

“A CONSTITUTION SIMILAR IN PRINCIPLE TO THAT OF THE UNITED KINGDOM”: THE PREAMBLE, CONSTITUTIONAL PRINCIPLES, AND A SUSTAINABLE JURISPRUDENCE

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In recent years, unwritten constitutional principles often find their place in Canadian constitutional law via their supposed foothold in the part of the preamble to the *Constitution Act, 1867* that refers to “a Constitution similar in Principle to that of the United Kingdom”. Principles such as judicial independence, democracy, federalism, constitutionalism and the rule of law, and protection of minorities have been derived from the preamble. This article looks through over a hundred years of Supreme Court of Canada case law in order to determine what that preambular phrase has meant over time. It turns out that in the years immediately after 1867, it referred to what we now call political constitutionalism. A hundred or so years later, this same passage came to be associated with legal constitutionalism, though the Court has more recently backed away from the fullest implications of that approach. This article proposes a reading of the preamble and constitutional principles that is consistent with recent Supreme Court of Canada case law and defensible given current jurisprudential trends. That reading gives due regard to the traditional meaning of the rule of law all the while acknowledging that there are genuinely hard cases (particularly prevalent at the Supreme Court level) where neither rules nor principles provide clear answers. In those circumstances, respect for the rule of law requires as much wisdom and judgement as it does application of more prosaic legal skills. This article therefore recommends what is here referred to as a “sustainable jurisprudence” that offers an essential bridge between by now orthodox Dworkinian principle-based reasoning and contextual studies more commonly found in socio-legal, feminist, and other critical literature.

Au cours des dernières années, les principes constitutionnels non écrits ont souvent trouvé leur place dans le droit constitutionnel canadien à travers leur prétendu ancrage dans la partie du préambule de la *Loi constitutionnelle de 1867* référant à « une constitution reposant sur les mêmes principes que celle du Royaume-Uni ». Des principes comme l'indépendance judiciaire, la démocratie, le fédéralisme, le constitutionnalisme et la primauté du droit, ainsi que la protection des minorités découlent du préambule. Cet article déchiffre une centaine d'années de jurisprudence de la Cour suprême du Canada afin de déterminer le sens attribué à cette phrase préambulaire au fil du temps. Il s'avère que, dans les années suivant tout juste 1867, elle référerait à ce que nous appelons maintenant le constitutionnalisme politique. Une centaine d'années plus tard, ce même passage est associé avec le constitutionnalisme légal, bien que la Cour ait récemment pris du recul par rapport aux pléines implications de cette approche. Cet article propose une lecture du préambule et des principes constitutionnels qui est compatible avec la jurisprudence récente de la Cour suprême du Canada et défendable au vu des tendances jurisprudentielles actuelles. Cette lecture accorde une considération appropriée au sens traditionnel de la primauté du droit, tout en reconnaissant que certains cas sont réellement complexes (ce qui est particulièrement fréquent au niveau de la Cour suprême), lorsque ni les règles ni les principes ne fournissent de réponse claire. Dans ces circonstances, le respect de la primauté du droit requiert tant la sagesse et le jugement que l'application d'habiletés juridiques plus prosaïques. Cet article recommande donc ce que l'on appelle ici une « jurisprudence durable », qui crée un pont essentiel entre un raisonnement dworkinien basé sur des principes et les études contextuelles plus souvent trouvées dans la littérature sociojuridique, féministe et dans d'autres genres de littérature critique.

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Introduction

In recent years, unwritten constitutional principles have often found their place in Canadian constitutional law via their supposed foothold in the part of the preamble to the *Constitution Act, 1867* that refers to “a Constitution similar in Principle to that of the United Kingdom”. Principles such as judicial independence, democracy, federalism, constitutionalism and the rule of law, and protection of minorities have been derived from the preamble. In this article, I look through almost 150 years of Supreme Court of Canada case law in order to determine what that preambular phrase has meant over time.

It turns out that in the years immediately before and after 1867, the relevant part of the preamble largely referred to what we now call political constitutionalism,¹ or the idea that constitutional questions should generally be resolved by democratically elected institutions. Concepts such as parliamentary sovereignty, parliamentary privilege, and the many constitutional conventions that filled out the essentially uncodified Constitution were manifestations of this political constitutionalism. Therefore, as a historical matter, it appears mistaken to suggest that the preamble was an “invitation” to courts to fill “gaps”² in the Constitution, in the manner suggested by the Supreme Court of Canada in the 1990s. And, as it happens, for the first 125 years of Confederation, the preamble was used in a more constitutionally orthodox fashion—that is, as an aid to interpretation.

How has it come to be that the preamble is now associated with legal constitutionalism, or the idea that constitutional questions should be resolved—and gaps filled—by courts? If the Supreme Court of Canada’s purported textual justification for this gap-filling tendency (the 1867 preamble) is not very convincing, then are there better justifications available? I propose a reading of the preamble and constitutional principles that is attentive to text, case law, principle, and an evolving Canadian context—what might be called a “sustainable jurisprudence.”³ Before considering my own reading, I describe other, more familiar options. Even if the preamble

¹ For an up-to-date account of “political constitutionalism” from a wide range of perspectives, see the special issue on “The Political Constitution at 40” (2019) 30:1 King’s LJ 1ff.

² See generally Martin Loughlin, “The Silences of Constitutions” (2018) 16:3 NYU Intl J Cont L 922 for a recent discussion of silences, gaps, and abeyances in constitutional texts and the main interpretative methods deployed to deal with them.

³ A more detailed account of what I call “sustainable jurisprudence” is in preparation, but a brief summary appears below in Part IV. I am grateful to Amanda Turnbull for suggesting the name for this approach; however, I am of course responsible for any errors or lack of clarity in presenting it. This article begins to explore the evidence in recent Canadian practice of a theory of adjudication that could be said to be part of a sustainable jurisprudence. Further dimensions of this sustainable jurisprudence will have to await a subsequent publication.

is not a convincing justification for the Court's gap-filling role, other jurisprudential developments since 1982 might be said to serve.

The 1980s happened to coincide with the growing influence of the ideas of Ronald Dworkin, according to which "hard cases" (including gaps in the text of the Constitution) can and should be filled with interpretations based in principle and political morality. This approach, and approaches like it, apparently obviate any need to find a foothold in the preamble. Therefore, by way of a first example, when a century's worth of unilingual Manitoba laws were deemed to violate the constitutional text in the *Manitoba Reference* of 1985,⁴ the Supreme Court used other countries' constitutional experience and the principle of the rule of law to inform its bold use of suspended invalidity, delaying the effects of its opinion until the laws could be brought into compliance.⁵ While it is true that "the rule of law" formed part of the UK constitution and could be identified via the preamble, nothing like this sort of muscular deployment of the principle could be grounded in the United Kingdom's more restrained tradition of judicial power. A deeper jurisprudential movement seemed to explain this and subsequent cases, including the Supreme Court's well-known *Secession Reference* decision of 1998.⁶

If the jurisprudential approach of Dworkin and his successors—and the related tradition of common law constitutionalism—had truly taken hold in the 1980s and 1990s, then it would have been hard to see where the courts' brief stopped in the name of deciding hard cases or filling gaps. And yet the courts clearly began to perceive limits to how far they could go in reasoning from principles. I explore the possible jurisprudential foundations for the courts' evolving approach to principles (and what is often referred to as common law constitutionalism).

As Mark Walters has identified,⁷ Dworkin's earliest writing on constitutional reasoning spoke of a process of "reflective equilibrium"—a sort of "back and forth," on Dworkin's account, between the underlying principles, on the one hand, and the ongoing intuitions about how to realize those principles as represented by the common law, on the other hand.⁸ In a later rendition, Dworkin set out this account using the compelling analogy of the

⁴ *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 [*Manitoba Reference* cited to SCR].

⁵ See *ibid* at 758–62.

⁶ *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference* cited to SCR].

⁷ Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 245 at 252 [Walters, "Written Constitutions"].

⁸ See Ronald Dworkin, *Taking Rights Seriously* (London, UK: Duckworth, 1977) at 81–130 (on hard cases), 155–68 (on reflective equilibrium).

chain novel, according to which each new chapter is based on a judge's best reading of the chapters that have come before.⁹ Dworkin's model had the advantage, formally speaking, of confining the judges' tools to rules, principles, and even morality developed *in the past* and applied *in the present*. So many of our legal instincts tell us that this is the proper way for law to work. The problem with Dworkin's version of reflective equilibrium is that, by confining itself in this way, it risked becoming less relevant and less effective *in the future* in the society to which it was meant to apply. Laws and legal systems, unlike chain novels, have to be relevant, effective, and sustainable in the real world, otherwise the promise of the rule of law cannot be realized.¹⁰

Another version of reflective equilibrium in hard cases (a more sustainable version, I argue here) imagines a back and forth not just between principles and the intuitions represented in prior cases, but also between principles and the actual context in which they must play out. This version of reflective equilibrium is expressly rejected by Dworkin,¹¹ probably because it opens up lawmaking in hard cases to accusations of non-legal policy-making. I argue that the application of general principles in hard cases is always a matter of judgement,¹² in its more traditional sense of wisdom or statecraft. In this version, taking the factual context seriously is not just

⁹ See Ronald Dworkin, *Law's Empire* (London, UK: Fontana Press, 1986) at 228–38.

¹⁰ I am here emphasizing the fact that the traditional virtues of the rule of law cannot be delivered in the future in the manner desired by adherents to that principle if law and legal system increasingly lack effectiveness (due to factors such as declining relevance to pressing contemporary challenges).

¹¹ See Dworkin, *Taking Rights Seriously*, *supra* note 8 at 159–66 (where he distinguishes between moral and common law forms of reasoning, the former taking facts into account and the latter confined to something more akin to specifications of general principle).

¹² In the United Kingdom and Canada, where the spelling “judgement” (with a second *e*) is commonly used, “judgment” (without a second *e*) is almost invariably used where legal proceedings are being referred to. The spelling “judgement” with two *e*'s that I have used here is intended to signal that decisions in genuinely hard cases involve a process and an attitude that is familiar to us in our daily life, aided by experience, empathy, common sense, etc., and which, when done well, we describe using words such as “wisdom,” “statecraft,” “discretion,” and the like. For further discussion and examples, see Peter C Oliver, “Change in the Ultimate Rule of a Legal System: Uncertainty, Hard Cases, Commonwealth Precedents and the Importance of Context” (2015) 26:3 King's LJ 367, especially n 7 [Oliver, “Change in the Ultimate Rule”]. In instances where I do not want to emphasize judgement in the broader sense just described, I have tended to speak of legal “decisions,” “opinions,” or “rulings” rather than risk confusion by alternation between “judgement” and “judgment.”

To be clear, I am not so much preferring judgement of the more expansive kind as saying that something of that nature is inevitable in hard cases (unless the opposite of judgement or wisdom—e.g., dogmatic and out-of-touch decision-making—is preferred, which appears to me to have nothing to recommend it). As I elaborate below, the very fact that judging in hard cases requires wisdom and sensitivity to context also means that it requires humility (which is not always the same thing as inaction).

desirable; it is essential to the law's future effectiveness, its sustainability. And, as counterintuitive as it might sound to those of us with a traditional legal education, those who care about the rule of law should be just as concerned with this forward-looking, judgement-based aspect of law as with its more familiar past-focused aspect.

At this point, it is usually (and rightly) said that judges are far from infallible (not to mention unelected) assessors of the broader factual context into which law plays out. It does not follow, however, that with their limited abilities to assess in mind, judges should always leave the law as it is. To do nothing can be as "activist" as to do something in any particular hard case.¹³ What good judges generally do in hard cases is to take a measured step¹⁴ in what seems to them to be the best direction, taking into account such rules and principles as exist, and such consideration of the context into which their decision will play out as their experience and counsels' pleadings allow.¹⁵ Without suggesting that Canadian courts always employ this jurisprudential method, I do think that what I call a sustainable jurisprudence points to some important elements in the current Canadian attempt to balance political and legal constitutionalism.

If this reading and analysis are correct, then Canadian courts have not simply moved from dominant political constitutionalism of 1867–1982 to dominant legal constitutionalism from 1982 onward. Instead, Canadian courts are moving toward an important compromise between the values that animated both periods of Canadian constitutional history. This more sustainable jurisprudence involves, as it must, a healthy respect for the many rules that constitute law in its traditional form. However, in the sorts of hard cases that regularly appear before the Supreme Court of Canada, a more sustainable jurisprudence provides courts with guidance in applying general principles to the broader context into which the courts' eventual judgements will play out.

The balance of this article proceeds as follows. Part I sets out basic rules regarding preambles and constitutional interpretation, and sketches a rough picture of the nineteenth-century UK constitution. Part II examines how the relevant apex courts (the Supreme Court of Canada and, until the middle of the twentieth century, the Judicial Committee of the Privy Council) interpreted the preamble before 1982, while Part III examines how the Supreme Court of Canada has interpreted it after 1982. Part IV seeks an

¹³ On the slippery distinction between so-called "activism" and "restraint," see Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1980) at 132.

¹⁴ Including a non-step, viewed here as one "measured" option, rather than presumptively favoured judicial behaviour.

¹⁵ This observation applies in private law, and it applies with greater force in public law, where the effects of any particular ruling are often likely to extend well beyond the facts and parties of the particular cause of action.

explanation for the very different accounts of the preamble pre- and post-1982, opting for an explanation based on what I have termed a sustainable jurisprudence. I then present a summary of findings in the conclusion.

I. Basic Rules Regarding Preambles and Constitutional Interpretation in the British Constitutional Tradition

A. *Preambles and Statutory Interpretation*

The *Constitution Act, 1867* begins with a four-paragraph preamble. This article will focus on the first paragraph, and especially on its final phrase:

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a *Constitution similar in Principle to that of the United Kingdom*.¹⁶

Driedger and Sullivan tell us that preambles are most often relied upon to reveal legislative purpose.¹⁷ That purpose should be apparent in a clearly

¹⁶ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, Appendix II, No 5 (formerly *British North America Act, 1867*) [emphasis added].

¹⁷ See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at 448 [Sullivan, *Construction of Statutes*] (previous editions published under the title *Sullivan and Driedger on the Construction of Statutes*); Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at 138. See also Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 65; Kent Roach, “The Uses and Audiences of Preambles in Legislation” (2001) 47:1 McGill LJ 129; Danielle Pinard, “Les énoncés de fait du législateur et le contrôle judiciaire de constitutionnalité au Canada : de l’utilisation des préambules et autres dispositions non normatives des lois” (2008) 24:1 NJCL 27.

This article focuses on how preambles are viewed in Canada and, where relevant, the United Kingdom. It is worth noting, however, that there is a rich comparative law literature on constitutional preambles: see generally Justin O Frosini, *Constitutional Preambles at a Crossroads Between Politics and Law* (Santarcangelo di Romagna: Maggioli, 2012), and more recently, Wim Voermans, Maarten Stremmer & Paul Cliteur, *Constitutional Preambles: A Comparative Analysis* (Cheltenham: Edward Elgar, 2017). These comparative law accounts rightly point out that in some jurisdictions, constitutional preambles have been deployed with important substantive legal effect. For a discussion of the preamble to the Australian Constitution, see Mark McKenna, Amelia Simpson & George Williams, “First Words: The Preamble to the *Australian Constitution*” (2001) 24:2 UNSWLJ 382.

I thank Rivka Weill for providing me with a reminder of the striking French example regarding the Constitution of the Fifth Republic (for more, see Voermans, Stremmer & Cliteur, *supra* note 17 at 111–15). Acknowledging, therefore, that preambles *can* play an important role, the emphasis in this article is on whether the particular wording of

drafted statute, but an explanation of purpose that relies on a preamble has what Driedger and Sullivan call “a desirable authority”¹⁸ and “added force and legitimacy.”¹⁹ Preambles can occasionally reach deeper than legislative purpose. Due to the fact that legislation inevitably leaves room for interpretive discretion, a preamble can be helpful in spelling out the assumptions, values, and principles that the legislator takes to be relevant.²⁰

The leading UK authority on the use of preambles, according to Driedger and Sullivan, is *AG v. Prince Ernest Augustus of Hanover*.²¹ *Hanover* establishes that “preambles may always be looked at as part of the context, but only minimal weight should be attached to them,” though such weight as they merit will be affected by their “clarity and specificity.”²² As far as Canadian statutory interpretation is concerned, Driedger and Sullivan agree that the weight to be given to the preamble is affected by its clarity and specificity; they stress, however, that the “minimal weight” assessment in *Hanover* does not reflect Canadian practice, where the tendency is “to attach as much weight to the preamble as seems appropriate in the circumstances.”²³

Canadian statutory interpretation rules seem to leave considerable potential for making use of preambles. What then should we make of the preamble to the *Constitution Act, 1867*?²⁴ Before considering the understandings of the preamble that emerged after Confederation, it may be helpful

the 1867 preamble—“Constitution similar in Principle to that of the United Kingdom”—justified such a role.

