"MAKING PUBLIC LAW, 'PUBLIC': AN ANALYSIS OF THE QUEBEC REFERENCE CASE AND ITS SIGNIFICANCE FOR COMPARATIVE CONSTITUTIONAL ANALYSIS"

JAMES T. MCHUGH*

I. REASSESSING THE PURPOSE OF CONSTITUTIONAL ADJUDICATION

THE Supreme Court of Canada's advisory opinion in *Reference re Secession of Quebec, 1998* (also known, more simply, as the "Quebec reference case") has been the subject of much interpretation and comment, because of its obvious implications for the future of Canada.[1] However, it offers an arguably wider opportunity to consider the role of the judiciary within a liberal democracy. The professional nature of the legal process and its practitioners often has made legal and judicial institutions, to most of the public, distant and alien components of the political system. The technical aspects of many areas of law (such as contracts, torts, and civil procedure) may, in fact, make this area of public concern seem unapproachable to the average citizen; indeed, some legal practitioners may prefer that the law remain that way. That mystique often is transferred to the realm of constitutional law, where the use of technical terms (including Latin words and phrases) may serve, intentionally or not, to insulate legal arguments and proceedings from public scrutiny.[2]

But constitutional law is the ultimate expression of *all* areas of law, public and private. All law functions within the foundational values and parameters that the constitutional structure establishes and enforces. The creation of professional distance between the public and its law undermines the sovereignty of a democratic polity.[3] Furthermore, this sort of

* Associate Professor of Political Science and Chair of the Legal Studies Program, Roosevelt University, Chicago, and Adjunct Professor, The John Marshall Law School, Chicago; Ph.D., Queen's University (Canada), 1991.

1. A brief sample of these commentaries include Stephen Dycus, "Quebec Independence and United States Security: A Question of Continuing Rights and Duties" (1998) 15 Ariz.J. Int'l. & Comp.L. 187; Rosemary Rayfuse, "Reference *re* Secession of Quebec from Canada: Breaking Up Is Hard to Do" (1998) 21 U.N.S.W.L.J. 834; Manisha Thomas, "Canadian Ruling on Quebec Secession" (1998) 5 Hum.Rts.Trib. 23; Jose Woehrling, "Les Aspects juridiques d'une eventuelle secession du Québec" (1995) 74 *Revue du Barreau Canadien* 293; Robert A. Young, "The Political Economy of Secession: The Case of Quebec" (1994) 5 Const.Pol.Econ. 221.

2. This general issue, including its semantic and cultural aspects, is explored in James T. McHugh, "Is the Law 'Anglophone' in Canada?" (1993) 23 Am.Rev.Can.Stud. 407. An interesting comment on the origins of the persistent use of Latin terms within the legal lexicon is offered in Robert F. Wright, *Medieval Internationalism* (1930), pp.189–190.

3. A general expression of that concern can be found in Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 Austl.L.J. 32.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

judicial opinion offers a more meaningful source for comparative constitutional law than the relatively parochial analysis of mechanical rules that has dominated much of the field of comparative law.[4] Therefore, the Supreme Court of Canada's opinion within the Quebec reference case offers an important concession to the principle of democratic sovereignty. This opinion addresses a crucial political issue within the context of the political needs and ideals of the Canadian nation.

This approach makes the decision both relevant and comprehensible to many citizens who, collectively, constitute the sovereign source of these needs and values. It is, therefore, entirely appropriate that the court produce an opinion that is phrased in both an instructional and "user friendly" manner.[5] It also is appropriate that the opinion is politically and philosophically expressive, since it acknowledges the fact (often obscured by arcane reasoning, technical rules, and "legalese"[6]) that public law is derived from ideals, beliefs, and values that originate in the public, rather than the professional, sphere.[7] It belies the strong misconception, which is promulgated too frequently within many law schools, that even the public law must be subjected to an "objectivity" that is so rigid that it denies the obviously political and philosophical nature of these cases, the constitutional clauses that provide them a basis, and the role of courts within a democracy.[8]

The evaluation of a single case (even in comparison to other cases) does not offer a body of empirical evidence that normally can sustain broad conclusions, even when it involves a constitutional controversy as seminal as this case. However, the case study, while parochial, does offer a format that can be useful for exploring and evaluating certain normative issues. The evaluation of a significant case can provide the sort of focus necessary for exploring these ideas and presenting a basis for later comparison that can transform anecdotal observations into empirically supported conclusions of broader scope and application.[9] The Quebec reference case

4. This problem and suggestions for a more normative approach to comparative law that acknowledge these cultural and theoretical influences are addressed in Mark Van Hoecke and Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 Int'l. & Comp.L.Q. 495.

