouvoir judiciaire et la démocratie parlementaire. Ces nouvelles théorisations possèdent des caractéristiques propres qui les distinguent de la théorie

1 Eugene V Rostow, « The democratic character of judicial review » (1952) 66:2 Harv L Rev 193; Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis, Bobbs-Merrill, 1962 aux pp 23-28; Michael J Perry, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking in the Judiciary*, New Haven, Yale University Press, 1982 à la p 113; Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process*, Princeton, Princeton University Press, 1988; Barry Friedman, « Dialogue and Judicial Review » (1993) 91:4 Mich L Rev 577.

2 Peter W Hogg et Allison A Bushell, « The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All) » (1997) 35:1 Osgoode Hall LJ 75. Voir également Peter W Hogg, Allison A Bushell Thornton et Wade K Wright, « Charter Dialogue Revisited: 'Or Much Ado About Metaphors' » (2007) 45:1 Osgoode Hall LJ 1.

3 Kent Roach, *The Supreme Court on Trial: Judicial Activism and Democratic Dialogue*, Toronto, Irwin Law, 2001.

4 Comme le note Alison L Young : « bien que le dialogue ait été mentionné auparavant dans les travaux universitaires américains en science politique et en droit, son gain en popularité semble avoir été déclenché par l'article séminal de Hogg et Bushell (maintenant Thornton) en relation avec la Charte canadienne des droits et libertés » [notre traduction]. Alison L Young, *Democratic Dialogue and the Constitution*, Oxford, Oxford University Press, 2017 à la p 1. Voir, par l'exemple, l'application de la théorie du dialogue dans le contexte asiatique par Po Jen Yap, *Constitutional Dialogue in Common Law Asia*, Oxford, Oxford University Press. 2015. Voir également Stephen Gardbaum,*The New Commonwealth Model of Constitutionalism: Theory and Practice*, Cambridge, Cambridge University Press, 2013; Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism*, Melbourne, Federation Press, 2016.

5 Mark Tushnet, « Alternative Forms of Judicial Review » (2002-2003) 101 Mich L Rev 2781. Mark Tushnet, *Weak Courts, Strong Rights:Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, Princeton University Press, 2008.

6 Voir généralement Gardbaum, *supra* note 4.

du dialogue à proprement parler[7], mais elles essaient toutes d'éviter les oppositions antinomiques entre, d'une part, la souveraineté parlementaire, et, d'autre part, la suprématie du pouvoir judiciaire, en mettant l'accent sur les institutions qui jouent le rôle de médiateur entre ces deux pôles de l'activité normative de l'État[8]. La théorie du dialogue comme justification du pouvoir de contrôle constitutionnel des juges, peut-être à cause de son ambiguïté conceptuelle[9] ou de sa participation au « tournant délibératif » de la théorie démocratique, est devenue un thème majeur de la recherche contemporaine en droit constitutionnel et au sein des études constitutionnelles[10]. Malgré tout, plusieurs auteurs remettent en question la validité des inférences descriptives que font les théoriciens du dialogue et soutiennent que les tribunaux soufflent plus souvent qu'autrement les réponses au législateur. Selon eux, il ne s'agirait donc pas d'un dialogue, mais d'un monologue[11].

Laissant de côté ces questions normatives et descriptives, cet article cherche à mobiliser les outils conceptuels et méthodologiques des études constitutionnelles plutôt que du droit constitutionnel *stricto sensu*[12]. Il soumet à un examen critique les présupposés *causaux* sur lesquels se base la théorie du dialogue et qui expliquent une partie importante de son attrait d'un point de vue comparatif. Selon ses défenseurs, le constitutionnalisme dialogique produirait des effets désirables qui mériteraient qu'on en défende l'application dans d'autres contextes politiques que ceux où on le retrouve actuellement[13]. Cet article cherche donc à déterminer quels sont les effets implicites attribués au dialogue constitutionnel. Il examine ensuite s'ils sont avérés et s'ils peuvent être

7 Rainer Knopff *et al*, « Dialogue: Clarified and Reconsidered », (2017) 54:2 Osgoode Hall LJ 609.

8 Il est révélateur, à cet égard, que Jeremy Waldron exclut nommément les régimes dialogiques ou « faibles » de sa critique démocratique du contrôle constitutionnel. Voir, Jeremy Waldron, « The Core of the Case Against Judicial Review », (2006) 115:6 Yale LJ 1346, à la p 1354.

9 Pour une analyse critique de la *métaphore* du dialogue elle-même, voir Aileen Kavanagh, « The Lure and Limits of Dialogue », (2016) 66:1 UTLJ 83.

10 Pour une analyse en profondeur et exhaustive des différentes théories du dialogue en droit constitutionnel, voir Anne Meuwese et Marnix Snel, « Constitutional Dialogue : An Overview », (2013) 9:2 Utrecht L Rev 123.

11 Voir, par exemple, Jean Leclair, « Réflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien », (2003) 63 Rev du Bar/Num Spec 379, à la p 410; Christopher P. Manfredi et James B. Kelly, « Six Degrees of Dialogue: A Reply to Hogg and Bushell », (1999) 37:3 Osgoode Hall LJ 513; F.L. Morton, « Dialogue or Monologue? A Reply to Hogg and Thornton », (1999) *Policy Options* 23; Emmett MacFarlane, « Dialogue or Compliance? Measuring legislatures' policy response to court rulings on rights », (2012) 34:1 Int'l Pol Sci Rev 39.

12 Sur la distinction entre les *études* constitutionnelles et le *droit* constitutionnel, en particulier dans le contexte comparatif, voir Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, Oxford University Press, 2014 ch 4.

13 Voir, par exemple, Stephen Gardbaum, « Are Strong Constitutional Courts Always a Good Thing for Democracy? », (2015) 53 Colum J Transnat'l 285.

raisonnablement attribués au dialogue constitutionnel lui-même. Finalement, l'article identifie certaines limites, voire conséquences indésirables, du constitutionnalisme dialogique notamment en ce qui a trait à l'institutionnalisation de l'ordre constitutionnel canadien.

L'intérêt pour la théorie dialogique du contrôle constitutionnel provient en grande partie du fait qu'on lui attribue directement ou indirectement les succès réels du constitutionnalisme canadien, comme en témoignent les hauts niveaux de confiance envers les institutions judiciaires, tant d'un point de vue comparatif[14] que par rapport aux autres institutions politiques au Canada[15], l'absence d'attaques politiques majeures contre les tribunaux, le respect des décisions judiciaires, et l'influence croissante de la Cour suprême du Canada ailleurs dans le monde[16]. Autrement dit, selon les théoriciens du dialogue, le constitutionnalisme canadien jouit d'une stabilité qui fait envie et pour laquelle on devrait remercier les institutions dialogiques de la constitution canadienne. Comme l'écrivait récemment Jamie Cameron, « la question de la légitimité [du contrôle constitutionnel] est en bonne partie en rémission aujourd'hui. Bien qu'il serait mal avisé d'attribuer plus qu'il ne le faudrait au dialogue, il est possible que le concept ait aidé à stabiliser la Charte et à faciliter son itinéraire ces dernières années » [notre traduction][17].

L'argument principal de cet article est que la théorie du dialogue s'appuie de façon implicite, et à tort, sur la relation causale qui existerait entre la stabilité politique des institutions judiciaires et le modèle canadien de contrôle constitutionnel[18]. Cette relation est généralement mentionnée en passant, tenue pour acquise ou simplement intégrée dans des discussions normatives ou descriptives

14 Nuno Garoupa et Tom Ginsburg, *Judicial Reputation: A Comparative Theory*, Chicago, University of Chicago Press, 2015 à la p 11. Voir également, Angus Reid Institute, « Canadians have a more favourable view of their Supreme Court than Americans have of their own » (2015) en ligne: <http://angusreid.org/wp-content/uploads/2015/08/2015.08.14-Supreme-Court-final.pdf>.

15 Voir Canada, Statistiques Canada, *Public Confidence in Canadian Institution*, Ottawa : Gouvernement du Canada, 2015, en ligne : <https://www150.statcan.gcca/n1/pub/89-652-x/89-652-x2015007-eng.htm

16 Voir, par exemple, Ran Hirschl, « Going Global? Canada as Importer and Exporter of Constitutional Thought », dans Richard Albert et David R Cameron, dirs, *Canada in the World: Comparative Perspectives on the Canadian Constitution*, Cambridge, Cambridge University Press, 2017, 305. Voir également David S Law et Mila Versteeg, « The Declining Influence of the United States Constitution » (2012) 87:3 NYU L Rev 762.

17 Jamie Cameron, « Collateral Thoughts on Dialogue's Legacy as Metaphor and Theory: A Favourite From Canada », (2016) 35 U Queensland LJ 157, 168.

18 Notons qu'il est question ici des relations causales au sens large comme étant soit probabilistes, soit des conditions nécessaires ou suffisantes. La dimension causale est utilisée en contraste avec les inférences descriptives et les discussions normatives qui constituent la grande majorité de la littérature sur le dialogue constitutionnel. Sur la notion de causalité, voir de façon générale Gary

tout en demeurant trop imprécise et non validée empiriquement. Bien qu'ils jouent un rôle probable dans ce succès, les facteurs culturels qui dépassent la configuration des institutions constitutionnelles sont rarement intégrés dans la discussion ou analysés en profondeur. Ces facteurs culturels incluent le changement générationnel dans les pays occidentaux vers des valeurs « post-matérialistes », c'est-à-dire « axées de plus en plus sur des priorités comme l'autonomie, l'expression de soi et la qualité de vie », plutôt que « matérialistes tels que la sécurité économique et physique » [notre traduction][19]. Ils incluent également la présence d'une culture constitutionnelle et politique attachée à la protection des droits des minorités préexistante à l'adoption de la *Charte canadienne des droits et libertés*[20]. Même en admettant que les structures dialogiques aient pu contribuer au succès du modèle canadien dans certains contextes, d'autres aspects de l'expérience canadienne suggèrent plutôt qu'il est préférable de demeurer prudent avant de louer la stabilité de son modèle constitutionnel. En effet, lorsque les tribunaux doivent remplir certaines fonctions délicates, comme favoriser l'institutionnalisation de l'entente constitutionnelle ou promouvoir la démocratie militante[21], la théorie du dialogue constitutionnel se révèle étonnamment pauvre. Si elle veut demeurer pertinente, la théorie du dialogue devrait au minimum prendre en considération l'impact d'autres facteurs institutionnels et répondre de façon plus explicite aux effets possibles des facteurs culturels sur la stabilité constitutionnelle de manière générale.

Cet article présente d'abord les principaux arguments avancés par différents défenseurs du dialogue constitutionnel entendu au sens large (**II**). L'article expose ensuite la dimension proprement causale, implicite ou explicite, de trois

King, Robert O Keohane et Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton, Princeton University Press, 1994 ch 2-3.

19 Ronald Inglehart, « Postmaterialist Values and the Shift from Survival to Self-Expression Values », dans Russel J Dalton et Hans-Dieter Klingemann, dirs., *Oxford Handbook of Political Behavior*, Oxford, Oxford University Press, 2007, 223 à la p 223. En général, voir Ronald Inglehart, *Culture Shift in Advanced Industrial Society*, Princeton, Princeton University Press, 1989. Au Canada, de façon générale, voir Neil Nevitte, *The Decline of Deference: Canadian Value Change in Cross-National Perspective,* Toronto, Broadview Press, 1996. Dans le contexte plus spécifique du droit constitutionnel et de la *Charte canadienne des droits et libertés*, voir FL Morton et Rainer Knopff, *The Charter Revolution and the Court Party*, Peterborough, ON, Broadview Press, 2000; Matthew E Wetstein, CL Ostberg, *Value Change in the Supreme Court of Canada*, Toronto, University of Toronto Press, 2017.

20 Dans le contexte canadien, voir Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-1982*, Vancouver, UBC Press, 2008.

21 Sur le rôle des tribunaux dans la promotion de la démocratie militante, voir Sam Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, Cambridge, Cambridge University Press, 2015. Pour une étude approfondie des limites du pouvoir judiciaire au-delà de l'adjudication constitutionnelle dans les processus de démocratisation, voir Tom Gerald Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders*, Cambridge, Cambridge University Press, 2017.

modèles idéaux-typiques de théories dialogiques soit le modèle idéationnel, le modèle socio-culturel et le modèle institutionnel (**III**). Partant de ce dernier modèle, l'article présente ensuite deux critiques de la théorie du dialogue, telle que défendue au Canada. En utilisant les données du World Values Survey (WVS), la première critique montre comment les arguments contrefactuels relatifs au caractère stabilisateur du dialogue constitutionnel ne sont pas validés par les données empiriques (**IV**). La seconde critique souligne les limites de la théorie du dialogue pour comprendre les modes d'institutionnalisation du droit constitutionnel. Cette seconde critique prend appui, d'une part, sur les réactions des acteurs constitutionnels québécois aux jugements sur les droits linguistiques et, d'autre part, sur les remous causés par la judiciarisation des enjeux liés à la diversité ethnoreligieuse, telles qu'en témoignent les suites de l'affaire *Multani* (**V**). L'article se conclut avec quelques hypothèses relatives à la désuétude de la disposition de dérogation de la *Charte canadienne des droits et libertés* qui est au cœur de la théorie du dialogue canadien et suggère quelques conclusions théoriques (**VI**).

II. Les motivations normatives des théories du dialogue

L'idée du dialogue constitutionnel a été utilisée de façon descriptive comme métaphore sensée saisir l'essence d'une série d'interactions entre les tribunaux et les branches législatives et exécutives de l'État. Elle a également été utilisée de façon normative pour justifier le contrôle constitutionnel de la validité des lois sur le fondement des droits et libertés lorsque celui-ci s'effectue à travers des arrangements institutionnels précis. En plus de ces dimensions descriptives et normatives, le constitutionnalisme dialogique s'appuie largement sur des présupposés causaux qui attribuent aux institutions un rôle important dans le maintien de la stabilité et le « succès » des systèmes constitutionnels. Cette section aborde les versants descriptifs et normatifs de la théorie du dialogue, alors que la prochaine section présente une critique des présupposés causaux sur lesquelles elle repose.

La théorie du dialogue peut se résumer à la quête d'un juste équilibre entre, d'une part, la suprématie judiciaire relative à l'interprétation constitutionnelle des droits et libertés, et, d'autre part, la souveraineté parlementaire. D'un point de vue normatif, elle cherche à offrir un modèle qui équilibrerait deux idéaux constitutionnels distincts et deux idées de la justice; d'un côté, l'idée de la liberté et de l'autonomie politique et son instanciation à travers des mécanismes majoritaires qui cherchent à exprimer de manière approximative la « volonté générale », ou la « volonté populaire », et, de l'autre côté, l'idée du constitutionnalisme, c'est-à-dire l'idée que le pouvoir politique doive s'exercer conformément

aux règles préétablies qui le constituent et l'encadrent. Notons que la tension entre ces deux idéaux constitutionnels est inhérente au constitutionnalisme moderne. Toutefois, certains aspects du constitutionnalisme semblent moins problématiques que d'autres d'un point de vue normatif en raison de leur impact limité sur la liberté et l'autonomie politique. Par exemple, lorsque la souveraineté est divisée entre différents paliers de gouvernement, comme c'est le cas dans les régimes fédératifs, les tribunaux sont souvent appelés à arbitrer les limites du pouvoir attribué par la constitution à l'une et l'autre autorité législative pour s'assurer qu'une certaine marge de manœuvre politique leur est préservée. Cette incursion du pouvoir judiciaire dans le processus législatif est moins problématique, du point de vue normatif[22], puisqu'elle n'amoindrit pas la capacité du peuple de se gouverner lui-même. Elle sert simplement à déterminer à travers quels mécanismes institutionnels ce gouvernement de soi peut légalement avoir lieu; les entités fédérées ou l'entité fédérale[23]. En revanche, la protection des droits et libertés individuelles réduit la marge de manœuvre à l'intérieur de laquelle peuvent se mouvoir les majorités parlementaires et soustrait, ce faisant, certains enjeux de la portée des mécanismes du gouvernement collectif. Le constitutionnalisme dialogique se propose de surmonter cette alternative dialectique. Le dialogue n'« incarner[ait] ni un échec de l'enchâssement absolu des droits ni une porte dérobée pour échapper à la protection des droits. Il s'agit d'une sorte spéciale de compromis puisqu'il ne fait pas que juxtaposer des éléments opposés. À la place, il combine le meilleur de chacune des deux positions contrastées pour en faire quelque chose de nouveau et de supérieur » [notre traduction][24].

La défense du dialogue constitutionnel s'appuie d'abord et avant tout sur une reconstruction normative des interactions effectives entre les tribunaux et les branches élues de l'État. D'un point de vue descriptif, les défenseurs du dialogue soutiennent que les relations entre les tribunaux et les parlements ne se résument pas à un simple respect coi de la part des élus pour le « constitutionnalisme oraculaire »[25] des juges. Le pouvoir judiciaire et les pouvoirs exécutifs et législatifs échangent plutôt des raisons et réagissent l'un et l'autre aux considérations spécifiques mises de l'avant par leur partenaire de dialogue. Ce va-et-vient permet de mettre en lumière les mérites et

22 *A contrario,* voir Adrienne Stone, « Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review », (2008) 28:1 Oxford J Leg Stud 1.

23 Jeffrey Goldsworthy, « Structural Judicial Review and the Objection from Democracy », (2010) 60 UTLJ 137.

24 Lorraine Weinrib, « Learning to Live with the Override », (1990) 35 McGill LJ 541 à la p 564.

25 Rainer Knopff et FL Morton, *Charter Politics*, Toronto, Thomson, 1992, ch 7.

les défauts des différents projets législatifs ou réglementaires qui pourraient limiter certains droits ou certaines libertés. Par exemple, le libellé lui-même des droits et libertés ou les méthodes d'interprétation constitutionnelle comme l'analyse de la proportionnalité permettent aux gouvernements de présenter des arguments de principe dans le but d'expliciter les raisons qui les poussent à limiter les droits et libertés et les raisons pour lesquelles aucune autre alternative moins restrictive n'est disponible[26]. Dans certains cas, les élus peuvent également renverser les décisions des tribunaux et adopter leurs projets de lois « nonobstant » les droits constitutionnels garantis, et avoir ainsi le dernier mot. Qui plus est, dans un régime parlementaire comme au Canada, les pouvoirs législatifs et exécutifs peuvent être mobilisés en réponse à une décision judiciaire plus facilement que dans un système présidentiel et bicaméral fort comme aux États-Unis[27].

Pour les théoriciens du dialogue, tous ces éléments ont une valeur normative positive. L'analyse de la proportionnalité donne aux citoyens dont les droits sont les plus affectés par les actions de l'État l'opportunité d'obtenir une démonstration que la limitation a été faite de manière à enfreindre le moins possible leurs droits. Cette forme de dialogue entre l'État et les justiciables fournit une justification délibérative du contrôle constitutionnel[28]. De plus, lorsque les législatures ont le pouvoir de renverser les décisions judiciaires en utilisant une disposition de dérogation, les branches élues de l'État, plutôt que les tribunaux non élus, conservent alors la responsabilité ultime en matière de politiques publiques. Dans le contexte canadien, la disposition de dérogation de l'article 33 de la *Loi constitutionnelle de 1982,* plutôt que de contraindre les politiciens à suivre docilement les décisions judiciaires, déplace simplement les bénéfices de « l'inertie législative » à l'avantage de ceux en faveur desquels une décision judiciaire a été rendue[29]. Finalement, la déférence en matière de réparations constitutionnelles permet aux tribunaux d'éviter d'imposer une solution précise à un litige tout en indiquant les droits qui devront être pris en considération dans la mise en balance d'intérêts divergents puisque les législatures sont mieux équipées et plus susceptibles de prendre une décision équilibrée dans

26 Roach, *supra* note 3 ch 9 aux pp 215-217. Sur les liens entre le constitutionnalisme dialogique et l'analyse de la proportionnalité, voir Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, traduit par Doron Kalir, Cambridge, Cambridge University Press, 2012 aux pp 465-467.

27 Roach, *supra* note 3 aux pp 79-80.

28 Pour un examen critique des possibilités « délibératives » du dialogue et une tentative de distinguer les dimensions normatives et descriptives de la théorie du dialogue, voir Luc B Tremblay, « The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures », (2005) 3:4 Int'l J Const'l L 617.

29 Roach, *supra* note 3 aux pp 63, 64, 194 et 195.

ce contexte[30]. Cette déférence peut être prévue dans la loi elle-même comme c'est le cas au Royaume-Uni ou en Nouvelle-Zélande où la compétence des tribunaux se limite soit à déclarer l'incompatibilité d'une loi[31] ou à en faire une interprétation atténuée[32]. Elle peut également être d'origine prudentielle, comme au Canada[33].

III. La dimension causale de la théorie du dialogue

La plupart des théories du dialogue s'appuient sur des théories causales implicites. Quelques-unes sont triviales — par exemple, que les juges reflètent le contexte culturel dans lequel ils évoluent — mais d'autres sont plus importantes, bien qu'elles demeurent souvent imprécises[34]. Par exemple, dans son livre sur l'histoire de la Cour suprême des États-Unis, Barry Friedman avance que « ultimement, à travers un dialogue avec les juges, la constitution finit par refléter le jugement pondéré du peuple américain à propos de ses valeurs les plus fondamentales » [notre traduction][35]. Selon Friedman, après des périodes d'expansion du pouvoir judiciaire et de repli, la Cour a fini par acquérir une place centrale dans le système politique américain[36]. Toutefois, Friedman n'identifie pas les mécanismes qui ont causé ou même simplement favorisé ce développement[37].

La théorie du dialogue, y compris dans la version articulée par Friedman, s'appuie sur des relations causales implicites qui la rendent normativement attrayante. Le constitutionalisme dialogique favoriserait les décisions judiciaires vigoureuses tout en préservant la stabilité politique et la confiance dans les institutions judiciaires. Ce faisant, cela éviterait les représailles politiques à l'encontre des tribunaux et les autres crises constitutionnelles du même

30 En général, voir Donald Horowitz, *The Courts and Social Policy*, Washington, Brookings Press, 1977; Lon L. Fuller, « The Forms and Limits of Adjudication » (1978) 92:2 Harv L Rev 353. Voir également, dans le contexte canadien, Janet Hiebert, *Charter Conflicts: What is Parliament's Role?*, Montréal-Kingston, McGill-Queens University Press, 2002 aux pp 59-60.

31 *Human Rights Act 1998*, (UK) c 42 art 4.

32 *Ibid*, art 3; *New Zealand Bill of Rights Act 1990*, (NZ) No 109, art 6. Voir, à cet effet, Janet L Hiebert et James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom*, Cambridge, Cambridge University Press, 2015.

33 Voir, par exemple, *Canada (Premier Ministre) c Khadr*, [2010] 1 RCS 44, 2010 CSC 3 aux para 33-47.

34 Jon Elster, *Nuts and Bolts for Social Sciences*, Cambridge: Cambridge University Press, 1989 aux pp 5-10.

35 Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, New York, Farrar, Strauss et Giroux, 2009 aux pp 367-368.

36 *Ibid*. Voir également, Barry Friedman, « Dialogue and Judicial Review », (1993) 91:4 Mich L Rev 577.

37 Lawrence B Solum, « Narrative, Normativity and Causation », (2010) Mich St L Rev 597.

genre. Par exemple, dans le contexte canadien, Hogg, Bushell et Wright affirment que le dialogue constitutionnel « nous a protégé du noyautage et des attaques contre les tribunaux qui sont à la base des débats politiques aux États-Unis »[38]. Toutes les théories dialogiques ne s'appuient pas pour autant sur le même genre de relations causales entre la stabilité politique et la légitimité démocratique des institutions judiciaires. Dans le but de bien distinguer les différentes versions mises de l'avant et de saisir les mécanismes causaux implicites qui sont à l'œuvre dans différentes théories dialogiques, il est utile de les regrouper en trois modèles généraux distincts, soit le modèle idéationnel, le modèle socio-culturel et le modèle institutionnel[39].

Dans le modèle idéationnel, le pouvoir judiciaire est conçu comme un partenaire institutionnel de délibération publique à propos des droits de la personne. Ses contributions spécifiques au débat public sont alors censées en augmenter la qualité et éclairer la discussion[40]. Les tribunaux offrent alors le « forum des principes »[41] dans le processus de prise de décisions politiques. Après la tenue d'une discussion informée à propos des mérites de celles-ci dans laquelle chaque partenaire institutionnel offre une vue complémentaire des enjeux, les décisions judiciaires fournissent ultimement un point focal vers lequel l'opinion publique peut converger. Comme le résume Michael J. Perry, « du dialogue constitutionnel entre la Cour et les autres organes gouvernementaux […] émerge une moralité politique plus auto-critique qu'elle ne l'aurait été autrement et donc une moralité politique plus mature également […] plutôt qu'une moralité stagnante ou régressive » [notre traduction]. Bien que cette affirmation soit difficile à mesurer empiriquement, les études de James Kelly sur l'importance de la *Charte canadienne des droits et libertés* dans les travaux du Cabinet fédéral canadien et des autres institutions étatiques[42], la diffusion

38 Hogg, Bushell et Wright, *supra* note 2 à la p 200.

39 Cette terminologie est de l'auteur et sert à créer une typologie. Nul doute que peu de théoriciens du dialogue ne défendent de façon exclusive l'une ou l'autre de ces théories, en particulier dans ces versions épurées. La typologie sert toutefois à capturer l'essence de théories causales souvent inarticulées et à les rendre comparables entre elles.

40 Voir, par exemple, Bickel, *supra* note 1 aux pp 23-28; Perry, *supra* note 1 à la p 113; William N Eskridge Jr. et John Ferejohn, « Constitutional Horticulture: Deliberation-Respecting Judicial Review », (2009) 87 Tex L Rev 1273; Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy*, Oxford, Oxford University Press, 2013. Dans une certaine mesure, voir également Frank Michelman, « Foreword 1985 - Traces of Self-Government », (1986) 100 :1 Harv L Rev 4 et Frank Michelman, « Law's Republic », (1988) 97:8 Yale LJ 1493. Dans le contexte canadien, voir Karim Benyekhlef, « Démocratie et libertés: quelques propos sur le contrôle de constitutionnalité et l'hétéronomie du droit », (1993) 38 RD McGill 91.

41 Ronald Dworkin, *A Matter of Principle*, Cambridge, Harvard University Press, 1981 ch 2.

42 James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framer's Intent*, Vancouver, UBC Press, 2005 ch 7.

du « rights-talk » en politique[43], la judiciarisation du politique de façon plus générale[44] et l'importance accrue dans la stratégie électorale de l'usage ou non de la disposition de dérogation dans la poursuite de certains objectifs politiques[45] semblent tous appuyer en partie cette thèse. Il semble en effet que les droits deviennent saillants *ex ante* dans le processus politique et que les gouvernements et les législatures adaptent effectivement leurs politiques publiques pour tenir compte de l'interprétation anticipée que les tribunaux feront des droits de la personne qui sont en jeu[46]. Au lieu de voir les élites politiques et les groupes d'intérêts comme ayant des préférences politiques fixes et définies, les théoriciens du dialogue idéationnel pensent donc[47] que la confrontation de l'opinion publique avec les décisions judiciaires passées ou à venir change les préférences des différents groupes politiques. Ceci a pour effet de réduire la possibilité de conflits entre le pouvoir judiciaire et le pouvoir politique. Il est à noter que les défenseurs du dialogue idéationnel peuvent s'accommoder aussi bien d'un contrôle constitutionnel fort que d'un contrôle faible.[48]

Quant à lui, le modèle socio-culturel du dialogue — qu'on pourrait associer, quoiqu'un peu rapidement, aux « constitutionnalistes populaires »[49] - conçoit le pouvoir judiciaire comme naturellement favorable aux élites politiques dominantes[50]. Cette convergence entre l'opinion judiciaire et l'opinion politique dominante peut survenir soit à cause de l'acculturation[51], du contrôle par les élites elles-mêmes des procédures qui leurs permettent de nommer les

43 Voir, par exemple, Mary Ann Glendon, *Rights-Talk: The Impoverishment of Political Discourse*, New York, Free Press, 1991. Voir également, d'un point de vue empirique, MacFarlane, *supra* note 11.

44 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, Wall et Thompson, 1989.

45 Lorraine E Weinrib, « The Canadian Charter's Override Clause: Lessons for Israel », (2016) 49:1 Israel L Rev 67, aux pp 82-97.

