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Deciding in the Heat of the Constitutional Moment Constitutional Meaning and Change in the Quebec Secession Reference

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Deciding in the Heat of the Constitutional Moment: Constitutional Change in the Quebec Secession Reference

The Quebec Secession Reference addressed divisive issues with far-reaching implications for the Canadian constitutional order. Recently, commentators have called for a less traditional and more systematic approach to understanding the decision, and its place in the broader scheme of Canadian constitutionalism. Accordingly, this paper challenges the predominant narrative concerning the Quebec Secession Reference, which is largely judge-centred and shows little regard for the important historical, political, and popular forces so crucial to understanding the decision. The challenge is mounted through the work of Yale constitutional scholar Bruce Ackerman and his theory of constitutional moments. This paper uses Ackerman's criteria of higher-lawmaking and constitutional moments – signalling, proposal, mobilized popular deliberation and synthesis – as an analytical framework to advance a new understanding of the Supreme Court's decision. The author argues that the events surrounding the decision fit Ackerman's criteria for a "constitutional moment" and demonstrate that key aspects of the constitutional doctrine introduced in the decision – in particular the much heralded "duty to negotiate" – were shaped more by political and popular forces than by the Court itself. In exploring the implications of this analysis, the author re-assesses the academic commentary on the decision and recommends a new dialogical theory of constitutional adjudication that considers not just the courts and Parliament, but also the role of popular and political forces in constitutional change.

Le Renvoi relatif à la sécession du Québec traite de questions fort controversées ayant des incidences très profondes pour l'ordre constitutionnel canadien. Les commentateurs ont récemment plaidé en faveur d'une approche moins traditionnelle et plus systématique pour la compréhension de l'arrêt et de sa place dans une vaste perspective du système constitutionnel canadien. Par conséquent, cet article conteste le point de vue purement descriptif concernant le Renvoi relatif à la sécession du Québec, lequel est fortement axé sur la vision des juges et n'accorde que peu d'importance aux grands courants historiques, politiques et populaires pourtant essentiels à la compréhension de la décision. La contestation s'appuie sur les travaux de Bruce Ackerman, spécialiste constitutionnel de l'université Yale, et sur sa théorie des « moments constituants ». L'auteur prend comme point de départ les critères de création des lois par des entités souveraines et de « moments constituants» énoncés par Ackerman – transmission du message, délibérations populaires mobilisées et synthèse – en tant que cadre d'analyse pour suggérer une nouvelle interprétation de l'arrêt de la Cour suprême. L'auteur prétend que les événements entourant la décision satisfont aux critères de « moment constitutif » proposés par Ackerman et démontrent que les aspects clés de la doctrine constitutionnelle compris dans la décision – en particulier l'obligation de négocier dont on parle tant – ont été façonnés plus par des forces politiques et populaires que par la Cour même. Tout en étudiant les incidences de cette analyse, l'auteur réévalue la doctrine relative à l'arrêt et recommande une nouvelle théorie dialogique d'adjudication constitutionnelle qui prend en considération non seulement les tribunaux et le Parlement, mais également le rôle des forces populaires et politiques dans le changement constitutionnel.

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Introduction

In the *Quebec Secession Reference*[1] the Supreme Court of Canada addressed divisive issues with far-reaching implications for the Canadian constitutional order.[2] Not surprisingly, the decision resulted in an avalanche of criticism and commentary. Yet, the vast majority of this commentary has focused mainly on the Court, debating the justices' motivations, legal

1. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Quebec Secession Reference*].
2. In the words of the Supreme Court, it had been asked to address "momentous questions that go to the heart of our system of constitutional government." See *Quebec Secession Reference*, *supra* note 1 at 227.

justifications and politics.[3] Recently, however, commentators have called for a less traditional and more systematic approach to understanding the decision, and its place in the broader scheme of Canadian constitutionalism.[4]

Accordingly, this paper challenges the predominant narrative concerning the *Quebec Secession Reference*, which is largely judge-centred and shows little regard for the important historical, political, and popular forces so crucial to understanding the decision. The challenge is mounted through the work of American scholar Bruce Ackerman and his theory of constitutional moments.[5] Like Sanford Levinson, I think Ackerman is one of the most important modern theorists of constitutional change.[6] I also agree with Levinson that while Ackerman's work is primarily concerned with the American experience, its structured framework can help understand constitutional development in other countries.[7] In addition to Ackerman's criteria for constitutional moments, this paper will draw upon his analysis of constitutional change during the New Deal period in American history for comparative purposes.

There are, of course, problems with using a theory based on unique aspects of American history to discuss Canadian constitutionalism. Still, Ackerman's historical approach to constitutionalism provides a "bridge" between Canadian and American traditions, as his theory has been likened to the "living tree" doctrine of constitutional development so prominent in Canada.[8]

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3. Professors Choudhry and Howse have documented a substantial portion of the commentary and noted its traditional focus on the court and the raw political consequences of the decision. See Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2001) 13 Can. J. L. & Juris. 143 at 143-145 ["Choudhry"].

4. *Ibid.* at 144-145.

5. The conception of the theory used here is discussed in: Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991) [*Foundations*]; Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998) [*Transformations*]; Bruce Ackerman, "Higher Lawmaking," in S. Levinson, ed., *Responding to Imperfection: Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995) ["Imperfection"]; Bruce Ackerman, "Revolution on a Human Scale" (1999) 108 Yale L.J. 2279 ["Revolution"]; and Bruce Ackerman, "Symposium: Fidelity in Constitutional Theory: Fidelity as Synthesis: A Generation of Betrayal?" (1997) 101 Fordham L. Rev. 1519 ["Fidelity"].

6. See Sanford Levinson, "Transitions" (1999) 108 Yale L.J. 2215 at 2215-2216 ["Transitions"].

7. *Ibid.* at 2215-2216.

8. See Michael Les Benedict, "Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution" (1999) 108 Yale L.J. 2011 at 2012 ["Benedict"]. Benedict links the term "living Constitution" to a 1927 article by Howard Lee McBain. In Canada, the "living tree" metaphor for constitutional development is most often attributed to Lord Sankey in the famous "persons" constitutional decision in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) at 136 [*Edwards*].

Ackerman also presents normative arguments supporting the form of constitutional change he identifies.[9] This paper is not concerned with these arguments for the most part. It is aimed at understanding how new constitutional commitments—that is, new understandings as to what a constitution provides, obliges or prohibits—are shaped *outside the courts*, rather than any normative project of justification.[10] That said, this paper does conclude with some normative concerns about the constitutional change identified.

Accordingly, this paper uses Ackerman's criteria of "higher lawmaking," and "constitutional moments" – signaling, proposal, mobilized popular deliberation and synthesis – as an analytical framework to advance a new understanding of the *Quebec Secession Reference*. I argue that the events surrounding the decision, for the most part, can be understood to involve a "constitutional moment" and conclude that key aspects of the constitutional doctrine introduced in the decision – in particular the much heralded "duty to negotiate" – were shaped more by political and popular forces than by the Court itself.

Part II involves a general elaboration of the theory of constitutional moments. For Ackerman, the New Deal era under President Franklin D. Roosevelt marked the last great time of revolutionary change in American constitutionalism. I demonstrate how his theory explains the events of the New Deal in terms of constitutional change, including the role of the United States Supreme Court. This discussion, in Part III, plays a comparative role in analyzing the *Quebec Secession Reference*.

Drawing upon the insights of Ackerman's theory, I argue in Part IV that the *Quebec Secession Reference* can be understood as part of a broad constitutional moment occurring within Canada at the time. I suggest that, like the "Old Court" under President Roosevelt, the decision involved a "switch in time"[11] by the Supreme Court of Canada, wherein the Court

9. *E.g.*, see chapter "Why Dualism?" in *Foundations*, *supra* note 5 at 295-322; *Imperfection*, *supra* note 5 at 66. Others have distinguished between Ackerman's descriptive and prescriptive arguments including Michael J. Klarman, "Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments" (1992) 44 Stan. L. Rev. 759; Robert J. Lipkin, "Can American Constitutional Law Be Post Modern?" (1994) 42 Buffalo L. Rev. 317; Roger M. Smith, "Legitimating Reconstruction: The Limits of Legal Realism" (1999) 108 Yale L.J. 2075; Sanford Levinson, "Transitions" *supra* note 6; and more recently, Mark Tushnet, *The New Constitutional Order* (Princeton: Princeton University Press, 2003).

10. I should here note that my views on this point have been deeply influenced by the work of Mark Tushnet and his scholarship on understanding how constitutional meaning is articulated outside the courtroom and whether examining these meanings is a worthwhile project. See Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton: Princeton University Press, 1999) [*Taking*].

11. I take this term from Ackerman's work. For Ackerman, "switch in time" denotes a sudden shift by an institutional actor (like a court) from a well-entrenched position (such as the constitutionality of a law) to a completely opposite one. An example of this was the "switch in time" of the United States Supreme Court during the New Deal period. See *Foundations*, *supra* note 5 at 48-50.

began a reconstruction[12] of doctrine to accommodate a new constitutional commitment largely defined by political parties and popular forces. This analysis includes a demonstration of how the Court went about synthesizing[13] the new constitutional commitments.

At the outset, I acknowledge that the *Quebec Secession Reference* cannot be a constitutional moment in the *exact* sense Ackerman means. This is because Ackerman's model contemplates a more drawn-out process arising from popular movements and a series of erratic decisions from the high court reconciling the ideas of the new movement with those of the old. The events surrounding the *Quebec Secession Reference* will deviate from Ackerman's model in various ways. Most importantly, I argue that the constitutional politics and commitments ultimately codified in the *Quebec Secession Reference* did not involve one single broad-based movement like the New Deal, but rather involved articulations about constitutional obligations from both political and popular sources.

I. *Ackerman's Theory of Constitutional Moments*

1. *The Basic Framework*

Bruce Ackerman has focused his studies on constitutionalism in America, hoping to bridge its radical disjuncture between history, theory and practice.[14] Ackerman's main contention is that courts have and should recognize significant constitutional changes that do not satisfy the formal amendment procedures laid out under Article V of the American Constitution, when those changes arise out of a "constitutional moment" characterized by widespread popular support among a mobilized citizenry.[15] A constitutional moment occurs when courts, in particular high courts, recognize new constitutional politics proposed by popular forces and reinterpret the constitution in ways consistent with the new commitments of those politics.[16]

In this way, constitutional interpretations as articulated by judges maintain their legitimacy by being anchored in popular sovereignty.[17] For

12. See "Revolution," *supra* note 5 at 2334-2335.
13. I also take this term from Ackerman's work. For Ackerman, "synthesis" occurs when the courts attempt to reconcile old doctrine with new constitutional politics. See *Foundations*, *supra* note 5 at 88-94, 267-268.
14. *Foundations*, *supra* note 5 at 6-7.
15. *Foundations*, *supra* note 5 at 6-7.
16. *Foundations*, *supra* note 5 at 86-94, 288-290.
17. *Imperfection*, *supra* note 5 at 81-87. As stated, Ackerman goes a long way to argue that higher lawmaking and the informal constitutional amendments it produces is a preferable form of constitutional change, mainly because it is rooted in popular sovereignty. Of course, this presumes that popular sovereignty itself is a worthwhile goal.

Ackerman, this model of change best reflects *actual* revolutionary changes in American constitutionalism, including the important changes in the constitutional commitments of the American people from the Founding era to the Reconstruction and New Deal periods.[18] This is his theory of constitutional moments.