Ewan Smith’s doctoral work (*The Unwritten Constitution in Britain and China* (DPhil Thesis, University of Oxford, 2018) [unpublished] at 132) provides a striking example of the legal significance of preambles. He describes how a seventeenth-century statute was repealed in 1863, leaving that statute’s preamble undisturbed, however. Almost seventy years later, Scrutton LJ relied on this “orphaned” preamble in *China Navigation Company Ltd v AG*, [1932] 2 KB 197 at 206–15, [1932] All ER 626 (CA).

¹⁸ Ruth Sullivan, ed, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 259.

¹⁹ Sullivan, *Construction of Statutes*, *supra* note 17 at 448. See also Côté, Beaulac & Devinat, *supra* note 17 at 66.

²⁰ On this point, see Sullivan, *Construction of Statutes*, *supra* note 17 at 450; Sullivan, *Statutory Interpretation*, *supra* note 17 at 139. See also Côté, Beaulac & Devinat, *supra* note 17 at 66.

²¹ [1957] AC 436, [1957] 2 WLR 1 (HL). See Sullivan, *Construction of Statutes*, *supra* note 17 at 452. See also Côté, Beaulac & Devinat, *supra* note 17 at 67.

²² Sullivan, *Construction of Statutes*, *supra* note 17 at 452–53.

²³ *Ibid* at 453.

²⁴ On the question of whether statutory and constitutional interpretation are different, see Stéphane Beaulac, “Constitutional Interpretation: On Issues of Ontology and of Interlegality” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 867, concluding that, at least since the early 1980s, the approach is very similar.

to consider what might have been meant by the phrase “a Constitution similar in Principle to that of the United Kingdom”, given the British constitutional tradition to which it clearly refers.

B. “A Constitution Similar in Principle to That of the United Kingdom” from a Nineteenth-Century Perspective

In some (especially foreign) eyes, the United Kingdom had no constitution at all, if “constitution” meant an entrenched, supreme, judicially reviewable, codified set of rules, as was the case with the US Constitution at the time. However, “constitution” has always had a narrower and a wider sense. The narrower sense has just been described. The wider sense refers to an assemblage of rules dealing, most importantly, with the establishment of the institutions of government, the relationships between the various institutions *inter se*, and the relationship between those institutions and citizens.²⁵ The United Kingdom has always had a constitution of this type, and its sources are many and varied: acts of Parliament (e.g., the *Bill of Rights*, the *Acts of Union*, the *Act of Settlement*, the *Representation of the Peoples Acts*, the *Habeas Corpus Act*), common law decisions (e.g., *Prohibitions del Roy*,²⁶ *Case of Proclamations*,²⁷ *Entick v. Carrington*²⁸), Crown prerogative (arising in custom but circumscribed by the common law), constitutional conventions (including the office of prime minister, the cabinet, and the workings of responsible government generally), the law and custom of Parliament (including parliamentary privilege), and so on.

The preamble to the *Constitution Act, 1867* (“1867 Act”) did not say that the constitution (in the wider sense) of the United Kingdom will also belong to Canada. Rather, it said that Canada would have “a” constitution “similar in Principle”. The act that followed the preamble set out provisions regarding institutions, the relationship between institutions, and to a lesser extent, the relationship between institutions and citizens. It did so in a way that was entrenched, from a Canadian perspective (by virtue of it being an act of the UK Parliament), was supreme (by virtue of section 2 of the *Colonial Laws Validity Act, 1865*), and gave rise to judicial review (given that acts and decisions of “subordinate” Canadian bodies acting under the *Imperial Act* were reviewable in the British constitutional tradition, unlike acts of the UK Parliament itself). And like the US Constitution, the 1867 Act established a federal system of government.

²⁵ See e.g. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan, 1985); Adam Tomkins, *Public Law* (New York: Oxford University Press, 2003) at 3.

²⁶ (1607), 12 Co Rep 64, 77 ER 1342.

²⁷ (1611), 12 Co Rep 74, 77 ER 1352.

²⁸ (1765), 2 Wils KB 275, 95 ER 807 [*Entick*].

In what sense then could this entrenched, supreme, federal constitution under which judicial review is possible be similar in principle to that of the United Kingdom? After all, I have just noted some of the similarities to the US Constitution. The most salient similarities to the constitution of the United Kingdom were the following: the Queen, prime minister, cabinet, and system of responsible government; the sovereignty of Parliament and the protection of rights by means of the common law; and the law and custom of Parliament.

1. The Queen, Prime Minister, Cabinet, and the System of Responsible Government

The 1867 *Act* referred to the legislative institutions (House of Commons and Senate) and the courts, but it said very little about the executive, or very little that was recognizable to lay observers. Executive power was vested in the Queen and in the Governor General and Lieutenant-Governors, with little mention of the establishment of and limits on the exercise of that power. The detailed rules regarding succession to the throne, like the detailed rules regarding the election, composition, and functioning of the Westminster Parliament (the *de facto* general amending formula of the Canadian Constitution²⁹), were nowhere to be found. In a way this was not surprising, seeing as the Crown (and the Crown-in-Parliament) were British institutions of long standing. If Canadians needed to know more about them, the preamble referred them to the United Kingdom and its laws and other traditions, without the need to adopt them into Canadian law.

The cabinet was referred to only obliquely, and the prime minister and premiers not at all. Similarly, the collective and individual responsibility of ministers to Parliament and the legislatures were not mentioned. Most of these latter “omissions” from the written text were, according to the constitution of the United Kingdom, governed by constitutional convention. Given that responsible government had already been achieved in the British North American colonies of Canada, New Brunswick, and Nova Scotia, it was inevitable that responsible government would also exist in the new Canada.

All this is to say that while the 1867 *Act* provided a substantial number of written constitutional rules, it did not in any sense purport to be *codified*. The Queen, prime minister, the cabinet, and the system of responsible government that were governed by *unwritten* constitutional conventions in the United Kingdom would be governed by similar rules in Canada. Unless this assumption is made, the 1867 *Act* makes very little sense. It is therefore safe to assume that the phrase “a Constitution similar in Principle to that

²⁹ See Peter Oliver, “Canada, Quebec, and Constitutional Amendment” (1999) 49:4 UTLJ 519 at 526ff.

of the United Kingdom” was at least intended to import unwritten conventional rules of this type. It is part of a broader post-1867 story (which is not emphasized in this particular narrative) that those same conventions evolved as Canada moved from colony to independent nation.³⁰

2. Sovereignty of Parliament and the Protection of Rights by Means of the Common Law

Other than rights regarding the use of the English and French languages, the 1867 *Act* made no attempt to protect rights in a manner similar to the famous American Bill of Rights. As Dicey would soon point out, rights in the UK constitution were protected in the common law, and (so it was said) in the good sense and tolerance of the British people and Parliament. In cases such as *Entick v. Carrington*,³¹ British judges ensured that the executive respected the rule of law and the liberties of subjects.³² Courts would not, however, invalidate acts of Parliament; Parliament remained supreme. Yet while only Parliament (not the executive) could trump the common law, it was assumed that a democratically elected Parliament would not cede its powers to the executive or attack the liberties of its own citizens. If “a Constitution similar in Principle to that of the United Kingdom” is to be given a likely meaning, then the long-standing British approach to parliamentary sovereignty and rights would have to be close to the core of that meaning.³³

3. The Law and Custom of Parliament

Section 18 of the 1867 *Act* made clear that the Parliament of Canada could define the privileges, immunities, and powers of the Senate and House of Commons. However, until Parliament did so, the privileges, immunities, and powers of the Senate, House of Commons, and provincial legislatures were presumably those that had already existed in the legislatures of the British North American colonies, and in the British parliamentary tradition for far longer. These rules are essential to the running of Parliament in the British tradition. Although such rules have often been overlooked or under-emphasized by constitutional lawyers, they too are essential to the proper functioning of the Constitution in the British tradition. And again, it is difficult to understand the 1867 *Act* without them. It

³⁰ *Contra* Louis Sormany, “La portée constitutionnelle du préambule de l’Acte de l’Amérique du Nord britannique” (1977) 18 C de D 91 at 103, who downgrades the importance of constitutional conventions with regard to the preamble.

³¹ *Entick*, *supra* note 28 at 818.

³² See Dicey, *supra* note 25 at 193–95.

³³ Sormany, *supra* note 30, argues that the sovereignty of Parliament is at the core of the preamble.

is likely, therefore, that the preamble is also referring to the law and custom of Parliament where it speaks of “a Constitution similar in Principle to that of the United Kingdom”.

4. A Common Denominator or Dominant Theme?

The common theme seems to be that “a Constitution similar in Principle to that of the United Kingdom” would *intentionally* leave gaps in the written text. That is, such a constitution would not try to cover all potential constitutional terrain with formal legal rules. Put another way, as noted earlier, the framers of the Constitution had not made an attempt at codification. Under the UK constitution, many important topics are left beyond the purview of law. This is not to say that they are unregulated. Rather, their regulation is governed by non-legal norms, principally political ones. A constitution similar in principle to that of the United Kingdom is, to a significant extent, a “political constitution.”³⁴

If we take the topics identified above (under headings 1, 2, and 3) in turn, we can see how the UK model works. It would be possible for the UK constitution both to create and to limit the executive. Instead, the UK constitution accepts extraordinary executive powers vested in the Queen, in the form of the prerogative, and (until relatively recently³⁵) it provided very little in the way of legal regulation of these powers. The courts have some say in identifying the existence and extent of the Crown prerogative,³⁶ but in many cases (even today), its exercise is legally unregulated. Instead, political norms, including constitutional conventions, do the important work of regulating seemingly exorbitant legal power. Far from being an invitation to courts to fill legal-constitutional gaps regarding executive power, the preamble seemed to say that the absence of thorough-going legal-constitutional regulation is acceptable; political regulation would do the rest of the job. That view has been subsequently questioned, even in the United Kingdom, but it remains a powerful feature of the British constitutional tradition.

The same is true for parliamentary sovereignty and rights. The UK constitution gave sovereign legislative power to (the Crown-in-) Parliament. This seemed to mean that Parliament could limit or erase the rights of subjects. It is quite normal in constitutional systems for courts to assume the responsibility of making sure that this does not happen. However, under the UK constitution, the courts’ role, and therefore the law’s role, is constrained: again, political regulation plays an important part. The courts

³⁴ Once again, for an up-to-date account of political constitutionalism from a wide range of perspectives, see the special issue on “The Political Constitution at 40”, *supra* note 1.

³⁵ See *CCSU v Minister for the Civil Service*, [1985] AC 374, [1984] 3 All ER 935 (HL).

³⁶ See *ibid* at 936–37.

developed the common law so as to respect the liberties of subjects, widely and robustly interpreted, but if Parliament ever considered limiting or erasing those rights in clear terms, then (again, until recently³⁷) the sanction lay not in the courts, but in the political process writ large (parliamentary pressure, elections, demonstrations, etc.). Understood in this sense, the preamble was a reminder to courts not to fill politically regulated terrain with too much law.

The law and custom of Parliament was a further example of this phenomenon, and one where the courts and Parliament had engaged in political battles (disguised as law from the courts' side) for some time.³⁸ The whole premise behind the law and custom of Parliament was that the courts would not attempt to regulate the internal affairs of Parliament. And again, we must remind ourselves that the absence of legal regulation did not mean the absence of any regulation whatsoever. Parliament had every interest in regulating its own affairs rigorously and competently. The preamble's "Constitution similar in Principle to that of the United Kingdom" was a reminder of that fact as well.

It is quite natural for those who are familiar with codified constitutions to ask a range of "what if" questions. *What if* the Queen or her representative abused their power and refused to assent to any of the legislation proposed by a democratically elected government? *What if* Parliament enacted legislation that erased the ability of certain groups in society to participate in political life? *What if* Parliament persistently misrepresented the results of votes taken in the House of Commons? The traditional approach of the UK constitution was to assume that these pathological developments would be resolved by non-legal means. However, even under the UK constitution it was possible that truly extraordinary circumstances would prompt a court to intervene, perhaps where it deemed the very fabric of the constitutional structure to be under attack. Nevertheless, many experts on the UK constitution argued that even in such extreme circumstances, the political constitution would be left to regulate itself without interference from the courts.³⁹

Clearly, then, the preamble pointed readers of the uncodified Canadian Constitution in the direction of answers to important questions regarding,

³⁷ See *Human Rights Act 1998* (UK), ss 3 and 4.

³⁸ See *Stockdale v Hansard* (1839), 9 Ad & E 1, 112 ER 1112 (QB).

³⁹ See Lord Irvine of Lairg, "Judges and Decision-Makers: The Theory and Practice of the *Wednesbury Review*" [1996] Public L 59 at 77. But see, subsequent to the arrival of the *Human Rights Act 1998*, Lord Irvine of Lairg, "Sovereignty in Comparative Perspective: Constitutionalism in Britain and America" (2001) 76:1 NYUL Rev 1 at 16, 18.

for example, executive and legislative power not set out in that Constitution. But it did not invite Canadian courts to import or invent new legal material to fill those gaps. Many laws lay behind the British sovereign and the Westminster Parliament, each of which played an important, ongoing role with respect to Canada after 1867. Anyone intent on knowing more about the legal nature of these constitutional actors was directed to the United Kingdom to find answers. However, those laws were not thereby imported into Canadian law, nor was it up to Canadian institutions—judicial, legislative, or executive—to regulate or alter them. What Canadians did do, however, was to develop constitutional conventions, norms of political behaviour, initially in the British tradition, but later in more distinctly Canadian ways, in keeping with Canada’s evolution from colony to independent nation. But this was principally a political evolution, as I have tried to emphasize.

Following this attempt to coax out some of the more salient potential meanings of the preamble in the British constitutional tradition, we can now turn to the Canadian courts’ treatment of the preamble.⁴⁰ It will be convenient and appropriate to divide this analysis into two periods: pre-1982 and post-1982. Generally speaking, the courts used the preamble in a manner consistent with traditional statutory interpretation prior to 1982. After 1982, however, there was a relative explosion of judicial creativity with regard to the preamble. The Supreme Court began to view the preamble as an invitation for judges to discover legal principles to fill gaps—even

⁴⁰ I agree with the suggestion by my colleague Vanessa MacDonnell that it would also be interesting to examine how the preamble has been used in Canadian parliamentary debates. Unfortunately, this article does not consider the preamble from that perspective. Prompted by her suggestion, I have, however, searched the pre-1867 debates in Canada for references to the “Constitution similar in Principle”. There are no clear references, but a few key speakers appear to be anticipating the phrase that eventually appeared in the preamble. The Honourable Sir Etienne-Pascal Taché noted that “if [we] were anxious to continue our connection with the British Empire, and to preserve intact our institutions, our laws, and even our remembrances of the past, we must sustain the measure” (PB Waite, *The Confederation Debates in the Province of Canada, 1865: A Selection*, 2nd ed (Montreal: McGill-Queen’s University Press, 2006) at 1).

Not surprisingly, the words of then Attorney General Macdonald come closest to the future preamble: “In this younger country one great advantage of our connection with Great Britain will be, that, under her auspices, inspired by her example, a portion of her empire, our public men will be actuated by principles similar to those which actuate the statesmen at home” (Province of Canada, Legislative Assembly, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 8-3 (6 February 1865) at 44 (AG Macdonald)).

The Honourable Mr. Dickson, reading a letter of protest against a proposition, stated, “The Act of Union conferred upon the people of Canada a Constitution as nearly similar to that under which Great Britain has attained her place among nations, as their colonial position would admit; and the Legislative Council, an integral part of that Constitution, was early established on its present basis as a check equally upon the hasty action of the popular branch, as upon the undue influence of the Crown” (*ibid* (17 February 1865) at 287 (Hon Mr. Dickson)).

gaps that had originally been the preserve of the political part of the Constitution.

One of the questions that arises from this account is whether the 1982 patriation process completed the Constitution of Canada, by turning an uncodified model into a codified one, or whether even after 1982, our Constitution should be understood to contain deliberate gaps where legal-constitutional regulation is off limits. That question will be answered in Part IV as part of a discussion about the role of principles and “a Constitution similar in Principle to that of the United Kingdom” in contemporary Canadian constitutional law.

II. The Privy Council, the Supreme Court of Canada, and the Preamble Prior to 1982

This long early period of Supreme Court and Privy Council interpretation of the preamble reveals surprisingly little about the phrase “a Constitution similar in Principle to that of the United Kingdom”. In over a century, the preamble was infrequently cited, and where it was cited, it was not required to bear much weight. Nonetheless, these early cases do give us some guidance as to interpretive method and substantive content regarding the preamble. By “interpretive method,” I am referring to the *ways* in which the preamble has been mobilized by courts, whereas by “substantive content,” I am referring to what the preamble is taken to *mean*, or what principles are understood to follow from it. It is important to keep these separate analytically, given that the former relates to courts’ self-understanding and the latter to the actual results of that understanding, though in practice both are at play to varying degrees. Focusing on the substantive results alone would leave unanswered the question of whether these results were arrived at deliberately or simply by unexamined assumptions and sloppy reasoning. We will see that the courts were often quite explicit as to their method where it was more traditional, less explicit where more radical.

A. Interpretive Method

1. Traditional or Orthodox Method

The first case to discuss interpretive method regarding the preamble was *Re Representation in the House of Commons*.⁴¹ Justices Davies and Mills used the preamble to discover the “objects” of the 1867 *Act*, in just the sort of way that Driedger and Sullivan would eventually recommend.