46 Kelly, *supra* note 42. En général, voir Vanessa MacDonnell, « The Civil Servant's Role in the Implementation of Constitutional Rights », (2015) 13 Int'l J Const'l L 383. Voir également la critique de Dennis Baker et sa défense d'une conception « coordonnée » de l'interprétation constitutionnelle qu'il contraste avec le dialogue, Dennis Baker, *Not Quite Supreme : The Courts and Coordinate Constitutional Interpretation*, Montreal-Kingston, McGill-Queen's University Press, 2010 ch 1.

47 Perry, *supra* note 1 à la p 113.

48 Pour une discussion plus approfondie des liens entre le contrôle constitutionnel fort et faible et leur potentiel délibératif, voir Alison L. Young, *supra* note 4.

49 Voir, en général, Mark Tushnet, *Taking the Constitution Away from the Courts*, Princeton, Princeton University Press, 1999; Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford, Oxford University Press, 2004.

50 Lucas A Powe, *The Supreme Court and the American Elite,* Cambridge, Harvard University Press, 2009; Robert McCloskey, *The American Supreme Court*, 6e éd par Sanford Levinson, Chicago, University of Chicago Press, 2016; Robert Dahl, « Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker », (1957) 6 J Pub L 279.

51 Voir, par exemple, Robert C Post, « The Supreme Court 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law », (2002) 117 Harv L Rev 4 aux pp 11 et 37; Reva B.

juges,[52] ou simplement parce que les juges font eux-mêmes partie de l'élite politique nationale dominante, notamment à cause de leur éducation et de leur statut socio-économique[53]. Tout comme le modèle idéationnel du dialogue, la convergence entre l'opinion publique ou l'opinion des élites politiques dominantes et les opinions judiciaires est la clé du modèle socio-culturel pour expliquer la stabilité des institutions judiciaires. Toutefois, contrairement au modèle idéationnel, le modèle socio-culturel du dialogue n'attribue pas aux décisions judiciaires une force causale déterminante capable d'altérer le positionnement idéologique des autres acteurs politiques ou du public plus généralement. S'il y a convergence, ce n'est pas parce que les forces politiques changent leurs préférences et leurs opinions à la lumière des décisions judiciaires, mais plutôt parce que les forces sociales ou politiques sont capables d'altérer le contenu même de ces décisions; les élites politiques réussissant ultimement à obtenir des juges le genre de décisions qu'elles veulent. Il n'est donc pas surprenant que certains théoriciens du dialogue socio-culturel manifestent leur scepticisme quant aux mérites du contrôle constitutionnel basé sur les droits de la personne et à sa capacité d'exercer une réelle force contre-majoritaire[54].

Finalement, le modèle institutionnel du dialogue met davantage l'accent, comme son nom l'indique, sur les institutions qui permettent le dialogue entre les tribunaux et les législatures. Ces mécanismes peuvent inclure l'analyse de la proportionnalité, le parlementarisme, la déférence et la flexibilité en matière de réparation constitutionnelle et la possibilité d'utiliser un mécanisme de dérogation à l'encontre des décisions judiciaires[55]. Contrairement aux modèles idéationnel et socio-culturel, le modèle institutionnel ne s'appuie pas sur une convergence hypothétique des préférences et des opinions des groupes politiques et des décisions judiciaires. Le modèle institutionnel cherche à montrer que les décisions judiciaires ne résolvent pas les enjeux de politique publique mais mettent plutôt en mouvement un va-et-vient dans lequel chacune des branches de l'État peut jouer un rôle important. Pour les partisans du modèle du dialogue institutionnel, la convergence de l'opinion publique et des préférences des élites politiques avec les décisions judiciaires n'est pas la seule façon de

Siegel, « Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto Era », (2006) 94 Cal L Rev 1323, aux pp 1348-1350

52 Dahl, *supra* note 50; Richard Funston, « The Supreme Court and Critical Elections », (1975) 69 :3 Am Pol Sci Rev 795.

53 Powe, *supra* note 50 à la p ix.

54 Voir, par exemple, Tushnet, *supra* note 49.

55 Roach, *supra* note 3; Kent Roach, *The Supreme Court on Trial: Judicial Activism and Democratic Dialogue*, éd rév, Toronto, Irwin Law, 2016. Kent Roach, « Sharpening the Dialogue Debate: The Next Decade of Scholarship », (2007) 45:1 Osgoode Hall LJ 169; Hogg et Bushell, *supra* note 2; Hogg, Bushell et Wright, *supra* note 2.

résoudre les disputes constitutionnelles. Au contraire, le dialogue institutionnel se présente comme une alternative qui permet aux juges ainsi qu'aux représentants élus d'atteindre un *équilibre* plutôt qu'un *consensus*, à cause de la façon dont le jeu politique est structuré. C'est sur cette dernière version institutionnelle du dialogue que nous nous attarderons ici, puisqu'il s'agit du principal modèle défendu par les auteurs canadiens.

Les partisans du dialogue institutionnel fondent une partie de leur théorie sur le modèle du dialogue idéationnel, puisqu'ils reconnaissent que les décisions judiciaires ont le potentiel de changer les préférences politiques sur le long terme. Cependant, ils soutiennent que les tribunaux conservent leur légitimité sociale non pas à cause de cette altération, mais plutôt parce qu'ils ne peuvent pas agir comme un joueur possédant un droit de veto capable de bloquer les initiatives politiques. Les structures institutionnelles laissent plutôt la possibilité aux groupes politiques de réagir aux décisions judiciaires lorsque celles-ci ne réussissent pas à les convaincre de leur bien-fondé. Comme l'écrit Kent Roach, le dialogue institutionnel permet que « la réponse au désaccord raisonnable à propos des décisions interprétant la Charte [ne soit] ni d'empêcher qu'une telle décision soit prise, ni de changer la composition de la Cour ou de permettre au Parlement ou à l'exécutif d'ignorer cette décision. »[56]. En d'autres mots, un cadre dialogique sert à dissoudre la tension inhérente dans l'adjudication constitutionnelle basée sur les droits et libertés de la personne décrite ci-haut. Ce faisant, toute une panoplie de confrontations directes et indirectes entre les tribunaux et les élus est évitée.

L'histoire de la Cour suprême des États-Unis, qui sert souvent de scénario contrefactuel implicite aux théories du dialogue, offre de nombreux exemples de tels conflits entre la Cour et les élus. Dès son arrivée au pouvoir en 1801, Thomas Jefferson et ses partisans du parti républicain ont institué des procédures de destitution contre les juges du parti fédéraliste de John Adams. Ils ont réduit la juridiction de la Cour suprême et forcé ses juges à quitter leur siège confortable à Washington et à reprendre la longue route pénible des « circuits »[57]. Quelques décennies plus tard, le président Andrew Jackson a accepté tacitement que la Géorgie ne mette pas en œuvre plusieurs décisions de la Cour suprême des États-Unis. Ce fut le cas notamment dans l'affaire *Worcester* v. *Georgia* qui annulait la condamnation criminelle d'un missionnaire et niait la juridiction de la Géorgie sur les relations avec les bandes

56 Roach, *supra* note 55 à la p 374.

57 En général, sur l'affrontement entre Jefferson et la Cour suprême des États-Unis, voir Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall and the Rise of Presidential Democracy*, Cambridge, Harvard University Press, 2007.

indiennes. Plutôt que d'envoyer les *federal marshalls* pour garantir la mise en œuvre du jugement, Jackson le déclara plutôt « mort né »[58]. Après sa réélection en 1936, Franklin D. Roosevelt a menacé de noyauter la Cour suprême des États-Unis en nommant des juges supplémentaires pour chaque juge de plus de 70 ans. Son plan de noyautage semblait motivé par sa frustration devant l'interprétation formaliste que la Cour suprême faisait alors de la Constitution américaine et qui avait pour conséquence de remettre constamment en question la mise en œuvre de son « new deal »[59]. Ces évènements, qui sont omniprésents dans la réflexion constitutionnelle aux États-Unis, ne sont toutefois pas des exceptions américaines. Pour ne citer que quelques exemples, en 1990, le Président argentin Carlos Menem nommait des sympathisants politiques à la Cour suprême et déclenchait une crise constitutionnelle. « Pourquoi devrais-je être le seul Président argentin à ne pas avoir ma propre cour? » demandait alors Menem[60]. Plus récemment en Pologne, le gouvernement du Parti du droit et de la justice a entrepris d'attaquer systématiquement le Tribunal constitutionnel et de le transformer graduellement en institution fantoche au service du parti au pouvoir. Par exemple, à partir de 2015, le gouvernement polonais a commencé à refuser de publier certaines décisions importantes du Tribunal qui auraient eu pour conséquences de mettre un terme au démantèlement d'institutions démocratiques, décisions avec lesquelles le gouvernement n'était pas d'accord. Sans être publiées, ces décisions devenaient inopérantes[61]. Le président bolivien Evo Morales, quant à lui, a utilisé plusieurs tactiques pour intimider les juges de la Cour suprême de Bolivie et du Tribunal constitutionnel depuis son arrivée au pouvoir en 2005. Il a, par exemple, nommé des juges par décret plutôt que par le processus parlementaire habituel et en a destitué d'autres au motif qu'ils étaient affiliés à l'opposition. Si bien qu'en 2008, il ne restait plus qu'une seule juge au Tribunal constitutionnel chargée de tous les dossiers. Bien qu'elle ait usé de son pouvoir pour rendre des décisions importantes, celles-ci ne pouvaient avoir qu'un poids symbolique puisque le quorum du tribunal ne pouvait plus être atteint[62]. Les exemples jalonnant

58 *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). La décision ne requérait pas d'action précise de la part du gouvernement fédéral et Jackson réussit plus tard à convaincre en coulisse le gouverneur de Géorgie de l'époque d'abroger la loi dont le contenu était contesté en Cour suprême. Voir Edwin A Miles, « After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis », (1973) 39:4 J South Hist 519.

59 Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, New York, Farrar, Strauss et Giroux, 2009, aux pp 218-220.

60 Cité dans Gretchen Helmke, *Institutions on the Edge: The Institutions and Consequences of Inter-Branch Crisis in Latin America*, Cambridge, Cambridge University Press, 2017 à la p 138.

61 Wojech Sadurski, « Polish Constitutional Tribunal Under PiS : From an Activist Court, to Paralysed Tribunal, to a Government Enabler », (2019) 11 Hague J Rule Law 63 aux pp 74-77.

62 Helmke, *supra* note 60 aux pp 131-133.

l'histoire américaine, et qui semblent s'être répandus ailleurs dans le monde avec la montée du pouvoir judiciaire[63], peuvent donc expliquer partiellement les craintes qui animent les théoriciens du dialogue quant aux dangers que fait peser sur la stabilité politique un pouvoir judiciaire trop fort ou à l'encontre duquel aucune réponse constitutionnellement déterminée n'est prévue[64].

En prenant tous ces éléments en considération, il est possible de reconstruire la thèse du dialogue institutionnel, y compris ses présupposés causaux implicites. Selon les théoriciens du dialogue institutionnel, le constitutionnalisme libéral, dans sa version forte, crée inévitablement de l'instabilité constitutionnelle puisqu'il frustre les majorités électorales en donnant à des juges non élus le pouvoir de prendre des décisions pour l'ensemble de la communauté politique. Cette frustration pousse alors les élus à attaquer les tribunaux de diverses manières, soit en leur retirant leur juridiction, soit en changeant la composition des tribunaux, soit en amendant la constitution pour contourner leurs jugements ou simplement en refusant de mettre en œuvre les décisions judiciaires. Ces formes de représailles diminuent la légitimité de ces tribunaux. Ainsi, selon l'argument mis de l'avant par les théoriciens du dialogue institutionnel, le contrôle constitutionnel faible permet aux juges d'exercer leur rôle tout en ménageant une échappatoire pour les forces politiques majoritaires lorsque celles-ci sont en désaccord avec une décision. Cela diminuerait la pression mise sur les juges et réduirait les probabilités que survienne une confrontation aux conséquences incertaines, voire néfastes. Le contrôle constitutionnel dialogique, selon eux, serait donc le meilleur moyen de maximiser *à la fois :* (1) la mise en œuvre des garanties constitutionnelles, en particulier celles ayant trait aux droits des minorités, que la majorité n'a en principe aucun intérêt à protéger; *et* (2) de préserver la légitimité de la Cour qui est en charge de remplir cette fonction, réduisant par le fait même les risques qu'elle soit attaquée par les branches élues de l'État.

Chacune de ces deux affirmations renferme de nombreuses présuppositions empiriques. Pour notre propos, nous nous attarderons d'abord à la deuxième affirmation et reviendrons brièvement à la question du niveau optimal de protection des droits des minorités dans la dernière section de cet article.

63 C Neil Tate et Torbjörn Vallinder, « The Global Expansion of Judicial Power: The Judicialization of Politics », dans C Neil Tate et Torbjörn Vallinder, dirs, *The Global Expansion of Judicial Power*, New York, New York University Press, 1995, 10.

64 Il s'agit exactement du type de scénario sur lequel se fonde Stephen Gardbaum pour défendre l'application du contrôle constitutionnel dialogique dans de nouvelles démocraties. Voir Gardbaum, *supra* note 13.

Tout d'abord, la deuxième affirmation suppose que la légitimité du pouvoir judiciaire en général dépende, d'abord et avant tout, du statut de la Cour suprême ou constitutionnelle dans l'opinion publique et des décisions relatives au droit constitutionnel. Pourtant, au Canada, il semble que ce soient davantage les dossiers criminels ou ceux qui impliquent une dimension de « human interest », plutôt que ceux concernant les droits constitutionnels, qui accaparent le plus l'attention médiatique portée à la Cour suprême. Dans ces circonstances, on peut douter de l'influence que peuvent avoir à elles seules les décisions concernant les droits constitutionnels sur la confiance du public envers les institutions judiciaires en général et envers la Cour suprême en particulier[65].

Ensuite, cette affirmation présuppose que la légitimité des institutions judiciaires est moins affectée lorsque la Cour suprême rend une décision impopulaire dans un contexte institutionnel où celle-ci peut être renversée que lorsqu'elle ne peut pas l'être. Rien n'indique pourtant qu'une décision de la Cour suprême qui est renversée par les législatures serait moins dommageable pour la réputation de la Cour qu'une décision qui ne pourrait pas l'être. En d'autres mots, il est fort possible que le dommage fait à la réputation de la Cour soit irréparable une fois la décision controversée rendue. Que les branches politiques de l'État puissent renverser ce qui a été décidé ne dissout pas la décision *a posteriori*. Cela présuppose également que, dans un contexte institutionnel dialogique, les réactions à l'encontre d'une décision impopulaire prendront la forme d'une considération des options disponibles dans l'espace politique constitutionnellement prévu à cette fin plutôt qu'une méditation sur l'opportunité de désobéir tout simplement au jugement. Nous reviendrons sur cet aspect dans la dernière section lors de la discussion sur la disposition de dérogation. Finalement, la combinaison de tous ces éléments diminuerait le risque qu'un tribunal de dernière instance se voit attaqué par le pouvoir politique, par exemple en remplaçant les membres de la cour, en noyautant la cour, en lui enlevant des juridictions clés, en refusant de nommer de nouveaux juges pour augmenter la charge de travail des juges siégeant, en lui coupant son budget, etc.

L'incertitude la plus importante de cette version schématique de la théorie du dialogue concerne la direction de la force causale entre le soutien exprimé par l'opinion publique et les représailles politiques à l'encontre des institutions judiciaires. Comme les travaux de Gretchen Helmke l'indiquent à propos de l'Amérique latine, des niveaux de confiance peu élevés envers les institutions judiciaires semblent augmenter les risques d'attaque de la part des branches

65 À cet effet, voir Florian Sauvageau, David Schneiderman et David Taras, *The Last Word: Media Coverage of the Supreme Court*, Vancouver, UBC Press. 2006 ch 1.

politiques[66]. D'un autre angle, une telle attaque peut elle aussi diminuer l'appui du public envers les tribunaux sans toutefois affecter le soutien du public envers les institutions exécutives. Ce type de dynamique peut inciter stratégiquement les élites politiques à attaquer les tribunaux, en particulier lorsque ceux-ci ne sont pas populaires[67]. Donc, même s'il existe certains fondements empiriques au présupposé des théoriciens du dialogue quant au fait qu'un soutien massif du public envers la branche judiciaire la protège contre les représailles politiques, cela n'explique pas comment les tribunaux peuvent *construire* ce soutien en premier lieu[68]. C'est ce que nous allons aborder dans la prochaine section.

IV. Expliquer le soutien public pour les institutions judiciaires en contexte dialogique

La première question que les théoriciens du dialogue doivent résoudre est celle de savoir si le soutien du public envers les institutions judiciaires en charge de protéger un nouvel ordre constitutionnel — dans le contexte canadien, la *Loi constitutionnelle de 1982* - était déjà présent avant son adoption. Il est possible de tester cette hypothèse en comparant des régimes similaires ayant adopté des modèles dialogiques de protection des droits et en vérifiant s'ils ont vu le niveau de confiance envers leurs institutions judiciaires augmenter après la transition constitutionnelle. Par exemple, on peut comparer le Canada, la Nouvelle-Zélande et le Royaume-Uni, d'autres modèles de contrôle constitutionnel « faible » ou dialogique qui ont adopté des instruments constitutionnels de protection des droits de la personne respectivement en 1982, 1990 et 1998[69]. En analysant les données du World Values Survey, un sondage international mené de façon périodique par une équipe de chercheurs universitaires, entre 1981 et 2014, force est de constater qu'il y a eu peu de variation dans le niveau de confiance dans le système de justice dans ces trois pays — à l'exception d'une légère hausse en Nouvelle-Zélande pour la période de 2010-2014. Il semble donc que le niveau de confiance envers les institutions judiciaires y reflète moins la sagesse de la structure institutionnelle que des tendances plus générales qui

66 Gretchen Helmke, « Public Support and Judicial Crises in Latin America », (2010) 13 U Pa J Const L 397 à la p 407.

67 Helmke, *supra* note 60 aux pp 159-160.

68 En général, pour un résumé de la littérature sur le sujet et la construction d'un modèle causal provisoire, voir Gretchen Helmke et Jeffrey K Staton, « The Puzzling Judicial Politics of Latin America : A Theory of Litigation, Judicial Decisions, and Interbranch Conflicts », dans Gretchen Helmke et Julio Riòs-Figueiroa, dirs, *Courts in Latin America*, New York, Cambridge University Press, 2011, 306.

69 Ces régimes possèdent des caractéristiques propres qui les distinguent les uns des autres. Toutefois, pour notre propos, ils offrent assez de caractéristiques communes pour que la comparaison soit à tout le moins un tant soit peu éclairante.

n'ont que peu à voir avec les institutions judiciaires domestiques elles-mêmes mais qui précédaient plutôt la transition vers le constitutionalisme dialogique.

Sans attribuer nécessairement de force causale propre au modèle dialogique, il est possible également d'examiner s'il s'agit d'une condition nécessaire ou suffisante pour construire le soutien du public envers les institutions judiciaires. À première vue, il ne semble pas y avoir plus d'indications qu'il s'agit d'une condition nécessaire. D'autres pays qui n'ont pas ou que très peu de contrôle constitutionnel basé sur les droits de la personne, comme la Norvège et les Pays-Bas, avaient pour la même période un niveau de confiance similaire ou plus élevé. Ces comparaisons semblent plutôt suggérer que des facteurs autres que le modèle de protection constitutionnelle des droits de la personne ont un rôle plus important à jouer dans le succès d'un ordre constitutionnel et de ses institutions judiciaires. Maintenant, pour vérifier si le constitutionalisme dialogique est suffisant pour augmenter le niveau de confiance envers les institutions judiciaires, il faudrait vérifier si celui-ci a augmenté dans un pays où il était initialement faible avant l'adoption d'une forme de constitutionalisme dialogique. Malheureusement, nous ne connaissons pour l'instant pas de tels cas qui pourraient fournir assez d'information pour en tirer de quelconques inférences[70].

Les théoriciens du dialogue pourraient mettre de l'avant le contre-argument que même si le dialogue constitutionnel ne *crée* pas le soutien public envers les systèmes judiciaires en général, à tout le moins prévient-il un déclin certain qui suivrait la transition vers un modèle constitutionnel donnant une place plus importante et plus controversée aux juges. Cette seconde version de la théorie causale du dialogue est toutefois beaucoup moins forte puisque le dialogue n'y *crée* plus l'appui pour les institutions judiciaires, mais prévient simplement son déclin. Elle est aussi moins attrayante d'un point de vue normatif, puisque cela impliquerait que le constitutionnalisme dialogique offre un modèle intéressant seulement pour les pays qui possèdent *déjà* un haut niveau de confiance dans les institutions judiciaires. Ce modèle ne serait donc pas propice dans de nouvelles démocraties ou dans des démocraties fragiles comme le suggère, par exemple, Stephen Gardbaum[71]. Toutefois, cette hypothèse est encore basée

70 Il y a bien eu d'autres cas de constitutionnalisme « dialogique » en Amérique latine comme en Équateur et en Colombie au XIX^{e} siècle. Toutefois, ces constitutions ayant été de courte durée, il est difficile d'en tirer des conclusions empiriques. À ce sujet, voir Daly, *supra* note 21 aux pp 269-270. Pour une discussion des enjeux relatifs à l'applicabilité du constitutionalisme dialogique dans des démocraties fragiles, voir Rosalind Dixon, « The Core Case for Weak-Form Judicial Review », (2017) 38 Cardozo L Rev 2193. Pour une vision plus optimiste, voir Gardbaum, *supra* note 13.

71 Voir Gardbaum, *supra* note 13.

Tableau 1 : Niveaux de confiance dans le système de justice, (« A great deal » et « Quite a lot », World Values Survey, 1981-2014

	1981-1984	1989-1993	1994-1998	1999-2004	2005-2009	2010-2014
CANADA	14% 49%	ND	10% 44%	ND	16% 49%	ND
ROYAUME-UNI	20% 46%	13% 40%	ND	10% 38%	13% 40%	ND
NOUVELLE-ZÉLANDE	ND	ND	5% 39%	ND	5% 39%	17% 47%
AFRIQUE DU SUD	25% 38%	27% 43%	23% 35%	ND	23% 41%	16% 33%
PAYS-BAS	11% 52%	10% 53%	ND	5% 43%	4% 46%	10% 52%
NORVÈGE	29% 55%	15% 59%	10% 60%	ND	18% 63%	ND

sur la prémisse que les tribunaux souffrent généralement de se voir attribuer le pouvoir de contrôle constitutionnel basé sur les droits et libertés de la personne. Bien que plausible, cette présupposition ne semble pas plus supportée par les données empiriques. Le contraste avec une démocratie parlementaire de style Westminster, qui vantait jusqu'à récemment les avantages de la souveraineté parlementaire, est révélateur à cet égard. L'Afrique du Sud a adopté une version forte (voire transformatrice)[72] du contrôle constitutionnel dans sa constitution transitoire de 1993 et puis dans sa constitution de 1996. Malgré un petit déclin pour la période de 2010-2014 selon le WVS, il n'y a pas eu de changement significatif dans le niveau de confiance envers le système judiciaire avant et après la

72 Karl E Klare, « Legal Culture and Transformative Constitutionalism », (1998) 14 SAJHR 146. Il est vrai que la constitution de l'Afrique du Sud intègre certains éléments « dialogiques » comme une clause de limitation générale des droits (article 36) et qu'elle permet explicitement aux tribunaux de rendre des déclarations d'invalidités suspendues pour permettre au législateur d'y répondre (article 172(1)b)ii)). Voir *Constitution of the Republic of South Africa*, (1996). Elle est toutefois généralement exclue des modèles plus clairement dialogiques comme le Canada, la Nouvelle-Zélande et le Royaume-Uni.

fin de l'Apartheid. Finalement, il semble que le niveau de confiance pour le système de justice était déjà élevé au Canada en 1981-1984, soit avant l'adoption de la *Loi constitutionnelle de 1982* ou, à tout le moins, avant que ses effets ne se fassent sentir. Le rapatriement de la Constitution et l'incorporation d'un modèle dialogique de contrôle constitutionnel dans la Constitution canadienne peuvent donc difficilement expliquer les phénomènes qui leur préexistaient[73].

Comme le montre Ran Hirschl dans son étude comparative du Canada, de la Nouvelle-Zélande, de l'Afrique du Sud et d'Israël, le fait de donner le pouvoir de contrôle constitutionnel aux juges dans une démocratie mature est grandement facilité en premier lieu par « l'existence d'une confiance largement répandue dans le public dans l'impartialité politique du pouvoir judiciaire » [notre traduction][74]. Dans un même ordre d'idées, Charles Epp montre que « le développement d'une structure de soutien vigoureuse pour la mobilisation judiciaire aide à expliquer les origines de la révolution des droits canadienne dans les années 1970, le passage et la nature de la Charte elle-même, et la force de la révolution des droits dans les années 1980 » [notre traduction][75]. F.L. Morton tire une conclusion similaire quant aux raisons stratégiques qui ont motivé l'adoption de la Charte en soulignant que « la Charte elle-même est moins la cause de la révolution des droits que le moyen à travers lequel elle s'est effectuée » [notre traduction][76]. Il semble donc y avoir eu, avant l'adoption de la Charte, du moins parmi certains groupes de l'élite politique, un niveau de confiance élevé envers les tribunaux, les droits constitutionnels et leur mise en œuvre à travers des mécanismes de contrôle constitutionnel.

À la lumière de ces études, il apparait difficile de distinguer l'impact des mécanismes constitutionnels des changements culturels plus généraux ayant porté les droits de la personne au-devant de la scène politique[77]. Qui plus est, le succès des tribunaux dans l'adjudication de conflits entre valeurs postmatérialistes[78] ne peut expliquer qu'une partie de la stabilité de l'ordre constitutionnel

73 Neil Nevitte et Ian Brodie, « Evaluating the Citizens' Constitution Theory », (1993) 26 Can J Pol Sci 235 aux pp 254-256.

74 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Harvard University Press, 2004 à la p 68.

75 Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* Chicago, Chicago University Press, 1998 à la p 171.

76 F.L. Morton, « The Charter Revolution and the Court Party », (1992) 30:3 Osgoode Hall LJ 627 à la p 629.

77 Samuel Moyn, *The Last Utopia: Human Rights in History*, Cambridge, Harvard University Press, 2010.

78 À ce sujet, Morton et Knopff, *supra* note 19 aux pp 77-80.

canadien. Cet ordre parfois précaire peut requérir beaucoup plus de la part des tribunaux, ce vers quoi nous nous tournons maintenant.

V. Adopter et maintenir un compromis constitutionnel : le problème de l'institutionnalisation

En tant que théorie du contrôle constitutionnel, le dialogue ne fournit pas d'explication satisfaisante au phénomène de l'institutionnalisation du compromis constitutionnel[79]. Le constitutionnalisme dialogique peut de façon plausible maintenir l'adhésion à un ordre constitutionnel déjà existant et perçu comme légitime. La question est toutefois différente lorsque l'on tente de *fonder* un tel projet ou d'en justifier la légitimité auprès des « perdants » du compromis constitutionnel[80]. Pourtant, il s'agit là de questions d'une importance capitale dans de nombreux contextes socio-politiques, parfois plus explosifs que le contexte canadien. Comme le souligne Samuel LaSelva, la théorie du dialogue ne réussit pas à fournir une justification au pouvoir judiciaire qui prendrait en compte les autres dimensions de l'expérience constitutionnelle canadienne. Elle propose donc une théorie « asymétrique du contrôle constitutionnel qui a le potentiel de mettre en doute la cohérence et la viabilité du constitutionnalisme canadien » [notre traduction][81]. Les arrêts *Ford* et *Multani* en fournissent deux exemples.

Lorsqu'ils traitent de la décision *Ford*[82], les théoriciens du dialogue décrivent correctement la conclusion juridique du bras de fer entre la Cour suprême du Canada et le Gouvernement du Québec[83]. Dans l'affaire *Ford*, la Cour suprême du Canada a en effet reconnu au Québec le droit constitutionnel d'utiliser la disposition de dérogation dans une loi *omnibus*, mais a néanmoins invalidé une partie de la *Charte de la langue française* relativement à l'affichage commercial en vertu de la *Charte canadienne des droits et libertés* et de la *Charte des droits et libertés de la personne* du Québec. En réponse au jugement de la Cour, le Gouvernement de Robert Bourassa décida d'adopter la « loi 178 » dont l'objectif était de protéger la partie invalidée de la *Charte de la langue française* relative à

79 Voir à cet effet, le texte séminal de Maurice Hauriou, « La théorie de l'institution et de la fondation : Essai de vitalisme social », (1925) 4 Cahiers de la Nouvelle Journée 2.