The theory works according to a "dualist" model of change.[19] The dualism within the constitutional system is "normal politics" and "higher lawmaking."[20] Most of the time a constitutional system works in a state of "normal politics," characterized by apathy, stability and low public participation.[21] In contrast, "higher lawmaking" occurs during rare constitutional moments when people become interested in grand constitutional issues that challenge established doctrine, principle and practice:

> A constitutional moment signifies that one or another grouping has managed to gain mass support for an invasion of the normally unideological center of American politics. Such a moment cannot occur without disrupting many political arrangements that have been shaped by normal politicians for quite different reasons. As a consequence, the rise of a constitutional moment tends to be a sudden affair—measured in years, not decades.[22]

During times of higher lawmaking, the public does not think selfishly, but rather in grand, abstract terms, posing broad questions about "the rights of citizens and the permanent interests of the community."[23] Typically, higher lawmaking can be identified by an agenda or proposal focused on national constitutional questions backed by popular support and later recognized by political institutions such as government officials and courts.[24]

A constitutional moment occurs when political actors are successful in bringing their reformist proposals to the "centre" of political life. The

18. *Foundations*, *supra* note 5 at 44–57. As will be seen later, I do not think the changes in *Quebec Secession Reference* amount to anything as significant as the doctrinal changes in those eras of American constitutional history. That said, I believe there is something going on in the decision that resonates with Ackerman's analysis. Ackerman often describes the changes in the different "constitutional moments" in American constitutionalism in terms of "commitment" to various principles, whether that is a commitment to equality rights (the Reconstruction) or activist government (New Deal). See *Revolution*, *supra* note 5 at 2327.
19. *Foundations*, *supra* note 5 at 5, 10-11, 16.
20. *Foundations*, *supra* note 5 at 240, 273-274.
21. *Foundations*, *supra* note 5 at 234-235, 265.
22. See "Fidelity," *supra* note 5 at 1521.
23. *Foundations*, *supra* note 5 at 240, 272-274.
24. *Foundations*, *supra* note 5 at 266-269.

"moment" is important, however, in that the new ideas or proposals may or may not become entrenched:

> [A constitutional moment] is both a rare and important event. But it should not be confused with the rise of a new constitutional solution. Once Americans begin to focus on the rising agenda, they may not find any solution that meets with their sustained and considered support. Provisional legislative efforts to deal with emerging problems generate a meaningless cycle as each set of election returns brings a new fad to the fore.[25]

Thus, for Ackerman, the higher-lawmaking of the New Deal era of American political history was an example of a successful constitutional moment where Franklin Roosevelt and Democrats successfully promoted their agenda in Congress with widespread popular support. The constitutional moment was solidified with the famous "switch in time that saved nine" wherein the United States Supreme Court, previously resistant to New Deal policy, capitulated and accepted new constitutional politics and commitments.[26]

In *We The People: Foundations* Ackerman breaks down higher lawmaking into criteria that can identify moments of constitutional change: (1) *signaling*, when the ideas or principles of a reformist movement have sufficient support that "its reform agenda should be placed at the center of sustained public scrutiny;"[27] (2) *proposal*, where political actors such as a president claim the mandate of the people and incorporate the reformist agenda into particular policies or proposals;[28] (3) *mobilized popular deliberation*, when grand ideas find national deliberation, opposition and discussion;[29] and (4) *legal codification*, when a "switch in time" occurs where the new principles and ideas of the successful movement are recognized by courts who begin a complex process of synthesis to reconcile the new ideas with old doctrine.[30] This is the secondary role high courts play in Ackerman's scheme. While sometimes providing judgments that provoke transformative change, most of the time courts enforce entrenched principles during years of normal politics[31] or synthesize existing principles to accommodate new constitutional politics.[32]

25. "Fidelity," *supra* note 5 at 1519-1520.
26. *Foundations*, *supra* note 5 at 47-50.
27. *Foundations*, *supra* note 5 at 266.
28. *Foundations*, *supra* note 5 at 268
29. *Foundations*, *supra* note 5 at 266.
30. *Foundations*, *supra* note 5 at 267-268.
31. *Foundations*, *supra* note 5 at 60, 86-87.
32. *Foundations*, *supra* note 5 at 88-94.

Since Ackerman argues that significant constitutional amendments may occur both inside and outside formal amendment procedures, the Founding and Reconstruction eras of American history are in a sense "easy," because both involved formal amendments under Article V and easily demonstrate popular support to authorize the "higher lawmaking" of those times.[33] The revolutionary changes during the New Deal, however, are important to Ackerman, because they involved changes outside of formal amending procedures.[34] Similarly, I believe the *Quebec Secession Reference* also involved important changes outside formal amendment procedures of Part V of the Canadian Constitution. Thus, the changes in American constitutionalism during the New Deal will be used as a comparative "constitutional moment."

2. *Dominant Narratives and the Myth of Rediscovery*

An important implication of Ackerman's work has been to revise dominant narratives regarding constitutional change and emphasize the role of a mobilized citizenry in promoting and authorizing new constitutional commitments:

> [T]he Constitution cannot be understood without recognizing that Americans have, time and time again, successfully repudiated large chunks of their past and transformed their higher law to express deep changes in their political identities.[35]

Indeed, in the first volume of his most influential work *We the People: Foundations*, Ackerman derides what he sees as the predominant understanding of American constitutional change, the judge-centred Myth of Rediscovery.[36] This narrative holds that important changes in American constitutionalism, from the Founding up to the New Deal, involved judicial "rediscovery" of certain truths about American constitutionalism. For example, under the Myth of Rediscovery, lawyers, judges and scholars believe that the United States Supreme Court of the New Deal era was correct in overruling *Lochner v. New York*, because that decision did not use a correct reading of the Constitution. That is, in overruling *Lochner*, the court rediscovered the true reading.

According to Ackerman, this account of American constitutional history based on judicial rediscovery is "built on sand" and cannot stand

33 For the same conclusions see: Benedict, *supra* note 8 at 2012-2013. See also Michael W. McConnell, "The Forgotten Constitutional Moment" (1994) 11 Const. Comm. 115 at 117-119 ["McConnell"].

34 McConnell, *ibid.*

35 *Transformations*, *supra* note 5 at 5.

36 *Foundations*, *supra* note 5 at 41-44.

up to measured historical scrutiny.[37] The true account of constitutional development is not "judge-centred" but instead illustrates the important role of the citizenry in generating and consenting to fundamental changes in constitutional development. For Ackerman, in focusing on judicial power and rediscovery, this narrative denigrates the role these other forces play in articulating new constitutional commitments.[38]

Similarly, the predominant character of the commentary and treatment of the *Quebec Secession Reference* has been largely judge-centred[39] and, as we will see, often demonstrates a form of the Myth of Rediscovery.[40] Like Ackerman, I wish to challenge this dominant narrative and introduce a new understanding of the *Quebec Secession Reference* through the analytical framework of constitutional moments. Hopefully, it will be one that better reflects the role of popular values of Canadians and political deliberation of elected officials in shaping constitutional change. First, however, I explore Ackerman's theory of constitutional moments in more concrete terms, as it applies to the New Deal changes in American constitutionalism. This will provide a valuable comparative tool in our analysis of the *Quebec Secession Reference*.

II. *The New Deal as a Constitutional Moment*

Prior to the New Deal policies of the 1930s, courts in the United States subscribed to the tenets of *laissez-faire* philosophy as reflected in constitutional jurisprudence protecting freedom of contract and property.[41] Even the Reconstruction amendments, such as the Thirteenth and Fourteenth amendments, invoked the language of property, holding that blacks could no longer be owned as chattels and, from then on, would be able to contract their labour for their own benefit.[42] This constitutional understanding based on free markets and fundamental protections of property, as articulated by the United States Supreme Court, was not challenged until the 1930s, when *laissez-faire* ideology would be repudiated by a popular President and Congress dealing with the problems of the Great Depression.[43]

37. *Foundations*, *supra* note 5 at 44.
38. *Foundations*, *supra* note 5 at 43-44.
39. Choudhry, *supra* note 3 at 143-144
40. In Part IV, I argue that Professors Choudhry and Howse expound a version of the Myth of Rediscovery in their analysis of *Quebec Secession Reference*.
41. *Foundations*, *supra* note 5 at 100.
42. *Foundations*, *supra* note 5 at 100-101.
43. *Foundations*, *supra* note 5 at 100-101.

1. *Signalling and Proposal*

It was in the 1930s that the American progressive movement was reborn.[44] During this period, President Franklin D. Roosevelt and his Congressional Democrats were able to secure repeated landslide electoral victories in 1932 and 1934. Roosevelt's progressive politics, encapsulated in the New Deal, advanced the values and scope of the welfare state, as a reaction to the troubles of the Great Depression. Under Ackerman's model, this was the *signaling* phase, where electoral victories illustrated national support for Roosevelt's New Deal movement. The New Deal statutes and policies enacted by Congress represent "proposals" of the *proposal* stage, where the progressive principles and values of the New Deal movement were concretized into policy. The first two indicia of a constitutional moment were present.

2. *Mobilized Popular Deliberation*

In accordance with the *mobilized popular deliberation* phase, there was institutional opposition from the United States Supreme Court. The constitutional dilemma took form when it became clear that the activism and interventionist welfare values of New Deal policies were incommensurable with the existing *laissez-faire* jurisprudence practiced by the United States Supreme Court.[45] The opposition to New Deal values from the "Old Court" (the name commonly given to the United States Supreme Court during this time) would involve the invalidation of 184 state laws between 1899 and 1937, mainly on the grounds that they violated individual freedom or the sanctity of property as protected under the Constitution.[46] The decision that famously characterized the *laissez-faire* jurisprudence was *Lochner v. New York*[47] where the United States Supreme Court, in 1905, struck down legislation limiting working hours as unconstitutional.[48]

Also in accordance with the *mobilized popular deliberation* phase, these events led Roosevelt to wait for another electoral mandate in 1936, before formulating a policy to deal with the Old Court's obstructionist judgments. In 1936, Roosevelt received another mandate. With the weight of the American people behind him Roosevelt threatened the Old Court with the court packing plan – that he would "pack" the court with

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44 F.L. Morton, "The Politics of Rights: What Canadians Should Know About the American Bill of Rights" in Marian C. McKenna, ed., *The Canadian and American Constitutions in Comparative Perspective* (Calgary: Calgary University Press, 1993) at 111 ["Morton"]. In this chapter, Professor Morton provides an interesting view of the New Deal changes as a movement towards judicial restraint, as opposed to a move to progressive values.

45 *Foundations*, *supra* note 5 at 63.

46 Morton, *supra* note 44 at 112.

47 198 U.S. 45 (1905).

48 *Foundations*, *supra* note 5 at 63.

appointed justices in order to overturn precedents, like *Lochner*, that failed to recognize the constitutionality of New Deal policies.[49] The bill Roosevelt proposed to Congress stated that when a federal judge failed to retire within six months of reaching the age of seventy, the president would be able to appoint an additional judge to that court, to a maximum of fifteen.