⁴¹ (1903), 33 SCR 475, 1903 CarswellNat 19 (WL Can) [*Re House of Commons* cited to SCR].

If they were to use the preamble at all, judges in this period were careful to point out that it was the preamble, *together with the 1867 Act*, that enabled them to interpret the meaning of the Constitution. Some examples may be helpful here.

In *Valin v. Langlois*, Justice Henry used the preamble to support his conclusion that the federal Parliament was competent to legislate regarding contested elections. For him, the preambular reference to “a Constitution similar in Principle to that of the United Kingdom”, together with a subsequent preamble paragraph and the whole scope of the *Act*, indicated that, even under the new federal arrangements, no matter was beyond the jurisdiction of one or the other level of government, with residual matters falling to the federal Parliament.⁴²

In *Re References by the Governor-General in Council*,⁴³ the Supreme Court of Canada had to consider whether a federal Parliament that could undoubtedly create courts could also vest those courts with an advisory role. The majority, which concluded that Parliament did have such a power, cited the preamble alongside references to sections of the 1867 *Act*. However, in his reasons, Chief Justice Fitzpatrick placed considerable weight on the preamble on its own, citing sections of the 1867 *Act* more by way of contrast or complement than by way of direct support. It was perhaps in reaction to the Chief Justice’s willingness to use the preamble in such direct fashion that a second member of the majority, Justice Anglin, issued a caution, one in which reliance on the 1867 *Act* was clearly preferred:

It may be that, having regard to the preamble of the “British North America Act,” the power to create a court involves the right to impose upon it the duties prescribed by section 60 and that, *ex vi termini*, when constituted it is endowed with the powers necessary to enable it to discharge such duties. But such implied or inherent jurisdiction, whether legislative or judicial, is apt to prove, like public policy, “a very unruly horse.” Its limits are vague and ill-defined. It may become a specious pretext to cloak an unwarranted assumption of power. I prefer to rest my opinion that section 60 of the “Supreme Court Act” is *intra vires* upon the provision of section 91 of the “British North America Act.”⁴⁴

The other two members of the majority, Justices Davies and Duff, displayed a more traditional reliance on the preamble as a strong aid to statutory construction.⁴⁵

⁴² See *Valin v Langlois* (1879), 3 SCR 1, 1879 CarswellQue 8 at 65–67 [*Valin*].

⁴³ (1910), 43 SCR 536, 1910 CarswellNat 36 [*Reference Governor-General in Council* cited to SCR]. For more on this case and the Canadian appeal courts’ advisory role, see Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019).

⁴⁴ *Reference Governor-General in Council*, *supra* note 43 at 591.

⁴⁵ See *ibid* at 565 (Davies J), 588 (Duff J).

2. More Radical Uses of the Preamble

If one were to look to the pre-1982 period for more muscular approaches to interpretation using the preamble, where it was used to fill gaps rather than to aid in the interpretation of the text, there would be few cases to rely on. The Chief Justice's isolated approach in *Re References by the Governor-General in Council* has already been noted. One might also point to *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*⁴⁶ In determining whether "Peace, Order, and good Government" in section 91 of the *Constitution Act, 1867* included a federal power to deal with emergencies, the text provided scant indication. The final court to hear the case, the Judicial Committee of the Privy Council, was far more influenced by the underlying principles revealed in the preamble. Viscount Haldane used the preamble to contrast UK and Canadian unitary tendencies with American state-centred tendencies.⁴⁷ The radical nature of this approach lay in the willingness to probe at a deep level of principle and abstraction.

The most famous "radical" cases of preambular interpretation are those that made the argument for an implied bill of rights: *Reference Re Alberta Statutes*,⁴⁸ *Saumur*,⁴⁹ and *Switzman*.⁵⁰ While recognition of an implied bill of rights was a genuinely radical development at that moment in Canadian constitutional history, the interpretive method used in these cases was not as radical as is often remembered. It is a well-known fact that the implied bill of rights perspective never owned a majority in any of these cases, but it is less well known that even judges inclined to seek far-reaching conclusions often used traditional methods.

Chief Justice Duff in *Re Alberta Statutes* is exemplary in this respect. There is no doubting the importance of the Chief Justice's willingness to take the lead in recognizing limits to legislative sovereignty based on freedom of expression. However, Chief Justice Duff (with whom Justice Davis agreed) purported to arrive at his conclusions by conventional means: using the preamble to indicate the purpose of the 1867 *Act*,⁵¹ and then using the actual provisions of the act to bear the weight of his argument.⁵² In contrast, Justice Cannon was willing to make only passing reference to the

⁴⁶ [1923] AC 695, [1923] 3 DLR 629 (PC) [cited to AC].

⁴⁷ See *ibid* at 704–05.

⁴⁸ [1938] SCR 100, [1938] 2 DLR 81 [*Re Alberta Statutes* cited to SCR].

⁴⁹ *Saumur v Quebec (City of)*, [1953] 2 SCR 299, [1953] 4 DLR 641 [*Saumur* cited to SCR].

⁵⁰ *Switzman v Elbling*, [1957] SCR 285, 7 DLR (2d) 337 [*Switzman* cited to SCR].

⁵¹ See *Re Alberta Statutes*, *supra* note 48 ("[t]he preamble ... contemplates a parliament working under the influence of public opinion and public discussion" at 133).

⁵² See *ibid* ("[a]ny attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right ... would ... be incompetent to the legislatures of the provinces ... as repugnant to the provisions of the *British North America Act*" at 134).

1867 *Act*, and to base his reasons more squarely on political theory and the preamble.⁵³

In the second case of the implied bill of rights trilogy, *Saumur*, all of the judges expressed a view regarding the preamble. Chief Justice Rinfret and Justice Kerwin were, in declining degrees, skeptical as to the effect of the preamble. Justice Kellock was open-minded, but he read *Re Alberta Statutes* as being inconclusive, preferring therefore to leave the preamble and implied bill of rights argument for another day. Justice Rand, who was clearly sympathetic to the implied bill of rights argument, followed his reference to the preamble with an immediate reference to the substantive provisions of the Constitution, notably those that established democratic institutions.⁵⁴ Justice Estey made a very general assumption about what those who drafted the 1867 *Act* must have intended, supporting that exposed claim by citing “more particularly” the preamble.⁵⁵ Thus, he used the preamble as an aid to interpretation, but an aid that was admittedly carrying considerable weight. Justice Locke was the most enthusiastic in his support of the implied bill of rights theory, and he used the preamble as the only constitutional base for this argument. He fully supported Chief Justice Duff in *Re Alberta Statutes*, who, as we have just seen, was quite conventional in his interpretive approach.⁵⁶ In conclusion, three of the six judges in this case made use of the preamble, but only Justice Locke used it as the exclusive constitutional grounding. The other judges were more orthodox in their interpretive approach, although, as we have seen, it is sometimes instructive to gauge the relative influence of text and preamble in their reasoning.

The final case of the implied bill of rights trilogy was *Switzman v. Elbling*. In that case, Justice Abbott provided strong support for the implied bill of rights theory, basing his view predominantly on the preamble.⁵⁷ Thus, in his view, the preamble could be used to impose limits on provincial legislation. By way of *obiter dicta*, Justice Abbott expressed the view that the implied bill of rights placed limits on equivalent federal legislation, and that this too would be based in the preamble.

One of the cases thought to be inimical to the approach initiated by the implied bill of rights trilogy is *Canada (AG) and Dupond v. City of Montreal*.⁵⁸ In fact, what Justice Beetz said in that case was that, because freedom of assembly was not recognized in the United Kingdom, it could not

⁵³ See *ibid* at 145–46.

⁵⁴ See *Saumur*, *supra* note 49 at 330.

⁵⁵ See *ibid* at 359.

⁵⁶ See *ibid* at 371–75.

⁵⁷ See *Switzman*, *supra* note 50 at 326–28.

⁵⁸ [1978] 2 SCR 770, 84 DLR (3d) 420 [*Dupond* cited to SCR].

become part of the Canadian Constitution via the preamble: “Being unknown to English law, the right to hold public meetings on the public domain of a city did not become part of the Canadian Constitution under the preamble of the *British North America Act, 1867*.”⁵⁹ Far from rejecting the force of the preamble, this decision appeared to affirm it. Had this right been recognized in English law, Justice Beetz would apparently have considered it as a candidate to “become part of the Canadian Constitution under the preamble.”

3. The Traditional or Orthodox Method Reasserted

One of the clearest assessments of the proper interpretation of the preamble appeared just prior to patriation, in the *Patriation Reference*.⁶⁰ The majority reasons regarding the legal question in the reference put the preamble argument back in its place, so to speak; it had no force of law, and while it could illuminate other substantive provisions of the Constitution, it was those provisions rather than the preamble that did the work:

What, then, is to be drawn from the preamble as a matter of law? A preamble, needless to say, has no enacting force but, certainly, it can be called in aid to illuminate provisions of the statute in which it appears. ... There is also an internal contradiction in speaking of federalism in the light of the invariable principle of British parliamentary supremacy. Of course, the resolution of this contradiction lies in the scheme of distribution of legislative powers, but this owes nothing to the preamble, resting rather on its own exposition in the substantive terms of the *British North America Act*.⁶¹

This review of the period before 1982 reveals that although there are glimpses of more expansive, radical uses of the preamble, the interpretive method was essentially orthodox. I proceed now to examine the meaning given to the preamble even when it was used in this traditional manner.

B. Meaning or Substantive Content of a “Constitution Similar in Principle to That of the United Kingdom” Before 1982

Having discussed the interpretive method employed when using the preamble pre-1982, I now turn to the meanings that were given to the preamble when the courts referred to it. As we shall see, those meanings centred on a fairly narrow and predictable

⁵⁹ *Ibid* at 798.

⁶⁰ *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference* cited to SCR].

⁶¹ *Ibid* at 805–06.

range of matters: responsible government and sovereignty of Parliament; the implied bill of rights; and the separation of powers and the independence of the judiciary.

1. Responsible Government and Sovereignty of Parliament

The dominant theme in the pre-1982 preamble case law is responsible government in a context of parliamentary sovereignty. In *Re Representation in the House of Commons*, Justice Mills, with the support of three other judges, said twice that a “Constitution similar in Principle to that of the United Kingdom” referred to the principle of responsible government and the doctrine of sovereignty of Parliament.⁶² Twenty five years later, in *Reference re Meaning of the Word “Persons” in Section 24 of the British North America Act, 1867*,⁶³ Justice Duff stated that the preambular phrase means two things, both related to parliamentary sovereignty: first, that, subject to sections 91 and 92, Parliament and the provincial legislatures are sovereign; and second, the executive is responsible to Parliament and the legislatures.⁶⁴ In *Reference Re Weekly Rest in Industrial Undertakings Act*,⁶⁵ Justice Cannon quoted with approval the understanding of the preamble that emphasized responsible government.⁶⁶

As argued in Part I, because responsible government is based to such a large extent on convention, it is the most obvious candidate for inclusion in the understanding of the preambular phrase under study. This also appeared to have been the view of the Supreme Court of Canada in *Quebec (AG) v. Blaikie*:

The Lieutenant-Governor is part and parcel of the Legislature. ... He appoints members of the Executive Council and ministers ... and these, according to *constitutional principles of a customary nature referred to in the preamble of the BNA Act* as well as in some statutory provisions ... must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of its elected branch.⁶⁷

2. Implied Bill of Rights

As noted earlier, much of the implied bill of rights reasoning was based not on the preamble, but on a reading of the 1867 *Act* itself, notably the establishment through the *Act* of democratic institutions. The creation of democratic institutions implied certain rights to support them, notably freedom

⁶² See *supra* note 41 at 581–82, 585, 593.

⁶³ [1928] SCR 276, [1928] 4 DLR 98 [cited to SCR].

⁶⁴ See *ibid* at 291–92.

⁶⁵ *References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, And The Limitation of Hours of Work Act*, [1936] SCR 461, 3 DLR 673 [cited to SCR].

⁶⁶ See *ibid* at 517.

⁶⁷ [1981] 1 SCR 312 at 320, 123 DLR (3d) 15 [emphasis added].

of expression. It may be helpful to discuss the various rights that have at times been linked to the preamble, even if only by a minority of judges.

It is well known that cases such as *Re Alberta Statutes*, *Saumur*, and *Switzman* dealt primarily with the right to freedom of expression, or free public discussion, and that judges such as Justice Cannon in *Re Alberta Statutes*, Justices Rand and Locke in *Saumur*, and Justice Abbott in *Switzman* relied on the preamble to the greatest extent. However, the pre-1982 case law also recognized other key rights, such as freedom of religion.

The *Saumur* case had to do with the right to *express* unpopular views, but the views in question were of a religious nature, so freedom of religion was also implicated. Justice Locke acknowledged this explicitly, and linked the need to protect this freedom to the preamble.⁶⁸

Freedom of expression and religion are part of the core of rights that invariably appear in a written bill of rights. However, the preamble left an opening for the inclusion of non-standard rights that happened to have existed under the UK constitution. High profile cases like *Re Alberta Statutes* would have encouraged counsel to bring the preamble to bear in argument even where more peripheral rights were being alleged.

In *Winner v. SMT (Eastern) Ltd*,⁶⁹ Justice Kellock used the preamble in support of his view that a right to unrestricted use of the highway was available to all Canadians, as was the case in the United Kingdom. As with freedom of expression and freedom of religion, this meant that the right was limitable, if at all, only by the federal Parliament. We see here the interaction between rights and parliamentary sovereignty under the constitution of the United Kingdom. In the pre-1982 period, a right would be recognized and protected to the extent possible by the common law, but such rights would ultimately give way if Parliament legislated clearly to limit them.

In some instances, the UK constitution, which is to say (in the tradition of Dicey) the common law, did not recognize rights that were included in the bill of rights component of many other written constitutions. This was the case in *Dupond* where, as noted earlier, the absence of recognition of freedom of assembly in the UK common law tradition caused the Supreme Court of Canada to refuse to recognize such a right or freedom via the preamble.⁷⁰

⁶⁸ See *Saumur*, *supra* note 49 (“[i]n the *preamble* to the British North America Act the opening paragraph says: ... At the time this *Act* was passed, the [Canadian] Act of 1852 declaring *the right to freedom of religious* belief and worship was in force in Canada and gave to the inhabitants of the provinces *the same rights in that respect as were then enjoyed by the people of the United Kingdom*” at 371 [emphasis added]).

⁶⁹ [1951] SCR 887 at 928, [1951] 4 DLR 529.

⁷⁰ See *Dupond*, *supra* note 58.

3. Separation of Powers and the Independence of the Judiciary

The conventions of responsible government and the implied bill of rights claimed by far the greatest amount of attention prior to 1982 where the preamble was concerned. We should not leave this Part, however, without noting a brief reference to an aspect of the preamble that would attract considerable attention post-1982: the separation of powers and the independence of the judiciary.

In one of the first cases to cite the preamble, *Valin v. Langlois*, Justice Fournier linked the preamble to the creation and maintenance of judicial power, within a constitution based on the separation of powers: “One of the essential elements of the British Constitution, as of every regular government, is the creation of a judicial power, such power and the legislative and executive powers forming the three indispensable elements of every government.”⁷¹ It is well known that the British constitution substantially merges the legislative and executive powers, but if the separation of powers is understood principally to require the creation, maintenance, and independence of a judicial power, then Justice Fournier’s argument appeared to be well founded.

C. Is “a Constitution Similar in Principle to That of the United Kingdom” Frozen at 1867, or Is It Ambulatory? The View Pre-1982

The pre-1982 cases provided few clues as to the proper answer to this question, but given its potential importance to future litigation, it is worth noting that such clues exist.

In *Re Alberta Statutes*, Justice Cannon appeared to assume that 1867 was the relevant moment when the content of the preamble should be determined: “As stated in the preamble of *The British North America Act*, our constitution is and will remain, unless radically changed, ‘similar in principle to that of the United Kingdom.’ *At the time of Confederation*, the United Kingdom was a democracy.”⁷² Justice Cannon could have simply said that the United Kingdom was and is a democracy, assuming that he was not inclined to deny this fact in the 1930s, but instead he referred, deliberately it would seem, to “the time of Confederation.”

We have already seen how Justice Locke was willing to recognize freedom of religion in *Saumur*. Like Justice Cannon in *Re Alberta Statutes*, Justice Locke appeared to assume that the test for such a right under the preamble was set at 1867: “The right ... was a right of the subjects of Her Majesty under the constitution of the United Kingdom referred to in the preamble of the British North America Act *when that statute was passed*

⁷¹ *Valin*, *supra* note 42 at 50–51.

⁷² *Re Alberta Statutes*, *supra* note 48 at 146 [emphasis added].

*in 1867.*⁷³ However, it is difficult to place much weight on this or the statement by Justice Cannon. Neither judge dwelled on the point, and in the case of Justice Locke, it is quite possible that the reference to 1867 was simply a relatively insignificant reminder of the date of the 1867 *Act*.