80 Sur l'institutionnalisation, voir Paul W. Kahn, *The Reign of Law*, New Haven, Yale University Press, 2002 ch 7 en particulier. En d'autres mots, il s'agit de comprendre la force intégrative des constitutions. Voir notamment, Günter Frankenberg, « Tocqueville's Question. The Role of the Constitution in the Process of Integration », (2000) 13:1 Ratio Juris 1. Sur les « perdants » constitutionnels de 1982, voir Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquest*, Toronto, University of Toronto Press, 2017 ch 14.

81 Samuel V LaSelva, *Canada and the Ethics of Constitutionalism: Identity, Destiny, and Constitutional Faith*, Montreal-Kingston, McGill-Queen's U Press, 2018 à la p 77.

82 *Ford* c *Québec (Procureur general)*, [1988] 2 RCS 712.

83 Voir par exemple, Hogg et Bushell, *supra* note 2 aux pp 83-86.

l'affichage commercial en utilisant les dispositions dérogatoires de l'article 33 de la Charte canadienne et de l'article 52 de la Charte québécoise[84]. Son gouvernement fut reporté au pouvoir neuf mois plus tard. Cinq ans après cette première ronde, lorsque la période initiale de validité de la disposition de dérogation à la Charte canadienne eut expiré et qu'elle eut attiré l'attention d'instances internationales comme le Comité des droits de l'homme des Nations unies[85], le Gouvernement Bourassa décida d'abroger la dérogation aux deux Chartes et finit par adopter un compromis législatif permettant l'affichage de signes publics en français et en anglais à l'extérieur, « pourvu que le français y figure de façon prédominante »[86]. Puisque le législateur québécois adoptait une mesure qui semblait provenir directement du jugement de la Cour suprême, laquelle avait suggéré « qu'exiger que la langue française prédomine, même nettement, sur les affiches et les enseignes serait proportionnel à l'objectif de promotion et de préservation d'un «visage linguistique» français au Québec et serait en conséquence justifié en vertu des *Chartes* québécoise et canadienne »[87], plusieurs auteurs ont noté qu'il s'agissait là d'un monologue plutôt que d'un dialogue[88].

Toutefois, c'est l'impact proprement « méga-constitutionnel » de cette décision, c'est-à-dire relativement à la définition de la nature de la communauté politique et à son existence même[89], qui est important pour notre propos ici plutôt que sa résolution légale dans un sens restreint. Comme de nombreux commentateurs l'ont souligné[90], l'utilisation de la disposition de dérogation par le Québec au beau milieu du processus de ratification de l'Accord du lac Meech - alors même que huit des dix provinces canadiennes ainsi que la Chambre des Communes l'eurent ratifié - a joué un rôle déterminant dans la cristallisation de l'opinion publique au Canada anglais en opposition à l'Accord. Suite à l'adoption de la « loi 178 », d'aucuns y ont vu un déséquilibre entre les droits reconnus au Québec et l'absence de protection adéquate pour les anglophones

84 *Loi modifiant la Charte de la langue française*, « Loi 178 ».

85 *Ballantyne, Davidson, McIntyre* v. *Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc CCPR/C/47/D/359/1989 et 385/1989/Rev.1 (1993)

86 *Charte de la langue française*, RLRQ c C-11 art 58.

87 *Ford* c *Québec (Procureur general)*, [1988] 2 RCS 712, section IX.

88 Voir, par exemple, Leclair, *supra* note 11 aux pp 385-386 et 391; Eugénie Brouillet et Félix-Antoine Michaud, « Les rapports entre les pouvoirs politique et judiciaire en droit constitutionnel canadien : dialogue ou monologue? » dans *XIX^e Conférence des juristes de l'État*, 2011, aux pp 3, 26 et 27.

89 Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3^e ed, Toronto: University of Toronto Press, 2004 à la p 75.

90 Voir, par exemple, Patrick J Monahan, *Meech Lake: The Inside Story*, Toronto, University of Toronto Press, 1991 aux pp 252-253; Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, Toronto, University of Toronto Press, 1992 aux pp 145-147; Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution*, Montréal-Kingston, McGill-Queen's University Press, 1994 aux pp 138-140.

sur son territoire. L'Accord n'ayant finalement pas été adopté par toutes les parties, et Québec n'ayant toujours pas « signé » la *Loi constitutionnelle de 1982*, le Québec a depuis continué son « exil dans la fédération »[91]. Cet achoppement a éventuellement mené au référendum national sur l'accord de Charlottetown, l'élection du Parti Québécois en 1994, et au référendum de 1995 sur la souveraineté du Québec, lequel s'est soldé par une très mince victoire pour le camp du « non ». Même si un théoricien du dialogue comme Kent Roach a raison de souligner que le dialogue entre la Cour suprême et le Québec a abouti à une certaine forme de protection pour la minorité anglophone du Québec, dans une perspective « méga-constitutionnelle », le dialogue a plutôt mis en péril le compromis constitutionnel qu'il était censé stabiliser[92]. Pour résumer, lorsqu'on l'aborde dans la perspective de la protection des droits des minorités et de l'adjudication des valeurs post-matérialistes, le dialogue constitutionnel a effectivement « fonctionné ». Toutefois, lorsqu'on regarde cet épisode du point de vue de sa capacité à assurer la *viabilité* de l'ordre constitutionnel, l'affaire *Ford* témoigne plutôt du fait que le dialogue a « le potentiel de mettre en doute la cohérence et la viabilité du constitutionnalisme canadien » [notre traduction][93]. La judiciarisation de ces questions constitutionnelles sensibles, « plutôt que de les soustraire à l'arène politique, les y a au contraire retournées mais dans un emballage, cette fois, beaucoup moins propice au compromis et en termes si véhéments que toute résolution consensuelle de ces enjeux devenait plus difficile qu'auparavant » [notre traduction][94].

Dans cette même lignée, la judiciarisation des enjeux liés à la diversité ethnoreligieuse au Québec dévoile aussi un angle mort de la théorie du dialogue. Le conflit entre les différentes conceptions de la citoyenneté qui étaient en jeu dans la « crise des accommodements raisonnables » révèle une tension importante qui permet de comprendre les réticences des québécois par rapport à la construction d'une « identité » constitutionnelle canadienne cimentée par la *Charte canadienne des droits et libertés*[95]. La tension entre la vision libérale-

91 Guy Laforest avec la collaboration de Jean-Olivier Roy, *Un Québec exilé dans la fédération : Essai d'histoire intellectuelle et de pensée politique*, Québec, Québec Amérique, 2014.

92 Voir Roach, *supra* note 3 aux pp 189-193. Roach reconnaît que l'utilisation de la disposition de dérogation par la Gouvernement de Robert Bourassa « a aidé à mener à l'échec de l'Accord du lac Meech » [notre traduction] à la p 191.

93 LaSelva, *supra* note 81 à la p 77.

94 Peter H Russell, « Canadian Constraint on Judicialization from Without », (1994) 15:2 Int'l Pol Sci Rev 165 à la p 173.

95 Notons, par exemple, qu'en 2013 les québécois étaient les moins enclins (53%, et les québécois francophones 48%) à considérer la *Charte canadienne des droits et libertés* comme une composante « très importante » de l'identité canadienne. Dans toutes les autres provinces, ils sont entre 70 et 80%. Canada, Statistiques Canada, (2013) en ligne : <https://www150.statcan.gcca/n1/

pluraliste du multiculturalisme canadien « favoris[ant] la conception de la société comme mosaïque », et la vision plus républicaine de la « convergence culturelle » québécoise « favoris[ant] l'intégration à la communauté politique nationale, intégration à la fois culturelle et civique » donne un cadre interprétatif qui permet de comprendre la réception, la réaction et la relation plus générale à la Charte canadienne au Québec[96]. Pourtant, les théoriciens du dialogue semblent ignorer cette tension. Kent Roach, par exemple, ne fait même pas mention de l'affaire *Multani*[97] dans la deuxième édition de son livre *The Supreme Court on Trial*, publiée en 2016[98]. Pourtant, cette décision, accordant à un jeune homme de religion Sikh le droit de porter son kirpan à l'école, a été perçue par certains comme une attaque de la part des institutions judiciaires au nom des droits individuels à l'encontre de l'identité collective distincte des québécois et de la conception québécoise de la citoyenneté. Cette décision a d'ailleurs contribué à l'établissement de la Commission Bouchard-Taylor sur les pratiques d'accommodements reliées aux différences culturelles[99]. Cet exemple montre, encore une fois, que la théorie dialogique du contrôle constitutionnel fournit peut-être une théorie normative ou même causale satisfaisante pour comprendre le soutien public envers les tribunaux qui doivent juger de valeurs post-matérialistes dans les démocraties bien établies. Par contre, cette même théorie reste étrangement pauvre pour les sociétés aux divisions ethniques profondes qui essaient de cimenter leur ordre constitutionnel fragile[100].

La théorie du dialogue a émergée de façon indépendante des débats « méga-constitutionnels » canadiens et elle y est restée plutôt imperméable. D'un point de vue chronologique, la métaphore du dialogue a fait surface plus d'une quinzaine d'années après l'adoption de la *Loi constitutionnelle de 1982*, et plus de deux décennies durant lesquelles les questions relatives au « modèle canadien » [101] et au futur de la fédération canadienne étaient au cœur des discussions

pub/89-652-x/2015005/t/tbl01-fra.htm>. Il s'agit là également d'une partie essentielle du propos de LaSelva, *supra* note 81 au ch 4.

96 Charles-Philippe Courtois, « La nation québécoise et la crise des accommodements raisonnables : bilan et perspectives », (2010) 42 Rev Int'l Études Can 283 à la p 289.

97 *Multani* c *Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 RCS 256, 2006 CSC 6.

98 Roach, *supra* note 55 postface.

99 Notons d'ailleurs que la Commission conclut qu'« une bonne politique de pratiques d'harmonisation doit à [son] avis contribuer à une réduction maximale de la judiciarisation des rapports entre les personnes ». Gérard Bouchard et Charles Taylor, *Fonder l'avenir. Le temps de la conciliation*, Québec. Gouvernement du Québec, 2008, à la p 167.

100 Christopher McCrudden et Brendan O'Leary, *Courts and Consociation: Human-Rights versus Power-Sharing*, Oxford, Oxford University Press, 2013 aux pp 35-45.

101 Sur le modèle canadien, voir Sujit Choudhry, « Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory », (2007) 5:4 Int'l J Const'l L 606.

constitutionnelles[102]. Si le Canada avait éclaté ou si sa constitution avait été refondue en profondeur, les défenseurs du dialogue constitutionnel, tel qu'il est inclus dans la Charte canadienne des droits et libertés, seraient probablement moins convaincus de ses mérites inhérents. Malgré le dialogue, la Charte n'a pas atténué durant cette période la perception de plus en plus répandue au Québec que la Constitution canadienne était une cage de fer à l'intérieur de laquelle le Québec ne pourrait pas trouver sa place.

VI. Comprendre la disposition de dérogation

La théorie canadienne du dialogue repose de façon significative sur le mécanisme de la disposition de dérogation qui offre l'alternative ultime au dialogue. Cependant, les théoriciens du dialogue négligent généralement de prendre sérieusement en considération l'effet de la disposition de dérogation sur les actions des juges et des élus. Bien que de nombreux politologues et juristes se soient penchés sur les enjeux normatifs qui y sont rattachés[103] et malgré quelques études descriptives approfondies[104], ici encore, le rôle causal que joue la disposition de dérogation dans la théorie du dialogue n'est pas clair. Kent Roach, par exemple, soutient que la disposition de dérogation retire les décisions controversées du centre de l'attention publique[105]. Puisqu'une position de repli est disponible, la question n'est plus de savoir si l'on doit ou non respecter telle décision judiciaire, mais plutôt comment devrait-on y répondre le plus adéquatement possible. En laissant au législateur la possibilité de passer outre aux décisions judiciaires, la disposition dérogatoire affaiblirait la suprématie judiciaire puisqu'elle donnerait aux tribunaux le dernier mot sur une affaire seulement lorsque le législateur acquiesce, du moins implicitement, à leurs décisions.

Les théoriciens du dialogue ne réussissent pourtant pas à saisir complètement la nature et la structure du jeu entre les tribunaux et les législatures

102 Sur l'émergence de la métaphore du dialogue et son contexte intellectuel et politique, voir Stéphane Bernatchez, « Les traces du débat sur la légitimité de la justice constitutionnelle dans la jurisprudence de la cour suprême du Canada », (2005-2006) 36 R.D.U.S. 165 aux pp 187-192.

103 Paul Weiler, « Rights and Judges in a Democracy: A New Canadian Version », (1984) U Mich JL Ref 51; Weinrib, *supra* note 24; John D Whyte, « On not Standing for Notwithstanding », (1990) 28:2 Alta L Rev 347; Peter H Russell, « Standing up for Notwithstanding », (1991) 29 Alta L Rev 293; Tsvi Kahana, « What Makes for a Good Use of the Notwithstanding Mechanism », (2004) 23 SCLR (2d) 191; Tsvi Kahana, « Understanding the Notwithstanding Mechanism », (2002) 52:2 UTLJ 221.

104 Tsvi Kahana, « The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter », (2001) 44:3 Can J Pub Adm 255; Guillaume Rousseau et François Côté, « A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights », (2017) 47:2 R.G.D. 343.

105 Roach, *supra* note 55 à la p 374.

imposé par le mécanisme de la disposition dérogatoire. L'utilisation peu fréquente de la disposition de dérogation a été décrite de diverses manières, soit comme découlant de contraintes institutionnelles, de la méfiance de l'opinion publique à propos de sa légitimité, du respect pour la sagacité de la Cour et de ses raisons bien articulées et motivées, de la dépendance au chemin emprunté de sa non-utilisation et de sa désuétude croissante[106]. Toutes ces théories conceptualisent la disposition de dérogation comme un mécanisme supposé mettre l'expression des préférences politiques de la majorité à l'abri de leur contrôle constitutionnel.

La faiblesse de cette analyse repose dans le fait qu'elle présente l'interaction entre les tribunaux et les législatures comme un jeu de coordination[107]. En d'autres mots, si la disposition de dérogation était simplement utilisée en anticipation ou en réaction aux décisions des tribunaux, elle serait utilisée à chaque fois qu'un jugement ne correspond pas aux préférences et aux intérêts du parti politique au pouvoir - pourvu que ces intérêts soient assez importants pour contrebalancer le soutien du public envers les tribunaux et briser ainsi « l'inertie législative ». Il s'agit d'un biais commun que de voir les tribunaux comme de simples arbitres de disputes légales ayant des préférences préétablies, avec lesquelles les législateurs doivent tout bonnement composer. En fait, comme les politologues étudiant le comportement judiciaire l'ont montré dans de nombreux contextes[108], les tribunaux et les législatures devraient être conçus d'abord et avant tout comme empêtrés dans un jeu stratégique où les joueurs disposent d'informations asymétriques et de possibilités limitées de communiquer et d'échanger de l'information.

Sous cet angle, la relation entre les tribunaux et les législatures devrait davantage être comprise comme une forme de négociation où le comportement d'un joueur influence réellement les possibilités de gain de l'autre joueur. En d'autres mots, si on considère les décisions des tribunaux comme étant motivées stratégiquement par ce que les juges croient être en mesure de faire respecter ultérieurement dans l'arène politique, alors les législatures ont un incitatif stratégique à promettre *de ne pas* utiliser la disposition de dérogation. Ceci pourrait expliquer pourquoi les législatures sont généralement si peu enclines à protéger

106 De façon générale, pour une discussion détaillée de chacun de ces modèles, voir Dave Snow, « Notwithstanding the Override: Path Dependence, Section 33 and the Charter », (2008-2009) 8 Innovations: A Journal of Politics 1.

107 Tsvi Kahana, par exemple, offre six différents modèles d'utilisation de la disposition de dérogation qui ont tous pour finalité la coordination du pouvoir judicaire et législatif. La dimension stratégique telle que nous l'entendons ici n'entre nulle part dans le cadre de son analyse. Kahana, *supra* note 103.

108 Pour un survol de cette littérature voir Lee Epstein et Tonja Jacobi, « The Strategic Analysis of Judicial Decisions », (2010) 6 Ann Rev Law et Soc Sci 341.

leurs projets de loi du contrôle constitutionnel *ex ante* ou qu'elles le font dans des contextes d'une importance plutôt mineure d'un point de vue politique[109]. Qui plus est, comme les gouvernements « jouent » de manière répétée en apparaissant souvent devant les tribunaux, ils peuvent décider rationnellement de ne pas renverser par voie législative les décisions judiciaires *ex post* dans le but de signaler aux cours qu'elles devront être prêtes à vivre avec les conséquences politiques de leurs décisions. Dans cette forme de dynamique politique, un acteur peut renforcer sa position en se montrant plus fragile.

En promettant de ne pas utiliser la disposition de dérogation, que ce soit *ex ante* ou *ex post*, les législatures peuvent ainsi s'engager de façon crédible ou irrévocable[110] envers la conclusion à laquelle parviendront les tribunaux dans un cas particulier ou dans des cas futurs[111]. Si les juges croient que leurs décisions ne pourront pas être renversées et qu'ils ne peuvent donc pas compter sur les élus pour corriger leurs erreurs ou leurs surenchères, ils seront probablement plus prudents.

Dans la décision *Vriend*[112] en 1998, la Cour suprême utilisait nommément la théorie du dialogue pour expliquer que la disposition de dérogation ménageait une « garantie parlementaire » permettant aux législatures de répondre aux décisions de la Cour[113]. Seize ans plus tard, dans sa dissidence dans l'affaire *Police Montée*, le juge Marshall Rothstein prenait au contraire acte du fait que cette « garantie » est peu utilisée. Il laissait également sous-entendre que la Cour ne devrait donc pas s'en autoriser pour surprotéger les droits et libertés garanties par la Charte. Il écrivait :

> Dans une démocratie constitutionnelle, le pouvoir judiciaire se prononce sur la constitutionnalité des lois adoptées par le législateur. Les décisions de la Cour ne sont toutefois pas susceptibles de contrôle. Elles lient le pouvoir législatif, à moins que celui-ci n'invoque l'art. 33 de la *Charte canadienne des droits et libertés* — une disposition rarement invoquée — pour que la loi ait effet indépendamment des atteintes portées à certains droits constitutionnels. Cela signifie que les décisions de la Cour qui tranchent des questions de nature constitutionnelle ont le pouvoir de figer les choses dans le temps et de restreindre la capacité du législateur de changer ultérieure-

109 Le Québec semble être une exception à la règle. Voir l'article de Rousseau et Côté, *supra* note 104.

110 Thomas Schelling, *The Strategy of Conflict*, Ann Arbor, Michigan University Press, 1960 ch 5.

111 Sur les scénarios d'engagements crédibles dans des contextes d'asymétrie d'information ou de contrôle des canaux de communication, voir Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment and Constraints*, Cambridge, Cambridge University Press, 2000 aux pp 34-44.

112 *Vriend c Alberta*, [1998] 1 RCS 493.

113 *Vriend c Alberta*, [1998] 1 RCS 493 au para 71.

> ment la teneur des lois, même si la conjoncture et des impératifs politiques pourraient suggérer ou exiger un changement d'orientation [nos soulignements][114].

Ainsi, l'inutilisation préventive de la disposition de dérogation est peut-être moins le signe du succès du dialogue constitutionnel que le résultat d'un équilibre issu de négociations entre la branche exécutive et la branche judiciaire. Comme le disait Peter Lougheed, la disposition de dérogation permet aux cours d'appliquer le droit de façon stricte et vigoureuse, puisqu'elles savent que « la société et le gouvernement garderont le dernier mot dans l'affaire » [notre traduction][115]. Or, si un équilibre est atteint parce que la cour s'est plutôt restreinte elle-même, comme le suggère le juge Rothstein cité ci-haut, de peur de se voir attaquée par d'autres moyens ou de peur d'avoir à vivre avec des décisions qu'elle sait trop ambitieuses, la non-utilisation de la disposition de dérogation est davantage la conséquence de la timidité judiciaire. Or, comme l'explique Kent Roach, « la structure dialogique de la *Charte* suggère qu'il est mieux [pour les juges] de surprotéger plutôt que de sous-protéger les droits et libertés » [notre traduction][116]. Il est donc possible que l'inutilisation de la disposition de dérogation soit le symptôme de l'échec du dialogue constitutionnel plutôt que de son succès ou de la capacité impressionnante des tribunaux à convaincre les acteurs politiques et le public du bien-fondé de leurs décisions ou encore du fait que « les décisions canadiennes ne se sont pas éloignées de façon trop marquée de l'opinion publique canadienne » [notre traduction][117]. Il s'agit peut-être plutôt d'une situation dans laquelle un joueur, — ici, un acteur politique - en limitant les actions qui lui sont disponibles, peut en fait empêcher ou dissuader un autre joueur d'attaquer. L'armée qui fait dos à une rivière et qui décide de mettre le feu au seul pont qui lui aurait permis une retraite en lieu sûr peut effrayer son ennemi en lui signalant que sa seule option disponible est de se battre jusqu'à la mort et échapper ainsi à une bataille sanglante[118]. Pareillement, les politiciens qui ont peur que leur agenda politique soit limité par les tribunaux peuvent décider de s'engager de façon crédible à ne pas utiliser la disposition de dérogation dans le but d'éviter les défaites judiciaires. Cette hypothèse mériterait toutefois une analyse empirique plus approfondie qu'il nous est impossible d'entreprendre dans le contexte de cet article. Les théories causales du constitutionnalisme dialogique devraient toutefois reconnaître la

114 *Association de la Police Montée de l'Ontario c Canada (Procureur général)*, [2015] 1 RCS 3, 2015 CSC 1 au para 159.

115 Cité dans LaSelva, *supra* note 81 à la p 46.

116 Roach, *supra* note 3 à la p 237.

117 Hogg, Bushell et Wright, *supra* note 2 à la p 202.

118 Voir en général, Thomas Schelling, *Arms and Influence*, nouv éd, New Haven, Yale University Press, 1995 aux pp 43-57.

possibilité de ce type d'interactions stratégiques entre les tribunaux et les législatures et essayer d'intégrer dans leur théorie la pratique effective du mécanisme de dérogation.

VII. Conclusion

La théorie du dialogue est demeurée jusqu'à maintenant dans le giron des constitutionnalistes. Bien qu'ils aient réussi à offrir une nouvelle conceptualisation de la façon dont fonctionne le système de justice constitutionnelle au Canada et dans d'autres contextes qui s'en rapprochent comme en Nouvelle-Zélande et au Royaume-Uni, et bien qu'ils aient forcé une reconsidération du débat traditionnel à propos de la légitimité démocratique du contrôle constitutionnel, ces constitutionnalistes n'ont pas réussi à explorer empiriquement et à valider les affirmations causales qui sont associées à cette théorie. Remettre la théorie du dialogue dans sa perspective institutionnelle et historique plus large permettrait d'ouvrir le débat à propos de l'efficacité des tribunaux et de leur capacité à favoriser l'épanouissement du constitutionnalisme dialogique dans différents contextes. De façon plus globale, si la théorie du dialogue veut offrir un modèle de constitutionnalisme démocratique à émuler dans d'autres contextes politiques, elle devrait reconnaître ses limites. Elle devrait également reconnaître son incapacité à traiter de questions parfois plus importantes que la « difficulté contre-majoritaire » dans les démocraties plus fragiles, telles que la promotion de la démocratie militante et l'institutionnalisation du compromis constitutionnel[119]. Comme l'affaire *Ford* devrait nous le rappeler, il est loin d'être évident que le dialogue constitutionnel a toujours joué un rôle stabilisateur, plutôt que déstabilisateur, dans les rondes de négociations politiques méga-constitutionnelles qui ont suivi le rapatriement de la Constitution au Canada.

La reconnaissance du fait que le dialogue constitutionnel au Canada a lieu dans un contexte institutionnel et culturel spécifique est salutaire, autant pour déterminer la plausibilité de ses affirmations causales que de son applicabilité ailleurs. Comme le reconnaît Kent Roach, « [l]e Canada a un système parlementaire caractérisé par une discipline de partie stricte, un Sénat non élu qui n'exerce normalement pas beaucoup de pouvoir et un système électoral uninominal à un tour qui produit souvent des gouvernements majoritaires. Un changement dans l'un quelconque des éléments judiciaires ou politiques peut altérer la balance dialogique entre les tribunaux et les législatures » [notre

119 Daly, *supra* note 21.

traduction][120]. À cette liste, il est important d'ajouter de manière générale la culture politique et constitutionnelle qui interagit aussi avec les institutions dialogiques. Indépendamment de l'enthousiasme[121] ou de la prudence[122] avec lesquels on croit à l'applicabilité du modèle dialogique du contrôle constitutionnel basé sur les droits de la personne dans d'autres contextes, il est crucial de se faire une meilleure idée de ce qui, des institutions ou de la culture politique des pays dans lesquels elles sont implantées, cause vraiment le succès du constitutionalisme dialogique.

120 Roach, *supra* note 55 à la p 337. Voir aussi Roach, *supra* note 55

121 Gardbaum, *supra* note 13.

122 Voir, généralement, la discussion de cette question dans Dixon, *supra* note 70.

Seven Conceptions of Federalism Guiding Canada's Constitutional Change Process — How Do They Work, and Why So Many?

Dave Guénette*

Canada's constitutional amending formula is a complex one, with many different procedures for different circumstances. By looking into the whole Canadian constitutional change process, we can observe that federalism, under different conceptions, is the main guiding principle. It is these conceptions that we want to discuss here. Indeed, we want to demonstrate that the Canadian constitutional change process gives shape to at least seven conceptions of federalism, thus demonstrating its commitment to the federal principle in many of its features. These different conceptions that we will explore are (1) territorial federalism through the major role of provinces in the process, (2) executive federalism and constitutional conferences, (3) personal federalism and the intervention of Indigenous peoples, (4) confederalism and the quest for unanimity, (5) asymmetrical federalism and the openings for special arrangements, (6) treaty federalism and Indigenous legal orders, and (7) consociational federalism with the search for consensus. Finally, this will lead us to propose two main reasons to explain why there are so many conceptions of federalism expressed in the Canadian constitutional change process.

La procédure de révision constitutionnelle du Canada en est une complexe, avec plusieurs modalités différentes applicables dans différentes circonstances. En étudiant l'ensemble du processus de révision de l'ordre constitutionnel canadien, on remarque rapidement que le fédéralisme, sous différentes facettes, en est le premier principe directeur. Ce sont ces facettes que nous souhaitons discuter dans la présente contribution. En effet, nous souhaitons démontrer que le processus de révision de l'ordre constitutionnel canadien donne forme à au moins sept déclinaisons différentes du principe fédératif, démontrant ainsi son engagement envers le fédéralisme, et ce, sous plusieurs de ses déclinaisons. Ces différentes déclinaisons que nous aborderons sont (1) le fédéralisme territorial par le rôle majeur que jouent les provinces dans le processus de révision, (2) le fédéralisme exécutif et les conférences constitutionnelles, (3) le fédéralisme personnel et l'intervention des peuples autochtones, (4) le confédéralisme et la quête de l'unanimité, (5) le fédéralisme asymétrique et les ouvertures aux arrangements spéciaux, (6) le fédéralisme par traités et les ordres juridiques autochtones, et (7) le fédéralisme consociatif avec la recherche de consensus. Cette étude nous amènera in fine à proposer deux principales raisons pouvant expliquer pourquoi il est possible d'observer autant de déclinaisons du principe fédératif dans le processus de révision de l'ordre constitutionnel canadien.

* LLD candidate at Université Laval (Québec) and Université catholique de Louvain (Belgium). The author is a student member of the Canada Research Chair in Quebec and Canadian Studies (CREQC). Some developments presented here come from his doctoral thesis. He would like to thank the two anonymous reviewers, the co-editors-in-chief of the *Review of Constitutional Studies* and Félix Mathieu (PhD candidate in political science, UQAM) for their insightful remarks that truly helped to improve the quality of this paper.