3. *The "Switch in Time" and Legal Codification*

Finally, these events led to the famous "switch in time" of 1937. Here, Justice Owen Roberts of the "Old Court" made a dramatic change from voting to invalidate a state law regulating wages and hours in *Morehead v New York ex rel. Tipaldo*[50] in 1936 to voting to uphold such a law in *West Coast Hotel Co v. Parrish*[51] a year later.[52] This "switch in time" began the final stage in Ackerman's model – legal codification – where a number of transformative decisions handed down by the United States Supreme Court in *Carolene Products*,[53] *Palko v. Connecticut*[54], *Gobitis*,[55] and *Barnette*[56] would *codify* and *synthesize* the principles and values of the New Deal as constitutional doctrine.[57]

While the "switch in time" occurred in *Parrish*, Ackerman says that the problem of *synthesis* is more easily identified in the case of *Carolene Products*. That decision is best known for "footnote four," which has become the most famous footnote in American constitutional law.[58] This anomaly, explains Ackerman, can best be understood as a rather unique form of "inter-generational synthesis."[59] In the decision, the main text introduced the famous "rational basis test" where the Court held it would not strike down commercial legislation with a rational basis.[60] Ackerman states that this is a transformative doctrinal change, but he is more interested in the footnote.[61] There, the Court peripheralized their attempt at reconciling the rational basis test with prior doctrine by demoting protections for property

49. "Revolution," *supra* note 5 at 2326-2327.
50. 298 U.S. 587 (1936).
51. 300 U.S. 379 (1937).
52. See Mark Tushnet, "The New Deal Constitutional Revolution: Law, Politics, or What?" (1999) 66 U. Chi. L. Rev. 1061 at 1064. This piece by Tushnet reviews the work of Barry Cushman, one of Ackerman's main critics, in terms of the latter's interpretation of New Deal changes. Still, I think Ackerman provides some notable responses. See "Revolution," *supra* note 5 at 2335-2336.
53. United States v. Carolene Prods, 304 U.S. 144 (1938).
54. 302 U.S. 319 (1937).
55. *Minersville Sch. Dist. v Gobitis*, 310 U.S. 586 (1940).
56. *West Va. Bd. of Educ. v Barnette*, 319 U.S. 624 (1943).
57. "Revolution," *supra* note 5 at 2234-2236.
58. *Foundations*, *supra* note 5 at 119.
59. *Foundations*, *supra* note 5 at 121.
60. *Foundations*, *supra* note 5 at 120.
61. *Foundations*, *supra* note 5 at 63.

(emphasized in the *laissez-faire* jurisprudence of the previous period) but reiterating certain fundamental rights that would attract strict scrutiny from Courts.[62] For Ackerman, this was a clear attempt at a synthesis of prior doctrine with new principles.

4. *The New Deal Reconstruction and the Myth of Rediscovery*

The "switch in time" of 1937 initiated a period of "self-conscious juridical reconstruction of framework values."[63] This period was to become the New Deal reconstruction of constitutional values. It was not until this year that the Old Court recognized the need to reorganize the existing framework of *laissez-faire* constitutionalism for the transformative New Deal values. What provoked this recognition? For Ackerman it was the "conscious" recognition by the justices of the gravity of widespread popular support (via repeated electoral victories) for the New Deal in both the White House and Congress, coupled with the threat of Roosevelt's Court Packing Plan. These concerns were amplified by the harsh effects of the Great Depression and the "institutional crisis" caused by the Old Court's obstructionist decision-making.[64]

Despite the fact that the Myth of Rediscovery could not adequately account for the innovative changes of the time, Ackerman argues, legal professionals still adhered to it:

> While all lawyers recognize that the 1930s mark the definitive constitutional triumph of activist national government, they tell themselves a story which denies that anything deeply creative was going on. This view of the 1930s is obtained by imagining a Golden Age in which Chief Justice Marshall got things right for all time by propounding a broad construction of the national government's lawmaking authority. The period between Reconstruction and the New Deal can then be viewed as a (complex) story about the fall from grace– wherein most of the Justices strayed from the path of righteousness and imposed their laissez-faire philosophy on the nation through the pretext of constitutional interpretation... Only Justice Robert's "switch in time," and the departure of the worst judicial offenders, permitted the court to expiate its countermajoritarian sins without permanent institutional damage.[65]

Whereas most observers recognize the important and unique constitutional changes of the New Deal, the professional narrative inevitably belittles the accomplishments of the era as merely a rediscovery of the Founders' original vision of the constitution.[66]

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62. *Foundations*, *supra* note 5 at 128-130.
63. "Revolution," *supra* note 5 at 2234
64. See "Revolution," *supra* note 5 at 2234-2238. See also *Foundations*, *supra* note 5 at 43-44.
65. *Foundations*, *supra* note 5 at 42-43.
66. *Foundations*, *supra* note 5 at 43.

This view marginalizes the role of the American people whose commitment to the progressive values and principles of the New Deal eventually led the justices of the United States Supreme Court to their "switch in time" and entrenchment of those same values.[67] In Ackerman's view, the *actual* account of the New Deal revolution has nothing to do with "rediscovery" but is one of creation and popular influence – one that recognizes the important role citizens had in advancing and shaping the progressive values of the New Deal through popular support that likely made the switch-in-time inevitable.[68]

While Ackerman's interpretation of these historic events is not undisputed, his analysis of the events of the New Deal transformations provides an important insight into the role that popular and political forces play in constitutional change. It is this aspect of Ackerman's theory that will provide the focus for our investigation of the *Quebec Secession Reference* and the constitutional doctrine articulated therein. As such, I am less interested in demonstrating that the events surrounding the *Quebec Secession Reference* fit perfectly into Ackerman's specific criteria than in identifying constitutional moments. To borrow a phrase from Professor Michael McConnell – "sometimes history trips up theory, when events stubbornly refuse to conform to the theory we have laid out."[69] Of course, it is not surprising that constitutional development in Canada, with its own unique stories and struggles, would not entirely follow a model of change derived from the experiences to the south. Still, the utility of Ackerman's framework will provide some important references along the way, including some interesting parallels between the New Deal reconstruction and events leading up to and following the *Quebec Secession Reference*.

III. *The Quebec Secession Reference as a Constitutional Moment*

The most controversial and heralded aspect of the *Quebec Secession Reference* was the Supreme Court of Canada's recognition of a constitutional duty to negotiate. According to the Court, this obligation, imposed on federal and provincial governments, would follow a clear expression by Quebecers that they wished to secede from the country.[70] Given that the terms of the reference to the Court addressed only the issue of unilateral secession and its legality, most commentators and legal experts expected the Court to decide that issue alone.[71] What prompted the Court to wade

67. *Foundations*, *supra* note 5 at 43-33.
68. "Revolution," *supra* note 5 at 2237-2239.
69. McConnell, *supra* note 33 at 115.
70. *Quebec Secession Reference*, *supra* note 1 at 265-267.
71. Warren Newman, *Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (Toronto: York University Press, 1999) at 84-85 ["Newman"].

into uncharted constitutional waters? The common answer, which will be examined more closely later, was the political "brilliance"[72] of the Court, which understood the necessity for shaping constitutional principles to articulate such a duty.

In contrast, I believe the real story behind the source of these new constitutional rules is something more along the lines of what happened with the United States Supreme Court in 1937. That is, rather than being a creation of the Court's own political craft, in truth, the origins of these new rules of constitutional doctrine can be traced to political and popular forces.

Ackerman often uses the term "commitment" to describe the changes in American constitutionalism over time, with each era characterized by the proposal and constitutionalization of new political and popular commitments.[73] For example, the Reconstruction era is characterized by a constitutional commitment to equality rights and the New Deal involved commitment to an activist national government.[74] With the help of Ackerman's analytical framework, I will attempt to demonstrate that rather than being a judicial creation, the new constitutional duty to negotiate was derived from an articulated "commitment"[75] to constitutional negotiations shared by federalists and separatists, a commitment that found support among the Canadian public.

1. *Signalling and Mobilized Popular Deliberation: Canada and the Quebec Question*

Ackerman goes to great lengths to emphasize the fact that a constitutional moment does not happen overnight. It is part of an ongoing process, usually spanning several years, culminating in national support or consensus on important constitutional changes.[76] Whether one points to the long history of the separatist movement, the failures of the Meech Lake and Charlottetown Accords or the referendum of 1995, there has been much popular and political deliberation on the issue of Quebec independence in Canadian history. In Ackerman's terms, it has long been at the "center"

72. *Ibid.* at 84.

73. See Ackerman's discussion at: "Revolution," *supra* note 5 at 2327. See also Bruce Ackerman, "Constitutional Politics/Constitutional Law" (1989) 99 Yale L.J. 453 at 489, 493, 517-518, 521.

74. "Revolution," *supra* note 5 at 2327.

75. I place commitment here in quotations to signify the reality that there may have been ulterior political reasons for both the separatists and federalists to proclaim a commitment to negotiating the terms of Quebec's separation. However, the important point for our purposes is that this was a *stated* political commitment, one which both sides held out as the policy of their respective side of the political divide. Indeed, I am more interested in political and constitutional discourse than motives or intentions underlying the language chosen by political parties. Hereinafter, I refer to the commitment without the quotations, but the qualifications remain.

76. "Revolution," *supra* note 5 at 2333.

of Canadian political life. Given this reality, Ackerman's initial criteria of "signaling" is less important in understanding the events leading up to the *Quebec Secession Reference*. More relevant in this context, however, is Ackerman's idea of the "proposal" stage.

2. *The Proposal: A New Constitutional Politics*

The "proposal" stage in Ackerman's theory involves a statement of new constitutional politics and principles later codified and accommodated by the present constitutional order. In the New Deal, it was the president's widespread popular support and political mandate that ultimately convinced the Old Court to avoid institutional crisis and ultimately accept the New Deal policies and "proposals" and accommodate them in American constitutional law.

There are parallels here with the *Quebec Secession Reference*. Like Roosevelt and the New Deal Democrats who proposed new constitutional politics to the Old Court, in the time leading up to the reference to the Supreme Court of Canada, a loose but definable political discourse developed among federalists and separatists and, with the support of the Canadian people, a new constitutional politics was formulated and proposed. The new constitutional politics involved a stated political commitment to negotiating the terms of secession in the event of a separatist victory in a Quebec referendum.

a. *The "Commitment" Among Separatists*

The political commitment to constitutional negotiations first figured most prominently within the Quebec separatist movement. For separatists, the framework for constitutional change after a positive referendum result had, since at least the 1980s, involved a process of negotiations.[77] This framework was tied closely to "sovereignty association," a concept advocated by René Lévesque and other separatists.[78] Underlying this was the belief that a referendum victory would confer democratic legitimacy on the separatist cause, not necessarily to effect unilateral seccession, but to compel Ottawa finally to deal on equal terms to negotiate new "association" between Canada an independent Quebec. Thus, Professor Charles F. Doran writes:

> [T]he separatist movement, beginning with René Lévesque himself, had always argued that it would negotiate with the federal government. The

77. In 1980, René Lévesque consistently held that "sovereignty association" between Canada and Quebec would have to be negotiated. Charles F. Doran, *Why Canadian Unity Matters and Why Americans Care: Democratic Pluralism At Risk* (Toronto: University of Toronto Press, 2001) at 199 ["Doran"].

78. *Ibid.* at 199.

> very notion of a 'sovereignty association' implied such a negotiation. In a formal sense, each Quebec referendum was about the right to negotiate with Ottawa on matters of Quebec–Ottawa relations, not unilateral separation.[79]

This commitment to negotiations was a conscious policy choice by separatists. Though there were separatist hardliners like Jacques Parizeau, who advocated a strict plan of unilateral secession following a referendum, it was Lucien Bouchard's notion of a negotiated partnership with Canada (a close relative of Lévesque's "sovereignty-association") that came to dominate separatist policy in the mid- to late 1990s.[80] Indeed, Bouchard's "softer" approach to Quebec sovereignty – involving a commitment to a partnership based on a "European model of partnership and the preservation of Canada's economic structure"[81] – garnered more support among Quebecers.[82]

Not surprisingly, when separatists began making concrete proposals for secession at this time, the commitment to negotiations would play a central role. The groundbreaking "Tripartite Agreement" of June 12, 1995 (signed by the leaders of the more prominent Quebec political parties – the Parti Québécois (Parizeau), Bloc Québécois (Lucien Bouchard) and Action Démocratique de Québec (Mario Dumont)) provided that in the event of separatist majority in a referendum, the Quebec government's resources would be put towards securing sovereignty, including negotiations of a partnership with the rest of Canada: "Insofar as the negotiations unfold in a positive fashion, the National Assembly will declare the sovereignty of Quebec after an agreement is reached on the partnership treaty. One of the first acts of a sovereign Quebec will be the ratification of a partnership treaty."[83] What is important to notice here is that a "partnership treaty" with Canada would be negotiated before a declaration of sovereignty, so long as those negotiations appeared to be "positive." Thus, separatist policy held that success in a referendum would first trigger negotiations rather than unilateral secession.