III. The Supreme Court of Canada and the Preamble Post-1982

We have just seen that prior to 1982, the Supreme Court of Canada (or the Privy Council) tended to employ the preamble together with the actual provisions of the 1867 *Act*. This approach was understandable, given that the preamble lacked “enacting force,” as the majority on the legal question had stated in the *Patriation Reference*.⁷⁴

However, all of this was about to change. What we see in the post-1982 period is a marked tendency to use the preamble as an independent, and occasionally independently sufficient, source of law, as if it had somehow acquired in 1982 the “enacting force” it lacked in 1981. It will be important to gauge the extent to which this new trend is based on the preamble, the principles underlying the Constitution, or both.

A. *Interpretive Method*

1. The *Manitoba Reference*

The *Manitoba Reference* represented an about-face in terms of the Court’s use of the preamble. Here, the rule of law was said to become “a postulate of our ... constitutional order *by way of* the preamble.”⁷⁵ On the one hand, the clear grounding of an argument in “principle” opened up new potential for legal reasoning that the Supreme Court of Canada would enthusiastically explore over the next twenty or thirty years. On the other hand, in terms of the independent force of the preamble and its future interpretation, it was significant that the Court used the preamble to ground *a principle* rather than a precise rule. As we shall see, having used the preamble to ground a principle, the Court was then quite capable of using principles to determine more precise rules.

Further on in the *Manitoba Reference*, it appeared that the principle in question (the rule of law) was “implicit in the very nature of a Constitution,” independent of (or, as the Court says, “additional to”) its origin in the

⁷³ *Saumur*, *supra* note 49 at 376 [emphasis added].

⁷⁴ *Supra* note 60 at 805.

⁷⁵ *Manitoba Reference*, *supra* note 4 at 750 [emphasis added]. “Postulates” are taken here to be in the nature of broader principles from which various rules could be deduced rather than discrete rules with an open-and-shut quality.

preamble.⁷⁶ This may have been a clue as to how the Court in the *Manitoba Reference* wished to be understood. Given the highly exceptional nature of the facts that gave rise to the *Manitoba Reference*—the potential invalidity of a century’s worth of Manitoban laws—it would have been surprising to find specific provisions of the Constitution of Canada that dealt with the matter. However, despite the absence of specific provisions, given the fundamental nature of the principle at stake, it would have been equally surprising not to find evidence of this principle throughout the structure of that constitution. We will return to this at a later point.

As if in recognition of this about-face, the Court somewhat defensively stated that it could not take “a narrow and literal approach to constitutional interpretation.”⁷⁷ Given the exceptional nature of the case, this was probably right. However, the Court must have been aware that in analyzing the case as it did, it was opening the door to a new form of argumentation: “In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.”⁷⁸ The Court was somewhat disingenuous in saying that this approach was consistent with use made of the preamble in the *Patriation Reference*; we have already seen how the majority on the legal question in that case reaffirmed a traditional approach to the preamble.⁷⁹

2. *New Brunswick Broadcasting*⁸⁰

There are three important sets of reasons in this case insofar as the preamble is concerned. Chief Justice Lamer and Justice La Forest, separately, had important things to say about the interpretation of the preamble. Whatever the cogency of their comments on interpretation, it was Justice McLachlin (as she then was) who attracted majority support in the result.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 751 (“[t]he Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution”).

⁷⁸ *Ibid* at 752.

⁷⁹ See Part II.A.3, *above*. The minority in the *Patriation Reference* made use of principles in its argument, and this was later picked up by the Court in the *Secession Reference* (*supra* note 6 at paras 32, 54), though without noting the minority support for the point.

⁸⁰ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212 [*New Brunswick Broadcasting* cited to SCR].

Chief Justice Lamer began by making clear a point that he had left ambiguous in the earlier case of *R. v. Smith*:⁸¹ the preamble does not incorporate specific pieces of legislation. It incorporates broad principles that may be instantiated by specific legislation, but the constitutions of Canada and the United Kingdom are similar, not identical. Chief Justice Lamer here kept close to the text of the preamble, elucidating both the words “similar” and “principle.”⁸²

The broad incorporation in this case was that of parliamentary privilege. Its “inherent constitutional status” was “derived” from “the very nature of legislative bodies and the preamble.”⁸³ Further along, Chief Justice Lamer confirmed this approach, referring to “incorpora[tion] by way of the preamble of the *broad principle* of ... the independence of the legislative process.”⁸⁴ It is probably important to note that Chief Justice Lamer’s caution here was also reflected in his reluctance to award full constitutional status to the broad principles thus incorporated.

Justice La Forest, who agreed in general with Justice McLachlin, saw the preamble as “giving expression” to that which attached to local institutions by virtue of their continuance in Confederation or by virtue of their creation. In other words, other legal rules were doing the work, and the preamble was simply recording the result that had been achieved by other textual means.⁸⁵

Justice McLachlin, in agreement here with Chief Justice Lamer, clearly rejected the idea that the preamble incorporated specific sections of the Bill of Rights (or any other UK or imperial statute). Contrary to Chief Justice Lamer, however, Justice McLachlin found that there was “a *constitutional* privilege inherent in the legislative assembly by virtue of ... the preamble.”⁸⁶ Our key question, again, was whether the preamble on its own would have been sufficient, and Justice McLachlin seemed happy to leave the impression that it would have been so.

It was in considering the weight of the privilege’s constitutional status that Justice McLachlin disagreed most profoundly with Chief Justice

⁸¹ [1987] 1 SCR 1045 at 1061, 4 DLR (4th) 435 (“[w]e in Canada adopted through the preamble of our Constitution the legislative restraint set out in s. 10 of the *English Bill of Rights* of 1688”).

⁸² See *New Brunswick Broadcasting*, *supra* note 80 at 353.

⁸³ *Ibid* at 354.

⁸⁴ *Ibid* [emphasis added] (“[t]o incorporate by way of the preamble the *broad principle* of the fostering of the independence of the legislative process through the exercise of parliamentary privileges is much more palatable than incorporating a specific article of the *Bill of Rights* of 1689” at 354).

⁸⁵ See *ibid* at 368.

⁸⁶ *Ibid* at 373 [emphasis added].

Lamer. She argued that privilege had equal constitutional status as compared to the *Charter*, and that the preamble (which she referred to as “the first part of our written constitution”⁸⁷) appeared to be the main reason or justification for this. Here she was at her most categorical: “There is no question that this preamble constitutionally guarantees the continuance of Parliamentary governance.”⁸⁸ In her final restatement of the proposition at the heart of her analysis, Justice McLachlin seemed to develop something of a test for how to use the preamble: “[G]iven the clear and stated intention of the founders of our country in the *Constitution Act, 1867* to establish [1] a constitution similar to that of the United Kingdom, the Constitution may also include such privileges as have been [2] historically recognized as [3] necessary to the proper functioning of our legislative bodies.”⁸⁹

3. *Provincial Judges Reference*⁹⁰

This case explored the principle of judicial independence. Chief Justice Lamer, this time for the majority, noted that subsection 11(d) of the *Charter* could not protect judicial independence outside the criminal sphere, so there had to be a broader foundation, if, as he believed, the principle of judicial independence existed beyond that sphere. He located that foundation in an unwritten constitutional principle, with its origins in the *Act of Settlement*, but “recognized and affirmed” in the preamble.⁹¹ The specific provisions of the Constitution merely elaborated the principle, as Justice Rand had said in *Switzman*.⁹² Chief Justice Lamer found the alternative view (i.e., that the formal provisions of the Constitution exhausted the possibilities for judicial independence protection) unconvincing. Looking at it another way, he said that sections 96 and 100 could not themselves explain the judicial independence doctrine beyond the criminal sphere, notably where (non-section-96) provincial courts were concerned: “The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of *unwritten* understandings which are not found on the face of the document itself.”⁹³

Chief Justice Lamer set out a note of caution that is highly relevant to this analysis. He reminded us that there are reasons to keep close to the written text of the Constitution, first among which is the need for legal

⁸⁷ *Ibid* at 375.

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at 377.

⁹⁰ *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3, 150 DLR (4th) 577 [*Provincial Judges Reference* cited to SCR].

⁹¹ *Ibid* at para 109.

⁹² See *supra* note 50 at 306.

⁹³ *Provincial Judges Reference*, *supra* note 90 at para 89 [emphasis in original].

certainty.⁹⁴ It was therefore important that principles such as judicial independence have a basis in the preamble. But what was the legal nature of the preamble? Chief Justice Lamer rightly observed that its status had never been discussed in a systematic way.

Chief Justice Lamer began by saying that it was clear the preamble was part of the Constitution, but then immediately added, quoting the *Patriation Reference*, that it had no enacting force: “[S]trictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.”⁹⁵ But speaking less strictly, Chief Justice Lamer then began to make a case. First, the preamble indicated the purpose of a statute and helped in interpretation (to resolve ambiguity). But Chief Justice Lamer was inclined to go further. The preamble embodied the *principles* on which the 1867 Act was based: “As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also *invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme*. It is the means by which the underlying logic of the Act can be given the force of law.”⁹⁶

All of this illustrated, according to Chief Justice Lamer, the “special legal effect of the preamble.”⁹⁷ According to him, “[t]he preamble identifies the organizing principles of the *Constitution Act, 1867*, and *invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text*.”⁹⁸

Chief Justice Lamer summarized his approach as follows:

In conclusion, the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.⁹⁹

Justice La Forest disagreed with the majority on the issue that concerns us. He had great reservations about Chief Justice Lamer’s discussing the role of the preamble, given that the parties had not argued the case on this

⁹⁴ *Ibid* at para 93. Lamer CJC omitted another sort of caution. He did not remind us that much of the unwritten part of the UK constitution is not justiciable.

⁹⁵ *Ibid* at para 94.

⁹⁶ *Ibid* at para 95 [emphasis added].

⁹⁷ *Ibid* at para 104.

⁹⁸ *Ibid* [emphasis added].

⁹⁹ *Ibid* at para 109 [emphasis added].

basis. However, because the Chief Justice had done so, Justice La Forest replied in kind.

He first insisted that it was not his view that the Constitution was an “exhaustive code.”¹⁰⁰ He agreed that there are unwritten constitutional rules that “find expression” in the preamble.¹⁰¹ However, their “origin” was not in the preamble, but in the actual provisions of the Constitution.¹⁰²

Justice La Forest’s approach was summed up in the following paragraph:

The idea that there were enforceable limits on the power of the British Parliament to interfere with the judiciary at the time of Confederation, then, is a historical fallacy. By expressing a desire to have a Constitution “similar in Principle to that of the United Kingdom,” the framers of the *Constitution Act, 1867* did not give courts the power to strike down legislation violating the principle of judicial independence. The framers *did*, however, entrench the fundamental components of judicial independence set out in the *Act of Settlement* such that violations could be struck down by the courts. This was accomplished, however, by ss. 99–100 of the *Constitution Act, 1867*, not the preamble.¹⁰³

Justice La Forest was reminding us that even within the legal part of the UK constitution, political rather than judicial preferences were given priority. He was intent on checking the tendency to expand the priority of judge-determined choices in the name of principle and under the pretext of the preamble. The following conveyed the force of Justice La Forest’s argument and the point at which he departed from the analysis of Chief Justice Lamer:

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

In other words, the approach adopted by the Chief Justice, in my view, misapprehends the nature of the *Constitution Act, 1867*. The Act was not intended as an abstract document on the nature of government. The philosophical underpinnings of government in a British colony were a given, and find expression in the preamble. The Act was intended to create governmental and judicial structures for the maintenance of a British system of government in a federation of former British colonies. Insofar as there were limits to legislative power in Canada, they flowed from the terms of the Act (it being a British statute) that created them and *vis-à-vis* Great Britain the condition of dependency that prevailed in 1867. In considering the nature of the

¹⁰⁰ *Ibid* at para 303.

¹⁰¹ *Ibid*.

¹⁰² *Ibid* at paras 303–04.

¹⁰³ *Ibid* at para 311.

structures created, it was relevant to look at the principles underlying their British counterparts as the preamble invites the courts to do.¹⁰⁴

Justice La Forest's approach was consistent with the pre-1982 approach to the preamble. The 1867 *Act* dictated, whereas the preamble and the principles it disclosed were simply useful aids. However, his view was a minority one by the 1990s. A majority of the Supreme Court of Canada seemed prepared to accept that the preamble, on its own, could incorporate certain legal principles. Those principles will be summarized in a subsequent section of this article. For now, we will continue to chart the consolidation of the Supreme Court's new approach.

4. The *Secession Reference*¹⁰⁵

The Court, speaking unanimously in this instance, began in historical perspective by noting that the preamble emphasized “the continuity of constitutional principles”¹⁰⁶—democratic institutions and the rule of law, and the sovereignty of federal and provincial bodies as successors to Westminster. Of the four main principles identified in this case (democracy, constitutionalism and the rule of law, federalism, protection of minorities), democracy and constitutionalism and the rule of law related most directly to the preambular phrase “a Constitution similar in Principle to that of the United Kingdom”. The connections between the preamble and federalism lay elsewhere in the preamble, in the desire to be federally united. Protection of minorities had no overt connection to the preamble.

The Court pointed to history (and, in the case of Canada, a very long history going back to the United Kingdom) as assisting in the analysis of constitutional principles, which were central to the reasoning in this case: “[P]rinciples inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.”¹⁰⁷

The Court affirmed the “structural approach” set out by Justice Beetz in *OPSEU*.¹⁰⁸ Simply stated, for present purposes, this structural or architectural approach allowed the Court to say that principles were implicit in the Constitution even if they were not expressly set out there. This in turn

¹⁰⁴ *Ibid* at paras 319–20 [references omitted].

¹⁰⁵ For a more extensive analysis of the use of constitutional principles in the *Secession Reference*, see Jean Leclair, “Constitutional Principles in the *Secession Reference*” in Oliver, Macklem & Des Rosiers, *supra* note 24, 1009 [Leclair, “Principles in the *Secession Reference*”].

¹⁰⁶ *Secession Reference*, *supra* note 6 at para 44.

¹⁰⁷ *Ibid* at para 49.

¹⁰⁸ *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at 57, 41 DLR (4th) 1 [*OPSEU*]. On the structural approach, see Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada's Constitution” (2001) 80:1/2 Can Bar Rev 67.

meant that less weight could be put on the preamble. Some of the principles were obliquely referred to in the preamble, but these references were not essential to the structural argument.¹⁰⁹

What use could be made of principles? According to the Court in the *Secession Reference*, they could not be used as a substitute for the written text. But as in the *Provincial Judges Reference*, the preamble was treated as something of a written text. It “incorporates” principles, and it “invites” judges to convert those principles by means of constitutional analysis into rules that can fill gaps in the express constitution: “Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have ‘full legal force,’ as we described it in the *Patriation Reference*), which constitute substantive limitations upon government action.”¹¹⁰

The preamble and principles together were potent forces, but then the context of the *Secession Reference*, like the *Manitoba Reference* before it, arguably justified the marshalling of the judiciary’s strongest, even fundamental arguments.

5. Refining the Post-1982 Approach

The four cases just discussed were the leading illustrations of the post-1982 approach to the preamble. How did the McLachlin-led Supreme Court of Canada interpret these cases? A number of decisions in the early 2000s provided initial indications.

In *Re Therrien*,¹¹¹ the Court itself formulated the constitutional question, as follows: “Is the ... law ... allowing the government to remove a judge without an address of the legislature of no force or effect to the extent that it infringes the structural principle of the independence of the judiciary

¹⁰⁹ See *Secession Reference*, *supra* note 6 (“[a]lthough 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” at para 51).

¹¹⁰ *Ibid* at paras 53–54 [references omitted]. Although it does not pertain directly to the preamble, it is worth noting that the Court in the *Secession Reference* used principles in a new way. In other cases, the issue has usually been whether a particular legal result could be derived from a particular principle. In the *Secession Reference* it was the incommensurability of the four principles that did much of the work. Each side in the *Secession Reference* emphasized the principle that served their argument best (democracy for the *amicus curiae*, constitutionalism and the rule of law for the Attorney General of Canada). The power of the *Secession Reference* lay largely in the Court’s refusal to prefer the democratic principle over constitutionalism and the rule of law, or vice versa. It insisted on attempting to keep *all four* principles in the balance.

¹¹¹ 2001 SCC 35.

which is guaranteed by the preamble to the *Constitution Act, 1867*?¹¹² There seemed to be no doubt here that the preamble itself was the main legal foundation for the principle, though the reference to structure pointed to a broader basis.

Justice Gonthier, for a unanimous seven-judge Court, stated that impartiality and independence were “inherited”¹¹³ via the preamble and “embodied”¹¹⁴ within it. He later asserted that independence was “protected”¹¹⁵ by the preamble. The provisions of the Constitution were only relevant in that they circumscribed the protection generated by the preamble. Preamble protection could not be greater than that provided by provisions such as subsection 11(d) of the *Charter*.¹¹⁶

In *Ocean Port*, Chief Justice McLachlin expressed the views of a unanimous nine-judge court when she stated that judicial independence was a “constitutional imperative emanating from the preamble”; she concluded, however, that this imperative extended only to provincial and superior courts and not to administrative tribunals.¹¹⁷

In *Mackin*, Justice Gonthier (with Justices Binnie and LeBel dissenting) returned to the idea of the preamble guaranteeing the principle of judicial independence.¹¹⁸ It was once again clear that the preamble was capable of grounding the principle on its own, though other provisions (and even other preambles, such as the one preceding the *Charter of Rights and Freedoms*) might be relevant.