Introduction

Federalism is a concept that is both polysemic and polymorphic. Although the federal principle is based on a key feature — the division of legislative powers within a single state between coordinated and not subordinated entities[1] — , it can produce several variations, and structure the societal organisation of power in numerous ways. There are, in fact, "multiple forms of federal states and manifestations of the federal principle."[2]

Federalism is thus one of those terms of legal and political vocabularies whose definition must be broad enough to include the plurality of meanings to which it can refer. This makes federalism a concept that is deepened by many theoretical teachings and practical experiences. After all, isn't it true that almost half of the world's population lives in federal states?[3]

Ever since its very first manifestations as a political entity, Canada has participated in and been enriched by the vividness of diverse practices of federalism. In fact, even before the 1867 Confederation, customs and conventions rooted in the spirit of federalism had spread over the Canadian territory. Among these, there was notably the consociational regime of 1848,[4] as well as Indigenous confederative experiences.[5]

In different spheres, Canada's constitutional system still reflects the importance that federalism has in its political organisation. If Canadian federalism does not always evolve according to the aspirations, desires, and hopes of all (which seems particularly true for many Quebecers, for instance), the federal principle nonetheless influences the way relationships are being developed between the partners of the Canadian political association. Most

1 See KC Wheare, *Federal Government*, 4th ed (London, Oxford University Press, 1963) at 10, 55; Ronald L Watts, *Comparing Federal Systems in the 1990s* (Kingston, Institute of Intergovernmental Relations, 1996) at 93.

2 Eugénie Brouillet, *La négation de la nation : L'identité culturelle québécoise et le fédéralisme canadien* (Sillery, QC, Septentrion : 2005) at 79-80 [translated by author].

3 See Michael Burgess, "Federalism and Federation: Putting the Record Straight" (6 October 2017), online (blog): *50 Shades of Federalism* <50shadesoffederalism.com/?s=federalism+and+federation>.

4 See James Kennedy, *Liberal Nationalisms: Empire, State, and Civil Society in Scotland and Quebec* (Montréal & Kingston: McGill-Queen's University Press, 2013) at 44, 150; Marc Chevrier, "La genèse de l'idée fédérale chez les pères fondateurs américains et canadiens" in Alain-G Gagnon, ed, *Le fédéralisme canadien contemporain : Fondements, traditions, institutions* (Montréal: Presses de l'Université de Montréal, 2006) 19 at 33.

5 See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 129 [Borrows, *Canada's Indigenous Constitution*]; Christophe Parent, "Fédéralisme(s) et sécession : De la théorie à la pratique constitutionnelle" in Jorge Cagiao y Conde & Alain-G Gagnon, eds, *Fédéralisme et Sécession* (Brussels, Peter Lang: 2019) 15 at 24.

notably, its process of constitutional change seems to be particularly influenced by federalism.

Indeed, in this process, several conceptions of federalism can be observed, under different circumstances and at various stages. The key purpose of this paper is to expose these conceptions and discuss their meaning. It is not to extol the merits of Canadian federalism, to list its flaws, to criticize some of its tendencies, or to define the way in which it should evolve. Rather, this contribution aims to demonstrate that the Canadian constitutional amending formula[6] gives shape to a large number of conceptions of the federal principle, thus demonstrating not only its commitment to federalism in many of its features, but also testifying to historical experiences and national compromises that occurred at different times and in different contexts.

The literature on constitutional change in Canada is rich and addresses, among other things, procedural aspects,[7] specific issues,[8] and critics of the process.[9] Several authors also have studied the constitutional amending formula through the lens of federalism.[10] Building on this literature, the first part of this

6 For the sake of my analysis, I do not limit the "amending formula" of the Canadian Constitution to the text of Part V of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 1 [*Constitution Act, 1982*]. Instead, I include in it mechanisms and procedures that globally play a role in the process of changing the Canadian constitutional order.

7 Allan C Hutchinson, "Constitutional Change and Constitutional Amendment: A Canadian Conundrum" in Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (London: Routledge, 2013) 51; Peter W Hogg, "Formal Amendment of the Constitution of Canada" (1992) 55:1 L & Contemp Probs 253; Benoît Pelletier, *La modification constitutionnelle au Canada* (Scarborough: Carswell, 1996) [Pelletier, *La modification constitutionnelle*]; Richard Albert, "Temporal Limitations in Constitutional Amendment" (2016) 21:1 Rev Const Stud 37.

8 See Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62:3 Am J Comp L 641; Richard Albert, "Nonconstitutional Amendments" (2009) 22:1 Can JL & Jur 5; Jamie Cameron, "To Amend the Process of Amendment" in Gérald-A Beaudoin et al, eds, *Le fédéralisme de demain : réformes essentielles* (Montreal: Wilson & Lafleur, 1998) 315.

9 Patrick Taillon, "Une Constitution en désuétude : Les reformes paraconstitutionnelles et la 'déhiérarchisation' de la Constitution au Canada" in Louise Lalonde & Stéphane Bernatchez, eds, *La norme juridique "reformatée" : Perspectives québécoises des notions de force normative et de sources revisitées* (Sherbrooke: Revue de droit de l'Université de Sherbrooke, 2016) 297; Kate Glover, "Complexity and the Amending Formula" (2015) 24:2 Const Forum Const 9; Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42:2 UTLJ 139.

10 See Kate Glover, "Structural Cooperative Federalism" (2016) 76 SCLR (2nd) 45; Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23:4 Const Forum Const 1; Martin Papillon, "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States" (2012) 42:2 Publius: J Federalism 289; Rainer Knopff, "*U2*: *U*nanimity versus *U*nilateralism in Canada's Politics of Constitutional Amendment" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 126; Martin

paper offers a general and complete overview of the different conceptions of federalism that are expressed in Canada's constitutional change process. The second part proposes two possible explanations of why federalism, in many dimensions, is the main principle guiding this process. In short, this paper seeks to define and explain, in a comprehensive way, the different conceptions of federalism underlying the amending formula.

Part I — The seven conceptions of federalism in Canada's constitutional change process

These different conceptions that will be explored are (1) territorial federalism through the major role of provinces in the amendment process, (2) executive federalism and constitutional conferences, (3) personal federalism and the intervention of Indigenous peoples, (4) confederalism and the quest for unanimity, (5) asymmetrical federalism and the openings for special arrangements, (6) treaty federalism and Indigenous legal orders, and (7) consociational federalism with the search for consensus.

1. Territorial federalism through the major role of provinces in the amendment process

Probably the most common conception of the federal principle, territorial federalism divides the components of a society according to a territoriality criterion. The federated entities, in such a context, are geographically identifiable and their boundaries delimit their area of action within their own spheres of competence. For individuals, the place where they live and settle on the territory of the state bases their membership to a given federated entity rather than to another.

Papillon & Richard Simeon, "The Weakest Link? First Ministers' Conferences in Canadian Intergovernmental Relations" in J Peter Meekison, Hamish Telford & Harvey Lazar, eds, *Canada: The State of the Federation 2002* (Montreal & Kingston: McGill-Queen's University Press, 2004) 113; José Woehrling, "Le recours à la procédure de modification de l'article 43 de la Loi constitutionnelle de 1982 pour satisfaire certaines revendications constitutionnelles du Québec" in Pierre Thibault, Benoît Pelletier & Louis Perret, eds, *Les mélanges Gérald-A Beaudoin : Les défis du constitutionnalisme* (Cowansville: Yvon Blais, 2002) 449 [Woehrling, "Le recours"]; Michael J Bryant, "The State of the Crown-Aboriginal Fiduciary Relationship: The Case for an Aboriginal Veto" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 223; Charlotte Twight, "Constitutional Renegotiation: Impediments to Consensual Revision" (1992) 3:1 Constitutional Political Economy 89; Daniel Proulx, "La modification constitutionnelle de 1997 relative aux structures scolaires au Québec : une mesure opportune et juridiquement solide" (1998) 58 R du B 41.

At its core, this type of federalism intends to treat all citizens identically,[11] whether or not they are part of some distinct group. It also puts all federated entities on an equal footing. Therefore, territorial federalism does not necessarily promote diversity among the federated entities and seems to assume that there are no significant differences within their populations.

In general, this territorial dimension predominates within Canadian federalism.[12] Indeed, legislative jurisdictions in Canada are shared between a federal state and provinces with well-defined and constitutionally protected territorial boundaries.[13] In addition, the main partners of the federal government in the conduct of state affairs are the provinces, with which it can also develop some forms of cooperation.[14]

This preference for territorial federalism in Canada is all the more evident in its constitutional amending formula and in the primary role that the provinces play in it. Indeed, the provinces all have the ability to formally introduce a constitutional amendment through their legislature.[15] In its *Reference Re Secession of Quebec*, the Supreme Court added that this initiative procedure, at least in some circumstances, is complemented by a constitutional duty to negotiate the proposed changes.[16]

11 Alain-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (London: Routledge, 2010) at 15 [Gagnon, *Multinational Federalism*].

12 One important exception can be found at section 91(24) of the *Constitution Act, 1867* with regard to the federal jurisdiction over "Indians, and Lands reserved for the Indians": *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. This is more in line with personal federalism.

13 *Constitution Act, 1982*, *supra* note 6, s 43.

14 See Noura Karazivan, "Le fédéralisme coopératif entre territorialité et fonctionnalité: le cas des valeurs mobilières" (2016) 46:2 RGD 419; *Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48.

15 This procedure is contained in section 46 (1) of the *Constitution Act, 1982*: "The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province."; See also Pelletier, *La modification constitutionnelle*, *supra* note 7 at 110-111: "both the provinces and the federal government can submit constitutional reform proposals to their federal partners" [translated by author].

16 There is a debate about whether the duty to negotiate constitutional changes applies to other cases than the secession of a province. The wording of the Supreme Court of Canada seems to include a wide range of cases regarding constitutional initiatives: *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 69, 161 DLR (4th) 385 [*Secession Reference*]: "the existence of this right [of initiative] imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance". On the duty to negotiate, see also Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th éd (Cowansville, QC: Yvon Blais, 2014) at 243-244: "the Reference inferred the duty to negotiate both from the underlying principles of the Constitution and the right of each participant of the federation to initiate the process of constitutional amendment" [translated

In addition to the ability to initiate amendments, provinces must ratify proposals that are of multilateral application. Two ways can thus be identified, namely that of the unanimity of the two houses of Parliament and the legislatures of the ten provinces, and that of the so-called "7/50" formula. The latter requires the approval, in addition to both houses of Parliament, of the legislatures of at least seven provinces that account, in the aggregate, for at least 50% of the Canadian population.[17] Together, these two procedures reflect a "political consensus that the provinces must have a say in constitutional changes that engage their interests."[18] They also make provinces the main actors in the ratification process of new constitutional provisions in Canada.

2. Executive federalism and constitutional conferences

Executive federalism — a form of intergovernmental federalism — is the second conception of the federal principle at work within the constitutional change process of Canada. Indeed, this type of federalism emphasizes the major role that federal and provincial governments are called upon to play in the conduct of state affairs.[19] This is, therefore, a conception of federalism in which the mechanisms of intergovernmental negotiation are controlled "predominantly by the representatives of the executive power within the various governments that make up the federal system."[20]

Executive federalism is also one of the most important conceptions of federalism in Canada. Its omnipresence is mainly explained by the convergence

by author]; David P Haljan, "A Constitutional Duty to Negotiate Amendments: Reference Re Secession of Quebec" (1999) 48:2 ICLQ 447; Jean-François Gaudreault-DesBiens, "The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity" (1999) 23:4 Vermont L Rev 793; Patrick Taillon & Alexis Deschênes, "Une voie inexplorée de renouvellement du fédéralisme canadien : l'obligation constitutionnelle de négocier des changements constitutionnels" (2012) 53:3 C de D 461; Commission sur l'avenir politique et constitutionnel du Québec, *Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec*, by José Woehrling, vol 2, (Québec: Commission sur l'avenir politique et constitutionnel du Québec, 2002) at 27: "In other words, when a province or the federal government (which are the 'participants of the Confederation') takes the initiative to propose a constitutional amendment, the principles of federalism and democracy place a general obligation on the other participants to negotiate in good faith. Such an obligation applies even if the proposed amendment is the secession of a province" [translated by author].

17 In both cases, it is important to note that the Senate only enjoys a suspensive veto because its failure to vote favourably on a proposed amendment can be resolved, after a six months, by a second affirmative vote in the House of Commons: *Constitution Act, 1982*, *supra* note 6, s 47.

18 *Reference Re Senate Reform*, 2014 SCC 32 at para 31 [*Senate Reference*].

19 See e.g. François Laplante-Lévesque, *L'impact des mécanismes de fédéralisme exécutif sur le déficit fédératif canadien* (MA Thesis, Université du Québec à Montréal, Montréal, 2010) [unpublished].

20 Ronald L Watts, "Executive Federalism: A Comparative Analysis" (1989) Institute of Intergovernmental Relations Research Paper No 26 at vii.

of two essential characteristics of the Canadian state: federalism and British-style parliamentarism. Indeed, as François Laplante-Lévesque notes, "Canada was one of the first countries to combine federalism — a system involving two levels of government — and the Westminster parliamentary model — with a concentration of power in the hands of the executive. This combination has fostered the development of intergovernmental coordination mechanisms."[21]

In addition, executive federalism finds in Canada an additional purpose: it fulfills a function that no other institution really is in position to fulfill. That is to represent the specific interests of the provinces at the federal level. Indeed, despite the existence of the Canadian Senate, Henri Brun, Guy Tremblay and Eugénie Brouillet write that "there is no effective 'federal chamber' in Canada" and neither "senators nor members of Parliament are mandated by the provinces."[22] As the Supreme Court stated in the *Reference Re Senate Reform*, "the Senate rapidly attracted criticism and reform proposals. Some felt that it failed to provide … meaningful representation of the interests of the provinces."[23] Therefore, executive federalism contributes to bridge this gap.

It is through executive federalism that constitutional conferences, the main forum for constitutional negotiations in Canada, take place. These conferences represent a practice that transcends the country's history. During such events, the creation of Canada was negotiated between 1864 and 1867, an agreement on Patriation was reached in 1981, and attempts to amend the Constitution with the Meech and Charlottetown Accords took shape.[24] Constitutional

21 Laplante-Lévesque, *supra* note 19 at 35 [translated by author]; See also David Cameron & Richard Simeon, "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism" (2002) 32:2 Publius: J Federalism 49 at 49: "'Executive federalism' or 'federal-provincial diplomacy' has long been considered the defining characteristic of Canadian federalism, which combines federalism and Westminster-style cabinet government"; For Guy Laforest and Éric Montigny, "executive federalism is therefore the result of the evolution of these institutional arrangements, and this, in a context where the state (regardless of its level of government) has undertaken to occupy an important place in the daily life of citizens": Guy Laforest & Éric Montigny, "Le fédéralisme exécutif : problèmes et actualités" in Réjean Pelletier & Manon Tremblay, eds, *Le parlementarisme canadien* (Québec: Presses de l'Université Laval, 2005) 345 at 348 [translated by author].

22 See Brun, Tremblay & Brouillet, *supra* note 16 at 432 [translated by author]. See also Marc-Antoine Adam, Josée Bergeron & Marianne Bonnard, "Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Don Mills, ON: Oxford University Press, 2015) 135 at 146.

23 *Senate Reference*, *supra* note 18 at para 17.

24 The Meech Lake Accord of 1987 is one of the culminating points of executive federalism in Canada, despite the fact that it failed to be ratified by the provinces. See Christopher Alcantara, "Ideas, Executive Federalism and Institutional Change: Explaining Territorial Inclusion in Canadian First Ministers' Conferences" (2013) 46:1 Can J Political Science 27 at 27.

conferences are a constant in Canadian history and have been at the heart of the deepest debates concerning the constitutional future of the country.[25] These conferences "thus perpetuate the mechanism for discussion, negotiation and collaboration among the political elites of the various groups present in Canada."[26]

Traditionally, constitutional conferences brought together the federal prime minister and provincial premiers. Since the 1980s and 1990s, they have included Indigenous leaders and premiers of the three territories in these conferences, especially when the issues discussed relate to them.[27] The source of many criticisms,[28] constitutional conferences and executive federalism nevertheless allow Canadian political elites to negotiate with each other the content of proposed constitutional amendments affecting all Canadians.

3. Personal federalism and the intervention of Indigenous peoples

Personal federalism, in contrast with territorial federalism, proceeds instead with the distribution of legislative competences according to the linguistic, ethnic, or religious cleavages of a given society. In such a system, it is to the various groups that make up the State that the different jurisdictions are assigned. This attribution is therefore in accordance with the principle of personality, from which this form of federalism draws its spirit. According to such a perspective, the application of laws and norms is intrinsically linked to individuals and not to territories.[29] As Geneviève Motard puts it, "A system of personal autonomy or personal federalism means that the division of legislative

25 See Papillon & Simeon, *supra* note 10 at 113-114; Alcantara, *supra* note 24 at 27; Donald J Savoie, "Le pouvoir au sommet : la domination de l'exécutif" in Alain-G Gagnon & David Sanschagrin, eds, *La politique québécoise et canadienne : Acteurs, institutions, sociétés*, 2th ed (Québec: Presses de l'Université du Québec, 2017) at 179.

26 Dave Guénette, "L'apanage des élites : Étude de la nature élitaire des processus constituants dans les sociétés fragmentées belge et canadienne" in Alex Tremblay Lamarche & Serge Jaumain, eds, *Les élites et le biculturalisme : Québec-Canada-Belgique XIX^{e}-XX^{e} siècles* (Québec: Septentrion, 2017) 196 at 213 [translated by author].

27 See Alcantara, *supra* note 24 at 27; José Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec " (1991-1992) 7:1 RQDI 12 at 19 [Woehrling, "Les aspects juridiques"].

28 See Patrick Taillon, "Les obstacles juridiques à une réforme du fédéralisme" (2007) Institut de recherche sur le Québec Working Paper, online (pdf): <irq.quebec/wp-content/uploads/2015/03/Obstaclesjuridiques.pdf> [Taillon, "Les obstacles juridiques"].

29 See Geneviève Motard, *Le principe de la personnalité des lois comme voie d'émancipation des peuples autochtones? : Analyse critiques des ententes d'autonomie gouvernementale au Canada*, (LLD Thesis, Université Laval, 2013) at 8 [unpublished].

powers among government entities is made along identity lines, rather than geographical criteria."[30]

In Canada, it is in harmony with the principles of personal federalism that Indigenous peoples were integrated into the multilateral process of constitutional negotiations. Indeed, having been left out in this matter until the 1980s,[31] Indigenous leaders have been able to find a place in this process of constitutional negotiations during the Patriation debates.[32] From that moment on, "Aboriginal peoples sought a central role at the constitutional bargaining table so that the rights for which they argued would be respected."[33]

After Patriation, four constitutional conferences were held between 1983 and 1987, specifically to discuss the issues related to Indigenous peoples. Indigenous leaders participated in each of these.[34] From the first of those conferences, the *Constitution Amendment Proclamation, 1983*[35] emerged, which added section 35.1 to the *Constitution Act, 1982*.[36] It provides that before enacting any amendment to the Constitution with respect to the rights of Indigenous peoples, it is mandatory to hold a constitutional conference on the matter and to invite Indigenous leaders to participate in it. This is the foundation of a constitutional duty to consult.[37]

After the success of the *Constitution Amendment Proclamation, 1983*, however, the 1984, 1985, and 1987 conferences all failed to produce results.[38] Indigenous peoples were subsequently excluded from the constitutional

30 *Ibid* [translated by author].

31 See Papillon, *supra* note 10 at 299: "indigenous peoples in Canada were not involved in the process leading to the creation of the federation and in its subsequent consolidation"; See also *Quebecers, Our Way of Being Canadian: Policy on Québec Affirmation and Canadian Relations* (Québec: Secrétariat aux affaires intergouvernementales canadiennes, 2017) at 15 [*Policy on Québec Affirmation*]: "During the constitutional negotiations that led to the *Constitution Act* in 1867, the Aboriginal peoples were not represented, and their participation was not even considered."

32 John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 115-127 [Borrows, *Freedom & Indigenous Constitutionalism*].

33 See Christa Scholtz, "Part II and Part V: Aboriginal Peoples and Constitutional Amendment" in Macfarlane, *supra* note 10, 85 at 86.

34 See Canada, Parliamentary Research Branch, *Aboriginal Self-Government*, by Jill Wherrett, Current Issue Review 96-2E (Ottawa: Library of Parliament, 1999), online: <publications.gc.ca/Collection-R/LoPBdP/CIR/962-e.htm>; Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) at 392.

35 *Constitution Amendment Proclamation, 1983*, 11 July 1984, SI/84-102, (1984) C Gaz II, 2984. This proclamation also amended sections 25 and 35 of the *Constitution Act, 1982*, *supra* note 6.

36 *Ibid*, s 35.1.

37 Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto, Irwin Law, 2017) at 514.

38 Wherrett, *supra* note 34.

debates that led to the Meech Lake Accord in 1987. The situation led to "strong Aboriginal protests that contributed to the Accord's defeat in 1990."[39] This was corrected two years later, in 1992, when federal, provincial, territorial, and Indigenous leaders all took part in the negotiation of the Charlottetown Agreement. Despite the failure of the Agreement, the precedent it created, with respect to the participation of Indigenous peoples and the three territories of Canada in the process of constitutional conferences, remains of great importance.

These events have had two main consequences. First, Indigenous peoples are increasingly perceived as constitutional partners in Canada. Indeed, as Martin Papillon says, "building on the precedent of the constitutional negotiation rounds of the 1980s, [I]ndigenous organizations have successfully established their status as 'intergovernmental partners' whenever federal-provincial negotiations directly concern their interests."[40] James Ross Hurley, for his part, describes Indigenous peoples as "important political participants in the constitutional debate."[41]

Another consequence of these precedents is that the role of Indigenous peoples in the constituent process seems to have been extended with the advent of constitutional conventions. Indeed, on the one hand, some have voiced the opinion that the constitutional duty to consult would today be of general scope and would come into play for any major constitutional reform proposal.[42] On the other hand, it appears that there is a custom which gives Indigenous peoples a *de facto* veto in relation to all constitutional amendments that directly affect them.[43] As Benoit Pelletier suggests, "although theoretically the consent of Indigenous peoples is not required for Canada's constitutional amendment, it now appears to be politically necessary."[44]

39 *Ibid*.

40 Papillon, *supra* note 10 at 302.

41 James Ross Hurley, *La modification de la Constitution du Canada. Historique, processus, problèmes et perspectives d'avenir* (Ottawa: Ministre des Approvisionnements et Services Canada, 1996) at 67 [translated by author]. See also Scholtz, *supra* note 33 at 85: "The mobilization of Aboriginal peoples during and since the Patriation process clearly indicates that they now have a political role. And, according to section 35.1 of the Constitution Act, 1982, there appears to be a legally enforceable obligation on the part of governments to consult with Aboriginal peoples prior to amending any constitutional provision that specifically applies to them."

42 See Taillon, "Les obstacles juridiques", *supra* note 28 at 28.

43 Scholtz, *supra* note 33 at 87-88; Taillon, "Les obstacles juridiques", *supra* note 28 at 28-29; Pelletier, *La modification constitutionelle*, *supra* note 7 at 112; Bryant, *supra* note 10 at 231-232.

44 Benoît Pelletier, "Les modalités de la modification de la Constitution du Canada", in Gérald-A Beaudoin et al, eds, *Le fédéralisme de demain : réformes essentielles* (Montréal: Wilson & Lafleur, 1998) 271 at 286 [translated by author].

4. Confederalism and the quest for unanimity

Federalism and confederalism are two different theoretical models, expressing different degrees of integration. While a federation is an independent and sovereign entity within which there are different member states, a "confederation is an association of sovereign and independent states recognised as such on the international scene"[45] and in which "each member state retains its full legal personality."[46] In this sense, a federation can participate in a confederal structure. Similarly, a confederation is often a step towards the creation of a federal state,[47] although the opposite can also be true.

One of the main differences between federalism and confederalism lies in the degree of consent required to change the founding act of the political association that created them. Indeed, as Hugues Dumont and Sébastien Van Drooghenbroeck write, it is the "principle of unanimity that defines the confederal model."[48] Thus, while federal states are perfectly comfortable with both centralized and decentralized amending formulas and usually require consent from a *majority* of their member states to allow for amendments to pass,[49] confederations necessarily opt for processes that are decentralized and in which the *unanimous* consent of states is required.[50]

In Canada, not only are there matters for which the Constitution provides that unanimous consent is required,[51] but there is also a tendency to try to amend simultaneously several subjects; some of them covered by the unanimity procedure, others by less stringent procedures, while setting out to meet the most stringent formula (unanimity) for the whole package. Rather than the

45 See Antoine Bailleux & Hugues Dumont, *Le pacte constitutionnel européen : Fondements du droit institutionnel de l'Union*, t 1 (Bruxelles: Bruylant, 2015) at 195 [translated by author].

46 See Philippe Ardant & Bertrand Mathieu, *Droit constitutionnel et institutions politiques*, 29e éd (Paris: LGDJ, 2017) at 46 [translated by author]; See also Louis Favoreu et al, *Droit constitutionnel*, 17e éd (Paris : Dalloz, 2015) at 455; Parent, *supra* note 5 at 22-23.

47 Favoreu et al, *supra* note 46 at 454.

48 Hugues Dumont & Sébastien Van Drooghenbroeck, "The Status of Brussels in the Hypothesis of Confederalism" [2007] Brussels Studies 1 at 1 [translated by Gail Ann Fagen]; Jean Gicquel & Jean-Éric Gicquel, *Droit constitutionnel et institutions politiques*, 30e éd (Paris: LGDJ, 2016) at 91; Favoreu et al, *supra* note 46 at 455; Olivier Beaud, *Théorie de la fédération*, 2e éd (Paris: Presses Universitaires de France, 2009) at 82.

49 Beaud, *supra* note 48 at 176.

50 Bailleux & Dumont, *supra* note 45 at 195: "This treaty, unlike a Constitution — at least in principle — can only be amended by the unanimous consent of member States." For instance, it is the unanimity rule that prevails to amend the European treaties. This procedure is the equivalent to granting a veto to all EU Member States, regardless of their size.

51 *Constitution Act, 1982*, *supra* note 6, s 41.

exceptional procedure it was designed to be,[52] unanimity thus became the norm to follow in the case of any major amendment to the Constitution. That was certainly the case with the Meech and Charlottetown Accords, for instance.

In addition, there is also a tendency to involve or to take into account the opinion of more and more civil society actors in the amending process.[53] Indeed, we are witnessing a "globalization of the constitutional amendment procedure" by the "multiplication of participants"[54] seeking to take part or be heard in the process. As José Woehrling writes, "Any attempt at constitutional reform now provokes the almost automatic intervention of many social groups who oppose any modification of the provisions that they consider to be in their advantage, or who call for the adoption of new constitutional provisions that would be in their interest."[55]

For Patrick Taillon, the globalization of this process represents a major obstacle to any future reform of Canadian federalism.[56] In his view, "the involvement of pressure groups in the debate on constitutional amendments makes it even more difficult to develop a consensus that would bring together the necessary support required for a renewal of federalism."[57] The quest for unanimity is therefore even wider.

5. Asymmetrical federalism and the openings to special arrangements

Asymmetrical federalism, in its conceptual foundations, is intended to be implemented in sociologically diverse political entities.[58] It represents a model of power sharing that seeks to promote a better cohabitation of groups holding important distinctions between them.[59]

52 See *Senate Reference*, *supra* note 18 at para 41: "It is an exception to the general amending procedure. It creates an exacting amending procedure that is designed to apply to certain fundamental changes to the Constitution of Canada."

53 Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004) at 157.

54 See Woehrling, "Les aspects juridiques", *supra* note 27 at 19 [translated by author]; See also Alan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montréal & Kingston: McGill-Queen's University Press, 1992).

55 Woehrling, "Les aspects juridiques", *supra* note 27 at 20 [translated by author].

56 Taillon, "Les obstacles juridiques", *supra* note 28 at 22.

57 *Ibid* at 23 [translated by author].

58 See Gagnon, *Multinational Federalism*, *supra* note 11 at 31-51.

59 See Linda Cardinal, ed, *Le fédéralisme asymétrique et les minorités linguistiques et nationales* (Sudbury, Prise de parole, 2008).

By providing for special arrangements, asymmetrical federalism recognizes and values the particularism of minority groups.[60] Hence, it is a model that is likely to create areas of institutional autonomy shaped by the aspirations of different political communities sharing a common territory. The constitutional amending formula in Canada offers many openings to create those separate spaces of autonomy. Indeed, it is precisely by following some of these asymmetrical ways that we can find "an avenue easily practicable"[61] in the process of amending the Constitution of Canada.