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79. *Ibid.* at 199.

80. Réjean Pelletier, "From Jacques Parizeau to Lucien Bouchard: A New Vision? Yes, But..." in Harvey Lazar, ed., *Canada: The State of Federation 1997: Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997) at 298-300 ["Pelletier"]. Pelletier notes that even before Bouchard became leader of the PQ, he "virtually imposed" this policy of partnership on Parizeau while in political collaboration with Mario Dumont.

81. *Ibid* at 300.

82. *Ibid* at 301.

83. As reprinted in Pierre Bienvenu, "Secession By Constitutional Means: The Decision of the Supreme Court of Canada in Quebec Secession Reference" (2001) 23 Hamline J. Pub. L. & Pol'y 185 at 195. See also, Newman, *supra* note 71 at 9-10.

But the separatists' commitment to negotiations went beyond mere agreements. Recall Draft Bill 1, tabled by the Quebec National Assembly in 1994. Consistent with the Tripartite Agreement, it set out a framework for secession that contemplated negotiations following popular approval under the heading "The Process":

1. publication of the draft bill;
2. a period of information and participation for the purposes of improving the bill and drafting the "Declaration of sovereignty" which will form the preamble to the bill;
3. discussion of the bill respecting sovereignty of Québec, and passage by the National Assembly;
4. approval of the Act by the population in a referendum;
5. *a period of discussion with Canada on the transitional measures to be set in place, particularly as regards the apportionment of property and debts; during this period the new Québec constitution will be drafted;* [emphasis added]
6. the accession of Québec Sovereignty[84]

This commitment was enacted later in Bill 1, *An Act respecting the future of Québec*, at Section 26:

> 26. The negotiations relating to the conclusion of the partnership treaty must not extend beyond October 30, 1996, unless the National Assembly decides otherwise.
>
> The proclamation of sovereignty may be made as soon as the partnership treaty has been approved by the National Assembly or as soon as the latter, after requesting the opinion of the orientation and supervision committee, has concluded that the negotiations have proved fruitless.[85]

Thus, negotiations were continually contemplated as a first item in any process to achieve secession, following a successful referendum result.

Importantly, this commitment, at least as it was articulated, involved negotiations in good faith. The legislative scheme set out in Bill 1 calls for treaty negotiations *first*, with ample statutory allowance for extensions of the deadline to complete negotiations ("unless the National Assembly decides otherwise") before even considering a unilateral proclamation. Moreover, before unilateral secession is even considered, a special committee must conclude that negotiations are "proved fruitless." In this regard, Premier Lucien Bouchard clearly articulates the separatists' intent to negotiate in good faith:

84. As reprinted in Newman, *supra* note 71 at 5.
85. As reprinted in Newman, *supra* note 71 at 12.

> And it is only if we do not agree, after making an attempt in good faith, that Quebec's National Assembly will, as a last resort, issue a U.D.I. while taking no steps whatsoever that would undermine our common economic space. [...] But I'm quite sure that U.D.I. will never be necessary. I have faith in the democratic nature of Canada. I have faith in the common economic interests at stake.[86]

The critic would respond that the call for "negotiations" was neither a preference nor a commitment, but a form of *realpolitik*. That is, it was a useful way of selling sovereignty to Quebecers, by suggesting that secession would not cause radical change, only an opportunity for a new equal partnership between Canada and an independent Quebec. It would be foolish to suggest that separatist advocacy for "sovereignty-association" and "partnership" did not have political motives. But such motives do not change the stated nature of the policy. The commitment and policy sold to Quebecers was that a positive referendum conferred legitimacy on a "right" to negotiate with Ottawa, not unilateralism. Thus, even in 1995, at the heights of its strength, the separatist push for secession from the Canadian constitutional order articulated a commitment to negotiate in good faith.

1. *The "Commitment" Among Federalists*

The separatists were not alone in contemplating a central role for negotiations. The federalist "commitment" to constitutional negotiations emerged shortly after the 1995 referendum. The commitment was part of the so-called "duality" in federalist strategy that developed in late 1995, between "Plan A," involving steps for constitutional renewal and "Plan B," involving a plan to clarify the rules and framework of legal secession.[87] Federalists would turn to Plan B after Plan A failed miserably.[88]

The last gasp in the long campaign for Plan A was the attempt by federalists to do by legislation what could not be done by formal constitutional amendment.[89] Following the 1995 referendum, the federal Liberals passed House of Commons resolutions that recognized a "distinct society" in Quebec. But the resolutions failed to inspire popular support

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86. Transcript of a speech by Premier Bouchard to the annual meeting of the Canadian Alliance of Manufacturers (6 October 1997) as reprinted in Newman, *supra* note 71 at 32-33.

87. See Robert A. Young, *The Struggle For Quebec: From Referendum to Referendum?* (Montreal & Kingston: McGill-Queen's University Press, 1999) at 94-96, 101-102 ["Young"]. See also: Tom Flanagan, "Canada and Quebec: Where Are We Now?" in Royal Society of Canada, *Can Canada Survive? Under What Terms and Conditions?* (Toronto: University of Toronto Press, 1997) at 19-27 ["Flanagan"].

88. Young, *ibid.*, at 96. See also: Flanagan, *ibid.* at 20; Alan Cairns, "The Supreme Court, The UDI Reference and Democracy" (1998) 19:7 Policy Options 45 ["Cairns"].

89. See Peter Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997) at 4-11 ["Hogg"].

and only further raised the ire of Lucien Bouchard and other separatists.[90] Finally, federalists understood that a new policy had to be formulated on National Unity.[91] This would be Plan B.

Plan B involved a momentous shift in federalist policy on several points, including a move from talking about *why* secession should not occur to the rules that should govern it.[92] Professor Allen Cairns describes the important changes in federalist policy at this time:

> Plan B was triggered by the 1995 referendum result that the "No" forces won by a barely detectable majority. That result made the ostrich policy previously followed by the federal government obsolete overnight, a (non) policy which assumed that a Quebec "Yes" was inconceivable, or that to prepare for a "Yes" was to give momentum to the "Yes" forces. "Plan B" now partners with "Plan A" in the federal strategy, "A" being the evolving version of the renewal of federalism to keep Quebec in Canada which goes back to the Pearson era of the 1960s... [Plan B's] overall purpose, however, is not ambiguous. One objective is to reduce "Yes" support by indicating that a sovereigntist government fresh from a referendum victory would encounter a tough bargainer, devoted to its own self interest, on the other side of the table... For the non-Quebec side, "Plan B" signals an end to the almost complete lack of preparation that characterized all governments outside Quebec prior to the 1995 referendum. This is to reassure Canadians outside Quebec that they will not be completely defenceless and unprepared should Quebecers, by an acceptable majority, decide to leave Canada. Finally, "Plan B" is an attempt to ensure that the referendum process in Quebec is fair to interests outside of Quebec.[93]

Thus, in addressing the process and rules for legitimate secession and holding out the federal government as a tough negotiator, "Plan B" acknowledged that secession *could* occur under the right conditions, such as a clear expression from a majority of Quebecers.

This had important implications. First, by requiring a clear majority in a referendum, federalists were implicitly recognizing an important principle underlying the separatist movement. As noted earlier, separatists believed that a referendum victory would confer democratic legitimacy on their cause in order to force federalists to the negotiating table.

Second, federalists would also have to address the framework for legal secession if such a clear majority was achieved. Here, we arrive at the

90. *Ibid.* See also: Young, *supra* note 87 at 95.

91. See Young, *supra* note 87 at 96 ("[A]ny positive impact [Plan A] had in Quebec was far outweighed by the alienation it caused in the West and by the effective criticism from the opposition.") See also: Flanagan, *supra* note 87 at 20-21 ["Flanagan"]. These realities led federalists to conceive a new approach to national unity.

92. Young, *supra* note 87 at 107.

93. Cairns, *supra* note 88 at 45-46.

constitution and the rule of law. For, in talking about what was a *legal* or *legitimate* secession, one must also speak of the rule of law. And the Liberals did. As Liberal Minister of Intergovernmental Affairs Stéphane Dion noted, the rule of law was not an obstacle for change, but rather provided a safe framework.[94] But what kind of "framework" would it provide? On this point, federalists would borrow a page from separatist political discourse.

Indeed, the constitutional framework for secession, proposed by federalists from this point forward, would include a stated commitment to negotiating secession in the event of a separatist referendum victory. Consistent with the theory of constitutional moments, where the "proposal" stage is identified with a clear policy statement of constitutional principle, the federalist "proposal" would come on September 26, 1996, via a speech by Minister of Justice Allan Rock announcing the reference of the constitutionality of secession to the Supreme Court of Canada.[95] The speech was a clear statement of the federal government's new policy on the Quebec question. From this point forward, the federalists would invoke negotiations in its constitutional talk:

> The Federal Government does not argue against the legitimacy of a consultative referendum. A referendum is an opportunity for a government to consult with the people. But however important it may be, the result of a referendum does not, in and of itself, effect legal change...
>
> [...]
>
> In most countries the very idea of secession would be rejected. But that has not been so in Canada. There have been two referenda in Quebec. *The leading political figures of all our provinces and the Canadian public have long agreed that the country will not be held together against the clear will of Quebecers. This government agrees with that statement.* [emphasis added]
>
> The Position arises partly out of our traditions of tolerance and mutual respect but also because we know instinctively that the quality and the functioning of our democracy requires broad consent of all Canadians.
>
> [...]
>
> *I firmly believe that we shall never reach the point of having to deal with the reality of Quebec's separation. But should such a day ever come, there is no doubt that it could only be achieved through negotiation*

94 Young, *supra* note 87 at 107.

95 Statement by the Hon. Allan Rock, Minister of Justice and Attorney General of Canada, House of Commons Debates (26 September 1996) vol. 234, no. 75 as reprinted in Newman, *supra* note 71 at 27-31

> *and agreement.* The Government of Canada believes that both our Constitution and international law protect us against the irresponsibility of a unilateral declaration of independence, and that is the very issue that we shall be taking to the Supreme Court of Canada. [emphasis added]
>
> *In this respect, we share a commitment to using negotiation and orderly processes to work out differences – something that Canadian individuals and businesses do every day.* This commitment is what the international community has come to expect of Canada and to admire. [emphasis added]
>
> Canadians' shared values have guided us in the past and will continue to do so in the future. *All Canadians, including Quebecers, can take pride in the civility and tolerance we have shown one another in dealing with this fundamental issue. There is every reason to believe that civility will continue.* [emphasis added]
>
> [...]
>
> Regrettably, [...] the view of the current Quebec Government on the nature of a referendum is quite different. We have, therefore, concluded that the responsible and the effective thing to do is to submit the issue for determination by the Supreme Court of Canada.[96]

Here, the government openly recognized the legitimacy of the democratic principle, in stating that Quebec could not be forced to remain in Canada against its will. This was an important principle underlying the separatist argument. Yet, the government went further to say that a referendum cannot itself effect legal change. If Quebec cannot be kept in Canada against its will, but an expression of that will cannot itself effect constitutional change – how will secession then come about? The only possible alternative is what the government articulates – "negotiation and agreement" to "work out differences." In effect, the federal government's position necessitates, by logic, a *duty* to negotiate, if a "clear will" to secede had been expressed. Further, language like "mutual tolerance," "civility" and "tolerance" all suggest a form of *good faith* in those negotiations. Indeed, co-counsel for the Attorney General of Canada, Pierre Bienvenu, has recently pointed this out:

> It was mentioned earlier in this paper that it had been the policy of the current government of Canada that "the country will not be held together against the clear will of Quebecers". A necessary corollary of such a policy is that the government of Canada would negotiate with the government of Quebec if the latter were ever in a position to state that it had a clear democratic mandate to pursue secession.[97]

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96. *Ibid.*
97. Bienvenu, *supra* note 83 at 249.