In *Babcock*, Chief Justice McLachlin consolidated the Court’s approach to these cases. Unwritten principles were discussed under the heading “The Preamble to the *Constitution Act, 1867*,”¹¹⁹ as if it were a given that they were guaranteed by the preamble. That is, Chief Justice McLachlin had no further need, beyond the section heading, to mention the preamble in discussing the unwritten principles.

As noted above regarding *Re Therrien*, the Court’s formulation of constitutional questions with reference to the preamble is revealing. In *Ell v. Alberta*,¹²⁰ both the constitutional question and the decision itself revealed

¹¹² *Ibid* at para 27.

¹¹³ *Ibid* at para 60.

¹¹⁴ *Ibid* at para 61.

¹¹⁵ *Ibid* at para 68.

¹¹⁶ See *ibid*.

¹¹⁷ See *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 31 [*Ocean Port*].

¹¹⁸ *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at paras 34–37 [*Mackin*].

¹¹⁹ See *Babcock v Canada (AG)*, 2002 SCC 57 at paras 54–57.

¹²⁰ 2003 SCC 35 [*Ell*].

once again that the preamble was apparently an independent legal source for the principle of judicial independence.¹²¹

In *Reference re Senate Reform*, the Supreme Court began to place the weight of its arguments less on the preamble and more on a structural or architectural approach to the Constitution.¹²² Citing the *Secession Reference*, the Court insisted that the Constitution implements a “structure of government” that must be understood according to “the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.”¹²³ Furthermore, constitutional interpretation “must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law.”¹²⁴ Having begun with reference to “a structure of government,” the Court concluded that the rules and principles of constitutional interpretation should be viewed as having an “internal architecture,”¹²⁵ in the sense that “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.”¹²⁶

The Court proceeded to discuss both the history and the constitutional text regarding the Senate and the amendment provisions pertaining to it, before addressing the question of whether legislation implementing consultative elections for senators amounted to amendments to the Constitution. Although in formal terms no constitutional text would be amended, the implementation of consultative elections “would amend the Constitution of

¹²¹ *Ibid* at para 16:

The Chief Justice stated the following constitutional questions on May 1, 2002:

- 1 Does s. 2.4(8) of the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, as amended, interfere with the tenure of non-sitting justices of the peace and thereby violate the principle of judicial independence guaranteed by:
 - (a) The preamble of the *Constitution Act, 1867*, or
 - (b) Section 11(d) of the *Canadian Charter of Rights and Freedoms*?
- 2 If the answer to question 1(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the *Charter*?

In his reasons, Major J referred to the preamble as “textual affirmation” of the unwritten principle of judicial independence (see *ibid* at para 19).

¹²² 2014 SCC 32 [*Re Senate Reform*]. For further analysis, see Kate Glover, “Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*” (2014) 67 SCLR (2d) 221.

¹²³ *Re Senate Reform*, *supra* note 122 at para 25.

¹²⁴ *Ibid*.

¹²⁵ *Ibid* at para 26.

¹²⁶ *Ibid*.

Canada by fundamentally altering its architecture.”¹²⁷ Conscious perhaps of the somewhat nebulous nature of “architecture,” the Court noted that the 1867 *Act* contemplated “a specific structure for the federal Parliament, ‘similar in Principle to that of the United Kingdom,’” in that the 1867 *Act* created “a lower *elected* and an upper *appointed* legislative chamber,” as existed in the United Kingdom.¹²⁸ According to that UK model, the latter chamber was intended to be complementary to rather than competing with the lower chamber, a body of sober second thought rather than one of short-term political calculus.¹²⁹ Accordingly, consultative elections were deemed by the Court to modify the constitutional architecture, requiring therefore a constitutional amendment rather than simple legislation.

What can we take from the post-1982 cases in terms of interpretive method?

1. The Supreme Court continues to view the preamble as an aid to interpretation as it did prior to 1982,¹³⁰ but it is now willing to go much further.
2. The Court is now clearly of the view that the preamble can be used as an independent ground for constitutional argument (though with varying consequences).¹³¹
3. The preamble as an independent ground does not generate discrete rules but rather provides a basis for more general principles (which can in turn generate different rules with varying consequences).¹³²
4. The preamble generates principles rather than specific legislative provisions from the United Kingdom’s constitutional past.¹³³
5. And accordingly the content of the Canadian Constitution is similar, though not necessarily identical, to that of the United Kingdom.¹³⁴
6. Having said that, the Court is mindful of the fact that, in the interests of legal certainty, that which it generates using the preamble

¹²⁷ *Ibid* at para 54.

¹²⁸ *Ibid* at para 55 [emphasis in original].

¹²⁹ See *ibid* at paras 56–57.

¹³⁰ See e.g. *Provincial Judges Reference*, *supra* note 90 at paras 95, 319.

¹³¹ See e.g. *Manitoba Reference*, *supra* note 4 at 752; *New Brunswick Broadcasting*, *supra* note 80 at para 373; *Provincial Judges Reference*, *supra* note 90 at paras 89, 95; *Mackin*, *supra* note 118 at paras 34–37.

¹³² See e.g. *Manitoba Reference*, *supra* note 4 at 752.

¹³³ See *Provincial Judges Reference*, *supra* note 90 at para 78

¹³⁴ See *ibid*.

must not stray very far from the balance of the Constitution, the main body of text.¹³⁵

7. In the interests of being seen to stay closer to the constitutional text, the Court is increasingly inclined to link the preamble to a structural interpretation of the Constitution.¹³⁶
8. And where, as is often the case, multiple principles are at stake, they should be treated as incommensurable, in that one principle cannot be traded off against another.¹³⁷

Having surveyed the post-1982 approach to interpretation of the preamble, we can now move on to a consideration of the substantive meaning afforded to the preamble by the post-1982 Court.

B. Meaning or Substantive Content of a “Constitution Similar in Principle to That of the United Kingdom” After 1982

The first and only comprehensive attempt to summarize the substantive meaning of the preamble appeared in the majority reasons of Chief Justice Lamer in the *Provincial Judges Reference*. Looking again to the text of the preamble, the Chief Justice identified three main categories of implicit contents: (1) the division of powers; (2) the legal and institutional structure of a parliamentary democracy; and (3) the principle of judicial independence.¹³⁸

Under the division of powers, by way of illustration, Chief Justice Lamer identified further elaborations or filling of gaps: for instance, the doctrine of full faith and credit¹³⁹ and the doctrine of paramountcy.¹⁴⁰

In terms of the legal and institutional structure of a parliamentary democracy, the Chief Justice cited (a) the rule of law, which was specifically grounded in the preamble in the *Manitoba Reference*,¹⁴¹ and (b) constitutional democracy. Under constitutional democracy, the preamble required

¹³⁵ See *ibid* at para 93.

¹³⁶ See *OPSEU*, *supra* note 108 at 57; *Secession Reference*, *supra* note 6 at para 51; *Re Senate Reform*, *supra* note 122 at para 25; *Re Therrien*, *supra* note 111 at para 27.

¹³⁷ See *Secession Reference*, *supra* note 6.

¹³⁸ See *Provincial Judges Reference*, *supra* note 90 at paras 96, 104–05.

¹³⁹ This doctrine was not grounded in the preamble in cases such as *Hunt and Morguard*, but the Chief Justice stated that it could have been so grounded: see *Hunt v T&N plc*, [1993] 4 SCR 289, 74 DLR (4th) 321; *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256.

¹⁴⁰ Again, the *Huson* case said paramountcy was implied by the provisions of the 1867 Act, but Lamer CJ stated that it could have been grounded in the preamble: see *Huson v Township of South Norwich*, [1895] 24 SCR 145 at 147–49, 1895 CarswellOnt 30 (WL Can).

¹⁴¹ *Manitoba Reference*, *supra* note 4.

(i) parliamentary institutions¹⁴² and the constitutionalization of legislative privilege;¹⁴³ and (ii) the interdependence of representative democracy and freedom of speech.¹⁴⁴

Finally, there was the principle of judicial independence. This was recognized by a unanimous Supreme Court of Canada in *Beauregard*, in which it held that the preamble provided “textual recognition” of this principle.¹⁴⁵

It will be convenient to use Chief Justice Lamer’s grid in the balance of this section, though it will be necessary to extend it in order to discuss various other principles that have been proposed or accepted.

1. Division of Powers

This heading was prompted by the preambular reference to the founding provinces’ desire “to be federally united into One Dominion”.¹⁴⁶ As this article has focused on the phrase “a Constitution similar in Principle to that of the United Kingdom”, there will be no further discussion of either the division of powers in general or the two subheadings identified by Chief Justice Lamer: the full force and credit doctrine, and the paramountcy doctrine. The focus will therefore be on the subsequent headings related more closely to the preamble phrase under study.

2. The Legal and Institutional Structure of a Parliamentary Democracy

a. *The Rule of Law*

The most important discussion of the rule of law appeared in the *Manitoba Reference*. There the Court noted that the rule of law was referred to or implicated in the preambles to both the *Charter* and the *1867 Act*.¹⁴⁷

In the *Provincial Judges Reference*, Chief Justice Lamer essentially summarized the *Manitoba Reference* by way of explanation of the rule of law.¹⁴⁸ In the *Secession Reference*, the Supreme Court of Canada identified the rule of law as one of four key unwritten principles underlying the Canadian constitutional structure.¹⁴⁹

¹⁴² See *Saumur*, *supra* note 49 at 330–31, Rand J.

¹⁴³ See *New Brunswick Broadcasting*, *supra* note 80.

¹⁴⁴ See *Re Alberta Statutes*, *supra* note 48; *Saumur*, *supra* note 49; *Switzman*, *supra* note 50 at 306; *OPSEU*, *supra* note 108 at 24–25.

¹⁴⁵ *Beauregard v Canada*, [1986] 2 SCR 56 at 72–73, 30 DLR (4th) 481 [*Beauregard*].

¹⁴⁶ *Constitution Act, 1867*, *supra* note 16, Preamble.

¹⁴⁷ See *Manitoba Reference*, *supra* note 4 at 750.

¹⁴⁸ See *Provincial Judges Reference*, *supra* note 90 at para 99.

¹⁴⁹ See *Secession Reference*, *supra* note 6 at para 49.

b. Constitutional Democracy

i. Parliamentary Institutions and the Constitutionalization of Parliamentary Privilege

The first key case regarding parliamentary privilege was *New Brunswick Broadcasting*.¹⁵⁰ This case has already been discussed in some detail under the heading of interpretive method. Further issues were dealt with in *Harvey v. New Brunswick (AG)*.¹⁵¹ The cumulative impact of these cases was summarized by Justice Binnie for a unanimous Court in *Vaid*.¹⁵²

As *Vaid* itself acknowledged, a concept closely related to parliamentary privilege is the principle of the separation of powers. In *Cooper v. Canada (Human Rights Commission)*, Chief Justice Lamer stated that the separation of powers was also “incorporated into the Canadian Constitution by the *Constitution Act, 1867*, through that provision’s reference to a constitution ‘similar in Principle to that of the United Kingdom.’”¹⁵³ However, the principle of the separation of powers arises mainly in discussions of judicial independence and will therefore be absorbed into those discussions below. It is important to note here that there is, of course, considerable potential for development of the separation of powers doctrine beyond the important sphere of judicial independence.

ii. The Interdependence of Representative Democracy and Freedom of Speech

As I have mentioned, an important role for the preamble in pre-1982 jurisprudence was in developing the implied bill of rights. Since the appearance of the *Charter* in 1982, this role has been significantly and understandably reduced. A handful of post-1982 references can be identified, however.

In the 1985 *Fraser* case,¹⁵⁴ the Supreme Court considered the status of freedom of speech in circumstances where the *Charter* did not apply. The Court concluded that freedom of speech was part of the common law constitution, incorporated by way of the preamble.¹⁵⁵ Unfortunately for the appellant, *Fraser*, freedom of speech was not an absolute right.

¹⁵⁰ *Supra* note 80.

¹⁵¹ [1996] 2 SCR 876, 137 DLR (4th) 142.

¹⁵² See *Canada (House of Commons) v Vaid*, 2005 SCC 30 at paras 28–48.

¹⁵³ [1996] 3 SCR 854 at para 22, 140 DLR (4th) 193.

¹⁵⁴ *Fraser v Public Services Staff Relations Board*, [1985] 2 SCR 455, 23 DLR (4th) 122.

¹⁵⁵ See *ibid* at 462–63: “[F]reedom of speech’ is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution, inherited from the United Kingdom by virtue of the preamble to the *Constitution Act, 1867*.”

In *Keegstra*, Justice McLachlin, dissenting, referred to the quasi-constitutional status of freedom of speech and the press even before the *Charter*, noting various judges' use of the preamble to support that status.¹⁵⁶

In *Authorson*, Justice Major employed the preamble in a manner that would have conformed to the more restrained standards of the pre-1982 era. He used the preamble to assist in interpreting a provision of the *Canadian Bill of Rights*:

Due process protections cannot interfere with the right of the legislative branch to determine its own procedure. For the [*Canadian*] *Bill of Rights* to confer such a power would effectively amend the Canadian constitution, which, in the preamble to the *Constitution Act, 1867*, enshrines a constitution similar in principle to that of the United Kingdom. In the United Kingdom, no such pre-legislative procedural rights have existed. From that, it follows that the *Bill of Rights* does not authorize such power.¹⁵⁷

Finally, in *Demers*, Justice LeBel, writing separately, expressed the view that respect for human rights and freedoms should have been added to the unwritten principles identified in the *Secession Reference*. Justice LeBel employed the preamble to support his argument.¹⁵⁸

3. Judicial Independence

The preamble has been used to the greatest extent in underpinning the Supreme Court of Canada's defence of the principle of judicial independence. The process began with Chief Justice Dickson's decision in *Beauregard*.¹⁵⁹ The Chief Justice set up a contrast in this case between derivation and textual recognition. The principle of judicial independence was "derived"¹⁶⁰ from many sources, two of which were unique to Canada (when compared with the United Kingdom): the fact that Canada is a federal country and the fact that Canada has enacted a *Charter*. These were the "sources of, or reasons for, judicial independence."¹⁶¹ But beyond these there was also, according to Chief Justice Dickson, "textual recognition of the principle in the *Constitution Act, 1867*,"¹⁶² namely in the preamble's

¹⁵⁶ See *R v Keegstra*, [1990] 3 SCR 697 at 808, [1991] 2 WWR 1.

¹⁵⁷ *Authorson v Canada (AG)*, 2003 SCC 39 at para 41.

¹⁵⁸ See *R v Demers*, 2004 SCC 46 at para 82. More recently, Côté and Brown JJ cited the preamble in support of "a parliamentary democracy with ... an electoral system resting on geographically defined electoral districts" (*Frank v Canada (AG)*, 2019 SCC 1 at para 154).

¹⁵⁹ *Supra* note 145.

¹⁶⁰ *Ibid* at 71–72.

¹⁶¹ *Ibid* at 72.

¹⁶² *Ibid*.

reference to “a Constitution similar in Principle to that of the United Kingdom”. Because judicial independence was a fact of UK constitutional life, it was fair to say, according to Chief Justice Dickson, that the principle was “transferred to Canada by the constitutional language of the preamble.”¹⁶³ It is perhaps no accident that use of the preamble in this manner (in 1986) followed so closely on the *Manitoba Reference* (1985).

The most significant development of the principle of judicial independence came with the *Provincial Judges Reference*. Summaries of the Court’s decision in this important case can be found in subsequent cases on judicial independence, such as *Re Therrien*, *Ocean Port*, *Mackin*, *Ell*, *Re Application Under S. 83.28 of the Criminal Code*,¹⁶⁴ and *Imperial Tobacco*. The *Imperial Tobacco* case provides a good example:

Judicial independence is a “foundational principle” of the Constitution reflected in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, and in both ss. 96–100 and the preamble to the *Constitution Act, 1867*. It serves “to safeguard our constitutional order and to maintain public confidence in the administration of justice.”

Judicial independence consists essentially in the freedom “to render decisions based solely on the requirements of the law and justice.” It requires that the judiciary be left free to act without improper “interference from any other entity”—i.e., that the executive and legislative branches of government not “impinge on the essential ‘authority and function’ ... of the court.”

Security of tenure, financial security and administrative independence are the three “core characteristics” or “essential conditions” of judicial independence. It is a precondition to judicial independence that they be maintained, and be seen by “a reasonable person who is fully informed of all the circumstances” to be maintained.¹⁶⁵

It is perhaps more important to look at what the Court is doing more globally. Justice La Forest’s skepticism in the *Provincial Judges Reference* is helpful in this regard. He could not find in the preamble a justification for courts’ limiting the ability of legislatures to affect judicial independence. He pointed out that *New Brunswick Broadcasting* had involved a historical survey indicating that the UK Parliament’s ability to exclude strangers had been absolute, constitutional, and immune from regulation by the courts. In other words, the Court had used the preamble in that case to *prevent* interference with the legislature’s long-standing freedom to ex-

¹⁶³ *Ibid.*

¹⁶⁴ 2004 SCC 42.