The first and most important of these avenues lies within the special arrangements procedure. Set out in section 43 of the *Constitution Act, 1982*, it provides that an "amendment to the Constitution in relation to any provision that applies to one or more, but not all, provinces" may enter into force when "authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province *to which the amendment applies*."[62] In other words, in the case of matters that are purely local, provincial, or regional, it is possible to amend the Constitution with the sole agreement of the two houses of Parliament[63] and that of the province or provinces concerned by the proposed amendment.[64]

So far, this section of the *Constitution Act, 1982* has been referred to by many different names: bilateral procedure,[65] selective unanimity procedure,[66] or special arrangements procedure.[67] This variety of labels could be explained by the fact that this procedure attempts to achieve aims of both efficiency and protection. On the one hand, it allows for some kind of flexibility in the rigid constitutional amending formula of Canada and, on the other hand, it

60 See Gagnon, *Multinational Federalism*, *supra* note 11 at 31-51.

61 See Guy Tremblay, "La portée élargie de la procédure bilatérale de modification de la Constitution du Canada" (2011) 41:2 RGD 417 at 419 [translated by author]; See also Dwight Newman, "Understanding the Section 43 Bilateral Amending Formula" in Macfarlane, *supra* note 10, 147.

62 *Constitution Act, 1982*, *supra* note 6, s 43 [emphasis added].

63 It should be remembered that the Canadian Senate has only a suspensive veto. See *Constitution Act, 1982*, *supra* note 6, s 47.

64 See Benoit Pelletier, "La modification et la réforme de la Constitution canadienne" (2017) 47:2 RGD 459 at 479-480; Hurley, *supra* note 41 at 81-82; Brun, Tremblay & Brouillet, *supra* note 16 at 231; Tremblay, *supra* note 61; Woehrling, "Le recours", *supra* note 10; Proulx, *supra* note 10; Woehrling, "Les aspects juridiques" *supra* note 27; David R Cameron & Jacqueline D Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process" (2008) 58:4 UTLJ 389.

65 Tremblay, *supra* note 61; Cameron & Krikorian, *supra* note 64.

66 Taillon, "Les obstacles juridiques", *supra* note 28 at 10; Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec : du régime français à nos jours*, t 1 (Montréal: Thémis, 1994) at 515.

67 See *Senate Reference*, *supra* note 18 at paras 42-44.

necessitates obtaining the consent of a province that is the subject of a special arrangement before amending it.[68]

Another asymmetrical opening offered by the Canadian constitutional amendment process is the provinces' right to dissent, which allows them to opt out of multilateral amendments. This mechanism is found in section 38(3) of the *Constitution Act, 1982*.[69] It provides that an amendment made under the "7/50" procedure "shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members."[70] This is coherent with the normative proposal that any "Member State which disagrees with an amendment accepted by the others should be able to withdraw from the scope of this measure."[71] It represents some sort of reversed asymmetrical federalism (reversed as accommodating for the majority, but without forcing the hand of the minority) or a constructive veto power (constructive since it does not block the process of amendment). It is also accompanied, in limited circumstances, by the right to "reasonable compensation."[72]

6. Treaty federalism and Indigenous legal orders

A specific conception of the federal principle that is at the heart of relations between a state and its Indigenous peoples, treaty federalism also leads to a form of asymmetry for Indigenous nations in the Canadian constitutional order. More respectful of Indigenous traditions,[73] this type of federalism insists on the role political negotiation must play in the relation between partners.[74]

From a theoretical point of view, treaty federalism is rooted in the *pactist* tradition.[75] In this sense, it is a form of federalism that categorically rejects unilateralism, preferring instead bilateralism or multilateralism.[76] Highlighting

68 *Ibid* at para 44; See also Newman, *supra* note 61 at 155.

69 *Constitution Act, 1982, supra* note 6, s 38(3).

70 *Ibid*.

71 See Louis Massicotte & Antoine Yoshinaka, "Les procédures de modification constitutionnelle dans les fédérations" (2000) 5:2 Rev Const Stud 138 at 144 [translated by author].

72 See *Constitution Act, 1982*, *supra* note 6, s 40; See also Brun, Tremblay & Brouillet, *supra* note 16 at 241; Hurley, *supra* note 41 at 79.

73 See Borrows, *Canada's Indigenous Constitution*, *supra* note 5 at 129; Alain-G Gagnon, *Minority Nations in the Age of Uncertainty: New Paths to National Emancipation and Empowerment* (Toronto, University of Toronto Press, 2014) at 82-93 [Gagnon, *Minority Nations*].

74 Gagnon, *Minority Nations*, *supra* note 73 at 82-93.

75 *Ibid*.

76 Papillon, *supra* note 10 at 302: "much coordination work is achieved through bilateral and trilateral negotiations at the local level, with specific First Nations under the Indian Act or a self-government agreement".

the *respect between nations* and *community coexistence* through *discussion* and *reconciliation*,[77] treaty federalism appears fundamental to address constitutional relations with Indigenous peoples[78]. In Canada, treaties and agreements with Indigenous peoples are "an important structuring element of the relationship between First Nations and the Canadian state."[79]

According to Félix Mathieu, "the best way to understand treaty federalism in the Canadian context is to understand treaties signed with Indigenous peoples, throughout the history of Canada, as parts of the constitutional order."[80] He continues: "Treaties with Indigenous nations therefore signify the recognition of their existence in the constitutional order as 'equal' partners of the Canadian political association."[81] In fact, in the words of the Supreme Court of Canada, "treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty."[82]

Treaty federalism and agreements with Indigenous peoples, although plagued with shortcomings,[83] represent a process that is more respectful of the traditions and claims of Indigenous nations than other approaches.[84] But the treaties with Indigenous peoples are also of symbolic value. Indeed, "Aboriginal peoples who have signed a treaty, old or new, generally consider the latter as the main constitutional document regulating their relationship with the Canadian federation."[85] In addition, treaties are also used to provide for the establishment of constitutions *by* and *for* the Indigenous peoples.[86]

77 Gagnon, *Minority Nations*, *supra* note 73 at 82-93.

78 See Gagnon, *Multinational Federalism*, *supra* note 11.

79 See Papillon, *supra* note 10 at 299.

80 Félix Mathieu, *Les défis du pluralisme à l'ère des sociétés complexes* (Québec: Presses de l'Université du Québec, 2017) at 195 [translated by author].

81 *Ibid* at 195 [translated by author]. See also Graham White, "Treaty Federalism in Northern Canada: Aboriginal-Government Land Claims Boards" (2002) 32:3 Publius: J Federalism 89.

82 *Haida Nation* v *British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20, 245 DLR (4th) 33 [*Haida Nation*].

83 See John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17 at 21; Motard, *supra* note 29 at 47.

84 See Papillon, *supra* note 10 at 302; Motard, *supra* note 29 at 46.

85 See Papillon, *supra*, note 10 at 299; See also Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); Kiera L Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can J Political Science 923; Geneviève Motard, "Le Gouvernement régional d'Eeyou Istchee Baie James : une forme novatrice de gouvernance consensuelle au Canada" in Loleen Berdahl, André Juneau & Carolyn Hughes Tuohy, eds, *Régions, ressources et résilience: état de la fédération 2012* (Montréal & Kingston: McGill-Queen's University Press, 2015) 145.

86 *Nisga'a Final Agreement*, 27 April 1999, s 22.12, online (pdf): *Nisga'a Lisims Government* <www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20

This leads us to the process of adopting and amending these treaties and agreements. Two elements appear fundamental. The first relates to the negotiation of these treaties, which must be conducted in accordance with the principle of honour of the Crown. This principle, which "infuses the processes of treaty making and treaty interpretation," forces the Crown to "act with honour and integrity" when "making and applying treaties."[87] The Crown is therefore obligated to negotiate in good faith.

The second fundamental element relates to the step that follows the negotiation of a treaty, *i.e.* its ratification. In this process, Indigenous peoples usually require the ratification of the treaty both by their institutions and by their population, through a referendum.[88] For their part, the federal, provincial and/or territorial levels of government that are signatories of a treaty must provide for its entering into force through the passing of a law by their parliaments.[89]

7. Consociational federalism and the search for consensus

Consociational federalism is a form of federalism that rests on the four pillars of consociationalism.[90] Those pillars are (1) a grand governing coalition in which all segments of a plural society are represented,[91] (2) the respect of

Date.PDF> [*Nisga'a Final Agreement*]; *Tłı̨chǫ Agreement*, 25 August 2003, s 7.1, online (pdf): *Tłı̨chǫ Ndek'àowo Government* <www.tlicho.ca/sites/default/files/documents/government/T%C5%82%C4%B1%CC%A8cho%CC%A8%20Agreement%20-%20English.pdf> [*Tłı̨chǫ Agreement*]; *Tsawwassen First Nation Final Agreement*, 6 December 2007, s 24.3, online (pdf): *Tsawwassen First Nation* <www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/1_Tsawwassen_First_Nation_Final_Agreement.PDF> [*Tsawwassen Final Agreement*]; *Westbank First Nation Self-Government Agreement*, 24 May 2003, s 42, online (pdf): *Westbank First Nation* <www.wfn.ca/docs/self-government-agreement-english.pdf> [*Westbank Self-Government Agreement*].

87 See *Haida Nation*, *supra* note 82 at para 19; See also *R* v *Sparrow*, [1990] 1 SCR 1075 at 1105-1106, 70 DLR (4th) 385.

88 See *Tłı̨chǫ Agreement*, *supra* note 86, s 4.2; *Tsawwassen Final Agreement*, *supra* note 86, s 24.2; *Westbank Self-Government Agreement*, *supra* note 86, s 282; *Nisga'a Final Agreement*, *supra* note 86, s 22.2.

89 See *Tłı̨chǫ Agreement*, *supra* note 86, s 4.3; *Tsawwassen Final Agreement*, *supra* note 86, ss 24.11-24.14; *Westbank Self-Government Agreement*, *supra* note 86, s 285; *Nisga'a Final Agreement*, *supra* note 86, ss 22.10-22.11.

90 Indeed, Arend Lijphart, the main theorist of consociationalism, writes: "If we add a few characteristics to the concept of federalism, we arrive at the concept of consociationalism": Arend Lijphart, "Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories" (1985) 15:2 Publius: J Federalism 3 at 3 [Lijphart, "Non-Majoritarian Democracy]; See also Brenda M Seaver, "The Regional Sources of Power-Sharing Failure: The Case of Lebanon" (2000) 115: 2 Politcal Science Q 247; Ian S Spears, "Africa: The Limits of Power-Sharing" (2002) 13:3 J Democracy 123.

91 See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, Yale University Press, 1977) at 25-36 [Lijphart, *Democracy*]

proportionality,[92] (3) a veto for minorities,[93] and (4) autonomy for segments in their own sphere of action.[94] Asymmetrical arrangements are another characteristic of consociational federalism.[95] Hence, in a society bounded by "segmental cleavages"[96] that can be of a "religious, ideological, linguistic, regional, cultural, racial, or ethnic nature,"[97] like Belgium or Switzerland for instance, consociational federalism is a way to think of and structure the various institutions and processes to allow for the groups to live and evolve without entering into conflicts.

An overview quickly reveals that all those characteristics and pillars are implemented in the Canadian constitutional amending formula. The first pillar, the grand governing coalition in which all the segments are represented, is exactly what the constitutional conferences are about. By having the Canadian prime minister, the premiers of all provinces and territories, and Indigenous leaders negotiating the content of future amendments, constitutional conferences embody this "primary characteristic of consociational democracy."[98]

The principle of proportionality, the second pillar, also has echoes in the amendment formula, most notably with the "7/50" formula in which provinces are represented according to the size of their population. As Andrew Heard and Tim Swartz put it, this "formula operates at two levels: the formal level makes no distinctions among the provinces; however, the informal level provides greater weight in practice for the more populous provinces."[99]

The third pillar of consociationalism, the veto power, has at least three different applications in the process of constitutional change in Canada. The first one is the unanimity procedure, in which all provinces have veto power.[100] The second is the bilateral procedure of section 43, because it gives provinces a

92 *Ibid* at 38-41.
93 *Ibid* at 36-38.
94 *Ibid* at 41-44.
95 See Arend Lijphart, "Consociation and Federation: Conceptual and Empirical Links" (1979) 12:3 Can J Political Science 499 at 510: "Therefore, a federation can be regarded as a consociation only if it belongs to the *asymmetrical* category [of federal systems]" [emphasis added].
96 Lijphart, "Non-Majoritarian Democracy", *supra* note 90 at 3.
97 *Ibid* at 3-4.
98 Lijphart, *Democracy*, *supra* note 91 at 25.
99 Andrew Heard & Tim Swartz, "The Regional Veto Formula and Its Effects on Canada's Constitutional Amendment Process" (1997) 30:2 Can J Political Science 339 at 340-341. They add at 341: "At the time that this measure was entrenched, Ontario and Quebec had an informal but still special status, since these two provinces contained more than 50 per cent of the nation's population between them."
100 Pelletier, *La modification constitutionnelle*, *supra* note 7 at 208.

veto when it comes to the special arrangements that concern them.[101] The third one relates to the possibility for a province to opt out of an amendment passed under the "7/50" formula — what we call a constructive veto — and therefore having it not producing any effects on its territory.[102]

Segmental autonomy, the fourth pillar, finds its most important feature in the capacity for provinces to amend unilaterally their own constitution. Contained in section 45 of the *Constitution Act, 1982*, it provides a large spectrum of autonomy for provinces and "establishes a unilateral power to amend provisions that affect province's institutions and that are not subject to the other amendment procedures provided by the Constitution of Canada."[103] It also allows provinces to adopt a written constitution if they so wish.[104]

Finally, with regard to the asymmetrical arrangements that consociational federalism should allow, the bilateral procedure, the possibility for provinces to opt out of "7/50" amendments and treaty federalism all lead to some sort of asymmetry. Therefore, the consociational federalism that can be traced in Canada's constitutional amending formula is a combination of many different elements of this process.

Part II — Two possible explanations for the many conceptions of federalism expressed by the process of constitutional change

Why are there so many conceptions of federalism in Canada's constitutional amending formula? We think there are two prominent explanations for this phenomenon and that the first one has to be the country's history. Indeed, some of these conceptions find their very origin and purpose in the Canadian past.

The practice of constitutional conferences through executive federalism is in direct harmony with this explanation. Constitutional conferences were the main approach the Fathers of Confederation took to concretize their plan to unite the colonies of British North America between 1864 and 1866.[105] This

101 See Taillon, "Les obstacles juridiques", *supra* note 28 at 10; Morin & Woehrling, *supra* note 66 at 515.

102 See *Constitution Act, 1982*, *supra* note 6, s 38(3); See also Brun, Tremblay & Brouillet, *supra* note 16 at 241.

103 Taillon, "Les obstacles juridiques", *supra* note 28 at 11-12 [translated by author].

104 Emmanuelle Richez, "The Possibilities and Limits of Provincial Constitution-Making Power: The Case of Quebec" in Macfarlane, *supra* note 10, 164 at 169.

105 Guénette, *supra* note 26 at 210.

custom then continued after Confederation and intensified in the 1960s,[106] especially with the different attempts to patriate the Constitution.[107] Even after Patriation, conferences were held to try to broadly amend the Constitution with the Meech and Charlottetown Accords.[108] The executive federalist conception in the constituent process of Canada therefore definitely has historical roots.

The important role that provinces play in the amending process can also be partly explained by the country's historical trajectory. Indeed, Canada is a federation that was shaped by an aggregation process. It was not only created by different colonies of British North America, but other territories were periodically added to it. In such circumstances, it is a common thread that member States will have a tendency to retain a strong hold on decision-making processes.[109] As Tocqueville once wrote, nations "all bear some marks of their origin; and the circumstances which accompanied their birth and contributed to their rise affect the whole term of their being."[110] This appears to be the case with regard to the role that provinces kept in the amending process of the Canadian Constitution.

The same can be said about the capacity of provinces to amend their own constitutions. Even before Confederation, colonies of British North America already had some powers to amend their constitutions.[111] This capacity was then entrenched in the *Constitution Act, 1867* at section 92 (1), which was replaced by section 45 of the *Constitution Act, 1982*.[112] Nonetheless, the intention and purpose of that power stayed stable throughout history.[113]

Treaty federalism with Indigenous peoples also goes back to long before Confederation. Actually, it is certainly the form of federalism in the constituent process that finds its oldest roots in Canada. Starting in 1701, "the British Crown entered into treaties with Indigenous groups to support peaceful economic and military relations."[114] Throughout Canada's history, this prac-

106 Adam, Bergeron & Bonnard, *supra* note 22 at 148.
107 Hurley, *supra* note 41 at 23-72.
108 *Ibid* at 115-139.
109 Beaud, *supra* note 48 at 32.
110 Alexis de Tocqueville, *Democracy in America*, translated by Henry Reeve (New York: Century Co, 1898) at 82.
111 See *Colonial Laws Validity Act 1865* (UK), 28 & 29 Vict, c 63, s 5; Brun, Tremblay & Brouillet, *supra* note 16 at 218.
112 *Constitution Act, 1867*, *supra* note 12, 92(1); *Constitution Act, 1982*, *supra* note 6, s 45.
113 Brun, Tremblay & Brouillet, *supra* note 16 at 218.
114 Government of Canada, "Treaties and Agreements" (last modified 11 September 2018), online: *Crown-Indigenous Relations and Northern Affairs Canada* <rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

tice has been perpetuated and since the *Calder* case in 1973,[115] its use has increased.[116]

The quest for unanimous consent with regard to multilateral amendments, although a little more ambiguous, still has deep roots in Canadian history. In fact, during all the years of debate on the Patriation of the Constitution, a consensus of all provinces was what leaders were intensely seeking.[117] Even with the Supreme Court ruling that there was no constitutional convention with regard to such unanimous consent or to a Quebec veto in 1982,[118] it still declared in 1981 that a "substantial degree of provincial consent" was required to patriate the Constitution.[119] Finally, after Patriation against Quebec's will, a strong search for unanimous consent became the norm again.[120]

The Patriation debates also explain the asymmetrical conception of federalism in the Canadian constituent process. With the denial of the Quebec veto,[121] other alternatives were exploited, including the possibility for dissenting provinces to opt out of multilateral amendments for which unanimous consent was not required.[122] It is also with Patriation that the special arrangements procedure was entrenched in the amending formula, at section 43 of the *Constitution Act, 1982*.[123]

It is thus easy to conclude that many modalities of constitutional amendment in Canada directly come from specific moments that shaped today's federation. Canada's historical trajectory and the many steps it took towards becoming a sovereign country all explain in part why are there so many conceptions of federalism in its constituent process.

The second major reason why there are so many conceptions of federalism in Canada's constitutional amending formula is most probably that it

115 *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145.

116 Papillon, *supra* note 10 at 303.

117 See Hurley, *supra* note 41 at 23-72; *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 905, (*sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2, and 3)*) 125 DLR (3d) 1 [*Patriation Reference*].

118 *Reference Re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793 at 811-812, 814-815, 140 DLR (3d) 385.

119 *Patriation Reference*, *supra* note 117 at 905.

120 Woehrling, "Les aspects juridiques", *supra* note 27; Taillon, "Les obstacles juridiques", *supra* note 28.

121 See Canada, Parliamentary Research Branch, *Quebec's Constitutional Veto: The Legal and Historical Context,* by Mollie Dunsmuir & Brian O'Neal, Background Paper BP-295E (Ottawa: Library of Parliament, 1992), online: <publications.gc.ca/collections/Collection-R/LoPBdP/BP/bp295-e.htm>.

122 Hurley, *supra* note 41 at 60.

123 *Constitution Act, 1982*, *supra* note 6, s 43.

is a complex society within which different groups of different natures evolve. Perhaps the most significant argument in favour of this explanation lies in the presence and importance of Indigenous peoples in Canada. Indeed, three conceptions of federalism in Canada's amending formula apply to Indigenous peoples and two explicitly aim to take their specificity into account.

Those two are treaty and personal federalism. While the first one allows for Indigenous nations to negotiate and benefit from the implementation of specific legal orders that apply to them,[124] the second one compels federal and provincial leaders to integrate Indigenous peoples in the multilateral process of constitutional negotiations.[125] The other conception of federalism that affects Indigenous nations is confederalism, and it does so because the quest for unanimity means that Indigenous peoples' positions and demands have to be taken into account in order to receive their support for important constitutional reforms.[126]

But confederalism also has significant implications for the other groups that participate to the Canadian diversity. As mentioned earlier, some groups use the process of constitutional negotiations, whether to call for new provisions or to oppose any modification of those provisions that they consider to be in their best interests.[127] The wider search for unanimity and consensus can therefore benefit smaller segments or interest groups that do not directly play a role in the amending process, but that nonetheless seek to intervene in order to make their voices heard.

For their part, populations that are of greater historical and demographic importance, like Quebecers, linguistic minorities, different regions with specific characteristics or issues, and bilingual provinces might use modalities directly offered to provinces to promote their own diversity. As the Supreme Court stated in the *Reference Re Secession of Quebec*, "[t]he principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province."[128] Therefore, territorial and asymmetrical federalism can both benefit segments of the Canadian diversity that are able to mobilise their provincial institutions.

124 See Ghislain Otis, ed, *Contributions à l'étude des systèmes juridiques autochtones et coutumiers* (Québec, Presses de l'Université Laval, 2018).

125 See Wherrett, *supra* note 34.

126 See Scholtz, *supra* note 33 at 87-88; Taillon, "Les obstacles juridiques", *supra* note 28 at 28-29; Pelletier, *La modification constitutionnelle*, *supra* note 7 at 112.

127 Woehrling, "Les aspects juridiques", *supra* note 27 at 20.

128 *Secession Reference*, *supra* note 16, at para 59.

Finally, it is precisely because Canada is a complex society within which coexist different groups that consociational federalism can be usefully implemented. This type of federalism is thus a way to make sure that the different segments of the Canadian society can play a role in the process of amending its Constitution, that they are able to evolve in asymmetrical areas and that they are protected against amendments they would oppose.

It is true that, if Canada was a less diverse society, it could still display different conceptions of federalism in its process of constitutional change. The United States and Germany,[129] for instance, are both federations in which there are multiple conceptions of federalism expressed in their constitutional amending formula. In the United States, territorial federalism is the main guiding principle of constitutional change, primarily because of the role states play in the process of ratifying amendments.[130] States additionally have their own constitutions, and therefore some autonomy.[131] Confederalism also has historical roots in the United States, with unanimity being required at the time of the *Articles of Confederation* of 1777.[132] In Germany, while territorial federalism is the predominant guiding principle of constitutional change, executive federalism also has some relevance, most notably through the *Bundesrat*, where Länder's governments are the main actors.[133]

On the contrary, diverse federations rarely exhibit as many conceptions of federalism as Canada in their amending formula. Belgium and Switzerland are two examples of federations that, although quite diverse, do not express as many conceptions of federalism in their constitutional change process. In Belgium, territorial and personal federalism are both partially implemented, in particular by the role of Regions (territorial federalism) and Communities

129 Although the United States and Germany are far from being homogeneous societies, they are still leading cases of "mononational federal States", along with Australia: See Michel Seymour with the collaboration of Alain-G Gagnon, "Multinational Federalism: Questions and Queries" in Michel Seymour and Alain-G Gagnon, eds, *Multinational Federalism: Problems and Prospects* (Basingstoke, UK, Palgrave Macmillan, 2012) 1 at 2; Gagnon, *Multinational Federalism*, *supra* note 11 at 31-51.

130 See John R Vile, "Constitutional Revision in the United States of America" in Contiades, *supra* note 7, 389 at 396-400. Territorial federalism is also expressed by the fact that each state is represented in the Senate — an important actor of constitutional change — by an equal number of Senators, regardless of its population: *ibid* at 397.

131 See Tom Ginsburg & Eric A Posner, "Subconstitutionalism" (2010) 62:6 Stan L Rev 1583; Robert F Williams & G Alan Tarr, "Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons" in G Alan Tarr, Robert F Williams & Josef Marko, eds, *Federalism, Subnational Constitutions, and Minority Rights* (Westport, Conn: Praeger, 2004) 3.

132 See Richard Albert, "Constitutional Disuse or Desuetude: The Case of Article V" (2014) 94:3 BUL Rev 1029 at 1034-1035.

133 See Philippe Lauvaux, "Quand la deuxième chambre s'oppose" (2004) 108 Pouvoirs 81, at 88.

(personal federalism) in selecting Senators,[134] by the existence of linguistic groups in both houses of the federal parliament (personal federalism),[135] and by the election of MPs in the House of Representatives in different electoral districts (territorial federalism).[136] Consociational federalism is additionally a distinct feature of the process of constitutional change in Belgium,[137] as it is in Switzerland. Territorial federalism is, nevertheless, the most important conception of federalism in the Swiss amending formula, where cantons all have the same voice.[138] Cantons in Switzerland also have their own constitutions, and the capacity to amend them.[139]

The four examples above tend to show that more or less diverse federations can all express multiple conceptions of federalism in their processes of constitutional change, but that Canada does so in a unique and enhanced way. This appears to be the case precisely because of the variety of distinct groups that make up Canada. In other words, it is not only because of its diversity that Canada has a process of constitutional change with so many conceptions of federalism, but because its diversity also has many dimensions.[140] The presence of minority nations, Indigenous peoples, and ethnocultural groups in Canada make it a country with a particularly complex diversity.

When considered together, we think that Canada's complex diversity and its history of evolution within constitutional continuity are the main explanations of why there are so many conceptions of federalism expressed by its process of constitutional change. This is, at least, a hypothesis that future research could explore and substantiate.

Conclusion

Federalism is a useful yet complex set of ideas and processes, and its Canadian expression is no exception. As Tocqueville stated, "The federal system, therefore, rests upon a theory which is complicated, at best, and which demands

134 *Belgian Constitution*, art 67, online (pdf): *De Kamer* <www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf>.

135 *Ibid*, art 43.

136 *Ibid*, art 63.

137 See Dave Sinardet, "Le fédéralisme consociatif belge : vecteur d'instabilité?" (2011) 136 Pouvoirs 21.

138 With the exception of the six historic half-cantons. See *Federal Constitution of the Swiss Federation*, art 142, online (pdf): *Federal Council* <www.admin.ch/opc/en/classified-compilation/19995395/201801010000/101.pdf>.

139 *Ibid*, art 51.

140 See James Tully, *A Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Mathieu, *supra* note 80.

the daily exercise of a considerable share of discretion on the part of those it governs."[141] Almost two hundred years after he wrote it, his claim is still as appropriate and relevant now as it was then.

The seven conceptions of the federal principle expressed in its amending formula offer an example of how federalism is implemented in a specific area of Canada's political and constitutional architecture. This architecture reflects some choices that were made along the way and some solutions that were applied to satisfy the greatest number of interested parties.

However, Canada's amending formula is rarely used, even when it comes to its different asymmetrical procedures and despite the openings they provide for the evolution of the federation. The many conceptions of federalism that can be observed in the constitutional change process of Canada are then left unexploited and constitutional debates are said to be for other times and situations.

Perhaps it could be appropriate to acknowledge that the time has come and recognise that some political actors and partners in Canada have asked for institutional changes.[142] Perhaps it could be appropriate to reopen constitutional debates and start using some of the conceptions of federalism that are guiding Canada's constitutional amending formula.

141 de Tocqueville, *supra* note 110 at 210.

142 See e.g. Canada, Truth and Reconciliation Commission of Canada, *Honoring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), as well as the recent *Policy on Québec Affirmation*, *supra* note 31.