Thus, when viewed in its proper light, this policy statement indicates a shared political discourse with separatists on several points. First, after years of implying that they would ignore a separatist referendum victory, federalists finally recognize the separatist democratic principle, that there are actual implications for a clear expression by Quebecers to leave Canada. Second, federalists declare a "commitment" to constitutional negotiations, an implied duty, that would follow such a "clear will" expressed by Quebecers. Third, the federalists imply that these negotiations would be conducted in *good faith*. Of course, federalists and separatists would disagree over what a "clear will" involved as well as the details of the process of negotiations; but in terms of constitutional discourse, these points illustrate that federalists and separatists appeared to share at this time a loose, but definable constitutional politics: a stated policy commitment to negotiating the terms of secession after a clear expression by Quebec to leave.

This analysis is important in shedding new light on our understanding of the *Quebec Secession Reference*. But before moving on, it should be noted that this policy statement indicating the new federalist political commitments came in the speech by the federal Minister of Justice referring the matter to the Supreme Court of Canada. While not a "threat" like the message President Roosevelt sent to the Old Court with his court packing plan, the federal government was clearly sending a strong message to the Court about the new constitutional politics on the Quebec question. Given the magnitude of the issues involved, it is not surprising that the Supreme Court of Canada did not issue its decision until 1998. This period of time left ample room for further popular deliberation on the proposals of the federal government.

3. *Further Mobilized Popular Deliberation*

The separatists and federalists were not alone in contemplating a central role for negotiations. The Canadian public also regarded negotiations as a key component of any plan for constitutional renewal. As one public opinion poll released soon after the 1995 referendum showed, there was a clear consensus on two points: first, recognition of the discontent in Quebec and second, widespread support for the proposition that

"negotiations" were the appropriate solution to the Quebec question.[98] In fact, the poll showed this idea most popular within Quebec itself.[99] Of course, there is a difference between negotiations to accommodate Quebec in the present constitutional framework and negotiations on the terms of Quebec secession. However, what these polls do indicate, at least at this stage, was that Canadians contemplated negotiations as an essential tool in the broader project of dealing with the Quebec question. Indeed, further public deliberation on the specific notion that secession, if it were to happen, ought to be completed through constitutional negotiations, would be an important part of the 1997 federal election.

Electoral returns are a key measure of popular deliberation and support for initiatives. President Roosevelt and his New Deal gained strong political momentum in the 1936 election, which awarded him a mandate to continue with his progressive policies in forwarding constitutional change. Similarly, the federal government's policy on the Quebec question would be tested in the 1997 federal election. As political scientist Robert A. Young observed, "the whole national unity issue dominated the 1997 federal election campaign."[100]

Indeed, during the election campaign the Liberals were even more explicit in recognizing that a secession victory in a referendum would lead to negotiations.[101] Here, institutional opposition to the proposal came mainly from the Progressive Conservative Party, led by Jean Charest, who repudiated any part of "Plan B," that is, seeking clarity about the rules

98. See Ipsos-Reid Research Inc., Press Release "Canadians' Reaction to the Quebec Referendum" (5 November 1995). For the sake of accuracy and clarity, I will quote directly. On the first point:

> The poll finds most English-speaking Canadians "prepared to see some concessions made to keep Quebec in Canada" - 61 percent chose this perspective compared to 32 percent who said they would "rather see Quebec leave than make any concessions". This suggests a more conciliatory outlook than the even split found the last time the Angus Reid Group asked this question in May of 1994, with the current findings similar to the mood that prevailed in the couple of years prior to that sounding.

On the second point, the release states:

> Asked what the federal government should now do, a plurality of 39 percent of Canadians surveyed said they would like to see the federal government "head to the bargaining table to try to get an agreement on changing the constitution that all provinces, including Quebec, can agree upon". One in three (32%) opted for seeing the federal government try to accommodate Quebec's concerns through some administrative and political changes, while one in four (27%) said they would like to see the federal government leave these issues alone for a while and move on to something else. *The desire for moving to the constitutional negotiating table is most acute in Quebec where 52 percent of those surveyed opted for this course of action. Across English-speaking Canada, views were fairly evenly split across all three options.* (Question 4). [emphasis added]

99. *Ibid.*

100. *Young, supra* note 87 at 111.

101. *Young, supra* note 87 at 115.

of secession.[102] Another debate was a clash with the Reform Party who advocated negotiating with separatists even after a narrow referendum victory.[103]

In the end, Canadians rejected the counter-proposals of the opposition parties and re-elected the Liberals. The Liberals were handed a 155-seat majority with only a slight decrease in their share of the popular vote (down to 38.4% from 41%).[104] Moreover, the Liberals' percentage of the popular vote was nearly twice that of its nearest opposition rivals (19.4% for the Reform), including a share of the popular vote in Quebec roughly equal to the Bloc Québécois (36.7% - Liberal, 37.9% - BQ).[105] Though clearly not a landslide, the Liberals had faced Canadian voters and could now claim the mantle of an electoral mandate to carry out their policies, including the federalist strategy on the Quebec question.

Following the election, public opinion further solidified in support of negotiating the terms of secession following a separatist referendum, especially in Quebec. By February of 1998, a public opinion poll released found that in Quebec 65% of respondents supported the option of negotiations between governments rather than unilateral secession (20%) in the event of a referendum result supporting sovereignty.[106] These numbers, plus the election, indicate that in the months leading up to the Supreme Court's decision in August, 1998, there was popular support for negotiations as the preferred means to achieve secession.

4. *The Supreme Court of Canada's "Switch in Time"*

According to Ackerman's theory, there is a key moment when institutional actors, in particular courts, perform a "switch in time," finding something as constitutionally required or sanctioned that, under existing principles,

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102. *Young, supra* note 87 at 112-113.

103. *Young, supra* note 87 at 115.

104. See "1997 Canadian Federal Election Results: By province and electoral district" Online: Policy and Analysis Division, Faculty of Commerce and Business Administration, University of British Columbia <http://esm.ubc.ca/CA97/results.html> (accessed: 11 September, 2005).

105. *Ibid.*

106. See Centre For Research and Information On Canada (CRIC), News Release "New Poll On the Referendum Question and a UDI: Quebecers Opt for Negotiation" (20 February 1998). Again, for the sake of accuracy and clarity, I will quote directly:

> A very large majority of respondents, 76 percent, believe that the governments of Canada and Quebec should agree on the wording of a referendum question, so that each side would accept the result as a fair reflection of Quebecers' will. Only 13 per cent oppose a jointly-negotiated question, while 12 percent are undecided. Among Yes voters (those who said they would vote Yes today in a referendum on sovereignty-partnership), 75 percent thought the question should be negotiated.
>
> A substantial majority of respondents, 65 percent, say that if the Yes side wins a future referendum, Quebec should negotiate the terms of its departure from Canada before leaving. Only 20 percent think Quebec should declare independence unilaterally and negotiate the details afterward, while 15 percent are undecided.

would not be possible. This, as discussed, clearly occurred during the New Deal in 1937, when the United States Supreme Court performed a "switch in time" to begin the process of constitutionalizing the principles of the New Deal. Similarly, I think the Supreme Court of Canada's decision in the *Quebec Secession Reference* also involved a "switch in time."

The three questions that the federal government had referred to the Supreme Court of Canada were as follows:

> 1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
>
> 2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
>
> 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[107]

Since all three questions in the reference involved adjudication solely on the *legality* of unilateral secession, most commentators and legal experts expected the Supreme Court of Canada to decide that issue alone.[108]

In the end, the Court went a great deal beyond that issue. After articulating the four foundational principles – federalism, democracy, constitutionalism and the rule of law and the protection of minorities – the Court explained how these principles worked to resolve the "momentous question" of Quebec secession. As expected, it held that legal secession could only be done through "radical and extensive" formal amendments to the Constitution.[109] Therefore, unilateral secession would be illegal under the Canadian constitutional order.

But the Court did not stop there. As already noted, where the alleged "brilliance"[110] of the decision came was in the Court's formulation of a "reciprocal obligation" to negotiate secession under certain circumstances:

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107. Newman, *supra* note 71 at 31.
108. Newman, *supra* note 71 at 84-85.
109. *Quebec Secession Reference*, *supra* note 1 at 263.
110. See Newman, *supra* note 71 at 84.

> The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.[111]

But what conditions are required for such a "clear repudiation" to trigger these obligations? The Court further explained:

> The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.[112]

Hence, the Court in one paragraph accomplished two important tasks: (1) it *recognized* the legitimacy of a popular expression for secession (*i.e.*, as expressed in a referendum) and (2) conferred a duty of good faith negotiations on the provincial and federal governments, in the event of such a popular expression.

This finding was clearly unexpected – perhaps even a "switch in time."[113] But why? To begin with an obvious point, there is nothing in the text of the constitution that deals with secession directly or indirectly, let alone its process. Second, in 1995 and 1996, when two courts in Quebec addressed the issue of unilateral secession in the *Bertrand Cases*, neither Justice Lesage nor Justice Pigeon mentioned or contemplated such a duty in their decisions. In fact, both stuck mainly to the issue of legality.[114] Third, neither the Attorney General of Canada nor the *amicus curiae* appointed by the Court discussed such a duty in their briefs, addressing

111. *Quebec Secession Reference*, *supra* note 1 at 266.

112. *Quebec Secession Reference*, *supra* note 1 at 265.

113. I acknowledge that this could not be a perfect "switch in time" – like the New Deal Court's switch – as the Supreme Court of Canada had never addressed the issue of secession before, and thus could perform no "switch" from previous rulings. That said, the issue *had* been addressed by two justices in Quebec in 1994 and 1995 in the *Bertrand* cases. See footnote 114 for a discussion on this.

114 See *Bertrand v. Quebec* (A.G.) (1996), 127 D.L.R. (4th) 408 (Que. S.C.) and *Bertrand v. Quebec* (A.G.) (1996), 138 D.L.R. (4th) 418 (Que. S.C.). The first resulted in Justice Lesage issuing a "declaratory judgment" as to the constitutionality of the Draft Bill 1, addressing the legality of unilateral secession. The second was a decision by Justice Pigeon on a motion to "dismiss" lawyer Guy Bertrand's challenge to the Bill. In both cases, the justices neither mentioned nor contemplated a "duty to negotiate," nor did they discuss the legal importance of a separatist referendum victory. See also Newman, *supra* note 71 at 12-14, 23.

mainly the issue of unilateral secession.[115] Nobody expected the Court to go beyond the question of unilateral secession.[116] Finally, the Quebec government, which had vigorously opposed the hearing from the start,[117] clearly never expected that the Court would both legitimize their position *and* create an obligation on other governments to recognize it.[118]

So, the question lingers – why did the court move beyond the initial issue of legality of unilateral secession to recognize a duty to negotiate? The common answer to this question, in the words of counsel Warren Newman, was the Court's "vision" and brilliant political craft: "[t]he sagacity – the brilliance, even – of the Supreme Court of Canada's judgment in the Quebec Secession Reference lies in the Court's having had the vision to wed the value of constitutional legality with that of political legitimacy, and this on several levels."[119] Similarly, Professor Robin Elliot has stated: "[F]rom the perspective of constitutional *politics*, the Court's reasons for judgment can fairly be said to be a remarkable act of judicial statecraft, not least because those reasons seemed to find favour with both sides of the dispute."[120] Such views are common. To most, this new constitutional obligation was the result of the Court's resourcefulness and astute political craft.[121] But these views neglect the historical context illustrated in our analysis of the shared constitutional politics of the federalists and separatists (with support in popular opinion). Indeed, I would argue that appearance of the "duty to negotiate" in the *Quebec Secession Reference* can be likened to the changes brought about by the United States Supreme Court in 1937.