5. A comparative and historical analysis of this objective is provided in Stephen Baister, "The Court as Educator: The Social Courts System of the German Democratic Republic" (1997) 18 J. Legal Hist. 47.

6. These problems are addressed in George H. Hathaway, "Plain Language: Clarity *v.* Legalese in the Law" (1998) 77 Mich.B.J. 198.

7. This ideal is suggested in Robert C. Post, "The Constitutional Concept of Public Discourse" (1990) 103 Harv.L.Rev. 601.

8. This objection is raised in Jules L. Coleman, "Truth and Objectivity in Law" (1995) 1 Legal Theory, 33; Heidi Li Feldman, "Objectivity in Legal Judgments" (1994) 92 Mich.L.Rev. 1187.

9. This educational objective within the legal and judicial systems is discussed in R. Randall Rainey, "Educating for Justice: A Reply" 11 St. Louis U.Pub.L.Rev. 521.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

provides this sort of a seminal revelation of larger theoretical issues that need to be defined and understood, thoroughly, before a broader methodological analysis can be applied.

The Supreme Court of Canada raised several controversies, in this respect. This decision addressed some of the most fundamental theoretical areas of concern to a democratic polity. The very nature and principles of liberal democracy, federalism, sovereignty, self-determination, individual rights and liberties, collective interests and identity, pluralism, and the rule of law pervade this ruling and provide a forum for scholarly and public, as well as legal, debate. Arguably, this result is precisely the sort of emphasis that a constitutional opinion should provide.[10] An assessment of its relative value necessitates a specific analysis of these areas, as they were addressed within the Quebec reference case. These areas are unusually expansive in their scope, so it may be more useful simply to focus upon one of these topics, as a manageable attempt to critique the actual, and proper, role of the judiciary, in reference to such broadly "public" concerns.[11]

II. BACKGROUND TO THE QUEBEC REFERENCE CASE CONTROVERSY

THE relationship of federalism to this controversy necessitated a complex series of analyses, by the court. The nature of federalism as the basis for the founding of the present Canadian political order, the role of federalism in the expression of both national and political identity, and the effect of federalism upon the rule of law provided an area of overlap between this issue and other issues raised by this reference. Therefore, the court's ruling upon this specific matter provides an excellent insight into its overall approach and its relationship to the wider public debate. It also serves the indirect role of providing a forum for public education and articulation, assisted (as it would be within a classroom) by profound scholarship. The interdisciplinary nature of that scholarship strengthened the applicability of this approach to its public audience, by addressing its

10. That argument is offered, from a comparative perspective, in A. Alen, "Nationalism-Federalism-Democracy: The Example of Belgium" (1993) 5 Eur.Rev.Pub.L. 41.

11. These broader social topics remain a central concern for many legal scholars, as revealed in Robert Post, "Democracy, Popular Sovereignty, and Judicial Review" (1998) 86 Cal.L.Rev. 429.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

significance beyond the narrow, technical realm and relating it to its social, cultural, and political context.[12]

Canada was created upon a foundation of federalism.[13] The authors of the British North America Act of 1867, which sanctioned and enacted the creation of a self-governing Canada, evidently were preoccupied with this issue. This act of the British parliament, which provided Canada with a *de facto* constitution, was the culmination of decades of efforts to govern this series of diverse colonies that constituted British North America and reconcile the French-speaking inhabitants, and their strong sense of a distinct identity, to the majority population of English-speaking inhabitants.[14] The most significant sections of the British North America Act were devoted to the relationship between federal and provincial governments, especially concerning the two most dominant provinces, Ontario and Quebec. Sections 91 and 92 of the Act, in particular, served to define the respective powers of each level of government. Both levels of government have competed with each other for political and economic advantage, with the provinces enjoying the advantage of control over

12. Examples of sources cited by the Supreme Court of Canada, within this reference case (although other, uncited sources also probably influenced this process), include Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995); Karl Doehring, "Self-Determination", in Bruno Simma (Ed.), *The Charter of the United Nations: A Commentary* (1994); Louis Favoreu, "American and European Models of Constitutional Justice", in David S. Clark (Ed.), *Comparative and Private International Law* (1990), pp.105 *et seq.*; Peter W. Hogg, *Constitutional Law of Canada* (1997); Joseph Pope (Ed.), *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (1895), plus several other works of government publications and independent scholarship.