Proportionality's *Reductio ad Monitum*: Review Essay on Paul Yowell's *Constitutional Rights and Constitutional Design*

*G.T. Sigalet**

This review essay focuses on Paul Yowell's recent argument against entrenching bills of rights, along with his 'second-best' case for institutionally reforming constitutional courts to resemble quasi-legislative bodies (i.e. Kelsenian courts). The essay argues that Yowell's case against entrenchment relies on the premise that constitutional rights adjudication tends to collapse into proportionality analysis. This premise is questioned by exploring how alternative techniques of rights adjudication, such as originalism and H.L. Black's textualism, could provide "internal constraints" against the judicial use of proportionality analysis. My claim is that the plausibility of such techniques qualifies Yowell's case against entrenchment and casts his argument for reforming courts to resemble quasi-legislatures in the light of a reductio. *The* reductio *is to a* monitum*, or warning against the judicial use of proportionality, reasoning about rights and the need to explore techniques by which the judicial use of proportionality reasoning can be constrained. The essay first reviews Yowell's arguments (II), then critiques his thesis that rights adjudication collapses into proportionality analysis (III), and concludes by evaluating how the possibility of legally constrained rights adjudication affects his central arguments (IV).*

Cet essai critique porte sur l'argument récent de Paul Yowell contre la validation des déclarations des droits, ainsi que ses arguments « de seconds rangs » pour la réforme institutionnelle des tribunaux constitutionnels afin de ressembler à des corps quasi-législatifs (c.-à-d. des tribunaux kelsenniens). L'auteur de l'essai soutient que l'argument de Yowell contre la validation part du principe que l'arbitrage des droits constitutionnels a tendance à s'écrouler en analyse de la proportionnalité. Cette prémisse est contestée en examinant comment d'autres techniques d'arbitrage des droits, comme l'originalisme et le textualisme de H.L. Black, pourraient offrir des « contraintes internes » contre l'utilisation judiciaire de l'analyse de la proportionnalité. L'auteur affirme que la plausibilité de telles techniques qualifie l'argument de Yowell contre la validation et révèle son argument pour la réforme des tribunaux afin de ressembler à des quasi-législatures à la lumière d'un reductio. *Le* reductio *est lié à un* monitum*, ou un avertissement contre l'utilisation judiciaire de la proportionnalité, un raisonnement sur les droits et la nécessité d'examiner les techniques grâce auxquelles l'utilisation judiciaire du raisonnement de la proportionnalité peut être entravée. L'auteur de l'essai reconsidère d'abord les arguments de Yowell (II), puis critique sa thèse selon laquelle l'arbitrage des droits s'écroule en analyse de la proportionnalité (III) et conclut l'essai en évaluant comment la possibilité d'arbitrage des droits limité juridiquement influe sur ses arguments centraux (IV).*

* Postdoctoral Fellow, Queen's Faculty of Law and Research Fellow, Constitutional Law Center: Stanford Law School. Email: gsigalet@stanford.edu.

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I. Introduction

Modern debates about the legitimacy of the judicial review of statutes for rights compliance tend to focus on the principled democratic merits of judicial or legislative control over rights. Justifications and critiques of modern judicial review often set out principled arguments with explicit moral and empirical assumptions about the societal and institutional circumstances for which their conclusions are salient. Unfortunately, even the best of these arguments can also tend to asymmetrically polish the empirical record of the institution they favour, and to tarnish the reputation of its alternate. In his book *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review*, Paul Yowell presents the reader with an elegant, alternative argument about judicial review.[1] Instead of directly engaging with the enduring question of the democratic legitimacy of constitutional judicial review, Yowell offers a unique focus on the *institutional capacities* of courts and legislatures to specify and protect abstract moral rights. He credits Montesquieu with inspiring this approach, and characterizes the philosophical spirit of his endeavor as a matter of "recover[ing] Montesquieu."[2]

In this book, Yowell is not interested in choosing examples of legislative and judicial decisions about rights to justify the democratic credentials of judicial review. Instead, he provides a philosophically sophisticated account of the moral and empirical premises of practical reasoning about abstract moral rights, and argues that legislatures are better equipped to engage in such reasoning than modern courts. The book provides an argument against constitutionally entrenched rights and judicial review as a matter of *constitutional design*. Legislatures are better designed to reason about the moral and empirical aspects of most abstract rights; therefore, constitutional framers have general defeasible reason to opt for legislative control over most rights questions. Yowell complements this argument with a surprising 'second-best' argument in favour of European-style constitutional courts. He distinguishes between American-Commonwealth and European-Kelsenian models of constitutional courts, and makes the case that Kelsenian courts have a superior design when it comes to reasoning about abstract rights. The book thus offers an intriguing comparative argument for the *institutional reform* of American-style constitutional courts. If constitutional reformers cannot turn back the clock on judicial review and entrenched rights, then it is better for constitutional courts to have the kind of

1 Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Oxford: Hart, 2018) [Yowell, *Constitutional Rights*].

2 *Ibid* at 12.

abstract *ex ante* jurisdiction and research support featured in many European courts.

Many critics of this book will focus on defending the 'proportionality' approach to rights against Yowell's characterization of this method as an extra-legal form of practical deliberation. Or, perhaps critics will level more traditional arguments claiming that his argument's empirical and moral assumptions load the dice against courts and in favour of legislatures. I think that Yowell is well situated to defend himself against both of these criticisms. Instead of taking these less promising lines of criticism, I would like to challenge how Yowell's conception of practical reasoning about rights has potentially underestimated the restraining power and moral importance of *legal* methods of adjudication, and has thereby mischaracterized how proportionality analysis relates to arguments for constitutional entrenchment and the design of constitutional courts. My first criticism is that Yowell is mistaken to claim that proportionality analysis better captures abstract moral reasoning about rights than legally directed forms of reasoning.[3]

Legally directed forms of reasoning about rights can sometimes provide the kind of normative coherence and conclusiveness that should characterize reasoning about the kinds of rights entrenched in bills of rights. The lack of these features in proportionality analysis does not necessarily take away from the moral usefulness of other legal techniques of reasoning about fundamental rights. My second criticism is that the failure of proportionality analysis to legally constrain moral reasoning about rights does not necessarily tarnish the case for entrenching constitutional rights and recommend European-style courts. This is because the use of proportionality analysis should not be taken as an inevitability of adjudicating entrenched rights. Yowell's intriguing 'second-best' argument for Kelsenian courts could be correct in certain circumstances, but it must be made in relation to a more charitable account of how legally directed forms of rights adjudication could protect rights. The possibility of such an account suggests that the case for reforming courts to *legislate* proportionately is not a plausible institutional reform. Instead, Yowell's argument for reforming courts to resemble legislatures is best read as a *reductio ad absurdum* given the possibility of adjudicating rights according to legal methods and not abstract moral reasoning.

3 The idea of 'legally directed reasoning' is explored in depth in Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 150-212.

This review essay will first sketch the outlines of Yowell's argument (II). It will then challenge his conclusions regarding the general nature of practical reasoning about rights and the ability of "other adjudicative methods" that eschew proportionality analysis to restrain judicial decision-making (III). Finally, it will explore some of the difficulties concerning his argument against entrenching constitutional rights and his case for Kelsenian courts (IV). I shall argue that Yowell's failure to adequately make the case that constitutional rights adjudication collapses into balancing both qualifies his argument against entrenchment and casts his 'second-best' case for Kelsenian courts in the light of a *reductio ad absurdum* against proportionality. In turn, this *reductio* is best read as *ad monitum*: a warning against abandoning techniques of rights adjudication that do not collapse into abstract moral and empirical reasoning.

II. Yowell's Argument

Yowell provides a clear account of the extra-legal moral and empirical aspects of reasoning about abstract rights. His account is instructively related to important rights cases in multiple constitutional jurisdictions, while remaining rooted in a deeper philosophical argument regarding the nature of practical reasoning about rights. The book presents teachers of legal theory with an accessible summary of how critics of the 'proportionality' approach to rights adjudication understand this controversial method of adjudication in a number of constitutional contexts. Of course, in modern legal theory, the 'proportionality' approach to adjudication is most commonly associated with the jurisprudence of European and Commonwealth courts. But in a provocative move, Yowell does not hesitate to link the U.S. Supreme Court's post-Warren court use of tests layered in "tiers of scrutiny" to the proportionality approach.[4] This contrasts with Jamal Greene's recent account of American rights adjudication as a "categorical" approach that is at odds with proportionality analysis.[5] Yowell even locates the ancestor of the U.S. version of proportionality analysis, and its attendant utilitarian use of social science, in *Lochner v New York* (a case more often reviled for its activist defence of rights that are unpopular in the legal academy than for its use of faulty social science).[6]

4 Yowell, *Constitutional Rights*, *supra* note 1 at 20-24.

5 Jamal Greene, "Rights as Trumps?" (2018) 132:1 Harv Law Rev 28 at 34-35.

6 Yowell, *Constitutional Rights*, *supra note* 1 at 56 citing *Lochner v New York*, 198 US 45 (1905) [*Lochner*].

The legal relevance of Yowell's account of reasoning about rights does not sacrifice its philosophical depth. At its heart, the book's institutional claims turn on the philosophical argument that reasoning about abstract rights requires conceiving of rights as constitutive specifications of the common good, rather than individual interests constraining the general welfare.[7] Reasoning about abstract moral rights as they relate to controversial issues will require both empirical reasoning assessing relevant factual information about society, technology, and science, and moral reasoning distinguishing between different values and deliberating on how they relate to a given issue. Yowell's argument is not that the 'balancing' and 'proportionality' approach to practical reasoning about rights is necessarily utilitarian. The utilitarian understanding of rights is contrasted with the idea that rights are specifications of the conditions of the common good, and certain technical *quantitative* understandings of the proportionality approach to rights collapse into utilitarian arguments.[8] But, insofar as the proportionality approach functions as a form of practical reasoning about the meaning of rights in relation to significant empirical factors and moral values, it will resemble a deliberate kind of underdetermined legislative choice. From this characterization of practical reasoning about rights, Yowell thinks it becomes clear that legislatures are better suited to engage in such legislative choices, and that the Kelsenian courts are superior to their common-law relatives.[9]

What is proportionality analysis? Proportionality analysis is the most widespread judicial approach to evaluating how legal enactments and executive actions relate to fundamental rights. It has been formulated in different doctrines, and philosophically defended along different lines, but at its most basic proportionality analysis entails a distinctive type of two-step evaluation of how laws relate to fundamental rights. The first step involves establishing whether a right has been "infringe[d]" or "engage[d]."[10] This first step establishes some kind of breach of "prima facie" fundamental rights by law.[11] The proportionality approach holds that "prima facie" rights are defeasible in the sense that *prima facie* conflicts of laws with rights do not require the invalidation of such laws, nor do judicial remedies addressing the conflict.[12] Rather, once rights are found to be infringed, courts will look to the (1) "*legitimacy*" (i.e. importance), (2) "*suitability*" (i.e. rational connection), (3) "*necessity*" (i.e.

7 Yowell, *Constitutional Rights*, *supra note* 1, at 107-109.
8 *Ibid* at 107-108.
9 *Ibid* at 90-130.
10 *Ibid* at 15-16.
11 *Ibid* at 16.
12 *Ibid.*

minimal impairment), and (4) "*proportionality*" (in the stricter sense of weighing interests) of the state's 'infringements' of rights in particular circumstances.[13]

In light of the many doctrines and jurisdictions using proportionality analysis, Yowell has done an admirable job of analytically boiling down the elements of this approach. The terms describing the second part of the proportionality test (i.e. *legitimacy, suitability*, *necessity*, and *proportionality*) nicely capture the point of different technical terms and standards used in the similar doctrinal prongs of various proportionality tests used by courts around the world. Yowell notes that the (1) *legitimacy* of an infringement is usually a matter of judges making judgments of political morality to approve of a law's purpose.[14] Although Yowell is correct to note that findings of illegitimate purposes are rare, his account could do more to emphasize how important the particular legitimate purpose a court attributes to a law is in terms of how it fares on other prongs of the test.[15] He correctly notes that although courts tend to distinguish their analysis of the (2) *suitability* and (3) *necessity* of a law's infringements on rights, these prongs are logically intertwined insofar as "if the means are necessary then they are also suitable."[16] It is uncommon for courts to find that the means by which a law infringes rights are "wholly unsuited" to legislative purposes, but it is common for courts to hold that a law unnecessarily infringes rights.[17]

Yowell insightfully distinguishes between two ways courts tend to evaluate the necessity of laws infringing rights. The first way narrowly considers whether there is an alternative to the law that would prove less restrictive of rights while still "*fully and completely*" achieving the legitimate aim of the impugned law.[18] The second approach to evaluating the necessity is less narrow because it asks whether there are alternative means to a legitimate legislative end that might not fully achieve that end, but would achieve it to "an appropriate degree, considering the effect of the means."[19] This latter approach to evaluating the (3) necessity of rights infringements is often subsumed into and indistinguishable from the final stage of the proportionality inquiry where courts (4) balance the interests of the political community against the rights of individuals.[20] Yowell summarizes the various formulations by which courts describe their tests for

13 *Ibid* [emphasis in original] [footnotes omitted].
14 *Ibid* at 30-31 [emphasis added].
15 *Ibid.* See Peter W Hogg "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817 at 820-821.
16 Yowell, *Constitutional Rights*, *supra note* 1 at 31.
17 *Ibid.*
18 *Ibid* [emphasis in original].
19 *Ibid.*
20 *Ibid.*

evaluating the broad necessity and balance of rights infringements with a simple question: "[H]as the legislature chosen means that unreasonably impair an individual's interest?"[21]

Why does proportionality analysis fail to legally constrain judicial reasoning about rights? Yowell thinks that proportionality analysis is the dominant form of reasoning about fundamental rights, and he contrasts the guidance it offers for reasoning about rights with ordinary legal rights.[22] In a sense, this contrast demonstrates how the legal structures of fundamental rights themselves are partly to blame for the unconstrained character of proportionality analysis. Counterintuitively, ordinary legal rights such as the right to fish a local river with a fishing licence obtained under statutory conditions are often more constraining on reasoning about rights than entrenched constitutional rights subject to proportionality analysis.[23] Yowell maintains that this is partly due to the contrast between the indefeasible status and three-term jural structure of ordinary legal rights, and the defeasible two-term jural structure of fundamental rights that are the subject of proportionality analysis.[24]

Ordinary legal rights usually involve a relationship between a right-holder A, an action ϕ, and B, a person or set of persons with no right to interfere with A's right.[25] Such rights can be changed by ordinary statutes, but they are usually absolute in the sense that they cannot be infringed for considerations of general welfare.[26] In most common-law jurisdictions, when a fisherman has a valid fishing licence and they follow the regulations to fish a specific river in season, their right to fish that river cannot be violated because a Conservation Officer deems it to be justified in the name of the general welfare.[27] In contrast, fundamental rights are often enshrined in bills of rights as two-term expressions: "'A has a right to X' where X is an abstract noun or subject-matter", and proportionality analysis holds that these rights can be justifiably infringed for the greater good.[28] The overly vague and simple jural structure of fundamental rights makes them less of a constraining guide to reasoning about their requirements than ordinary legal rights. Some fundamental rights might appear to be quite absolute, such as Article 5 of the Universal Declaration of Human Rights' right that "no one shall be subjected to torture", but even in this case

21 *Ibid* at 32.
22 *Ibid* at 24-26.
23 *Ibid* at 25.
24 *Ibid* at 26.
25 *Ibid.*
26 *Ibid.*
27 *Ibid* at 25.
28 *Ibid* at 26.

"torture" is an abstract concept that must be defined.[29] The indefiniteness of the Declaration's right against torture may be less absolute than the statutory right to fish a river.

Proportionality analysis itself is not responsible for the indeterminacy of the two-term jural structures of many fundamental rights, but Yowell argues that it fails to make reasoning about these already-vague rights any more specific and absolute by insisting that they can be justifiably infringed.[30] The first stage of the analysis expands rights to make them less specific, while the second stage ensures that they are absolute. The first stage renders rights less specific by inflating their meaning without reference to sophisticated legal methods of textual interpretation.[31] In the absence of three-term jural specifics, proportionality guides reasoning about rights by treating rights as *interests* and thereby defines the *prima facie* protections of the right as expansively as the semantic content of terms will allow.

The right to freedom of expression will not be limited in relation to the original public meaning of 'expression' at the time of its enactment, nor in relation to contemporaneous common-law uses of the term, but by the semantic right of 'expression.' Freedom of expression theoretically extends equally to political speeches at state-funded universities and to child pornography.[32] This approach logically excludes methods of interpretation that might help specify the scope of rights and invites the confusion of rights.[33] This is why some proponents of proportionality analysis go so far as to say that the interests protected by rights can all be boiled down to one interest in autonomy.[34]

The second stage of the proportionality approach to rights further undermines the kind of legal guidance offered by techniques of interpreting ordinary

29 *Ibid* at 25; *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 5. Of course, it is possible to interpret the *Universal Declaration*'s right against torture as a *duty* obligating a smaller class of persons (e.g. "those *within my political community*" [emphasis in original]) to establish positive laws protecting against the torture of *any human person*: See Grégoire Webber et al, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) at 51-52. This renders many of the *Declaration*'s rights a *three-term* jural relation, and Yowell and his co-authors argue that the rights of the Declaration can be read this way: *ibid* at 51-52, 121-22.

30 *Ibid* at 27-28.

31 *Ibid* at 28; See also Grégoire Webber, "On the Loss of Rights" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 123 at 132-137.

32 See *R v Sharpe*, 2001 SCC 2 at para 78.

33 Yowell, *Constitutional Rights*, *supra note* 1 at 30.

34 *Ibid* citing Kai Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) at 178.

rights. It does so by weakening the normative absoluteness of fundamental rights. Once a court has discovered the *prima facie* infringement of an interest protected by a right, judges must morally and empirically reason about the (1) legitimacy, (2) suitability, (3) necessity, and (4) balancing of rights. Yowell outlines how this way of thinking allows courts to use substantive moral reasoning about the requirements of justice[35] and empirical reasoning about the causal efficacy and side-effects of policies to override the interests that rights protect.[36] Assessing the (3) necessity of a law's infringement of rights in terms of other potential policies that might equally fulfill its purpose in a less rights-threatening way, or (4) in a way that better *balances* the impugned law's purpose with interests protected by rights, is not a legally constrained form of reasoning.

The conclusions of such analysis will be primarily shaped by the moral and empirical steps in its reasoning process, rather than by legal premises. This kind of reasoning offers no more guidance by formulating it as a technical legal test.[37] Such tests can only appear to legally calculate whether rights infringements are justified by presupposing the untenable moral premise that "a single value can be used to *commensurate* all relevant interests in a constitutional case."[38] To be clear, an important aspect of Yowell's argument is that he does not think it is necessarily wrong to consider the trade-offs of the interests rights protect against one another.[39] His point is that this approach does not legally direct reasoning about rights. The first step of proportionality analysis scrubs away the legally detailed scope of rights, while the second weakens their normative absoluteness.

Why does the nature of proportionality reasoning about rights matter? While Yowell thinks that the potential for utilitarianism is a problem with

35 Yowell, *Constitutional Rights*, *supra* note 1 at 34 citing Mattias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" in George Pavlakos, ed, Law, Rights and Discourse: *The Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007) 131 at 140.

36 Yowell, *Constitutional Rights*, *supra* note 1 at 34.

37 See Robert Alexy's "Weight Formula" for calculating whether a rights infringement should be upheld given how the intensity of interference with a rights interest relates to the abstract importance and probability of a policy goal.: Yowell, *Constitutional Rights*, *supra note* 1 at 32 citing Robert Alexy, "On Balancing and Subsumption: A Structural Comparison" (2003) 16:4 Ratio Juris 443. Alexy's Weight Formula attempts to relate all of the variables at issue in constitutional rights cases as:

$$Wi,j = \frac{Ii,Wi,Ri}{Ij,Wj,Rj}$$

38 Yowell, *Constitutional Rights*, *supra note* 1 at 32 [emphasis in original].

39 Although he does think that presupposing their value commensurability cannot be justified and leads to a *quantitative* utilitarian type of analysis that should be rejected: *ibid* at 107-109.

such reasoning, his primary concerns are institutional. For Yowell, practical reasoning about rights in general involves "balancing in a non-technical sense" of deliberatively analysing "trade-offs between different values and factors" related to rights and the common good.[40] He claims that when its pretensions of legality are set aside, proportionality analysis is roughly an approximation of what abstract practical reasoning about rights entails.[41] The difficulty is that this kind of abstract reasoning is dependent on certain institutional capacities and designs. Yowell argues that common law courts are meant to reason about the legal meaning of rights in disputes between parties, and are poorly designed to engage in the empirical and moral reasoning that he thinks constitute practical reasoning about rights more generally. He claims that common law courts are particularly poorly designed to reason about the kinds of abstract rights entrenched in bills of rights.[42] In order for an institution to reason about rights generally, it must be designed to accurately acquire and assess empirical knowledge, and to deliberatively and transparently evaluate relevant moral reasons.[43] Yowell's argument concludes that common law courts are generally inferior to European-Kelsenian courts in their institutional capacity for such reasoning, while legislatures are superior to both.[44]

Practical reasoning about the proportionality of rights as they relate to policy matters requires the minimization of bias and effective access to information — including empirical research about the actual causal effects of policies in specific circumstances, the nature of certain historical events, etc.[45] Common-law courts lack sufficient information for resolving general questions of trade-offs related to rights for society at large, because they are situated to make decisions based on the facts of a certain case between specific parties, and empirical research is usually only "*passive[ly]*" received as evidence by courts through Brandeis briefs.[46] Appellate common law courts are situated at the apex of a judicial system designed to resolve questions of public and private law between litigating parties in a way that artificially constrains relevant facts in order to be procedurally fair and attentive to their circumstances.[47] They are ill designed to investigate and reason about how rights relate to public policies and social issues. Yowell shows how appellate common law courts are often

40 *Ibid* at 107.
41 *Ibid* at 107-108
42 *Ibid* at 113.
43 *Ibid* at 90-130.
44 *Ibid* at 129.
45 *Ibid* at 100-104.
46 *Ibid* at 102 [emphasis in original].
47 *Ibid* at 90-96.

bound by the empirical findings of lower trial courts; even when these findings are questionable, they lack the research expertise and procedural flexibility to actively scrutinize Brandeis briefs.[48]

In contrast, European constitutional courts are separated from other courts in the legal system and enjoy direct jurisdiction over matters of constitutional law. This general jurisdiction allows them to directly address questions of how rights relate to public policy, as they are not tied to the circumstances and facts arising from the need to settle legal questions contested by litigants. Such courts are not as passively reliant on Brandeis briefs as they are often granted research services that they can use to directly interact with scientific experts.[49] Yowell claims that even the stronger capacity of European-style courts to engage in empirical reasoning pales in comparison with the ability of legislatures to gather information from representatives who possess policy expertise informed by diverse backgrounds and who are electorally incentivized to gather information from constituents affected by policy.[50] Legislatures also have the superior ability to delegate responsibility for specific empirical research on policy areas to specialized committees, allowing subsets of legislators to "acquire and assess empirical research on a daily basis and gain a level of proficiency superior to that of judges."[51]

There is an important moral dimension to practical reasoning about the 'proportionality' of laws relating to rights and policy matters. Practical reasoning about rights is not only a matter of empirically discovering what a law has done in the past, or what the effects of a law will be, but also what *should* be done given how certain aims relate to other goals and empirical findings. Yowell argues that the comparative capacities of courts and legislatures to reason about the moral dimensions of rights follow a similar ranking to their empirical capacities. Common law courts are comparatively weaker in moral reasoning than Kelsenian courts, and both of these types of courts are generally inferior to legislatures. Common law courts are comparatively impoverished in their capacity to reason about moral rights because they are bound to deliberate confidentially; they are further hampered by the pressures of fitting moral arguments within the constraints of legal rules to avoid the political pressures of public criticism.[52] Kelsenian courts are superior insofar as their ability to reason about cases in the abstract brings moral reasoning about policy trade-offs more

48 *Ibid* at 57-72, 154.
49 *Ibid* at 152-154.
50 *Ibid* at 98-104.
51 *Ibid* at 103.
52 *Ibid* at 109-114.

transparently to bear on rights questions, or at least has more potential for such transparency.[53] Legislatures are better situated for transparent and deliberative moral reasoning than *either* common law or Kelsenian courts because they are "open to every kind of reason in [their] deliberation … including moral reasoning", and are designed to transparently accommodate contrasting chains of moral reasoning about rights as they relate to enacting changes to the law.[54]

The legislature is thereby better situated to transparently integrate moral *and* empirical reasoning into its deliberation on the proportionality of laws as they relate to rights. Yowell's comparisons lead to the conclusion that *if* courts are to engage in practical reasoning about vague rights, then it will be better for them to be designed as centralized, separate Kelsenian courts with the specialized task of engaging in proportionality analysis about abstract constitutional rights claims with the support of a research service. But, the ideal institutional design of an institution undertaking proportionality analysis will have the features of a legislature, a conclusion that cuts against the entrenchment and judicial review of constitutionally vague rights.[55]

III. Practical Reasoning about Rights

My first criticism of Yowell's argument is that it is too quick to equate proportionality analysis and practical reasoning about rights in general, and thereby understates the role that legally constrained forms of adjudication can play in reasoning about rights. The result is that it insufficiently recognizes the role of adjudication in practical reasoning about ordinary and constitutional legal rights. My second criticism follows from the first, as the potential role that legally constrained forms of reasoning can play in practical reasoning qualifies Yowell's argument against entrenched rights and turns his 'second-best' case for Kelsenian courts into a *reductio* argument against adjudicative proportionality analysis. I suspect that Yowell might agree with these criticisms, as they are, in truth, friendly amendments to his admirable project of encouraging legislative and adjudicative responsibility for the specification of rights.

Why should we be cautious in drawing an equivalence between proportionality reasoning, shorn of its technical pretensions, and abstract moral and

53 *Ibid* at 113.

54 *Ibid* at 113 citing Richard Ekins, *The Nature of Legislative Intent*, 1st ed (Oxford: Oxford University Press, 2012) at 118-127. The legislature's membership is also more diverse in their backgrounds and skill sets and, unlike judges, legislators are selected for their perceived acumen in moral and empirical reasoning about matters outside of the meaning of the law — matters that are relevant to proportionality analysis.

55 Yowell, *Constitutional Rights*, *supra* note 1 at 131-146.

empirical reasoning about rights? I argue that this equivalence risks playing down important aspects of reasoning about rights that do not involve proportionality judgements. There are important aspects of legislative and adjudicative reasoning about rights that do not involve proportionality judgements. Legislative deliberation about the values rights protect does not necessarily involve proportionality reasoning. More importantly, adjudication about the *legal* meaning of fundamental rights in particular cases and circumstances can serve a critical role in reasoning about rights without any reference to 'proportionality.' Indeed, such technical adjudication is part of what makes the ordinary legal rights elaborated in statutes and private law so much more specific and absolute than constitutional rights subject to proportionality analysis. Yowell's own insights into the ability of courts to reason about the meaning of statutory and common law rights support the idea that adjudication can play a key role in ensuring two of the desiderata of practical reasoning about rights: specificity and normative absoluteness. While his argument against the legally directed nature of reasoning about fundamental rights may prove correct as a matter of *practice*, it fails to give the possibility of such reasoning its due.

Can proportionality reasoning about rights in a non-technical sense be equated with practical reasoning about rights generally? Yowell writes that proportionate balancing can be thought of as:

> practical deliberation that involves conflicting considerations and reasons of varying strength, and that recognizes that there are trade-offs between different values and factors relevant to a decision. In this loose sense many of our everyday decisions, and most legislative decisions, involve 'balancing'.[56]

Balancing the conflicting considerations and reasons of varying strength in decisions regarding rights is just a description of abstract practical reasoning, and not necessarily a matter of reasoning 'proportionately.' This is the first problem with equating proportionality and practical reasoning about rights. Proportionality can have a much more abstract sense than it is given in the adjudicative analysis of rights, but as a concept, it presupposes some prior judgements about ends that reason uses to calibrate a further proportionality judgement. Aristotle might have thought that we cannot deliberate about ends, but whatever he meant by that exactly, insofar as we judge the worth of some ends as basic goods, these evaluations do not appear to be judgments of proportionality.[57] Rather, they are the judgments that ground the incommensurability

56 *Ibid* at 107-108.

57 Aristotle, *Nichomachean Ethic*s, translated by WD Ross, Book III Chapter 3, online: *The Internet Classics Archive* <classics.mit.edu/Aristotle/nicomachaen.3.iii.html>.

of certain goods and render arbitrary any proportionality analysis seeking to aggregate their relation to one another. For example, it is not *disproportionate* to fail to judge friendship a basic value in life, although in my view it would nevertheless be a grave failure of practical judgement.[58] This failure would not be a failure in judging the proportionality of a good as it relates to other ends and specific circumstances, but of practical reasoning about ends. It is not a failure of proportionality reasoning to fail to see that certain ends are important and justify specific rights, but it can be a failure of legislative deliberation. Thus, Yowell must be careful not to simply equate proportionality reasoning in the loose sense with practical reasoning about rights, as at least one dimension of abstract practical reasoning about rights (viz. reasoning about the ends that justify certain rights) does not necessarily involve the idea of proportionality.