115. Generally speaking, the Attorney General addressed the three questions referred to the Court, arguing that the Constitution of Canada could accommodate any change through the use of the amending procedures and that unilateral secession was illegal and inconsistent with international law. The *amicus curiae*, although taking a different tack, also made submissions largely with respect to unilateral secession, arguing that domestic courts had no jurisdiction as secession was a matter of pure international law. The *amicus curiae* also argued that secession was a right under the international legal principle of self-determination. No arguments were presented, by either the Attorney General, interveners, or the *amicus curiae* on negotiations as a constitutional duty. See: M. Dawson, "Reflections on the Opinion of the Supreme Court of Canada in the Quebec Secession Reference" (1999) 11 N.J.C.L. 5. See also Newman, *supra* note 71 at 84

116. Patrick J. Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference" (1999) 11 N.J.C.L. 65 at 66.

117. Young, *supra* note 87 at 147.

118. Though separatists were not entirely happy with the decision they certainly agreed with the duty to negotiate. As Professor Monahan notes, following the decision the Quebec Government ran news stories saying that the Court had set one of the "winning conditions" for the next referendum: Monahan, *supra* note 116 at 67-68.

119. See Newman, *supra* note 71 at 40-41.

120. Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67 at 97, n115 ["Elliot"].

121. After examining the vast majority of the commentary on the decision, Professors Choudhry and Howse conclude that there is widespread agreement as to the political prudence of the decision. See Choudhry, *supra* note 3 at 144-145.

After receiving the reference questions in 1996, the Supreme Court of Canada was faced with a number of important realities just as the Old Court was in the lead-up to its famous "switch in time."

First, the Court was aware that the Canadian public, including Quebec, had rejected the Charlottetown Accord in the 1992 national referendum. This rejection has been read by some, like Professor Hogg, as a repudiation of the existing framework for dealing with the constitutional issues of the Quebec question.[122] Historian Michael D. Behiels agrees: "[n]o matter how Canadians viewed the contents of the Charlottetown deal, most of them felt deeply that the deal was illegitimate because of the elitist, exclusionary nature of the entire process, all-too-reminiscent of the Meech Lake Accord."[123] In this sense, the Canadian people had spoken: change was needed within the legal framework of constitutional negotiations. Certainly, a *duty to negotiate in good faith* would be a change.

Second, despite the failure of Meech Lake and rejection of the Charlottetown Accord, negotiations remained as the favourite process among Canadians for addressing the constitutional issues of the Quebec question. This was indicated in polls conducted following the 1995 referendum.

Third, despite the preference of some, like Jacques Parizeau, to secede unilaterally without negotiations, separatists reaffirmed their stated commitment that constitutional change through secession would involve negotiations in good faith.[124] This was reflected, as shown, in the Tripartite Agreement, the statements of Lucien Bouchard, as well as the numerous legislative enactments of the Quebec National Assembly.

Fourth, the federal government had, in its shift to "Plan B" and clear policy statement in 1996, adopted a new discourse that recognized the salience of Quebec's popular will and a commitment, in the form of an implied duty, to negotiate the terms of secession in the event of a separatist referendum victory. Furthermore, the reference of three questions to the

122. Professor Hogg has argued that the rejection can be seen as a repudiation of the elitist framework for constitutional negotiations. Where the Meech Lake agreement most likely failed because of little public consultation, the Charlottetown Accord involved the greatest amount of public consultation of any constitutional amendment in the history of Canada. Professor Hogg provides a persuasive reason for this result: no matter how much public consultation occurs during constitutional talks, there must be a crucial period of wheeling and dealing among first ministers to reach an agreement on a proposal – so at the most important moment, popular participation is excluded. If he is right, and I think he is, then the referendum results can largely be seen as a rejection of the existing formal process for constitutional change. See: Hogg, *supra* note 89 at 4-39, 4-40

123. Michael D. Behiels, "Charlottetown: The Anatomy of Mega-Constitutional Politics" (December 2002-January 2003) 24:1 Policy Options 65 at 66-67.

124. For clarity, I want to further emphasize that this was an *articulated* political commitment that may have had underlying political motives. As noted, I am more interested in political and constitutional discourse than motives underlying the language chosen by political parties.

Supreme Court was announced *on the very day* that the federal government first articulated this new constitutional politics. Like Roosevelt's message in the court packing plan, the justices of the Supreme Court of Canada would have been aware of this pointed message, sent directly their way, about the federalists' new constitutional politics.

Fifth, the Court was aware that these Liberal federalist policies on Quebec secession were put to the test in the 1997 election and that the Liberals were re-elected with a sizeable majority. Like the American public in 1936, *the people had spoken*. Moreover, public opinion polls in 1998 indicated that popular support for the notion that negotiations were the only legitimate process to achieve secession continued to develop in Quebec, with 65% of respondents stating their support.

All of this pointed to the fact that a loose but definable consensus concerning the politics of constitutional change had developed among the most powerful interested parties in the Quebec question. Indeed, both the federalists and separatists indicated a commitment to good faith negotiations of secession following a democratic expression of Quebec to leave, and the Canadian people (as well as Quebecers) supported that notion. To borrow a mixed metaphor from Ackerman (à la Robert Cover and Ronald Dworkin), the constitutional nomos and narrative of this consensus created a powerful normative or "gravitational force" on the decision of the Court.[125] In the end, I would argue that, like the Old Court in 1937, the Supreme Court of Canada recognized the normative and dialogical force of the new constitutional politics and accommodated it as a new constitutional obligation to negotiate.

In other words, there was a form of dialogical interaction where a new constitutional politics was articulated outside the courtroom, and the Court showed deference to it; or, at least, subconsciously incorporated those politics into its judgment. Either way, no longer would the federalists, separatists, or the Canadian public have to argue or claim that constitutional secession would or ought to involve good faith negotiations, because their discourse had been constitutionalized. Somehow this new constitutional requirement of good faith negotiations – articulated by the federal government in 1996 and shaped largely outside of courts in popular and political deliberation – found its way into constitutional doctrine.

In light of all this, to assume, as many have, that the duty to negotiate in good faith was an example of pure juridical creation are wrong. Instead,

125. I borrow this terminology from Ackerman, who in turn borrows it from Ronald Dworkin and Robert Cover: See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1971) at 111-13 ("gravitational force"); Robert Cover, "The Supreme Court 1982 Term - Foreword: Nomos and Narrative" (1983) 97 Harv. L. Rev. 4 at 11-44.

the Court was simply perceptive of events and discourse unfolding before it. Like anyone conscious of the important debates and events occurring in Canada at the time, the Court was affected by the popular and political consensus for the new constitutional politics and showed deference to it in writing its constitutional decision. The next section will examine how the Court attempted to accommodate the new constitutional politics within existing doctrine in what Ackerman calls the process of synthesis.

5. *Legal Codification and the Problem of Synthesis*

According to Ackerman, the final stage of the constitutional moment is *codification* of the new constitutional politics. The toughest project facing the United States Supreme Court after its "switch in time" was the process of *legal codification* of the New Deal policies into existing constitutional law through a process of *synthesis*. The problem, of course, was that the *laissez-faire* constitutionalism of the previous era was clearly inconsistent with the new interventionist values of the New Deal. Thus, the task of synthesis would be difficult. This problem was clearly evident in cases like *Carolene Products* with its use of a footnote to synthesize past principles.

So far, I have also argued that the Supreme Court of Canada incorporated a new constitutional politics into its decision. And, like the New Deal court in 1937, the problem facing the Supreme Court was to reconcile it with constitutional doctrine. However, there is nothing explicit or implied in the Canadian constitution to guide secession.[126] This raises the question as to how the Court was able to justify the sudden appearance of a duty to negotiate if no provision in the text of the constitution either recognized it or implied it. We know this answer already – through recourse to "unwritten norms" articulated by the Court as "fundamental" principles of our constitution.

But it would be inaccurate to say that the Court's use of unwritten constitutional norms in the *Quebec Secession Reference* was itself a radical change. Indeed, the Supreme Court has utilized unwritten rules in previous constitutional cases such as the *Patriation Reference* and, more recently, in *New Brunswick Broadcasting*[127] and the *Provincial Judges Reference*.[128] Despite these precedents, however, there were still important changes in the *Quebec Secession Reference*.

126. Choudhry, *supra* note 3 at 155.

127. *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 [*New Brunswick Broadcasting*].

128. For a thoughtful discussion of the more recent decisions see Mark D. Walters, "The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law" (2001) 51 U.T.L.J. 91 at 92.

In my view, the Court answered the challenge to reconcile the new "duty to negotiate" with constitutional doctrine with a rather subtle but important act of *synthesis*. Unlike previous structural cases dealing with unwritten constitutional norms like the *Patriation Reference*[129] and the *Provincial Judges Reference*,[130] the Court in the *Quebec Secession Reference* shifted its language to emphasize the supremacy of these unwritten norms over the written text of the constitution and, in the process, it also expanded their scope and application. It is this more expansive approach to unwritten constitutional norms that provided the flexibility to constitutionalize the new duty to negotiate.

a. *Unwritten Constitutional Norms as Supplements to the Written Text*

The momentous and politically charged issues often addressed in constitutional cases bring into play questions as to the legitimacy and institutional competence of the Court to answer such questions. This is compounded where the Court, as it did in the *Quebec Secession Reference*, determines issues beyond those formally referred by the government. Given this reality, as Professors Choudhry and Howse point out, the Court must provide a justification for its recourse to unwritten norms: "[t]he Court's assertion that the Canadian Constitution contains unwritten rules or 'principles' (terms which the Court used interchangeably, without reference to the technical distinction between the two drawn by legal theorists) required some sort of justification."[131] Implicit in this requirement for a "justification" is the idea that rather than delving into unwritten constitutionalism, the Court ought to respect the limits of the written text of the constitution that say nothing about the legitimacy of Quebec's right to secede, nor any duty to negotiate. That is, the Court ought to show fidelity to the written text of the constitution, both in what it provides and what it does not provide.

This notion of showing fidelity to the written text of the constitution has deep roots. To begin with, a written constitution provides guidance and certainty over time, two important components of a stable constitutional order:

> Written constitutions codify discrete exercises of deliberate self-determination and aim to enshrine deeply held views about political society and to impose constraints and obligations on governments. Citizens want and expect the Constitution to endure, both as a public symbol and as a guide and limit for political conduct... Therefore, we tend to expect that it will not be changed, or will not be changed except

129. [1981] 1 S.C.R. 753 at 803 [*Patriation Reference*].
130. [1997] 3 S.C.R 3 [*Provincial Judges Reference*].
131. Choudhry, *supra* note 3 at 154.

> for extraordinary reasons and with extraordinary justification.[132]

Furthermore, in providing explicit textual authority for judicial determination, a written constitution anchors the legitimacy of judicial review. Indeed, as the authors of *Canadian Constitutional Law* note, one of the possible reasons why debates about the legitimacy of judicial review remained muted throughout the nineteenth and early twentieth centuries, was that lawyers and commentators more readily accepted the idea that the Courts were showing fidelity to the text by simply interpreting it:

> [T]he legitimacy issue did not dominate discussions of judicial review under the British North America Act of 1867 in the latter part of the nineteenth century and first part of the twentieth. This was primarily because the legal culture then was such that those who commented on the courts' performance in the area of constitutional law... either did not think in terms of the legitimacy issue the way we do now or, if they did, were less willing than commentators today to raise it. But it may also have been because those commentators were more willing to accept that the courts really were doing what they claimed to be doing – giving effect to the text of that constitutional instrument.[133]

But one need not examine nineteenth-century jurisprudence to find judicial pronouncements as to the "supremacy" or primacy of the written text of the Canadian constitution. The Supreme Court affirmed this very principle in the *Provincial Judges Reference*, a case decided in 1997.