¹⁶⁵ *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 44–46 [references omitted]. See also *Conférence des juges de paix magistrats du Québec v Québec (AG)*, 2016 SCC 39 at para 31 for a more recent affirmation by Karakatsanis, Wagner, and Côté JJ of the relevance of the preamble to the principle of judicial independence in Canada.

clude strangers as it saw fit. Justice La Forest pointed out that, in the context of the *Provincial Judges Reference*, there was no equivalent historical evidence for the idea that the UK Parliament was prohibited from interfering with judicial independence. Accordingly, the Supreme Court was not justified in using the preamble to *authorize* an interference with legislative preferences regarding judicial remuneration. He might have added that it would be one thing for the Court to interfere in the face of a radical attack on judicial independence, and quite another for the Court to impose conditions regarding judicial remuneration that diverged markedly from those proposed by the legislature in circumstances falling well short of such an attack. We will return to this point in Part IV and the conclusion.

4. Other Arguments Grounded in the Preamble

Chief Justice Lamer’s attempt to summarize the meaning of the preamble in *Provincial Judges Reference* was just that: a worthy attempt. It in no way purported to limit the preamble’s potential. It was not surprising, therefore, to see other arguments based on the preamble emerge from time to time.¹⁶⁶

In *Public School Boards Association of Alberta v. Alberta (AG)*,¹⁶⁷ the appellant attempted unsuccessfully to argue that the preamble protected the autonomy of provincial school boards. Even more speculatively, one might have thought, the appellant in *Ontario English Catholic Teachers’ Association v. Ontario (AG)* argued that the principle of “no taxation without representation” was protected by the preamble.¹⁶⁸ Justice Iacobucci was willing to go along with the argument. However, he stated that the guarantee was based in section 53 of the 1867 *Act* rather than the preamble; and, in any event, the guarantee had been respected on the facts, in his opinion.¹⁶⁹

Unsuccessful or successful by other means or in other circumstances, these examples provide a sense of the potential for a wide range of further arguments based in the preamble.

C. *Is a “Constitution Similar in Principle to That of the United Kingdom” Frozen at 1867, or Is It Ambulatory? The View Post-1982*

Once again, as in the pre-1982 period, there is no conclusive view on this point. In *OPSEU*, Justice Beetz stated that we must study history to

¹⁶⁶ By way of analogy, we could say that, like the Crown prerogative, the preamble’s content is substantially determined, but it is always possible to make new arguments based in history and so “discover” new principles or precepts.

¹⁶⁷ 2000 SCC 45 at paras 30, 42.

¹⁶⁸ 2001 SCC 15 at para 69.

¹⁶⁹ See *ibid* at paras 71–73, 79.

determine what the situation was in the United Kingdom “at the time of Confederation.”¹⁷⁰ This would seem to make clear that the preamble’s meaning was frozen at 1867. However, Justice Beetz then went on to use historical sources from 1914 (adopted in 1949). Were they being used as evidence of what the situation was in 1867, or did this mean that the preamble is ambulatory? It is tempting to adopt the former interpretation because “at the time of Confederation” is fairly unambiguous, whereas the historical references are capable of more than one interpretation.

Other cases are difficult to interpret for similar reasons. In *New Brunswick Broadcasting*, for instance, Justice McLachlin analyzed parliamentary privilege by focusing to a great extent on the nineteenth century. However, she also cited twentieth-century textbooks.¹⁷¹ Accordingly, we are no clearer as to whether 1867 is the cut-off date (with later textbooks used simply to describe a continuity since 1867) or whether the preamble is ambulatory.¹⁷²

Given the Supreme Court of Canada’s general willingness to discover and explore constitutional principles since 1982, it seems unlikely that the Court will be constrained by a conception of the preamble frozen in 1867. Principles are ambulatory by nature, it might be said. Judicial independence might have one meaning in 1867 and quite another in a complex administrative environment in the twenty-first century.

In *Ocean Port*, the Supreme Court was unwilling to extend the principle of judicial independence to administrative tribunals, but Chief Justice McLachlin’s approach was by no means frozen:

The Constitution is an organic instrument, and must be interpreted flexibly to reflect changing circumstances. Indeed, in the *Provincial Court Judges Reference*, Lamer C.J. relied on this principle to extend the tradition of independent *superior* courts (derived from the

¹⁷⁰ *OPSEU*, *supra* note 108 at 43, citing *Re Ontario Public Service Employees Union and Ontario (AG)* (1980), 118 DLR (3d) 661 at 669, 31 OR (2d) 321 (CA): “The history of the development of the Legislature’s control over the civil service and the gradual emancipation of civil service appointment from political patronage is of importance in determining what conventions existed in this connection at the time of Confederation. It helps determine what was imported into Canada in this regard by the words ‘a Constitution similar in Principle to that of the United Kingdom.’”

¹⁷¹ See *New Brunswick Broadcasting*, *supra* note 80 at 378–85.

¹⁷² See also *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 29ff, 130 DLR (4th) 385 [*MacMillan Bloedel*]. According to Lamer CJC, the English judicial system was “imported” into our legal system by virtue of the preamble (*ibid* at para 29). He used literature dating from the 1970s to describe the English system. Again, is this because the literature from the 1970s continues to describe the system in 1867 or because the preamble is ambulatory? Supporting the former construction, IH Jacob refers to inherent jurisdiction existing “from the earliest times” (“The Inherent Jurisdiction of the Court” (1970) 23:1 *Current Leg Probs* 23 at 25, cited in *MacMillan Bloedel* at para 30).

constitution of the United Kingdom) to *all* courts, stating that “our Constitution has evolved over time.”¹⁷³

If the Constitution is a “living tree” then so too, perhaps, is the preamble. It seems clear from the reasons of Justice Major in *Ell v. Alberta*, for example, that any of the principles based in the preamble can be updated so as to achieve their purpose in a contemporary setting. His reference to a “modern” context seems relevant in this respect:

In modern times, it has been recognized that the basis for judicial independence extends far beyond the need for impartiality in individual cases. The judiciary occupies an indispensable role in upholding the integrity of our constitutional structure. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals.¹⁷⁴

If this wider role for the judiciary is welcome in this day and age, then so too is this more contemporary approach to the preamble, one would think. One might also argue that a less static approach to the preamble adds a capacity to develop a truly Canadian Constitution, as opposed to a borrowed model from the mother country. Both of these points will be touched on in Part IV and in the conclusion to this paper.

More recently, in *Reference re Senate Reform*, it became clear that even if the preamble itself was not capable of evolving, the constitutional architecture clearly was. If, for instance, the preamble put in place the structure of elected and representative chambers on the UK model, when those chambers subsequently evolved, the architectural approach to the Constitution evolved along with it. For instance, the Senate quickly took on a federal representative role, different from the UK model, but it also eventually became a forum for under-represented groups, on the basis of, for example, ethnicity, gender, religion, language, and indigeneity.¹⁷⁵ This was more in the nature of “living” architecture.

The main thrust of the argument in this article is that if the Supreme Court of Canada wishes to deploy constitutional arguments based in principle, the preamble is not the best or most appropriate basis for that approach. However, this does not necessarily mean that the Court should return to its pre-1982 approach. The next Part considers the question of

¹⁷³ *Ocean Port*, *supra* note 117 at para 33 [references omitted].

¹⁷⁴ *Ell*, *supra* note 120 at para 22 [emphasis added, references omitted].

¹⁷⁵ See *Re Senate Reform*, *supra* note 122 at paras 15–16.

choosing between pre- and post-1982 approaches or seeking an alternative reconciliation of the two.

IV. Choosing Between or Reconciling the Pre- and Post-1982 Approaches to the 1867 Preamble: A Sustainable Jurisprudence

A. *The Vulnerabilities of Political Constitutionalism*

According to the above reading of our highest courts' deployment of the 1867 preamble, there would seem to be a fairly stark division between the pre-1982 and post-1982 periods. Taking their cue from the preamble's reminders about what we would now call the importance of the political constitution, pre-1982 courts generally resisted requests to fill gaps in the Constitution by means of the preamble. The "Constitution similar in Principle" was certainly used to help make better sense of the uncodified Constitution of 1867, for example in the recognition of an ongoing role for uncodified and judicially unenforceable constitutional conventions, and in the traditional or orthodox process of constitutional interpretation. Individual judges were tempted from time to time even before 1982 to go further, to use the preamble and its indirect reference to common law rights, and to lift those rights to constitutional status. The "implied bill of rights" movement never attracted a majority in the Supreme Court of Canada, but it had many supporters in the Canadian legal community. That support, which grew most markedly from the 1930s onward, was understandable in the context of abhorrent examples of persecution of minorities and egregious rights violations, most notably in Nazi Germany. In the logic of political constitutionalism, those violations would have to be dealt with by means of legislation (that might not yet be in place) or through political pressure (that might not emerge). Canadian experience has shown that the division of powers could sometimes be redeployed to invalidate rights violations.¹⁷⁶ However, using a tool designed for another purpose was and is not optimal when the problem of majorities oppressing minorities and vulnerable individuals is persistent, and when support for such oppression is widespread, as may occur at any moment, notably when social, political, economic, or other pressures put the polity under strain.

One person who was always aware of the vulnerabilities of political constitutionalism was Pierre Elliott Trudeau. Trudeau had been educated at the London School of Economics—the home, if one had to choose a single

¹⁷⁶ See e.g. *Switzman*, *supra* note 50 and *Saumur*, *supra* note 49 (in which Duplessis-era rights-violating provincial legislation was struck down under the division of powers as an attempt at criminal legislation, the latter being beyond the powers of the provinces).

home, of political constitutionalism¹⁷⁷—but he had also subsequently lived through the rights-blind excesses of the Duplessis era in Quebec. It was Trudeau’s political mission to see to it that Canada acquired a judicially enforceable bill of rights, or *Charter of Rights and Freedoms* as it came to be called. The *Charter* introduced an era of increased legal constitutionalism, with the more expansive role for courts that accompanies that model.

However, whereas the *Charter of Rights and Freedoms* benefitted from section 52 of the *Constitution Act, 1982*, a provision that confirmed the supremacy of the texts making up the Constitution of Canada and declared any law inconsistent with that Constitution “of no force and effect,” the status of constitutional postulates and principles incorporated via the preamble was less clear. As had been discussed in cases such as *New Brunswick Broadcasting*, section 52 stated that the Constitution of Canada “includes” various constitutional texts such as the *Constitution Acts, 1867 and 1982*, and the word “includes” left room for other constitutional content benefitting from supremacy (and the judicial enforcement that ensued). We saw that parliamentary privilege in the provincial assemblies, though not specifically mentioned in the constitutional texts, benefitted nonetheless from constitutional status, and this with the assistance of the 1867 preamble. What of the growing list of principles that could also be linked to that preamble? Should they also enjoy supreme status and judicial enforcement?

A proper answer to that question would require full treatment in a separate article. We are fortunate enough to benefit from other brilliant explorations of that terrain, notably those by Jean Leclair and Mark Walters, both of whom provided profound early accounts of the role and significance

¹⁷⁷ It is worth noting that political constitutionalism in the United Kingdom is historically the favoured perspective of the political left, given that judges in that country were until recently seen as conservative brakes on progressive legislative measures (see e.g. the classic by JAG Griffiths, *The Politics of the Judiciary* (Manchester: Manchester University Press, 1977).

In Canada, political constitutionalism is more frequently associated with the political right, given that judges in Canada are more often seen as existing or potential accelerators of progressive change (though clearly still insufficient in some eyes). There was a time in Canada when the protagonists on the political left favoured political constitutionalism, something that in part explains the support of some left-of-centre politicians for the notwithstanding clause, section 33 of the *Constitution Act, 1982*. For example, on Allan Blakeney’s views, see Dennis Gruending, *Promises to Keep: A Political Biography of Allan Blakeney* (Saskatoon: Western Producer Prairie Books, 1990) at 196.

For more on political constitutionalism, see *supra* note 1. For more on the notwithstanding clause, from an author who straddles the United Kingdom–Canada divide on the issue of political constitutionalism, see Janet L Hiebert, “The Notwithstanding Clause: Why Non-use Does Not Necessarily Equate with Abiding by Judicial Norms” in Oliver, Macklem & Des Rosiers, *supra* note 24, 694.

of constitutional principles.¹⁷⁸ I set out a few further considerations here, without the sort of engagement with Leclair, Walters, and others that the quality of their interventions deserves. For present purposes, I wish to keep closer to the account of the evolving role of the preamble that has been set out above, and to the question posed in this Part: how do we choose between or reconcile the pre- and post-1982 approaches to the 1867 preamble?

B. Preferring Legal Constitutionalism?

On one possible reading of that account, political constitutionalism gives way to legal constitutionalism in Canada as of 1982, not just in relation to rights and the new *Charter* but generally speaking. Those who support a more robust, principle-based role for our courts, and especially for the Supreme Court of Canada, can find support for that role in the writings of prominent scholars such as Ronald Dworkin, whose influence in Anglo-American legal circles can hardly be exaggerated.¹⁷⁹ Dworkin's approach does not require a foothold for principles in a constitutional preamble. Where a court is presented with a "hard case," it must not lose heart in the face of an apparent gap in the constitutional text. On Dworkin's account, a court must dig deeper so as to uncover and make use of the principles, and if necessary the political morality, that underpin the legal system, in order to make the (constitutional, in this case) law the best that it can be. This jurisprudential approach is itself an invitation to fill gaps in the Constitution, even before one refers to the preamble. Accordingly, it may be helpful to dwell on it for a moment before returning to the discussion of the post-1982 use of the preamble. The argument I present here is that the Supreme

¹⁷⁸ See Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 *Queen's LJ* 389 [Leclair, "Unwritten Constitutional Principles"]; Mark D Walters, "The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law" (2001) 51:2 *UTLJ* 91. See also Leclair, "Principles in the *Secession Reference*", *supra* note 105; Walters, "Written Constitutions", *supra* note 7; Elliot, *supra* note 108; David Dyzenhaus, "The Unwritten Constitution and the Rule of Law" in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004) 383; Benjamin L Berger, "White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text" (2008) 3:1 *J Comparative L* 249; David Schneiderman, "Unwritten Constitutional Principles in Canada: Genuine or Strategic?" in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge, UK: Cambridge University Press, 2018) 517; Han-Ru Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019) 67:4 *Am J Comp L* 889.

¹⁷⁹ See generally Dworkin, *Taking Rights Seriously*, *supra* note 8; Dworkin, *Law's Empire*, *supra* note 9; Ronald Dworkin, *Justice in Robes* (London, UK: Belknap Press, 2006); Ronald Dworkin, *Justice for Hedgehogs* (London, UK: Belknap Press, 2011). See also TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013).

Court has helpfully modified the Dworkinian model, particularly with regard to what Dworkin and others sometimes refer to as reflective equilibrium.

C. *Reflective Equilibrium*

When Dworkin first introduced his principle-led jurisprudential theory, he indicated that judges would engage in a sort of reflective equilibrium in developing the common law (of the Constitution or otherwise), moving back and forth, or to and fro, between the underlying principles and the more particularized intuitions represented by existing case law.¹⁸⁰ The more modern and better-known version of this approach is Dworkin's famous chain novel analogy, according to which judges are seen metaphorically to be providing a new chapter in a novel each time they decide a case, while remaining faithful to the chapters written by judges in earlier cases.¹⁸¹

In a contrasting version of reflective equilibrium—for example, that described (though not always applied) by John Finnis¹⁸²—the back and forth is between (natural law or other) principles and social scientific context. Is there any important difference between the two descriptions of reflective equilibrium? To my mind there is, and crucially so. One can adapt the chain novel metaphor to make the point. In Dworkin's version, as we have seen,

¹⁸⁰ See Dworkin, *Taking Rights Seriously*, *supra* note 8 at 155–68.

¹⁸¹ See Dworkin, *Law's Empire*, *supra* note 9 at 228–38.

¹⁸² John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 17–18.

Finnis would appear to be squarely opposed to the sort of partially future-focused approach to hard cases set out in this article. See John Finnis, “Judicial Power: Past, Present and Future” (2 February 2018), online: *Judicial Power Project* <judicialpowerproject.org.uk> [perma.cc/8MKZ-B9VV] [Finnis, “Judicial Power”]. In Finnis' view, courts should confine themselves to applying pre-existing (past) law to established facts, it being the role and responsibility of *legislatures* to turn their minds to the future.

Finnis acknowledges, in *Natural Law and Natural Rights*, that there are (hard) cases where the law does not provide an obvious answer (“‘legislator’ ... includes any judiciary that, like the judge at common law, enjoys a creative role” at 286), and where the court must exercise the sort of judgement that in chapter 1 of that same book clearly involved practical reasoning and reflective equilibrium. One looks in vain, at least in his *magnum opus*, for a fuller exploration of this scenario.