A more important reason to be cautious about Yowell's equivalence between practical reasoning about rights and proportionality is that it understates the role that adjudicative techniques that do not involve proportionality can play in reasoning about rights. This does not mean that Yowell is wrong to draw a connection between abstract proportionality analysis and legislative reasoning about rights. On the contrary; while Yowell goes a bit too far in equating the looser sense of proportionality reasoning with practical reasoning about rights, he convincingly argues that proportionality can be used in a looser sense to describe many legislative choices about rights. Although legislative deliberation can involve judgements about the basic goods justifying specific rights, it will often accompany these kinds of judgments with deliberation on the relationship between such rights and empirical factors.[59]

In my view, he is correct to conclude that general legislatures feature a superior institutional capacity to engage in such abstract proportionality reasoning about rights. Yowell's examples of faulty judicial uses of proportionality reasoning, such as the Canadian Supreme Court's invalidations of criminal prohibitions on medically assisted suicide, compare quite unfavourably with examples of legislative judgments of proportionality, such as the UK Parliament's debate over whether to permit medically assisted suicide.[60] But, this superior ability of legislatures to proportionately specify rights is complemented, and often reliant on, forms of adjudication that do not involve proportionality analysis. These forms of adjudication deserve a distinctive place of

58 See Richard Ekins, "Legislating Proportionately" in Huscroft, Miller & Webber, *supra* note 31, 343 at 347 for discussion of this distinction.

59 *Ibid* at 345-347.

60 Yowell, *Constitutional Rights*, *supra note* 1 at 113-114 citing UK, HC Deb (11 September 2015) vol 599 cols 655-724.

honour alongside legislation in our abstract ideal of practical reasoning about rights.

The point I'm making is that when we reason about the meaning of rights in the abstract, we cannot only take on the internal view of the legislature seeking to balance rights considerations to achieve the common good. We must not only reason about the meaning and trade-offs between different rights when we consider *changes* to the law, but also how these changes might *apply* to other past laws, and unforeseen future circumstances entangling particular individuals.[61] We must reason about how to change laws specifying rights, the primary function of the legislature, but also about how changes will be applied to relate to other laws and particular cases, the primary function of courts.[62]

This application of law is a part of assessing the proportionality of rights in the loose sense of consistently specifying trade-offs between different rights and values, but not in the technical sense of balancing interests. The role of courts in ensuring the specificity and absoluteness of ordinary legal rights suggests that adjudicative reasoning *without* proportionality analysis (in the technical sense) complements proportional legislation as a key aspect of constrained practical reasoning about rights. I shall argue that there is a case to be made that adjudication can play this role with regard to both ordinary and constitutional rights. As I will show in the following section of this essay (IV), the possibility that adjudication can play in these roles has consequences for Yowell's argument against entrenchment and his 'second-best' case for Kelsenian courts.

As I've mentioned above, Yowell favours the specificity and absoluteness of ordinary legal rights created by private law and statutes (e.g. a statutory fishing licence scheme), but he fails to highlight the role of adjudication in creating the consistency and absoluteness of *ordinary rights* and is dismissive of the possibility that *constitutional rights* could be adjudicated in a way that grants them a similar measure of specificity and absoluteness. The result is a potential distortion of the role of adjudication in practical reasoning about rights. The role of adjudication in protecting ordinary legal rights complicates Yowell's portrait of practical reasoning about rights proportionately by providing an example of a non-proportionately oriented form of practical reasoning about rights in certain cases and circumstances.

61 See Grégoire Webber, "Past, Present, and Justice in the Exercise of Judicial Responsibility" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 129.

62 See HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon, 1994) at 95-99.

Part of what makes ordinary legal rights specific and absolute is their application to specific cases and circumstances by judges making use of interpretive techniques of statutory and common law. When the legislature grants the right to a class of persons (e.g. a fishing licence granted to citizens aged 16 and over), for a specific period of time, with special privileges, immunities, terms and conditions, it makes its own proportionality judgement that is reliant on courts using techniques *other* than proportionality analysis to make sense of these legal rules in relation to other laws and specific circumstances. Adjudication helps make such ordinary legal rights more specific and absolute by using legal techniques of reasoning to apply their meaning across different parties and empirical facts (e.g. holding the licences of 15-year-olds caught lying about their age invalid; or holding valid the licences of 17-year-olds accused by fisheries officers of lying about their age). Not only does this ensure that changes to the law specifying rights in the past are consistently applied and not overridable by certain interests, but it contributes to the resolution of 'hard cases' by providing answers to questions about the relationship of past changes to the law to more recent changes or circumstances the legislature may not have foreseen (e.g. is a "fish" a "tangible object" for purposes of another act?).[63]

I think that Yowell would readily agree with this claim, but even so, he does not give due credit to the role of adjudication in practical reasoning about rights in his case against constitutional methods of adjudication. For Yowell, most forms of constitutional rights adjudication appear to collapse into proportionality analysis. He notes that most of the methods of adjudication that are alternatives to proportionality analysis, such as the 'living tree' technique of updating the meaning of constitutional rights to reflect changes in society's political morality, fail to restrain judicial reasoning any more than proportionality analysis.[64] I tend to agree with Yowell regarding these methods. But he is also unimpressed with techniques of reasoning about constitutional rights that explicitly purport to restrain judicial discretion, such as originalism.

Yowell claims that most originalists reject Justice Black's view that "the task of the interpreter is to fix a clear meaning of the constitutional right and apply it without considering whether some governmental interest requires limiting the right."[65] Because originalist methods fail to abolish the possibility

63 See *Yates v United States*, 83 USLW 4120 (US 25 February 2015).
64 Yowell, *Constitutional Rights*, *supra note* 1 at 35-36.
65 *Ibid* at 36.

of overriding rights in relation to governmental interests, in the wake of their historical analysis of original meaning, "judges relying on originalism often proceed to apply a balancing test, via and established category within the tiered scrutiny framework or sometimes in a looser way."[66] While in many jurisdictions Yowell's arguments about originalism may ring true as a matter of constitutional practice, in my view, they fail to credit the possibility that judicial methods of discovering original meaning, respecting long-standing practices and even judicial deference, can help judges resist the temptations of balancing rights as defeasible interests. The importance of Yowell's failure to address the potential tension between originalism and balancing is not that originalism is a "constitutional truthmaker" or ultimate criterion for adjudicating entrenched rights.[67] In the following section, I will argue that if techniques of adjudication such as originalism can constrain reasoning about rights without recourse to proportionality, then Yowell must qualify his critique of entrenchment and recommend that judges interpreting entrenched bills of rights redouble their efforts to practice such constrained adjudicative techniques.

To hit home his point about constitutional adjudication, Yowell cites a number of cases in which purportedly originalist judges have, in his view, failed to resist the lure of proportionality.[68] Originalism is just one method of restraining judicial discretion, but it is a useful method for testing Yowell's claims because, in many cases, it is among the most aggressive methods for resisting balancing. Unless the original meaning of rights provisions itself entails proportionality, judges seeking to discover and apply the original meaning of rights provisions will undermine their own historical project by allowing uncovered meaning to be overridden by contemporary interests.[69] If originalism cannot constrain the impulse to balance rights as interests, then Yowell's argument against the consistency and absoluteness of adjudicating constitutional rights would seem to be quite strong. But Yowell's case against originalism is unconvincing, partly because he does not adequately explore cases of originalist rights jurisprudence, and partly because he conflates 'originalism' as it has been labelled in practice with originalism as it should be practiced.

66 *Ibid* at 36-37.

67 See William Baude, "Originalism as a Constraint on Judges" (2017) 84 U Chicago L Rev 2213 at 2216 citing Christopher R Green, "Constitutional Truthmakers" (2018) 32:3 Notre Dame JL Ethics & Pub Pol'y 497.

68 Yowell, *Constitutional Rights*, *supra* note 1 at 36-37.

69 See e.g. Michael B Rappaport "Is Proportionality Analysis Consistent with Originalism" (2017) 31:3 Dirrito Pubblico Comparato Ed Europeo 627. I discuss the relevance of this possibility to Yowell's argument in note 106.

Two of his main suspects are the U.S. constitutional rights cases of *District of Columbia v Heller* and *Citizens United v Federal Election Commission*.[70] Yowell's use of *Heller* fails to acknowledge the majority opinion's opposition to mixing originalist analysis with balancing rights, and his use of *Citizens United* does not deal with the originalist elements of the case, nor does it acknowledge prominent originalist arguments against what might be taken to be the Court's use of balancing in the case. *Heller* involved a five-justice majority opinion holding that the District of Columbia's ban on handguns violated the founding-era original meaning of the Second Amendment's protection for citizens' rights to bear arms.[71] Yowell indicates that although the case featured originalist disagreement about whether the "right to bear arms" protects an individual right to possess a firearm unconnected with the right to firearms in the context of "[a] regulated Militia", in his view, this case ultimately turned on a balancing test.[72]

This use of *Heller* bizarrely passes over Justice Scalia's argument against Justice Breyer's separate dissenting claim that "interest-balancing inquiry results in the constitutionality of the handgun ban."[73] Scalia, in fact, excoriates the idea of balancing, arguing that:

> the very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.[74]

That's not exactly a claim supporting a synthesis between originalism and proportionality analysis. Whatever one makes of the originalist claims in *Heller*, its explicit arguments against balancing deserve some attention from an argument characterizing the case as a clear exercise of proportionality analysis.[75]

70 *District of Columbia v Heller*, 554 US 570 (2008) [*Heller* 2008]; *Citizens United v Federal Election Commission*, 558 US 310 (2010) [*Citizens United*].

71 *Heller* 2008, *supra* note 70 at 576-626.

72 Yowell, *Constitutional Rights*, *supra note* 1 at 36-37; US CONST amend II.

73 *Heller* 2008, *supra note* 70 at 634-35, Breyer J, dissenting.

74 *Ibid* [emphasis in original].

75 Yowell does pursue a deeper analysis of *Heller* in Paul Yowell, "Proportionality in United States Constitutional Law" in Liora Lazarus, Christopher McCrudden & Nigel Bowles, eds, *Reasoning Rights* (Oxford: Hart, 2014) 87. He argues that notwithstanding Scalia's "expressed distaste" for balancing "because the majority both (i) acknowledged that the right to bear arms is limited and (ii) did not rely on a particular tier of scrutiny, it is difficult to escape the conclusion that the Court's decision involved some kind of implicit evaluation or weighing of the goals of the legislation against the interference with the right.": *ibid* at 100. I don't understand how acknowledging that rights can be "limited" or eschewing use of the tiers of scrutiny renders rights adjudication a matter of balancing. Presumably statutes "limit" rights in the specificationist sense and insofar as Yowell thinks the

Yowell also uses the case of *Citizens United* to make the argument that, *in practice*, originalist constitutional adjudication devolves into balancing interests. *Citizens United* was a widely reviled U.S. Supreme Court decision holding that the First Amendment's right to "freedom of speech" protects against the suppression of "political speech on the basis of the speaker's corporate identity."[76] The case involved a non-profit corporation that received some funding from for-profit corporations and produced and distributed a documentary film criticizing then-Senator Hillary Clinton while she was a candidate running for President of the United States. The Court held that the impugned campaign finance law restricting the political expenditures of corporations and unions (the *Federal Bipartisan Campaign Reform Act*) discriminated against political speech on the basis of corporate identity.[77] The government's reasons for these restrictions ("antidistortion",[78] "anticorruption",[79] and "shareholder protection"[80]) failed to justify a compelling interest for the law under the strict scrutiny demanded by speaker-based restrictions. Ultimately, the clearest question at stake in the case was "whether a group outside of the news industry is constitutionally entitled to disseminate to the public through mass communications media a commentary about a candidate for public office within a certain number of days before an election."[81]

While *Citizens United* could be interpreted as involving a form of balancing, Yowell does not demonstrate how the specific originalist elements of the majority opinion in the case collapse into interest balancing. The most originalist argument in the majority opinion addresses whether the original meaning of the First Amendment permitted the suppression of speech by media corporations as a means of preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the

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tiers of scrutiny *entail* balancing avoiding it is a sign that they are not engaged in a proportionality inquiry. A stronger argument might be that *Heller* 2008 left room for balancing, but even that possibility is questionable given the reception of *Heller* 2008 by originalist minded judges. Note that the in the sequel to *Heller* 2008 considering an automatic weapons ban at the D.C. Circuit Court Then-Judge Kavanaugh explicitly argued that *Heller* 2008 bound lower courts with the implicit "clear message" that "Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations.": *Heller v District of Columbia*, 670 F (3d) 1244 (DC Circ 2011) at 1271, Kavanaugh J, dissenting [*Heller* 2011].

76 *Citizens United*, *supra* note 70 at 365; US CONST amend I.

77 *Ibid* at 340-42, 364-65.

78 *Ibid* at 349-56.

79 *Ibid* at 356-61.

80 *Ibid* at 361-62.

81 See Michael W McConnell "Reconsidering *Citizens United* as a Press Clause Case" (2013) 123:2 Yale LJ 412 at 422 [McConnell, "Reconsidering *Citizens United*"].

corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[82] Then-Justice Kennedy's majority opinion argued that the antidistortion rationale for discriminating against corporate speech would allow Congress to suppress the speech of wealthy media corporations to prevent distortions, and that the original meaning of the First Amendment does not authorize such suppression.[83] Originalism was thereby used to overturn a precedent that could *invite* balancing.

This originalist argument did not collapse into balancing; rather, it potentially became an *accessory* to it when Kennedy J moved on to assess two other compelling interests that could justify the government suppressing political speech in a way that discriminates on the basis of corporate identity: anticorruption and shareholder protection. It is possible that these non-originalist assessments of whether the restrictions on corporate speech are justifiably tailored to the government's interest in preventing corruption and protecting corporate-shareholders devolve into balancing. For example, in assessing the anticorruption rationale, the majority opinion assesses evidence that independent expenditures might ingratiate politicians to specific groups; it ultimately rejected this evidence but, on one reading, implicitly countenanced this as a rationale for justifying restrictions on political speech.[84] This is arguably a form of proportionality analysis, but it does not stem from originalist methods of interpretation. Every methodology can be abused, and the fact that the judge writing the opinion calls himself an originalist does not itself taint originalism with the sin of balancing.[85]

Yowell also fails to explore how what might be thought of as the balancing approach to corporate speech could be taken as a failure of originalist methodology *on its own terms*. Michael McConnell has convincingly argued that former Justice Kennedy's proposed category of strict scrutiny for speaker-specific restrictions on political speech logically challenges restrictions on corporate contributions to political campaigns that have long been accepted as constitutional.[86] He proposes that this difficulty could be resolved if the speaker-based category is drawn not from the free speech clause of the First Amendment, but rather from the original meaning of the press clause found

82 *Citizens* United, *supra* note 70 at 348. That is, the majority made originalist arguments to assess the compelling interest in preventing distortion as grounds for suppressing corporate speech, an interest raised in the precedent of *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990) at 660.

83 *Citizens* United, *supra* note 70 at 353-356.

84 *Ibid* at 356-61.

85 See Michael W McConnell, "Time, Institutions, and Interpretation" (2015) 95:6 BUL Rev 1745 at 1761.

86 See McConnell, "Reconsidering *Citizens United*", *supra* note 81 at 449-450.

in the same amendment.[87] The original meaning of the right to freedom of the press did not merely protect the right of established media such as newspapers and printers to write and publish their opinions, as both the British Blackstonian and American Jeffersonian interpreters of the clause agreed that it extended to "every citizen."[88] The press clause was meant to prevent a state licencing scheme from restricting the publication of opinions in newspapers, but also in books and pamphlets.[89]

The freedom of the press was invoked and understood to apply to libel and sedition cases involving non-professional journalists, and even the purchasing of advertisements.[90] This originalist argument fits well with relevant precedent and pragmatic concerns relating to campaign finance laws, and it provides a basis for holding restrictions on campaign contributions to be constitutional, while protecting individual expenditures taking the form of published advocacy for or against a political candidate.[91] While McConnell is not concerned in his article with the problem of balancing, his originalist solution to this problem also potentially guides the court away from balancing by directing courts to assess the *content* of individual expenditures as they relate to the *scope* of the right to freedom of the press. On this approach, "abridgements" of the First Amendment would not be infringements that cannot be justified by government interests, but violations of "*the*" original meaning of rights such as "the freedom of the press" *antedating* the founding.[92]

In addition, there is tension between the claim that originalism and other methods of adjudication collapse into proportionality analysis and Yowell's approval for the rights jurisprudence of former U.S. Supreme Court Justice Hugo Black.[93] Black is praised for advancing the view that rights are absolute.[94] He interpreted the right to freedom of speech under the First Amendment as excluding any laws limiting the content of speech but allowed for restrictions

87 *Ibid.*

88 *Ibid* at 436.

89 *Ibid* at 437.

90 *Ibid* at 438 citing Eugene Volokh "Freedom of the Press as an Industry, or for the Press as a Technology? From the Framing to Today" (2012) 160:2 U Pa L Rev 459 at 483-98.

91 McConnell, "Reconsidering *Citizens United*", *supra* note 81 at 453-454.

92 *Ibid* at 435 [emphasis added]. Incidentally, the historical significance of "abridgements" as pointing to pre-founding terms is at odds with former Justice Black's textualist insistence that that "'Congress shall make no law' means Congress shall make no law." Hugo LaFayette Black, *A Constitutional Faith*, 1st ed (New York: Knopf, 1968) at 45. On the originalist view, Black's textualist naively fails to make sense of the historicizing effect of the word "abridgements". My thanks to Michael McConnell for waking me from my Black slumbers.

93 Yowell, *Constitutional Rights*, *supra note* 1 at 24.

94 *Ibid*.

on the time and place of speech by distinguishing between speech (protected) and conduct (not protected).[95] In Yowell's view, the end of the 1960's, and presumably Black's retirement in 1971, spelled the end of the view that rights were absolute in American constitutional adjudication.[96] Perhaps originalism is unable to reliably direct adjudication as law establishing absolute limits on rights due to the indeterminacy of the original meaning of constitutional language.[97] But even if originalism collapses into balancing, Yowell's approval for Black's approach to rights adjudication suggests that it could constitute an alternative method that does not collapse into balancing. Unfortunately, the relationship between Black's absolutism and the originalist understanding of rights is left unexplored, as is the possibility of reviving Black's approach to rights adjudication.

Yowell's failure to adequately make the case that originalism and alternative methods of adjudication will collapse into proportionality analysis suggests that we should at least be open to the possibility that certain methods of rights adjudication can play a role in specifying the meaning of constitutional rights without recourse to balancing. When we reason together about the meaning of rights, the looser idea of proportionality tracks our deliberation on the trade-offs relating to changes to the law specifying the meaning of rights. But, in modern legal systems, this deliberation will be incomplete without considering the techniques of adjudicative reasoning by which our choices will be applied to other changes to the law and specific circumstances.

My own critique of Yowell's claims indicates that these techniques of adjudication could help complete our practical reasoning about rights in the contexts of both ordinary and constitutional rights. What those techniques should be, and how they have been employed in existing constitutions, is a separate and deeply important question. I shall conclude this essay by arguing that this more complete image of practical reasoning about rights, an image Yowell would likely endorse, poses difficulties for his argument against constitutional entrenchment and his 'second-best' argument in favour of Kelsenian courts employing proportionality analysis.

95 *Ibid* citing Hugo L Black, "The Bill of Rights" (1960) 35:4 NYUL Rev 865 at 866.

96 Yowell, *Constitutional Rights*, *supra* note 1 at 24 citing T Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96:5 Yale LJ 943.

97 See e.g. Jud Campbell, "Natural Rights and the First Amendment" (2017) 127:2 Yale LJ 246.

IV. A Qualification and a *Reductio*

Yowell might very well agree with the idea that practical reasoning about rights includes the adjudication of ordinary legal rights, but still object to constitutional rights adjudication in practice given the widespread popularity of proportionality analysis as an adjudicative technique. On this reading, he is not interested in showing that originalism collapses into proportionality analysis as a method but simply that 'originalist' judges do not reliably employ originalism or other methods of adjudication in a way that avoids balancing. But, if Yowell were to agree with the possibility that methods of adjudication *could* play a salutary role in practical reasoning about constitutional rights without recourse to proportionality, then this would complicate his case against constitutional entrenchment and his 'second-best' case for Kelsenian courts.

Recognizing this possibility would require his comparative case against constitutional entrenchment to do more to assess how methods of adjudication that do not involve proportionality can help render constitutional rights specific and absolute. For systems already featuring entrenched rights, non-proportionality oriented methods of rights adjudication such as originalism may provide a better 'second-best' option than institutional reforms allowing courts to more effectively engage in proportionate legislation. Yowell's arguments against entrenchment remain cogent warnings against the risk of planting the tree of a constitutional bill of rights in an environment where adjudicative proportionality analysis is widely taken to be the best means of tending to its growth. But this warning is due to the tendency of this technique to undermine what it was meant to protect: rights as just relations, or incipient attempts to chart just relations, between persons entrenched in fundamental law. The conclusion that ameliorating the flaws of proportionality reasoning about rights could be *institutionally* resolved by turning courts into quasi-legislatures should encourage us to explore methods of adjudicative reasoning that could provide "internal constraints" on rights adjudication.[98]

Yowell's comparative case against constitutional entrenchment is on firmer ground than his 'second-best' argument for Kelsenian courts, but must be qualified by the inadequacy of his account of legally constraining methods of constitutional adjudication. The argument is on firmer ground because the possibility of legally directed constitutional rights adjudication remains implausible in many contexts due to the global popularity of proportionality analysis. Aside from some hints about the influence of post-war constitutional theory, Yowell does not tell a causal story about how proportionality was a historical result of

98 See Baude *supra note* 67 at 2226.

rights entrenchment. His analysis treats proportionality oriented rights adjudication as the *fait accompli* of entrenchment. This allows him to cogently argue against entrenchment insofar as the adjudication of constitutional rights inevitably functions as a deficient and disguised form of legislative changes to the law. But as Yowell himself notes, notwithstanding the use of empirical research and balancing he finds in the *Lochner* era of U.S. constitutional history, the rise of proportionality analysis is largely a development constituting part of post-WWII European constitutionalism.[99]

The incompleteness of his argument against the plausibility of non-proportionality oriented forms of rights adjudication and the contingency of proportionality analysis both qualify his case against entrenchment. For example, Yowell applauds Alexander Hamilton's opposition to entrenching the "liberty of the press" in *The Federalist* No. 84 on the grounds that the term was too vague and would "sound much better in a treatise of ethics than in a constitution of government."[100] Yet as we've seen in the interpretation of *Citizens United* as a press clause case above, the original public meaning of the term "freedom of the press" may have had more determinacy and relevance to future disputes than Hamilton cared to admit. Again, Yowell would probably agree with this tepid qualification.

The possible role of legally direct adjudication in practical reasoning about rights does more than just qualify Yowell's intriguing argument in favour of centralized, separate Kelsenian courts with the power to review abstract questions of rights. It directly challenges this 'second-best' alternative to avoiding entrenchment, especially in the common law countries lacking courts with Kelsenian designs. It challenges the argument because these reforms will not improve courts' ability to engage in legally directed adjudication, and it is unclear why the aim of these reforms is superior to measures that could help realize such adjudication. Empirically, Yowell follows Kenneth Culp Davis in thinking that courts will better address proportionality questions with an independent research service and the ability to directly remedy the policy implications of rights questions without struggling to tie them to specific legal issues raised by the artificial world of a trial between litigating parties.[101]

99 Yowell, *Constitutional Rights*, *supra note* 1 at 2-4.

100 *Ibid* at 149 citing *The Federalist* No 84. The author recommends the following edition: George W Carey & James McClellan, eds, *The Federalist: The Gideon Edition* (Indianapolis: Liberty Fund, 2001).

101 Yowell, *Constitutional Rights*, *supra* note 1 at 154 citing Kenneth Culp Davis "Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court" (1986) 71:1 Minn L Rev 1.

Morally, Yowell follows Adrian Vermeule's suggestion that because proportionality analysis is not an especially legal technique, rights adjudication will be ethically improved by appointing judges without formal legal training.[102] In effect, Yowell's argument suggests that because courts faced with adjudicating rights claims will inevitably slip into proportionality analysis, reforming them to directly address proportionality rights claims with an independent research service is preferable to encouraging courts to employ techniques to enforce the determinate meaning of rights in particular cases and circumstances. In the end, Yowell admits that reforming courts along such Kelsenian lines mean that "the argument for *judicial* review of legislation is better thought of as an argument for review by a quasi-legislative body that resembles a legislature in all important respects but one: crucially, it is not elected."[103]

Advocating the reform of courts to resemble legislatures is not a 'second-best" alternative to avoiding entrenchment, but a *reductio ad absurdum* of the counter-majoritarian arguments in favour of proportionality analysis as "Socratic constestation" and public reason.[104] The argument holds that the capacity of courts to assess rights questions of proportionality will be improved with extensive research expertise and deliberations and by reforming courts to resemble legislatures in their ability to directly engage with rights questions without tailoring their reasoning to the technical facts of disputes between particular parties.[105] This is simply founding a new legislature to undermine the deleterious effects of entrenchment. Embracing proportionality as the proper mode of practical reasoning about rights effectively requires embracing the institution that proponents of proportionality analysis distrust: the legislature. The argument that courts should practice proportionality analysis in order to counter the pitfalls of legislative protections for rights turns out to be an institutional argument for designing courts to legislate better. The *reductio* exposes the elitist pretensions of many counter-majoritarian arguments in favour of judicial review, because accepting reforms to improve the *legislative* capacity of courts entails abandoning any attachment to the special function of adjudication beyond its independence from the plebeians. Although this is a *reductio*, its recommended institutional reforms could be advisable in polities lacking the political and legal culture to reinvigorate practices allowing for legally constrained rights adjudication.

102 Yowell, *Constitutional Rights* , *supra note* 1 at 155-156 citing Adrian Vermeule, "Should We Have Lay Justices?" (2007) 59:6 Stan L Rev 1569.

103 Yowell, *Constitutional Rights, supra* note 1 at 163.

104 Mattias Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4:2 L & Ethics of Human Rights 140 at 170.

105 See Yowell, *Constitutional Rights*, *supra note* 1, at 147-166,

Where rights have been constitutionally entrenched, a better option may be to revive legislative and judicial responsibility for the legally directed specification of rights. Yowell's 'second-best' argument cannot be conclusive as long as such a revival remains plausible.[106] It could be that originalism, and even Black's old fashioned absolutism all collapse into proportionality analysis due to the indeterminacy of legal rights. But Yowell's praise for Black's approach suggests otherwise. Exploring how these methods could constrict or eschew proportionality analysis holds the promise of containing its spread within and across jurisdictions featuring entrenched bills of rights. The shape this project takes will depend on specific contexts. For example, in the U.S. it could involve investigating the extent to which Yowell's alleged use of balancing within the tiers of scrutiny analysis of rights should be rejected, reformed, reconciled, or constrained by originalism, textualism, etc.[107] In Canada, it could involve exploring such methods and questioning the conflation of rights "infringements" and "limitations" in jurisprudence concerning section 1 of the *Charter*.[108] But, even if such methods fail completely or partially, it is unclear why more traditional forms of judicial restraint and respect for long-standing legislative constructions of rights would not prove a better option than simply encouraging and reforming courts to function as legislatures.[109] This would allow legislatures to specify the meaning of rights using the changeable yet absolute ordinary rights that Yowell approves of.[110]

106 Of course, as Stephen Gardbaum has noted, courts could be legally directed to employ the proportionality by the texts of bills of rights (e.g. by their limitations clauses) as an intentional choice made by a political community: Stephen Gardbaum "Proportionality and Democratic Constitutionalism" in Huscroft, Miller & Webber, supra note 31, 259 at 280-82. In that case, Yowell's 'second-best' argument would apply, as courts would be legally directed to perform a kind of legally undirected reasoning better suited to legislatures. My thanks to the thoughtful anonymous reviewer who suggested that I address this important argument. In my view, the original legal direction of the "limitations" of right in Commonwealth documents such as in section 1 the *Canadian Charter of Rights and Freedoms* do not determinately direct courts to employ proportionality analysis: *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Other bills of rights, such as the *European Convention on Human Rights*, more clearly lend themselves to proportionate thinking: *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*European Convention on Human Rights*] .

107 See e.g. *Whole Woman's Health v Hellerstedt*, 84 USLW 4534 (US 27 June 2016), Thomas J, dissenting.

108 See e.g. *Frank v Canada (AG)*, 2019 SCC 1 at para 120-125, Brown & Côté JJ, dissenting; *Charter*, *supra* note 104, s 1.