In the *Provincial Judges Reference* the Court found in the preamble to the Constitution a guarantee of the independence of Provincial Courts, though these courts, in contrast to "superior, district, and county courts" are not referred to implicitly or explicitly either the *Constitution Act, 1867* or the *Constitution Act, 1982*. The most controversial aspect of the decision – the notion of constitutional protection for judicial salaries – ultimately relied upon an unwritten norm of judicial independence found to be – like the unwritten norms in *Quebec Secession Reference* – a "foundational principle" of the Canadian constitution.[134] This unwritten principle, according to the Chief Justice, had "grown" to include all courts, not just superior courts.[135]

Still, Chief Justice Lamer made clear that these unwritten principles would in no way usurp the "supremacy" of the written text:

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132. Joel Bakan *et. al.*, *Canadian Constitutional Law*, 3rd ed. (Toronto: Emond Montgomery Publications, 2003) at 9 ["Bakan"].
133. *Ibid* at 31.
134. *Supra* note 130 at 76.
135. *Supra* note 130 at 76.

> [T]he constitutional history of Canada can be understood, in part, as a process of evolution "which [has] culminated in the supremacy of a definitive written constitution". There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review.[136]

For Chief Justice Lamer, the written text of the constitution, its stability and the certainty it provides in the law, can ground judicial interpretation and secure its legitimacy. Courts must return, over and over again, to the written text to secure this legitimacy.

True to this language, Chief Justice Lamer made clear that the Court's use and application of unwritten principles would constitute two lesser interpretive roles: first, they may be used "to fill in gaps in the express terms of the constitutional scheme" and, second, as an aid to construe the provisions of the written constitution itself.[137] Thus, the "unwritten principles" of the constitution here were mere supplements to the written text itself, working simply as aids to its structure.

This account of unwritten constitutional norms is consistent with the Court's approach in two earlier cases dealing with such norms, the *Patriation Reference* and *New Brunswick Broadcasting*. In the *Patriation Reference*, the Supreme Court addressed the issue of repatriation, a situation not contemplated nor dealt with by any part of the constitution. Though the majority found there was no *legal* constitutional requirement that the federal government seek the approval of the provinces to repatriate the constitution, it did find that Ottawa would violate an unwritten constitutional convention if it did not obtain "substantial" consent of the provinces. Yet, the majority was quite clear that this unwritten "rule" was not a part of the "law of the constitution," had no legal effects and could not be enforced by the Courts:

> The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.[138]

136. *Provincial Judges Reference*, *supra* note 130 at 68.
137. *Supra* note 130 at 76. See also Newman, *supra* note 71 at 43.
138. *Patriation Reference*, *supra* note 129 at 833.

Though the majority in *Patriation Reference* affirmed a constitutional unwritten rule, it was clear that the rule had no independent legal force. A similarly restrained approach to unwritten norms is evident in the Court's decision in *New Brunswick Broadcasting*. In that case, while the majority relied upon an "unwritten" and "inherent" legislative privilege, Justice McLachlin, as she then was, was quite cautious in her approach to unwritten norms, explaining the importance of maintaining the integrity of the written aspects of the constitutional order:

> I say immediately that I share the concern of the Chief Justice that unwritten concepts not be freely imported into a constitutional regime which has culminated in a written constitution. I note as well that there is eminent academic support for taking a cautious approach to the recognition of unwritten or unexpressed constitutional powers.[139]

Justice McLachlin's caution implies that while "unwritten concepts" may be defined by the courts, they should not be imported to usurp the written components of the constitution. This is consistent with the Court's approach to these norms in *Provincial Judges Reference*.

These cases provide an important insight into the Court's approach to unwritten constitutional norms prior to its decision in the *Quebec Secession Reference*: unwritten norms are, at best, supplements to fill in the "gaps" of the written text with no independent legal force like that of a written constitutional provision (*Provincial Judges Reference*, *Patriation Reference*). Furthermore, Courts must guard against importing unwritten concepts and norms that would undermine the written components of the constitution (*New Brunswick Broadcasting*). As will be seen, the Court appears to abandon this approach in the *Quebec Secession Reference*.

b. *The Unlimited Nature of Unwritten Norms in the Quebec Secession Reference*

The *Quebec Secession Reference* introduces a more expansive approach to unwritten constitutional norms. In contrast to the approach outlined in the cases above, the Court here describes unwritten principles of the constitution as primary or supreme and the text secondary. This is evident in several passages:

> What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital

139. *New Brunswick Broadcasting*, *supra* note 127 at 376.

> unstated assumptions upon which the text is based.[140]

And later:

> The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole... certain underlying principles infuse our Constitution and breathe life into it.[141]

And finally:

> Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.[142]

The expressive language used – that these unwritten principles "stretching back through the ages" "breath life" into the constitution, and are its "lifeblood" – signal that the Court is attempting to erase any doubt as to whether the unwritten principles – not the text – are the essential elements of Canadian constitutionalism.[143] Here, the written text is merely a tangible, but limited glimpse of something greater, something much more fundamental upon which it is based – "vital" underlying principles and assumptions. In contrast to the comments of Chief Justice Lamer in *Provincial Judges Reference*, the written text is no longer supreme, but rather a frozen moment sustained by the primary architecture of the underlying principles.

Before, unwritten principles were supplement to the written text. According to the Supreme Court in the *Provincial Judges Reference* they could, at the very most, "fill out gaps in the express terms of the constitutional scheme" or be used as an aid to construe the provisions of the written constitution itself.[144] However, the *Quebec Secession Reference* suggests that it is the written text that supplements the underlying unwritten principles. Thus, one might be tempted to conclude with Professor Hughes, that the express text can no longer displace the unwritten principles but merely influence their meaning:

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140. *Supra* note 1 at 247.
141. *Supra* note 1 at 248.
142. *Supra* note 1 at 248.
143. The use of expressive language is an effective method of clarifying previous case law that suggested, in less expressive terms, the primacy of the text.
144. *Supra* note 130 at 69.

> Fundamental constitutional principles may be considered the source of the explicit provisions which "merely elaborate those organizing principles in the institutional apparatus they create or contemplate."
>
> On the one hand, therefore, they are not displaced by explicit provisions. On the other hand, their meaning may be affected by the explicit provisions...[145]

This view – that the written text cannot displace underlying constitutional principles, only influence their meaning – is certainly warranted based on the above passages taken from *Quebec Secession Reference*.

But that is not all. The Court also took great pains to emphasize the limited and particular application of the written text in contrast to the breadth and scope of unwritten principles:

> In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.[146]

Thus, the answer to the limits of the written constitution in dealing with unforeseen and complex structural issues like secession, is the limitless nature of the underlying principles. As noted by Professor Elliot, the unwritten principles no longer simply fill in the little gaps between the express provisions of the constitution, but rather provide an exhaustive set of constitutional rules to deal with numerous possible situations:

> [T]he *Quebec Secession Reference*... poses the greater challenge to the legitimacy of judicial review in Canada. Not only does it suggest that the term "gap" can be understood very broadly, it also suggests that the reasoning process to be used by the courts in the filling of "gaps" can be such as to leave the courts with a relatively free hand to devise such rules as in their view best reflect the underlying or organizing principles of the Constitution.[147]

These changes are important, for in order to accommodate the new constitutional politics of recognition and negotiation, the unwritten principles required independent legal force beyond the limits of the text. The text itself said nothing about secession. Thus, the Court stated:

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145 Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dal L.J. 5 at 15.

146. *Quebec Secession Reference*, *supra* note 1 at 240.

147 See Elliot, *supra* note 120 at 97.

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference, supra, at p. 845)*, which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.[148]

Here, judicially articulated unwritten norms achieve independent legal status, beyond the limited scope of the written text.

Many will claim that this discussion ignores certain parts of the judgment where the Supreme Court appears to reaffirm the primacy of the text, in particular the following passage:

> In the *Provincial Judges Reference, supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.[149]

This passage is hard to reconcile with the other passages cited earlier. This reiteration of the importance of the written text is best understood as an example of the difficult process of *synthesis* itself. As demonstrated by the footnote in *Carolene Products*, the process of accommodating new constitutional principles must work against the considerable normative weight of existing jurisprudence. Here, the Court recognizes the importance of past jurisprudence emphasizing the primacy of the written components of the constitution. However, the decision, as a whole, demonstrates that the old has given way to the new: an approach to unwritten constitutional norms more expansive than that in *Patriation Reference*, *New Brunswick Broadcasting*, and *Provincial Judges Reference*.

Ackerman writes that an important role for lawyers is to use their skills in the common law method to identify and scrutinize acts of *synthesis* implemented by Courts in order to better understand the role of constitutional development.[150] Indeed, the purpose of this section has been to trace how the Supreme Court of Canada introduced a more expansive

148. *Quebec Secession Reference, supra* note 1 at 249.
149. *Quebec Secession Reference, supra* note 1 at 249.
150. *Transformations, supra* note 5 at 25.

application of unwritten constitutional norms to accommodate a new constitutional politics. Such reconciliation and accommodation within constitutional doctrine is the final stage of the constitutional moment.

IV. *The Dominant Narratives of the Quebec Secession Reference*

Most scholarly work on the *Quebec Secession Reference* has focused almost exclusively on the Court itself.[151] However, if this analysis that emphasizes the key role political consensus and popular deliberation played in influencing the Court's decision is correct, then such judge-centred explanations will ultimately fail in their attempts to understand the new constitutional rules in this unprecedented decision. Still, there are several common threads of commentary that ought to be explained.

One thread is the view that the decision, as a political solution was a great success, but in terms of constitutional theory, is much more problematic:

> What were the political *effects* of the judgment? On this point, there seems to be a consensus that the judgment was a success. It has been widely accepted by political actors across the political spectrum. Moreover, it has shaped the terms of debate in a stability-promoting way. It has eliminated extreme positions – that a yes vote would effect a unilateral secession, or could be ignored by the federal government with impunity.[152]

Here, Professors Choudhry and Howse acknowledge the common consensus about the decision's political prudence, but later note its theoretical problems:

> Thus, even from a pragmatic perspective dominated by a concern with political effects, the question of legitimacy of the Court's decision... deserves serious attention. And this question, especially given the apparent novelty and anomaly of some of the Court's holdings in this case, can only be answered through an excursion in constitutional theory of the kind dreaded by many academics.[153]

Similarly, after a sustained analysis of the decision, Professor Robin Elliot praised the Court for its political pragmatism but included reservations about theory:

> I recognize... that the Court's balanced handling of the questions on the basis of the four organizing principles was very likely attributable to its sensitivity to the awkward position in which it found itself. In fact,

151. See Choudhry, *supra* note 3 at 143-144.
152. Choudhry, *supra* note 3 at 144
153. Choudhry, *supra* note 3 at 145.

> from the perspective of constitutional *politics*, the Court's reasons for judgment can fairly be said to be a remarkable act of judicial statecraft, not least because those reasons seemed to find favour with both sides of the dispute. However, from the standpoint of constitutional theory, the Court's response was, for the reasons given, problematic.[154]

These observations can be explained in relation to the process of *synthesis*. What Professors Choudhry, Howse and Elliot have identified in finding "theoretical problems" with the decision are the typical doctrinal inconsistencies evident when courts accommodate new forms of constitutional politics. Typically, these politics are either incommensurable with existing principles or doctrine, or difficult to reconcile with them. Thus, the doctrinal problems identified may be the initial stages of a longer process of synthesis that has begun with the *Quebec Secession Reference*.