In later works, including the *Policy Exchange* essay referred to above (“Judicial Power”), Finnis argues that too many lawyers are too quick to identify “hard cases.” He notes in *Natural Law and Natural Rights* at 269 that lawyers rely on the admittedly fictitious postulate that there are “no gaps” in the law, that “every present practical question ... has, in every respect, been ... ‘provided for’ by some ... past juridical act or acts,” concluding that there is “no need to labour the point.” Without going into detail, I am of the view, first, that some lawyers are also too quick to identify “easy cases” (see the example developed in note 191 below) and, second, that the point about fictions regarding closing gaps (see Finnis, *Natural Law and Natural Rights* at 269, 292) most certainly needs to be laboured.

the judge seized with a hard question must ensure fidelity to the themes, setting, and characterizations that have been developed in past chapters, with no *necessary* concern for how those relate to real life.¹⁸³ While this may not seem odd when we are talking about novels, it is a surprising assertion when talking about law, an institution that is designed not to entertain or divert but to regulate real people in real societies, and to do so on an ongoing, efficacious, and sustainable basis. With that in mind, it would seem to make more sense, *contra* Dworkin, to move in reflective equilibrium between principles and the real, variable context.

There are a number of possible reasons why Dworkin did not recommend this latter course of action. In fact, in the early discussion of reflective equilibrium just referred to, he specifically rejected it.¹⁸⁴ One reason may have been that Dworkin was determined to assert that his jurisprudential approach was based in law rather than policy or political ideology, even if what counts as law is broader than many positivist theorists had previously assumed.¹⁸⁵ A second reason may have been that, to his mind, principle-based interpretation had within it all the elements that were necessary to produce good, defensible legal answers.

D. Questioning Full Faith in Principles

Although, again, the full elaboration of a rebuttal of the Dworkinian approach would require a separate article, the discussion of preamble-related cases points to some reasons to question Dworkin's faith in principles and the instincts represented by the common law. In a case such as the *Manitoba Reference*, it is hard to see the principle of the rule of law (or the Canadian precedents, of which there were none that covered the point at issue) doing all the work necessary to produce the carefully crafted result in that case. The rule of law principle as it was known in Canada in 1985 militated in favour of invalidation of almost one hundred years of Manitoban law. To my mind, it was the Supreme Court judges' encounter with the social scientifically predictable consequences of deciding the case in that straightforward rule-of-law fashion that prompted them to examine the question more carefully. A Dworkinian might wish to say that the Court's survey of comparative case law resembled the interpretative, principle-led chain-novel method. However, it seems more credible to me to envision the Court in reflective equilibrium between the principle of the rule of law and the social scientific context in 1980s Canada into which an advisory opinion apparently invalidating almost a century of Manitoba law would play out.

¹⁸³ See *supra* note 11 and accompanying text.

¹⁸⁴ See Dworkin, *Taking Rights Seriously*, *supra* note 8 at 162–63.

¹⁸⁵ I argue below that consideration of the real context, including the future context (as difficult as that is to gauge), is relevant to at least one side of the concepts of law and legal system.

It was the Court's fear of future chaotic or anarchic consequences that caused it to reconsider.

A similar point with a different conclusion can be made regarding the *Provincial Judges Reference*, the case among those discussed in this article that has attracted the most criticism.¹⁸⁶ Although the criticisms of that case were not always put in these terms, one can acknowledge that there is a principle in our legal system regarding the independence of the judiciary without necessarily agreeing that the Supreme Court of Canada should have interfered with what was in fact a relatively minor public service-wide pay reduction. If reflective equilibrium is confined to the principle and the intuitions reflected in a (sometimes sparse) case law, as Dworkin suggested, then it is easy to see how mistakes can be made. The power of a principle such as judicial independence can be hard to modulate. If the reflective equilibrium is between a principle and the observable and predictable social scientific facts, then one can see more clearly that, contrary to the context in the *Manitoba Reference*, the Court was arguably making a principled stand in the face of a negligible threat—overreacting, in other words.

The *Provincial Judges Reference* and the post-1982 approach to the preamble squarely raised the question of whether principles should have the power on their own to strike down laws. If one followed the logic of Dworkin's reasoning, it was hard to see why they should not. If a gap in the positive law of the Constitution is something that can be filled by principle-based constructive reasoning, then the Constitution, through its oracle the Court, always has an answer. If, on the other hand, Dworkin misconceives the relevant process of reflective equilibrium, and if it is actually better understood as a back and forth between principle and social scientific context, then we have to acknowledge that judges are imperfect assessors of that social scientific context. They are by no means completely ignorant, and they are (or should be) aware that doing nothing can be as radical as doing something; so the question is not the stark false choice between judicial conservatism and judicial activism. The question, in my view, is whether a judgement in a hard case is good and wise and, ideally, lasting, and how best to come by such results. This is not a choice between political and legal constitutionalism but a call for judicial craft or wisdom. It is what I refer to as a sustainable jurisprudence.

¹⁸⁶ See e.g. Leclair, "Unwritten Constitutional Principles", *supra* note 178; Jamie Cameron, "The Written Word and the Constitution's Vital Unstated Assumptions" in Pierre Thibault, Benoît Pelletier & Louis Perret, eds, *Les mélanges Gérard-A. Beaudoin : les défis du constitutionnalisme* (Cowansville, QC: Yvon Blais, 2002) 91; Jeffrey Goldworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11:2 Const Forum Const 60.

E. A Sustainable Jurisprudence

Briefly, a sustainable jurisprudence can be summarized in terms of the following points, some of which emerge out of foundational theoretical concerns,¹⁸⁷ also noted here:

1. The concepts of law and legal system, as employed in legal and non-legal parlance, implicate not just the phenomenon of static rules in their rule-book form, but also the ability of such rules to endure.¹⁸⁸
2. Effectiveness is commonly said to be essential to the concepts of law and legal system,¹⁸⁹ and therefore to the idea of the rule of law.¹⁹⁰ If the enduring quality of law (noted in point 1) is a part of law's essence, then the requirement of effectiveness must include its *future* effectiveness.
3. These first two points mean that "law" is double-sided and that each of those sides has different attributes. Law has:
 - a. a past- and present-focused, familiar meaning that is primarily designed to determine the answer to a question with only two possible answers: law or not law? (the binary standard); and

¹⁸⁷ Despite the seemingly remote theoretical starting points, it is argued here that the practical consequences of this approach are substantial. On the importance of initial theoretical assumptions, see Timothy Endicott & Peter Oliver, "The Role of Theory in Canadian Constitutional Law" in Oliver, Macklem & Des Rosiers, *supra* note 24, 937.

¹⁸⁸ By way of example and analogy, it would be possible for medical practitioners to think of a "medical treatment" as simply the drug administered or procedure performed, with reference perhaps to a pre-existing list of drugs and procedures. But the teaching and practice of medicine only make sense if the meaning of a "medical treatment" includes its future-oriented aspects, if it includes not just that which is administered or performed on the day but also that which is likely to transpire regarding health and welfare of the patient in the future. It is suggested here that the same is true of law, though the teaching and practice of law have historically focused on the first dimension (highlighted by the binary standard introduced at point 3a below). Law and medicine differ, of course, in many ways. The analogy is made here simply to illustrate the sometimes under-appreciated future element in the term "law."

¹⁸⁹ Austin, Kelsen, and Hart devote most of their attention to how it is that we identify that which is and is not law; however, each of them lists effectiveness as a necessary condition of their respective concepts of law and legal system. For further discussion see Oliver, "Change in the Ultimate Rule", *supra* note 12 and accompanying notes. The point I make here is that effectiveness for Austin, Kelsen, and Hart is apparently determined by considering law from some moment in the past through until the present, when to my mind the more relevant consideration where effectiveness is concerned is with regard to the future, even if that future effectiveness is harder to gauge (hence the relative standard in point 3).

¹⁹⁰ On the connection between the concept of law and the rule of law, see Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga L Rev 1.

- b. a future-focused judgement, wisdom, or statecraft meaning based in a relative standard of sustainability or endurance (the relative standard).
4. Easy cases involve the application of clear rules, and the sustainability of law as a whole usually requires a great deal of fidelity to those rules. Given the two sides of law just identified, we can at the same time observe that certain laws that are clearly law by the binary standard may be inadequate law on the relative (no less vital) standard.¹⁹¹
 5. Hard cases require greater emphasis on deeper, broader, structural principles, but even the introduction of principles does not eliminate a significant role for judgement, wisdom, and statecraft. Principles on their own can be *presented* as the reasoned basis for a decision that may satisfy the binary standard, but, despite appearances, they do not in and of themselves provide enough direction regarding the kinds of legal outcomes that the equally important relative standard of future sustainability demands.
 6. Rather than employ Dworkin's version of reflective equilibrium involving principles and the decided cases, a truly sustainable jurisprudence requires a reflective equilibrium that makes specific determinations based on principles while keeping real-life social scientific facts in the balance.¹⁹²
 7. Sustainable jurisprudence is relevant to all forms of law, legislated and judge-made. Regarding the latter, it may be thought to justify

¹⁹¹ For example, Canadian laws regarding residential schools and South African apartheid legislation were laws by the (binary) standard imposed by the Canadian and South African legal systems at the time, but they were wholly inadequate according to the relative standard, for a whole range of reasons relating both to the broader principles that they violated and the social scientific context that they ignored, with inevitable negative consequences for the rule of law in the years subsequent to their enactment. If a lawyer focuses only on the binary standard, the question of legal validity appears to be an easy case. It is when one engages both the deeper principles and the real-life social scientific contexts that the case becomes deeply worrying and appropriately hard. On Canadian residential schools, see Truth and Reconciliation Commission of Canada, *They Came for the Children: Canada, Aboriginal Peoples, and Residential Schools* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012). On principles and hard cases in apartheid South Africa, see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2nd ed (Oxford: Oxford University Press, 2010).

¹⁹² A sustainable jurisprudence therefore brings considerations such as reciprocity, focal meaning, normal justification, legitimacy and facticity into the legal picture in hard cases: see Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 209; Finnis, *Natural Law and Natural Rights*, *supra* note 182 at 9–10; Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 53; Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass: MIT Press, 1996).

even greater discretion than that which is encouraged by the Dworkinian approach. However, whereas the Dworkinian approach appears to equip judges to decide all manner of hard cases, the sustainable jurisprudence approach reminds them of the inevitable element of judgement that is involved in their decision, and this takes some of the wind out of the judicial sails. First, the importance of legal certainty is itself a factor in the future sustainability of law and legal system. And second, given that judgement involves an assessment of past, present, and future contexts, judges are at the same time reminded of the difficulty of the task (and its controversial nature given their unelected status). As I have noted, the tendency of most judges in the circumstances is to act with humility and take a small step in what they deem to be the most sustainable direction, keeping in mind that inaction is often unsustainable as well.¹⁹³

Some will still object that this approach gives too much power to judges. However, such criticism is often based in a form of wishful thinking (a fiction) according to which there are legal answers to all imaginable legal

¹⁹³ There is not space here to spell out what elements determine a sustainable direction. That is a question of judgement, wisdom and statecraft, as I have said. One might want to look for guidance in the United Nations Sustainable Development Goals (online: <un.org> [perma.cc/8FLT-47F5]), but some elements of sustainability (understood here as having a meaning that includes but is not limited to environmental issues) inevitably relate to more local factors. Indigenous teachings have immense potential to contribute to our understanding of our relationship to each other and to the environment in which we live: see e.g. John Borrows, “Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada” in Oliver, Macklem & Des Rosiers, *supra* note 24, 13. Equally, in order to understand the contexts relevant to women, racialized, or disabled people, we have access to a wealth of appropriately contextual research. Whatever sustainable jurisprudence must be, and that is admittedly difficult to determine (if we were all wise it would be easier), it seems clear that it should steer away from legal directions that desecrate the environment, take children from families, fail to protect women from violence, create different tiers of citizenship based on race, or deny the most basic opportunities to participate in society due to failure to remove obstacles.

Law is often said to be the monopoly of force, or orders backed by threat. Authoritarians will always remind us that any law can be enforced. However, when those laws attack things that are fundamental to our life and identity, law becomes a form of what behavioural scientists would call conditioning, training those negatively affected by such laws to associate law, legal system and the rule of law with those negative outcomes, a linkage that is unsustainable and that should be of concern to all who purport to care about the rule of law.

In the natural law tradition, that which is here referred to as sustainability relates to basic goods such as life, knowledge, friendship and sociability, play, aesthetic experience, practical reasonableness, and religion (see Finnis, *Natural Law and Natural Rights*, *supra* note 182 at 81–99). However, as with all promising starting points, including those mentioned above, where even such basic goods are applied in ways that ignore the social scientific realities, they can subvert the principles and values on which they are based. From a sustainable perspective, even timeless, basic goods can only be realized if one is aware of the context into which they are intended to play out.

questions. Even those most disposed to agree with such a conclusion because of their belief that law's virtue is that it serves as a second-order, exclusionary reason (positivists such as Hart and Raz)¹⁹⁴ acknowledge that there are cases where, even on their formalized account, there is no law that determines an answer, and that judges must exercise discretion (judgement or wisdom).¹⁹⁵

We have already acknowledged that Dworkin arguably over-arms judges, allowing them to justify a wide range of action and inaction in the name of principle. In my view, reflective equilibrium of the Dworkinian type is not just unwise, in the sense just mentioned; it is also unworkable, in that even if principles are always available, one needs more information than that which the principle, or even previous instantiations of the principle, provides in order to arrive at the sort of good and wise judgement just invoked. The principle itself under-determines, and even a fully elaborated principle requires contextual understanding in order to deliver on both its promise and the promise of law and legal system as a whole.¹⁹⁶

As the *Manitoba Reference* so clearly revealed, the existence of a seemingly relevant constitutional principle structures but leaves substantially unclear the determination of the final result in the case. The Court has no other alternative but to exercise judgement. Whether that judgement involves no action, or small or large steps in the direction of what the Court deems to be the most sustainable solution, it is still a judgement. In the *Manitoba Reference*, inaction was not an option. The Court's eventual judgement was to my mind a good one.

In the *Provincial Judges Reference*, the Court seemed to respond as if the mere identification of a principle required a moderately large step. I am less convinced that this was a good judgement. Arguably, the Court in the *Provincial Judges Reference* would have been better advised to take the following steps: first, to canvass such constitutional text and case law as was available and relevant, acknowledging that certain cases are genuinely hard where the text and case law do not point to clear answers; second, to assert the existence and importance of the constitutional principle of judicial independence both in the case law and in the structure of the

¹⁹⁴ See Joseph Raz, *Practical Reasons and Norms*, 3rd ed (Oxford: Oxford University Press, 1999) at 35–48, 190–99; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 37 [Raz, *The Authority of Law*].

¹⁹⁵ The Hart approach accepts that in hard cases, “at the margin of rules and in the fields left open by the theory of precedents,” and given the open texture of rules, judges exercise a discretion that is better described as “rule producing” rather than “rule following” (HLA Hart, *Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012) at 135). See Raz, *The Authority of Law*, *supra* note 194 at 49–50, 53–77.

¹⁹⁶ I have set out a lengthy account of the indeterminacy of principles in the by-now less controversial context of Commonwealth devolution in Oliver, “Change in the Ultimate Rule”, *supra* note 12.

Constitution (though with no need to cite the preamble in doing so); third, to assert the constitutionally protected power and responsibility of democratically elected actors to come to decisions in response to political, economic, and social factors; and finally, to conclude that while the courts must always be vigilant to protect judicial independence, the facts of this case, and the generalized future consequences of allowing the political decision in this case to apply, did not call for judicial intervention.

No doubt other constitutional commentators will have other views regarding the proper outcome—the proper exercise of judicial craft—in the case. The main point being made here is that the existence of a constitutional principle (without the need for invocation of the preamble) should not justify the filling of a constitutional “gap,” especially where the judicial action so significantly interfered (then and subsequently) with what would otherwise be viewed as constitutionally mandated political discretion.

F. Incommensurable Principles and Reconciling Approaches

A further point needs to be made about how principles work in legal reasoning independent of the discrete point about their reflexive interaction with social scientific context. When they are first employed, in a legal system that has previously made little reference to principles, the newly stated principles yield new legal results largely or exclusively by deduction from the principles as generally stated. As actors in the legal system become more familiar with the relevant principles, those principles begin to change shape from decision to decision. But even after some refinement, principles retain a fairly open meaning for the purposes of legal reasoning, unlike rules with their open-and-shut attributes. So even in applying a principle that has already been somewhat refined by case law, a judge will have to consider how that principle will play out in a real-life context.

It is possible nonetheless to argue that principles serve a purpose that is independent from either the deductive or inductive modes of reasoning just referred to. As the *Secession Reference* indicates, sometimes principles work most powerfully in groups rather than individually. The original argument in support of a secessionist logic was based on appeals to the democratic principle and the undeniable force of a clear referendum result in favour of secession. The original argument against that logic was based on familiar assertions of constitutionalism and the rule of law. It was only when the principles of democracy, constitutionalism and the rule of law, federalism, and protection of minorities were assembled together and seen to be *incommensurable* that the much-praised advisory opinion took shape. It was the reminder of multiple incommensurable principles that powerfully structured that decision, *together with* the judges’ understanding of the Canadian and Quebec contexts, that gave the Court’s opinion its force.