13. This extremely strong emphasis upon Canadian federalism has resulted in a great many scholarly studies. Some significant texts that emphasise various aspects of this theme include Peter Aucoin, *The Centralization-Decentralization Conundrum: Organization and Management in the Canadian Government* (1988); Edwin R. Black, *Divided Loyalties: Canadian Concepts of Federalism* (1975); Howard Cody, "The Evolution of Federal-Provincial Relations in Canada" (1977) 7 Am.Rev.Can.Stud. 55; Mark R. Krasnick, *Fiscal Federalism* (1986); Gills Lalande, *In Defense of Federalism: A View from Quebec* (1978); Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (1997); J. Peter Meekinson (Ed.), *Canadian Federalism: Myth or Reality?* (1977); Jean-Pierre Prévost, *La Crise du Fédéralisme Canadien* (1972); Richard Simeon, *State, Society, and the Development of Canadian Federalism Diplomacy* (1990); Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (1979); Pierre Elliott Trudeau, *Le Fédéralisme et la Société Canadienne-Française* (1967).

14. A seminal account of the motivations for, and creation of, Canada's federal union, is provided in P. B. Waite, *The Life and Times of Confederation, 1864–1867* (1967), pp.104–116.

The Upper Canada (Ontario) and Lower Canada (Quebec) rebellions of 1838 prompted an imperial mission, under Lord John Durham, that recommended a federal union of these two provinces (initially excluding the Maritime provinces and the Hudson's Bay Company lands of British North America) in the hope of assimilating French-speaking Canadians into the English-speaking population. It began a process that contributed to the Canadian confederation of 1867 and the present mistrust of Quebec towards the rest of Canada. An assessment of his report, and its legacy, is offered in Denis Bertrand and d'Albert Desbiens (Transl. and Eds), *Le Rapport Durham* (1990), pp.11–44.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

natural resources (including Albertan oil and Quebec hydroelectric power) and the federal government exercising oversight of the "Peace, Order, and Good Government of Canada".[15]

The people of Quebec have been able to nurture a unique identity, within the Canadian federal system, despite a lack of complete independence. This identity has evolved through different phases, from a period dominated by traditional elites and political patronage, when many conventional functions of government were delegated to the Roman Catholic Church, through a period of social democratic reform, culminating in *la revolution tranquille* of the 1960s, to the current period of more aggressive attempts to achieve cultural security, economic self-sufficiency, political autonomy, and, even, outright independence, following the emergence of the separatist *Parti Québécois*, during the 1980s.[16] The desire to preserve Quebec as a distinct nation with a unique and vulnerable culture has prompted two referenda on the subject of redefining Quebec's relationship with the rest of Canada.

The *Parti Québécois* sought authority to negotiate a relationship of "sovereignty association" with the federal government, in 1980. The Quebec electorate's rejection of this vaguely worded request provided the opportunity for the federal government, under Prime Minister Pierre Trudeau, to negotiate a new constitutional order with all of the Canadian provinces. The result was the creation of a constitutional amending formula, the patriation of the British North America Act (renamed the Constitution Act of 1867), and the adoption of the Constitution Act of 1982, including the Canadian Charter of Rights and Freedoms, all of which the Quebec government rejected. This Charter of Rights, in particular, emphasises the principles of federalism, liberal democratic

15. Can.Const. (Constitution Act, 1867), ss.92–93.

A contextual evaluation of Canada's federal-provincial, including the pivotal role of ss.91 and 92 of the Constitution Act of 1867, can be found in Gordon R. Brown, "Canadian Federal-Provincial Overlap and Government Inefficiency" (1994) 21 *Publius* 21.