109 Although Yowell does admit the value of deference, he does not indicate how it might cut against his 'second-best' argument: Yowell, *Constitutional Rights*, supra note 1 at 165.

110 See Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights*, (Cambridge: Cambridge University Press: 2009) at 208-212.

Yowell has himself contributed to this cause in his excellent recent book, *Legislated Rights: Securing Human Rights Through Legislation,* that he has co-authored with Grégoire Webber, Richard Ekins, Maris Köpke, Bradley Miller, and Francisco Urbina.[111] In that book, he argues that national legislatures can help specify and protect even the broad rights found in the Universal Declaration of Human Rights.[112] He goes on to say that "[j]ust as the day-to-day work of legislating is indispensable for protecting human rights, so is the day-to-day enforcement of legislated rights in courts."[113] If legally directed adjudication is indispensable for protecting human rights using ordinary legislation, then so is the project of investigating clear and reliable means of adjudicating constitutional rights. In constitutional orders with entrenched bills of rights, this task for adjudication is all the more indispensable because the Kelsenian alternative does not reform but replaces the function of courts. If adjudication possesses its own value in reasoning about rights, then this is an absurdity. But this absurdity is useful for thinking about the different aspects of practical reasoning about rights. This is because it admonishes us to recognize and inquire about the virtues of adjudication insofar as we sense the absurdity of seeking to realize it by replacement. In truth then, proportionality's *reductio* is to an absurdity that functions as a *monitum* (warning).

111 Webber et al, *supra note* 29.
112 *Ibid* at 151-152.
113 *Ibid* at 152.

Book Review

*Neliana Rodean**

Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford: Oxford University Press, 2017) by Yaniv Roznai, 368 pp.

In 1890, John W. Burgess described the three fundamental parts of *a COMPLETE constitution* noting that "[t]he first is the organization of the state for the accomplishment of future changes in the constitution. This is usually called the amending clause, and the power which it describes and regulates, is called the amending power. This is the most important part of a constitution."[1]

Writing in Canada's *Review of Constitutional Studies*, I might just note that Canada certainly has experience with the significance of amendment clauses, with the debates over its amendment provisions spanning fourteen rounds of constitutional negotiation from 1926 to 1982,[2] as well as subsequent thought on matters like secession. Perhaps naturally, one of Canada's internationally known constitutional scholars has devoted his entire body of scholarship to the topic of constitutional amendment.[3]

Over time, Burgess is certainly not the only scholar to highlight the value of the amending clause. One century later, Akhil Reed Amar described the unsurpassed significance of those rules that govern constitutional amendment and its entrenchment against it.[4] Their reasoning has been appropriate, and Yaniv Roznai opens his remarkable book in the same spirit, explaining "the meaning and importance of constitutional amendments" by arguing that "formal constitutional amendments not only remain an essential means

* Research Associate & Adjunct Professor of Constitutional Law, University of Verona.

1 John W Burgess, *Political Science and Comparative Constitutional Law* (Boston: Ginn & Company, 1890) vol 1 at 137 [emphasis in original].

2 See e.g. Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) Chapter 2.

3 I reference some of Richard Albert's extensive writings on the subject below. I would also note his forthcoming *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, New York: Oxford University Press [forthcoming in 2019].

4 Akhil Reed Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V" (1994) 94:2 Columbia L Rev 457 at 461.

of constitutional change[5] but ... raise imperative questions for constitutional theory" of our times.[6]

The theory of constitutional amendments, concerning both formal and informal amendment rules, has blossomed as one of the most central issues of modern constitutionalism. Constitutional change occurs in two different ways, constitutionally or unconstitutionally, depending on the conceivability of constitutional amendments to violate, or not to violate, the constitutional order. If a *constitutional* constitutional amendment shall be able to stand alone without compromising the spirit of the constitution within a formal constitutional amendment framework, the most challenging issue is who can declare constitutional amendments unconstitutional, and when or whether this should be done. In this sense, Roznai's objective is both to investigate the phenomenon of *unconstitutional* constitutional amendments and to provide for a multifaceted constitutional unamendability.

Through a comprehensive and meticulous analysis of unconstitutional constitutional amendments, the book demonstrates the increasing tendency in contemporary constitutionalism to impose substantive limits on formal changes to constitutions. Roznai's book, the first of its kind, draws on the imposing study of many constitutions and the scholarship and case law on constitutional amendments. This book is bound to become a turning point within comparative constitutional theory, (un)constitutional design, and constitutional adjudication. By focusing on a wide comparative study, Roznai stresses the theory of unamendability and gradually develops his arguments across three main lines. He first approaches unamendability from a comparative perspective (Part I). Secondly, he establishes the foundation of this theory (Part II). Finally, he defends the judicial enforcement of constitutional unamendability (Part III). Roznai concludes by infusing the philosophy of unamendability with an initial exploration of "eternity clauses"; the book definitely establishes the nature and scope of constitutional amendment power and provides an overview of the dynamics of the development of unamendability doctrines to answer whether a constitutional amendment may be considered unconstitutional.

5 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017) at 2 citing Adrian Vermeule, "Constitutional Amendments and the Constitutional Common Law" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 229; Heinz Klug, "Constitutional Amendments" 11:1 Annual Rev L & Soc Science 95.

6 Roznai, *supra* note 5 at 2.

The fundamental question answered by the book relates to the very essence of unamendability. The author wonders, "Is the idea of an '*unconstitutional constitutional amendment'* an actual paradox[?]"[7] It did not take too long to search for examples, which would help to state this issue. Roznai skillfully begins by describing a global trend towards explicit limitations on constitutional amendment powers, though he claims that "eternity clauses" entrenched in constitutions are neither eternal nor unchangeable. Through a laborious study of thousands of constitutions and their revisions, Roznai provides a range of substantive limitations on constitutional amendments contained in constitutional texts, conceptualizing and establishing a taxonomy of unamendable provisions. In his effort to demonstrate how this constitutional phenomenon successfully migrated across jurisdictions over time and became a prominent feature of the modern constitutional design, he first reviewed the origins, structure, and content of explicit unamendability (Chapter 1).

Unamendability is examined through an innovative mixture of functional and expressive approaches. Following and advancing other scholars' work and empirically focusing on the core of values and principles enshrined in different constitutions and deemed unamendable, Roznai explores the facets of unamendable provisions and identifies different features of unamendability. In a modest but prevalent way, Roznai frames it into the classical constitutional change structure, only to ascertain that it fits perfectly with the idea of a compromised "genetic code" of the constitution.[8] Behind this logic there are the unamendable provisions that he investigates from the perspectives of the following dimensions: "preservative"[9] (the core of constitutional values), "transformative"[10] (the essence of the political communities), "aspirational"[11] (the prevailing culture and conditions of society), "conflictual"[12] (the essence of reconciliation), and "bricolage"[13] (the characteristics of compromise and contingency).[14]

Considering Article V of the US Constitution, Roznai appears primed to clear up the shadow side of any expressed limitation on the amendment power and go beyond the meaning of the constitutional text in order to disclose the

7 *Ibid* at 7 [emphasis added].
8 *Ibid* at 38.
9 *Ibid* at 26.
10 *Ibid* at 28.
11 *Ibid* at 32.
12 *Ibid*.
13 *Ibid* at 35.
14 *Ibid* citing David Schneiderman, "Exchanging Constitutions: Constitutional Bricolage in Canada" (2002) 40:3 Osgoode Hall LJ 401 at 401-402.

implicit unamendability framework (Chapter 2). He looks to the United States because there he found useful conceptual tools and the genesis of the implicit unamendability useful to identifying the scope of the amendment power, which does not concern only explicit limitations but the existence of any implicit constrains on it. It is interesting how the substantive dimensions of the amending power in the early United States do raise questions and problems similar to those presented in the EU related to supra-constitutionality (Chapter 3). After his effort to demonstrate how the amendment power philosophy reflects a move from an explicit to an implicit unamendability doctrine, Roznai shifts away from the US's Article V interpretations, and takes the reader through the last century's 'Basic Structure Doctrine' because his broader project needs not hinge on a close analogy to the US constitutional amendment process. Once more, the book shows that implicit unamendability does not remain a marginal theoretical debate but also has become a global phenomenon reproposing the idea, already expressed elsewhere, of the 'Basic Structure Doctrine' as migratory from Europe to Asia, concretely from Germany to India, and subsequently in other jurisdictions. While "the term 'supra-constitutional' is often attributed to the explicit or implicit superiority of certain rules and principles over the content of the constitution", in the words of Roznai, the 'Basic Structure Doctrine' provides a clear example of the same.[15] The importance of the conclusion concerning the Indian doctrine's essence is not to be underestimated: ". . . certain principles have a *supra-constitutional* status. Yet these [implied] limitations derive from within the constitutional order rather than from a source external to constitutional order."[16]

At first glance, the theory of unamendability seems intertwined with the broadest concept of substantive limitations to the amendment power, which refers to both explicit and implicit unamendability. Nevertheless, there are other external limits on the constitutional amendment power considering the relationships between domestic constitutional law and natural law, international law, or regional law, most notably with regard to European Union law. After describing the constitutional limitations' essence of the amendment power, Roznai turns to the analysis of the supra-constitutional limits to establish the core of unamendability placed *above* the domestic constitutional order, and documents the gradual move from natural to international dimension, which also allows for the making of important predictions about the development of the theory in the future. Roznai's choice to explore what he terms *supra-*

15 Roznai, *supra* note 5 at 72 citing Serge Arné, «Existe-t-il de normes supra-constitutionnelles» (1993) 2 R du Dr public 460 at 461.

16 *Ibid* at 70 [emphasis in original].

constitutional unamendability, related to natural law and international law constraints on the amendment power, is fundamental in order to find that no external limitation exists as such. Neither of these norms interferes with the supremacy of domestic constitutional law; their normative value stems from the constitution itself.

Confining his project to an assessment of the relationship between natural law principles and implicit constraints, Chapter 3 also presents the examples of Germany and Ireland in order to assert that there is no basis to regard the principles with "a 'minimal content' of natural law[17] . . . as the yardstick for determining the *legal validity* of an amendment."[18] Then, the author proceeds to analyze the *alleged supremacy* of international law emphasizing the role of national courts. There is no better choice to describe the supranational unamendability than through the explicit and implicit unamendability. Through his selective examples, Roznai concludes that "[i]t is unamendability within the constitution itself that is used in order to render valid limitations on the amendment power affecting supranational standards."[19]

The following two parts of the book represent the "special part" dedicated to the masterful investigation of the constitutional amendment powers The second part focuses on the nature of the amendment power and its limitations (chapters 4-6), in order to explain, finally, the role of constitutional courts in enforcing limitations on constitutional amendments (chapters 7-8). Thus, the work draws on constitutional amendments from the prism of the nature (chapter 4), the scope (chapter 5), and the spectrum of the constitutional amendment powers (chapter 6), as well as their judicial review (chapters 7-8) in order to trace the most important line within the constitutional change framework: that is, the erection of the theory of constitutional unamendability and its enforcement.

First, Roznai develops his arguments for a constitutional unamendability theory, exploring the nature and the scope of the constitutional amendment power and demonstrating its multiple facets. Indeed, the most original feature of this book is its demonstration that the amending power fits comfortably neither into categories of constituent powers nor constituted powers; it is a *sui generis* power that rests within a *spectrum* between the constituent power and the regular legislative power. Roznai brilliantly sets out to explain these powers through supremacy, procedural, and consequential arguments.

17 *Ibid* citing HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 193-200.

18 *Ibid* at 80 [emphasis in original].

19 *Ibid* at 102.

The core of his theory regards the amendment power as a *secondary constituent power*. Drawing on the French doctrine that distinguishes between "original" and "derived" constituent power, he argues that the amendment power needs to be grasped in terms of *delegation* as long as it acts *per procurationem* of "the people."[20] Delegation and trust are the conceptual keys to the nature and the scope of amendment power in Roznai's account. Adding some terminological explanations about primary and secondary constituent powers, and distinctions between power and authority, Roznai highlights a *delegation theory* based on a constant power of "the people" to establish and change the constitutional order. As long as the amendment power, which is a secondary constituent power, is bounded by unamendability, he wonders whether the people's constituent power might be restricted by unamendable provisions. Identifying three tracks of a constitutional democracy — legislative, amendment, and primary constituent power — and recalling the well-known Article 79(3) of German Basic Law, Roznai demonstrates that "the people" can freely change the constitution's grounds, yet this power originates not from the constitutional amendment procedure, but resides in the primary constituent power of the sovereign people.[21]

Roznai claims that unamendability does not bound the popular primary constituent power but the constitutional amendment power as delegated competence "that acts in trust" on behalf of the people is explicitly and implicitly limited. On the one hand, such a power must comply with those explicit constraints entrenched in the constitution related to the content of certain amendments.[22] On the other, the holder of this power cannot use it in order *to destroy the constitution*, from which its authority emanates.[23] Through the amendment power is built that mechanism of constitutional self-preservation. In this perspective, replacing the constitution earns an *ultra vires* action by the delegated amending power undermining its own *ethos*. Since the toolkit of basic values and principles governs the entirety of constitutional orders and makes up the spirit of the constitutions and their identity,[24] the constitutional amendment power cannot abolish or alter them without triggering constitutional collapse and replacement involving again popular participation and deliberation.[25]

20 *Ibid* at 117-118 [emphasis in original].
21 *Ibid* at 126-128.
22 *Ibid* at 137.
23 *Ibid* at 141 [emphasis in original].
24 *Ibid* at 148.
25 *Ibid* at 142-143.

Given its nature, what is the scope of the amendment power? Drawing attention to explicit and implicit unamendability, Chapter 5 elucidates *how* the amendment power is limited. As demonstrated, a delegated power may be restricted by a primary constituent power, and the theory advanced in this book supports implicit unamendability by means of judicial interpretation. To this end, Roznai introduces another innovative argument: *foundational structuralism*. The implied limitations do not derive only from the theory of delegation but also from the way by which the amending power, like any governmental institution, acts.[26] In summary, not all amendment powers are equally limited; there is a "spectrum of amendment powers" that helps to better understand the path to follow in order to lay the foundations for the theory of unamendability. In this sense, drawing attention again on the role of "the people" within the amendment process, Roznai underlines the need to regard the amendment power neither in a binary manner (limited or unlimited), but to relate it to the polymorphic nature of constitutional orders. However, depending on the type of *delegation* as to its similarity to the constituent power or the regular legislative power, he argues that the amendment power fluctuates within a *spectrum*; thus, the more it resembles the constituent power, the broader is the scope of its authority. This viewpoint is developed by comparing *popular and governmental powers* and amendment procedures. It clearly appears that popular amendment powers should be awarded wider scope than governmental ones, and a "constitutional escalator" idea is endorsed and supported in order to employ unamendability as a protective constitutional mechanism.[27]

This journey towards the unamendability theory could only dwell on the link between unamendable provisions and constitutional amendment procedures. As the nature of amendment powers is directly linked to their scope, amendment processes are linked to unamendability. Following various scholars, Roznai couches his justification of a constitutional escalator as a practical safeguard of certain constitutional principles or institutions, and as a means of generating legitimacy for a specific amendment process. In this regard, focusing his theory most on popular amendment processes, "the people" are described as a "legitimation escalator" able to increase the legitimacy of constitutional changes, but such amendment powers are limited too, moving only inside a spectrum. It is here that Roznai engages with his main thesis: that unamendability may be regarded as involving a deeper struggle among substantive and procedural aspects of constitutionalism. The spectrum of amendment powers,

26 *Ibid* at 143.
27 *Ibid* at 166.

tangled by amendment procedures and constitutional constraints, attempts to complement such traits.[28]

As each coin has two sides, even unamendability may mirror both the spectrum of amendment powers and the spectrum of intensity of judicial scrutiny and restraint exercised by the courts over constitutional amendments. Roznai's complete mastery of unamendability is not for a casual observer of the constitutional amendment powers; he assumes a fair amount of knowledge of constitutional history, theory, and worldwide practice regarding judicial review of constitutional amendments. It is the last part and the second aspect of the "special core" of his book that offers a thorough and comprehensive systematic and critical review of "eternity clauses" and examines the judicial enforcement of constitutional unamendability (Chapters 7-8).

For those prepared for the next steps, this part of the book provides many interesting and challenging insights. According to Roznai, the effectiveness of unamendable provisions is directly related to their enforcement through judicial review. Employing the theory of delegation and foundational structuralism previously advanced, he also defends substantive judicial review of constitutional amendments even in legal orders in which the courts are not explicitly authorized to intervene. Obviously explicit unamendability implies that judicial review of constitutional amendments enjoys greater legitimacy,[29] but this book also offers a framework of implicit unamendability stressed by how even in the absence of "eternity clauses," constitutional courts have recognized a core of basic principles to protect. In such circumstances, the challenges of constitutional amendments' limits to constitutional theory turn into an even more complex issue for constitutional courts enforcing such limitations and declaring the *unconstitutionality* of constitutional amendments.

Roznai carefully separates the closely related issues of constitutionality of constitutional amendments and judicial enforcement, thereby emphasizing the political check of unamendability on the amendments process too. Although he does not dwell on it much, it is clear that, as a political theory of structuring vertical powers, unamendability had strong force in some jurisdictions, such that a real movement towards a model can be observed. However, the comprehensive approach of Part III — ranging from rationales to practice of judicial review of amendments — works well in convincing the reader that un-

28 *Ibid* at 175.
29 *Ibid* at 39.

amendability does indeed reflect democratic ideals and safeguards the popular primary constituent power.

Beyond the amendability/unamendability dynamics, Roznai also addresses in some detail specific doctrines of courts and the ways in which a "foundational structuralist interpretation" should be articulated in order better to reflect the principle of *vertical* separation of the primary and secondary constituent powers. With this approach, Roznai claims that, once the nature and scope of the constitutional amendment power are correctly construed, "the alleged paradox [of unconstitutional constitutional amendment] disappears."[30]

At first glance, the idea of an "unconstitutional constitutional amendment" is puzzling, yet intriguing. So as not to disappoint the reader, Roznai closes the circle and concludes his book with a clear answer to the question raised in the Introduction: the unconstitutionality of constitutional amendments does not entail a paradox. He demonstrates that unconstitutional constitutional amendments do exist and delivers a theory around the concept of the constitutional amendment power that finds ample room in contemporary constitutionalism. In this way, his book accurately bridges a constitutional gap by proposing a theoretical underpinning and a sophisticated justification for constitutional unamendability.

Roznai does hint at an answer to the "why" for limits on the amendment power. He argues that substantive unamendability, compatible with the limited nature of amendment powers, is "the ultimate expression of democracy" because limitations on the amendment power merely uphold the more fundamental democratic act of the primary constituent power, indispensable to preserve the "constitutional identity."[31] From this perspective, foundational structuralism seems to be indifferent to the substantive content of the "constitutional identity" that requires protection as adopted by the primary constituent power. Only "the people" as holders of primary constituent power should decide upon fundamental constitutional transformation. And Roznai skillfully underscores how this power, nowadays, may be regarded as limited by supraconstitutional norms which may be referred to as the "genetic code of constitutional arrangements."[32] Perhaps this is the underlying claim of the book; a

30 *Ibid* at 233.

31 *Ibid* at 196.

32 *Ibid* at 229 citing Carlo Fusaro & Dawn Oliver, "Towards a Theory of Constitutional Change" in Carlo Fusaro & Dawn Oliver, eds, *How Constitutions Change: A Comparative Study* (Oxford: Hart, 2011) 405 at 428.

simple argument that is, at the same time, complex and a greater challenge to the literature on amendment powers.

With this analysis on the character of the amending power ("an exceptional authority, yet a limited one"), Roznai has published an excellent book, and the larger questions his project raises are worthy of attention. First of all, the book provides full and in-depth analysis of a doctrine — unconstitutional constitutional amendment — which gains its growing role in modern constitutional law. It also proposes a theoretical framework for constitutional unamendability based on an original collection of unamendable provisions that still exist, and its judicial enforcement drawing on global jurisprudential thinking.

In recent years, scholars have produced copious literature on constitutional amendments, particularly in analyzing such phenomena as constitutional endurance,[33] constitutional amendments rules,[34] the competence of constitutional courts to rule on constitutional amendments,[35] and "abusive constitutionalism" or stealth authoritarianism.[36] However, until now, there has still been little scholarly debate on the amendment power, and even less on the

33 See Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009); Tom Ginsburg, "Constitutional Endurance" in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011) 112.

34 See Richard Albert, Xenophon Contiades, and Alkmene Fotiadou, eds, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart, 2017); Richard Albert, "The Structure of Constitutional Amendment Rules" (2014) 49:4 Wake Forest L Rev 913; Rosalind Dixon, "Constitutional Amendment Rules: A Comparative Perspective," in Ginsburg & Dixon, *supra* note 33, 96.

35 See Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa: Ekin Press, 2008); Sabrina Ragone, *I controlli giurisdizionali sulle revisioni costituzionali: Profili teorici e comparative* [Judicial Review of Constitutional Amendments: Theoretical and Comparative Profiles] (Bologna: Bononia University Press, 2011); Yaniv Roznai, "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea" (2013) 61:3 Am J Comp L 657; Michael Freitas Mohallem, "Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts' Authority" (2011) 15:5 Intl JHR 765.

36 See David Landau, "Abusive Constitutionalism" (2013) 47:1 UC Davis L Rev 189 at 195; Rosalind Dixon, "The Swiss Constitution and a Weak-Form Unconstitutional Amendment Doctrine?" (2017) UNSW Law Working Paper No 17-75 at 2; Gábor Halmai, "Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective" (2015) 50:4 *Wake Forest L Rev* 951; Rosalind Dixon & David Landau, "Transnational Constitutionalism and a Limited Doctrine of Constitutional Amendment" (2015) 13:3 Intl J Constitutional L 606 at 609-13; Vicki C Jackson, "The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism" (2015) 13:3 Intl J Constitutional L 575; Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225; Samuel Issacharoff, "Constitutional Courts and Democratic Hedging" (2011) 99:4 Geo LJ 961; Vincent J Samar, "Can a Constitutional Amendment be Unconstitutional?" (2008) 33:3 Okla City UL Rev 667; Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution?: A Comparative Perspective" (2006) 4:3 Intl J Constitutional L 460.

role of "the people" within constitutional changes.[37] The narrowness of the literature regarding people's capacity to strengthen constitutional rigidity is not because their amendment power is irrelevant or is a secondary matter within democratic constitutional design,[38] nor is it because of its misperceived "secondary-ness" within the institutional structure of political system. The need for further discussion exists because constitutional change is a complex "labyrinth" of relationships and interactions between amendment procedures, political actors, and centers of authority, and these processes must be studied in any part, considering them from an integrated perspective. I found this aspect less underlined in Roznai's book; it is not necessarily a critique, but more an observation of its incompleteness. He addresses with an unusual thoroughness the problem of unamendability as a constitutional theory but insists less on the political features of it.

Exploring and modelling constitutional change demands a correlation between the actors and mechanisms within a given legal order, and this process inevitably touches all areas of constitutional law and the allocation of powers. As long as amendment procedures are designated as adaptive approaches to changing circumstances, formal changes provide means for resolving conflicts between constitutional actors, especially with regard to the allocation of amendment power. The principle of vertical separation of powers, the role of "the people," and the enforcement of the theory by the courts are described well. But there could be more scrutiny on the serious constitutional law problems behind the formal amendments stressing the people's role in the phase of initiating the constitutional amendment procedure, proposing amendments, or within the final phase, with an eventual deliberation on the constitutional amendment.

37 See Xenophon Contiades & Alkmene Fotiadou, eds, *Participatory Constitutional Change: The People as Amenders of the Constitution* (London: Routledge 2017); Ragone, *supra* note 35; Zachary Elkins, Tom Ginsburg & Justin Blount, "The Citizen as Founder: Public Participation in Constitutional Approval" (2008) 81:2 Temp L Rev 361 at 362; Michel Rosenfeld, "Putting the People back in the Constitution: On Arab Popular Revolt and Other Acts of Defiance" (2010) 8:4 Intl J Constitutional L 685; Cheryl Saunders, "Constitution-Making in the 21st Century." (2012) 2012:1 Intl Rev L 1; Joel Colon-Rios, "Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America" (2013) 44:3/4 VUWLR 521; Mila Versteeg, "Unpopular Constitutionalism" (2014) 89:3 Ind LJ 1133; Silvia Suteu, "Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland" 38:2 Boston College Intl & Comp L Rev 251.

38 See David A Strauss, "The Irrelevance of Constitutional Amendments" (2001) 114:5 Harv L Rev 1457 at 1460; Brannon P Denning & John R Vile, "The Relevance of Constitutional Amendments: A Response to David Strauss" (2002) 77:1 Tul L Rev 247 at 274; Bjørn Erik Rasch and Roger D Congleton, "Amendment Procedures and Constitutional Stability" in Roger D Congleton & Birgitta Swedenborg, eds, *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (Cambridge, Mass: MIT Press, 2006) 319 at 323.

Constitutions usually contain rules about constitutional amendments, and sometimes people could be called to approve any constitutional change. Nevertheless, as demonstrated, democratic constitutions undermine the people's involvement in the constitutional amendment processes. In this sense, firstly, I wonder what legal consequences are when an unconstitutional constitutional amendment is proposed by "the people" as bearer of the right of initiative for constitutional reforms, but such popular initiative is not granted by the legislator on the basis of its unconstitutionality. Secondly, what opportunity really exists for "the people" to overcome their representatives' decisions regarding a constitutional change? There should always be consideration that, within this process, and because of different qualifications for constitutional referenda, the relationship between the Parliament and the popular interference within the constitutional amendment process is liable to change. So, would it not be better to invest the people with decision-making power within a constitutional change process initiated by other political actors in order to combine their interests and respond to their needs in that particular moment?

In any case, this is an overwhelmingly important book, and Roznai brilliantly exposes the phenomenon of unconstitutional constitutional amendments, develops a theory to explain unamendability, and provides cogent justification for it. I found this book unique and interesting from many standpoints. Given the issue investigated, namely the unamendable provisions, the book seems taken for granted and easy to criticize. But, this is not the case. It reveals the complexity of the argument and provides the foundation of constitutional theory. It is true that it relates only to formal constitutional changes, but it is complete and comprehensive on a contemporary phenomenon, bringing the reader within the world of modern constitutional changes. Its merits are threefold: firstly, this book delivers a rich and illuminating analysis of the amendment power, responding to who holds this power, explaining what its nature is, what the scope is, and what its limitations are; secondly, answering these questions, it constructs the framework of unamendability as a path towards a theory, in order to explain, thirdly, the dimension and role of constitutional courts when enforcing constitutional amendments' constraints.

For each of these issues, Roznai proposes an in-depth study, combining theory and practice, academic and jurisprudential issues. After analyzing explicit and implicit unamendable provisions within a wide range of constitutions, the originality of this part regards the thin line between primary and secondary constituent power. Another innovative issue faced by this book relates to the *sui generis* character of amendment power that moves within a spectrum. Amendment power is also presented in terms of *delegation*, and Roznai's rich

and enlightening reconstruction of the role of "the people" and connotations of democracy responds to most intriguing issues of contemporary constitutional orders. Coining the term *foundational structuralism*, according to which the foundations of the constitutional structure are unamendable, Roznai gives another addendum to this book.

The uniqueness of Roznai's book is to set clear boundaries for constitutional unamendability. Unamendability emphasizes "the thin line between constitutional success and constitutional failure."[39] Developing a theory, in addition to being the most complex issue of nature and scope of constitutional amendment powers, Roznai determines how unamendability blocks certain constitutional modifications through the exercise of amendment procedures, and how the primary constituent power always has the ability to re-emerge and disregard it. According to this theory, it is demonstrated that certain constitutional amendments can be unconstitutional because they attempt to create a new constitution. And following this *fil rouge*, Roznai supports the idea of constitutional change not only through amendment but also by means of constitutional interpretation and practice. The spectrum of amendment power mirrors a spectrum of intensity of judicial interpretation. He gives another distinctive response to this theory, wondering which are the limitations imposed upon the judiciary in interpreting substantive constraints of amendment power and whether such interpretation can be unconstitutional. The unconstitutionality of constitutional amendments pursues the objectives set out in this indispensable book as starting point of the advance of unamendability theory for years to come, especially in these times of backsliding democracy.

39 Roznai, *supra* note 5 at 229.