How does this then relate to the pre- and post-1982 use of the preamble? The post-1982 case law on the use of the preamble makes clear that principles are available not just for interpretation, but occasionally to do the sort of heavy lifting that involves elaborating new constitutional rules to fill gaps. However, it also seems clear that this is not a straightforward switch from political to legal constitutionalism, and from political to judicial control. And there are good reasons for this.

While principles are clearly a powerful and useful potential device, their use is not uncontroversial. For every one *Manitoba Reference* where it is essential for principles to do important work, there may be another case such as the *Provincial Judges Reference* where the principle is deployed unnecessarily by a court. Getting it right, in my view, is not so much a matter of choosing between political and legal constitutionalism as acknowledging that judicial wisdom depends on bringing the context to bear on the question, by which I mean to include the *future* context into which the court's decision will play out.

G. Principles and Constitutional Conventions

A further reason for hesitating to deploy principles, with or without an invitation from the preamble, is that they threaten the political regulation that conventions allow and that “a Constitution similar in Principle” refers to. On the Ivor Jennings account¹⁹⁷ of conventions affirmed in the *Patriation Reference*, conventions exist where three elements are present: (1) precedents for the behaviour that is the subject of the alleged convention; (2) the belief on the part of the relevant political actors that they are bound by the alleged conventional rule; and (3) a reason for the alleged conventional rule.¹⁹⁸ The reason is often democracy, though in the *Patriation Reference* it was federalism. Democracy and federalism are also principles attributable to different parts of the 1867 preamble and Constitution. This last fact means that even where a convention already exists, a court will often have at its disposal a principled basis on which to create a new component of the common law constitution should it so wish. There could be scenarios where this is necessary, in the sense of the wisdom or judicial craft identified a moment ago. The subject matter of the *Secession Reference* had been argued in the language of constitutional conventions before it was converted in that reference into the language of law. Arguably, the constitutional rules regarding secession work best in legal form, given the important constitutional values at stake. But the same would not be true regarding judicial codification of the whole range of conventional rules that presently make up so much of the “Constitution similar in Principle”. There

¹⁹⁷ See Sir Ivor Jennings, *The Law and the Constitution*, 5th ed (London, UK: University of London Press, 1959) at 134–36.

¹⁹⁸ See *Patriation Reference*, *supra* note 60 at 888.

are occasional calls to gather together key conventions into a public, codified but legally unenforceable Canadian *Cabinet Manual*. Whatever the merits of that proposal, the option would disappear if the Canadian courts pre-emptively used the democratic principle and the so-called invitation of the preamble to convert our present conventions into judicially enforceable law.¹⁹⁹

The best approach when faced with an apparent gap in constitutional text is first to identify whether that gap is presently filled by a constitutional convention. Second, a court should consider what the future implications might be of either allowing a convention to regulate the particular area of constitutional activity or leaving the area unregulated by either the law or the conventions of the Constitution—that is, regulated by politics alone.

Arguably, it was this sort of future-oriented and context-sensitive approach that was employed by the Supreme Court of the United Kingdom in the recent *Case of Prorogation*.²⁰⁰ In considering whether the Prime Minister's advice to the Queen was lawful, the Court was of course aware that prorogation is, normally speaking, guided by constitutional conventions. The Court also identified some of the constitutional principles that were at stake, notably parliamentary sovereignty and parliamentary accountability.²⁰¹

In ordinary circumstances, as I have argued elsewhere,²⁰² courts should not be in the business of enforcing constitutional conventions; otherwise, the political constitution would have a radically reduced sphere of action. But does the fact that constitutional conventions are present and the political constitution engaged mean that the Court has no role at all? Or, viewed from a Dworkinian perspective, did the presence of at least two constitutional principles mean that the Court had every justification to intervene, in the name of the legal constitution? Or was the Court trying to carve out an intermediary position?

In my opinion, the Court was trying to follow the last of these options, and in doing so, it adopted something very similar to the approach I have

¹⁹⁹ I have written about the risk of judicially overwriting constitutional conventions in Peter C Oliver, "Reform of the Supreme Court of Canada from Within: To What Extent Should the Court Weigh in Regarding Constitutional Conventions?" in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Kingston, ON: Institute of Intergovernmental Relations, 2013) 161 at 178–83. See also Peter C Oliver, "Constitutional Conventions in the Canadian Courts" (4 November 2011), online (blog): *UK Constitutional Law Association* <ukconstitutionalallaw.org> [perma.cc/3UBD-KX8N].

²⁰⁰ *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland*, [2019] UKSC 41 [*Case of Prorogation*].

²⁰¹ See *ibid* at paras 41, 46.

²⁰² See *supra* note 199.

recommended in this article. We can see a reflective equilibrium at work that moves back and forth between the constitutional principles and the future consequences of their abuse in these and similar circumstances. Far from committing itself to intervening *every time* the constitutional principles are potentially engaged, as full-throated legal constitutionalism might require and as critics of the decision fear, the Court appeared to be exercising judgement based on the concrete effects of this type of prorogation: “For the purposes of the present case ... the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament ... will be unlawful if the prorogation has the effect of frustrating or preventing ... the ability of Parliament to carry out its constitutional functions.”²⁰³ To say that this judgement was based in a back and forth simply between principle and previous common law decisions, as Dworkin describes his reflective equilibrium, would leave out the important ingredient of contextual analysis, including an assessment (more in the nature of wisdom or statecraft) of the concrete effects of the court’s action or inaction (that is, allowing or not allowing the prorogation to occur).²⁰⁴

This type of reasoning is familiar to the Supreme Court of Canada in much of its *Charter*-based equality jurisprudence. But perhaps more relevant to the issues raised in this article, effects-based or contextual (including future contextual) reasoning has been used by the Supreme Court of Canada in order to identify cases where abstract principles such as the rule of law should be used to justify judicial intervention as, for example, in the *British Columbia Trial Lawyers* decision.²⁰⁵

Without suggesting that Canadian courts always employ this jurisprudential method, I do think that what I call a sustainable jurisprudence

²⁰³ *Case of Prorogation*, *supra* note 200 at para 50.

²⁰⁴ I am not the first to note the context-based assessments that were critical to the Court’s ruling in this case. Tarun Khaitan pointed out on the day of the Supreme Court’s prorogation decision that the reasoning turned on an “effects test” similar to that which is used in discrimination law to identify indirect discrimination: see Tarun Khaitan, “The Supreme Court Ruling: Why the Effects Test Could Help Save Democracy (Somewhat)” (24 September 2019), online (blog): *The London School of Economics and Political Science* <blogs.lse.ac.uk> [perma.cc/5AUU-TVBR].

²⁰⁵ See e.g. *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at para 40:

In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account—the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state’s power to make and enforce laws and the courts’ responsibility to rule on citizen challenges to them may be skewed.

points to some important elements in the current Canadian attempt to balance political and legal constitutionalism.

Conclusion

The preceding analysis identified what appeared at first to be two distinct approaches to the 1867 preamble. The first approach, before 1982, was traditional and orthodox, employing the preamble to interpret the constitutional text, but ultimately relying on that constitutional text for the legal result. Although the Supreme Court and Judicial Committee of the Privy Council rarely reflected openly on the point, the result was that the many parts of the Constitution left to political forms of regulation—convention, parliamentary privilege, sovereignty of Parliament itself—remained so regulated. Different judges occasionally considered the possibility of judicial recognition of implied rights, but such reflections never attracted majority support and, as often as not, were underpinned by more orthodox analysis based on the constitutional text.

The second approach, after 1982, explicitly used the preamble, not as a reminder of the retention of a significant element of political regulation, but rather as a source of principles that could serve as *legal* regulation via the courts. This approach reached its apogee in the assertion by Chief Justice Lamer in the *Provincial Judges Reference* that the 1867 preamble was an invitation to the Canadian courts to fill gaps in the Constitution.

In Part IV, I noted that there is a temptation to view the Supreme Court's post-1982 treatment of the preamble as an inevitable, one-way shift from political to legal constitutionalism. As a historical matter, it is hard to justify this shift while still citing a preamble that confirmed the existence of an uncodified Constitution and the significant amount of political regulation that went with it. At the level of constitutional theory, a Dworkinian or common law constitutional approach would allow the courts to arrive at the same result.

Perhaps, however, the preamble is less an essential source of constitutional principles (that are available independently in the structure of the Constitution in any event) and more a reminder of the need to balance what both political constitutionalism and legal constitutionalism bring to a polity. This vision of Canada as a compromise between UK (primarily political) and US (predominantly legal) models of constitutionalism is not a new one,²⁰⁶ but the assertion here is that this compromise is based less in the (over-emphasized, in my view) presence of the section 33 override and more in broader considerations of constitutional theory and practice.

²⁰⁶ See e.g. Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49:4 Am J Comp L 707.

Once principles can be brought to bear in constitutional argument and reasoning, it is hard to know when to begin and where to stop applying them. We have seen in Part IV that the entire body of constitutional conventions, based as they are in “reasons for the rule” that mirror principles (usually the democratic principle, but in Canada, also the federal principle), could, on that basis, easily be absorbed into the legal constitution. The preamble, interpreted in the new way suggested in the previous paragraph, would not prevent some conventions (or some parts of conventions) becoming constitutional rules,²⁰⁷ if the evolving Canadian circumstances revealed the good sense of it. But for the most part, the preamble remains a reminder of the healthy coexistence of convention and law in our constitutional system, and of the political and legal dynamics that surround each.

The place of conventions in the Canadian legal system is one example of the difficulty of knowing when to begin and where to stop applying constitutional principles. But there is a larger terrain on which that tension plays out. We have already seen and briefly discussed prominent examples of the Supreme Court of Canada struggling with that tension, in cases such as the *Manitoba Reference* and the *Provincial Judges Reference*. In the first of these cases, the fact that both the invalidity and its suspension were said to be based in the principle of the rule of law was a clue to the difficulty of understanding these cases as a form of deduction from principle.²⁰⁸ Even viewed as an evolving (more in the nature of an inductive) common law principle in the manner of Dworkin’s chain novel, it was hard to read the

²⁰⁷ The *Secession Reference* itself can be seen as case of transforming conventions into constitutional principles. For a pre-reference account of the conventional nature of the arguments later presented in the context of that reference, see Fabien G  linas, “Les conventions, le droit et la Constitution du Canada dans le renvoi sur la « s  cession » du Qu  bec: le fant  me du rapatriement” (1997) 57:2 R du B 291. So too the *Case of Prorogation* discussed above at the end of Part IV.

²⁰⁸ In “Unjust Enrichment and the Idea of Public Law” in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of Unjust Enrichment* (Oxford: Oxford University Press, 2009) 394 at 396–97, Charles Mitchell and I discuss how Bastarache J in *Kingstreet Investments Ltd v New Brunswick (Finance)* (2007 SCC 1) also wrestled with the implications of a rule of law principle that had to explain both the need for the state to reimburse taxes paid on the basis of a statute later found to be unconstitutional, and the possibility that such reimbursements might imperil the stability of the state’s finances. Bastarache J seemed to tie the rule of law into a tangled shape in asserting that the solution to the possibility of reimbursement-generated financial instability would be a retroactive statute (itself anathema to many rule of law proponents) relieving the state of the need to reimburse (such reimbursement supposedly based in the rule of law) (*ibid* at para 12). We preferred the approach of La Forest J (see *Air Canada v British Columbia*, [1989] 1 SCR 1161 at 1204–06, 59 DLR (4th) 161), who did not attempt to make the rule of law principle do all the work, indicating instead that adjudication of principles does not occur in some lofty legal space but is always related to political, economic, and social realities, including the possibility of fiscal chaos. This, it is argued, is much like the approach to reflective equilibrium recommended here and discussed in greater detail in Part IV, an approach that forms part of what I have termed a sustainable jurisprudence.

Manitoba Reference as the product of the sort of reflective equilibrium envisioned by Dworkin. The back and forth or to and fro is more convincingly described as a movement between principle and the actual (including future) context of Manitoban society rather than as one (as Dworkin preferred) between principle and the intuitions of the common law. There could be no question in such circumstances of leaving the political process to work out the solution. The Court had to work hard to find a way forward, and it worthily (in my view) fulfilled the great demand for statecraft that the situation presented. It is hard not to admire the Court's wisdom in the way forward it identified.

In the *Provincial Judges Reference*, the Court arguably lost its way in finding the right balance between the political and the legal. The Court's invocation of the preamble, given the preamble's primary association with political constitutionalism, was confusing, especially in a context where, unlike the *Manitoba Reference*, the Court was about to invalidate the political actors' judgements in circumstances that were far from unusual in the normal run of political and economic affairs. The Court could have invoked the principle of judicial independence without referring to the preamble, that is, by citing previous case law, and, if need be, by supplementing it through new forms of common law constitutional argumentation (spurred on by the writings of Dworkin).

Each of these cases (the *Manitoba Reference* and the *Provincial Judges Reference*) required judicial wisdom above and beyond the invocation of constitutional text and constitutional principle. The contention in this article is that, in the hard cases that regularly come before it, the Court is at its wisest when it engages in the sort of reflective equilibrium that takes into account not just principle and previous common law instincts (as Dworkin suggested) but also the social scientific context (including a sense of what that future context may well entail). Given our traditional legal and judicial practices, the last of these considerations is not always spelled out. This is because those real-life stakes are often set out in the account of the facts, a segment of the reasons that lawyers frequently ignore, so eager are we to get to the *ratio decidendi*, analysis, and disposition of the case.²⁰⁹

²⁰⁹ A good example of this phenomenon (the Court attending to past, present, and even future factual context in the "Facts" rather than the "Analysis") is *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 2–10 [*Doucet-Boudreau*]. The case involved the right under section 23 of the *Charter* to have children educated in the language of the minority, in this case the minority francophone population of Nova Scotia. The case could have involved a simple decision based on s. 23. However, the recitation of facts by the trial judge, repeated in their own words by the majority in the Supreme Court of Canada, painted a clear picture of non-respect for francophone rights, prior to, and even after, the arrival of section 23 in 1982. This "factual" account indicated the ways in which local educational authorities used delay and other methods to deprive francophones of their rights. In considering whether the trial judge could order the local

However, advocates appearing before appellate courts and the Supreme Court of Canada understand well the importance of setting out the real-life consequences of the choices courts have to make, and the courts sometimes have more to say about those same consequences than we are often inclined to take in.

If we bring these different parts together, then we have in Canada a substantially written constitution that remains, despite all, uncodified. The uncodified Constitution includes an important political or institutional component: constitutional conventions, parliamentary privilege, and a thorough-going faith in the good sense of the peoples' representatives in Parliament and the legislatures. The preamble to the 1867 *Act* is a reminder both of the existence of this non-legal dimension and of the need for those political components to regulate themselves to a considerable extent.

An understanding of the deep structure and principles of the Constitution requires an examination of the whole Constitution, including its history, its purpose, and the ongoing context in which it plays out. All constitutional actors need to engage in that process on a regular basis. As noted, courts are particularly well equipped to articulate the conclusions of their own examinations of the deep structure and principles of the Constitution, but they are less able to understand the ongoing context in any detail and with sufficient nuance. The risk is that they convert their own thinking at the level of principle into specific legal conclusions in parts of the Constitution that should be reserved for political argument and political conclusions. This is not to say that the Court should never intervene with principled judgements suited, as best as can be determined, for the evolving context of Canadian life. Sometimes doing nothing is radical or activist, as it

authorities to report to him on the status of efforts to provide the required educational facilities, the judge was making clear that he had the future effects of his decision in mind as much as the present and the past.

Though not a case in which the courts cited the preamble as a prelude to invoking constitutional principles, *Doucet-Boudreau* is a further example of the difficulty of applying constitutional principles in the way that Dworkin envisioned, and as discussed in Part IV. Instead, *Doucet-Boudreau* is a fine example of the sort of reflective equilibrium that I have proposed, where principle(s) and social scientific context (including future context) are taken into account in hard cases.

In *Doucet-Boudreau*, both the separation of powers principle and the prior case law seemed to dictate that the trial judge should not have required the local authorities to report back to him regarding the implementation of his judgement. However, the factual account, in particular the future that could easily be envisioned given past failures to respect court decisions, clearly implicated the principle of the rule of law. What would be the effect on Nova Scotia francophones' perception of the rule of law if, once again, they saw their constitutional rights unrealized, despite an order of a court? The trial judge and the Supreme Court of Canada majority's attention to the effectiveness of law going forward, as suggested in what I call a sustainable jurisprudence, helped untangle that which constitutional principles required. A relatively small variation on the usual separation of power principle was needed in order to vindicate the rule of law (in the full sense of the latter principle required by a sustainable jurisprudence).

would have been had the Court stood back and let the cards fall as they might in the *Manitoba Reference*. Sometimes, as in that case, a more dramatic step represents the best judgement possible. In other cases, as where conventions operate, the best judgement may be to do nothing. And in yet other cases, the best judgement will be to do what courts so often do: take a small step in what seems to them to be the best direction, given their limited but nonetheless vital understanding of the relevant Canadian context.