Any long-term concerns arising from these theoretical "kinks" – such as those largely indeterminate unwritten norms[155] – will likely, according to Ackerman, be worked out over time as other courts continue the project of synthesis:

> Over time, a different approach to synthesis comes to the fore. As the last transformation recedes in collective experience... a new and more comprehensive perspective on multi-generational synthesis becomes more available. Here the Justices no longer content themselves with salvaging fragments of the old regime: they try to integrate the new principles added by the last transformation in the older tradition in a comprehensive way.[156]

In fact, this may have already begun to happen in cases like *Hogan v. Attorney General of Newfoundland*,[157] *Moncton City v. Charlesbois*[158] and *R. v. MacKenzie*[159] where the Newfoundland, New Brunswick and Nova Scotia Courts of Appeal have attempted to work out the problem

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154 Elliot, *supra* note 120 at 97, n115.

155. For example, after a sustained analysis of the Court's approach to underlying constitutional principles, Robin Elliot concluded:

> [T]here is reason to believe that it is the *Quebec Secession Reference* rather than the *Provincial Court Judges Cases* that poses the greater challenge to the legitimacy of judicial review in Canada.... Unless and until the Court is able to find a way to avoid these implications of its judgments in that case, that judgment not only has the potential to inspire creative counsel to launch constitutional challenges of a kind heretofore largely unknown in Canada – a potential that is already in the process of being realized – but also alter in a fundamental way the manner in which we as Canadians think about our Constitution and the roles played in determining the content of our Constitution by the courts and legislatures respectively.

See Elliot, *supra* note 120 at 97.

156. *Foundations*, *supra* note 5 at 161.

157. 183 D.L.R (4th) 225 (Nfld. C.A.) [*Hogan*].

158. [2001] N.B.J. No. 480 (N.B. C.A.) (QL) [*Moncton*].

159. [2004] N.S.J. No. 23 (N.S. C.A.)(QL) [*MacKenzie*].

of unwritten norms in the *Quebec Secession Reference* by reaffirming, in various ways, the primacy of the text.[160] On the other hand, the Ontario Court of Appeal's decision in *Lalonde v. Commission*[161] foreshadows a continuing role for unwritten principles in constitutional adjudication.

Another collection of commentary involves attacks on the Court for its unprecedented decision. If my analysis is correct, then those who would accuse the Court of "making up" the rules of secession by judicial fiat[162] would do better to investigate the historical and political factors leading up to the judgment. Indeed, the entire purpose of Ackerman's project of constitutional moments has been to unearth the ways in which popular values and political deliberation influence important constitutional changes. The Court made nothing up. Rather, it merely perceived widespread political consensus and popular support for the recognition of legitimacy of popular will and good faith negotiations as constitutional obligations and, like the Old Court, showed deference to these new articulations by accommodating them in constitutional law.

Finally, there is a thread of commentary that praises the Supreme Court of Canada for rediscovering certain facts or truths about the Canadian constitution in the judgment. For example, Professors Sujit Choudhry and Robert Howse have argued that the creation of the new constitutional obligation (i.e., good faith negotiations) is justified as an "extension of the internal logic of the Constitution."[163] They do so with a tenuous distinction between "normal interpretation" and "extraordinary interpretation."[164] The distinction, however, cannot be sustained. First, in attempting to establish the distinction, Professors Choudhry and Howse become confused as to why the Court appears to treat the decision as sometimes extraordinary and sometimes ordinary:

> Again, the Court was woefully unclear, in large part because while at some points it recognizes the extra-ordinary nature of the context, in

160. In *Moncton*, the New Brunswick Court of Appeal subsumes the unwritten principles in *Quebec Secession Reference* as merely underlying constitutional interpretation. Thus, they are, again, supplementary to the text: *Moncton*, *ibid.* at para.58. Similarly, in *Hogan and MacKenzie* two courts of appeal reiterate the primacy of the written text *vis-à-vis* unwritten principles.

161. (2001) 56 O.R. (3d) 505 (Ont. C.A.). In that case, the Court quashed a decision by a government Housing Commission to close an Ontario francophone hospital on the basis that it failed to give serious weight to the importance of the hospital to the minority francophone population contrary to the unwritten constitutional principle of respect for and protection of minorities.

162. For example, see. D. Usher, "The new constitutional duty to negotiate" (1999) 20(1) Policy Options 41, 42; Editorial, 'How the Courts Are Rewriting the Constitution,' *The Globe and Mail* (3 December 1999) A20; J. Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11 Const.Forum 60; W.H. Hurlburt, "Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court of Canada" (1999) 26 Man.L.J. 181.

163. Choudhry, *supra* note 3 at 157.

164. Choudhry, *supra* note 3 at 156-157.

> many other places it seeks to present its judgment as quite ordinary, rather than acknowledging that it had shifted gears into an extra-ordinary mode. Thus, for example, at one point it stated that the duty to negotiate flowed not from a positive referendum result that amounted to a repudiation of the existing constitutional order, but rather from any proposals for constitutional amendment.[165]

The reason, I would suggest, is that this "extraordinary" decision was not to be limited to one extraordinary instance, but rather, to be applied in cases of "normal interpretation" as well. Second, the distinction is deeply problematic for normal judicial practice. How would lower courts apply the distinction? Are they to ignore the Supreme Court of Canada's holding in *Quebec Secession Reference* as extraordinary? If this is the case, then the Court's passages highlighting the "vital" nature of underlying principles with independent legal force are meaningless, and thus violate the very rule of law they purport to follow. The idea that the *Quebec Secession Reference* is merely an illustration or extension of the internal logic of the constitution sounds suspiciously like the Myth of Rediscovery, that the Court has "rediscovered" the duty to negotiate within the logic of the constitution.

Similarly, on the Court's recourse to unwritten norms, Professor Mark D. Walters writes:

> [T]he Court's effort to anchor its unwritten constitution in "ages past" evokes the grand tradition of *lex*, or *ius, non scripta* embraced by Coke and other seventeenth-century common lawyers for whom the constitution was based upon customs practised "time out of mind." Unfortunately, the Court's references to this ancient legal past are fleeting and under-examined. So too are its other historical arguments. For example, the majority of the Court held that it was the intention of the framers of the Constitution Act, 1867, that certain unwritten norms be regarded as having a fundamental and supreme status in Canadian law - but no support is given for this remarkable interpretation of Canadian constitutional history.[166]

Walters also credits the Court for rediscovering a "grand tradition" dating back to Coke and the seventeenth century. Consistent with the Myth of Rediscovery, Walters argues that the Court has returned to the *true* origins of the common law that emphasized the unwritten norms supporting the law. Yet, he is confused that the Court's historical arguments are so thin on this point.

165. Choudhry, *supra* note 3 at 157.
166. Walters, *supra* note 128 at 92-93.

The Myth of Rediscovery is not limited to legal scholars. For example, historian Michael D. Behiels writes:

> It would be interesting to know if Romney's rather harsh and unfounded criticism of the Supreme Court has changed since the Court's 1998 opinion on the *Reference Re the Secession of Quebec*, an opinion which is grounded in large measure on the Justices' largely unacknowledged and unexplained acceptance of the dual compact theories of Confederation! Any Canadian province can now extricate itself from the Confederal compact if it follows certain referendum procedures, acquires a clear majority however defined, and respects in the negotiated.[167]

For Behiels, the Court was correct in rediscovering the truth about Canadian Confederation – that it was a union based on compact. Yet, like Walters, Behiels finds the Courts supposed rediscovery as "unexplained."

These are all examples of the Myth of Rediscovery that Ackerman has pledged to demolish with his historical constitutional work.[168] Indeed, the reason why both Behiels and Walters cannot find support for their assessments in the reasons of the *Quebec Secession Reference* is because the Court was in fact not rediscovering any truths about Canadian constitutionalism. Instead, it was introducing new and innovative politics into constitutional doctrine in the heat of the constitutional moment.

V. *Toward a New Dialogical Theory of Constitutionalism*

Today, the dominant debate concerning constitutional adjudication in Canada focuses upon *dialogical theory*. Whether this theory is right or wrong, it only includes two players: the Supreme Court of Canada and the legislature.[169] One of the purposes of this paper was to advance a new inquiry that investigates the contributions to constitutional development of political parties, popular movements and the Canadian people themselves. What the *Quebec Secession Reference* involved was a dialogical interaction where new constitutional commitments and politics were articulated outside of the court, largely through political deliberation among parties, policy changes and popular values expressed in public opinion and electoral returns and, ultimately, the court showed deference to those new

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167. Michael D. Behiels, "Review of: *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation*" (2001) 38 Alta. L. R. 595 at 599.

168. *Foundations*, *supra* note 5 at 44.

169. For example, see Peter W. Hogg & Allison A. Thornton, "Reply" to "Six Degrees of Dialogue" (1999) 37 O.H.L.J. 529; Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 O.H.L.J. 513; Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Toronto: Oxford University Press, 2001); Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

commitments or, at least, consciously or subconsciously incorporated those commitments and politics into its judgment. Thus, a new dialogical theory of constitutionalism is required, one that also considers the role of popular and political forces in constitutional change.

This new dialogical theory would raise important normative issues. It is one thing to describe how various popular and political forces influenced the important doctrinal changes in the *Quebec Secession Reference*, but quite another to decide whether this is a good thing for the legitimacy and development of our constitutional order. Such concerns figure prominently in Ackerman's work on the theory of constitutional moments. For him, the historical role the American people have played in facilitating constitutional change secures the legitimacy of the American system. That is, the legitimacy of constitutional interpretation and change remains anchored in popular sovereignty.

In many ways, the political and popular forces played a similar role in the *Quebec Secession Reference*. That being the case, perhaps we can follow Ackerman and conclude that the Supreme Court's decision in the *Quebec Secession Reference* helps maintain the legitimacy of the Canadian constitutional order, being a triumph not of juridical craft, but popular and political dialogue through the development of new constitutional obligations outside of the courts.[170] Of course, this is a rather simplistic account of the normative equation. There are many who would find these revelations troubling.[171] Thus, I will leave these complex questions for a future day. They deserve a much more thorough treatment.

Finally, it should be said that my use of Ackerman's framework and comparison to the New Deal was only one way of demonstrating the events and political forces involved with the decision, how they influenced it, and how the courts attempted to deal with those norms and forces within the judgment. There are likely better ways of going about this inquiry. In the United States, many scholars such as Sanford Levinson, Paul Brest, Louis Fisher, and Mark Tushnet have all contributed to a significant body of work demonstrating how constitutional meaning is developed outside

170. Perhaps this was recognized in the judgment itself. Barbara Darby has noted that for the first time ever, the Supreme Court in *Quebec Secession Reference* states that it is the "people of Canada" who ultimately have the power to amend the constitution. See B. Darby, "Amending Authors and Constitutional Discourse" (2002) 25 Dal. L.J. 215.

171. For example, noted American constitutional scholar Laurence Tribe has found Ackerman's advocacy for a "free-form" approach to constitutional interpretation troubling for, among others things, failing to take the structure and text of the constitution seriously. See L. Tribe, "Taking Text and Structure Seriously: Reflections on Free Form Method in Constitutional Interpretation" (1995) 108 Harv. L. Rev. 1221. Canadian scholars would no doubt voice similar criticisms and more.

of courts and how they interact with judicially articulated norms.[172] This paper was taken up with a similar goal in mind. For if Ackerman is right about American constitutionalism—that only an attentive historical approach can discern the role that popular sovereignty plays in provoking constitutional change—perhaps only when a similar investigation in Canada is undertaken will the real stories of our experiences be revealed.

172. *E.g.*, Sanford Levinson & Paul Brest, *Processes of Constitutional Decisionmaking* (Boston: Little Brown, 1975); Louis Fisher, "Constitutional Interpretation by Members of Congress" (1985) 63 N. Car. L. Rev. 707; *Taking*, *supra* note 10.