16. Good accounts of the evolution of Quebec nationalism include Michael D. Behiels, *Prelude to Quebec's Quiet Revolution* (1985); Dominique Clift, *Quebec Nationalism in Crisis* (1982), Fernand Dumont, "La Culture québécoise: ruptures et traditions", in Jean Sarrazin, Claude Glayman, Micheline Jérome (Eds), *Dossier Québec* (1979), pp.59–69; Marcel Rioux, *Les Québécois* (1974); Dale Thomson, *Jean Lesage and the Quiet Revolution* (1984).

The distinction between the concepts of nationalism as understood within Quebec and as understood within the rest of Canada is explored in James T. McHugh, "On the Difference Between 'a Nation' and '*une nation*': Contrasting Concepts of Canadian and Québécois Nationalism", in Jürgen Kleist (Ed.), *Canada Observed: Perspectives from Abroad and from Within* (2000, *forthcoming*).

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

governance, and pluralism, especially in terms of group identity, multiculturalism, and equality, including the equal status of both the English and French languages and their respective cultures, throughout Canada.[17]

Quebec nationalists frequently have expressed a sense of isolation and vulnerability, regarding Quebec's language and culture. The fear that this national identity continues to be threatened by the dominance of the English-speaking North American society that surrounds Quebec and the relatively affluent and powerful English-speaking minority population of Quebec has prompted many Quebec nationalists to reject the vision of many federalists of a Canada where strict equality of language and culture rights, throughout the country (including within Quebec), will guarantee the continued existence and prosperity of both linguistic traditions.[18] The failure of an ambitious attempt at constitutional compromise (known as the Meech Lake Accord) revived Quebec nationalist sentiment and the return to power of the *Parti Québécois*,[19] which introduced a more lucid referendum question, in 1995, on the subject of seeking eventual independence for Quebec. This proposition nearly succeeded in gaining support from a majority of the Quebec electorate who participated in it.[20]

III. THE QUEBEC REFERENCE OPINION AND ITS INSTRUCTIONAL PURPOSES

THE stated intention of the Quebec government to pursue yet another referendum question upon this subject prompted the government of Canada, under Prime Minister Jean Chretien, to submit a reference case

17. The political progress of this constitutional negotiation and the role of Quebec separatism in motivating that progress are discussed in Gregory S. Mahler, *New Dimensions of Canadian Federalism: Canada in Comparative Perspective* (1987), pp.57–83.

The ideals of the Canadian Charter of Rights and Freedoms have become a central focus of Canadian legal and political discourse. Good overviews of the Canadian constitutional tradition, the Charter, the values they reflect, and their significance to Canadian society include Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1992); Edward McWhinney, *Canada and the Constitution, 1979–1982* (1982).

18. More recent and accurate accounts of Quebec nationalism, the fears that prompt it, and its constitutional implications are provided in Léon Dion, *Á la Recherche du Québec* (1987); John Fitzmaurice, *Quebec and Canada: Past, Present, and Future* (1985); Jacques-Yvan Morin and José Woehrling, *Demain, le Québec: Choix Politiques et Constitutionnels d'un Pays en Devenir* (1994).

19. The failed attempt to adopt the Meech Lake Accord (which would have established constitutional recognition of Quebec as a "distinct society within Canada") and some of the consequences of that failure are recounted in Raymond Breton, *Why Meech Failed: Lessons for Canadian Constitution-making* (1992).

20. Analyses of the 1995 Quebec referendum and the events leading to it are provided in Harold D. Clarke and Allan Kornberg, "Choosing Canada? The 1995 Quebec Sovereignty Referendum" (1996) 29 PS: Pol.Sci. & Pol. 676; Robert M. Gill, "The 1995 Referendum: A Quebec Perspective" (1995) 25 Am.Rev.Can.Stud. 409; Gregory S. Mahler, "Canadian Federalism and the 1995 Referendum: A Perspective from Outside Quebec" (1995) 25 Am.Rev.Can.Stud. 449.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

before the Supreme Court of Canada, as provided under the terms of the Constitution Act of 1982. Specifically, the Supreme Court of Canada was asked to rule upon the constitutional validity of any future attempt of Quebec to secede from Canada. The court established the centrality of federalism within the Canadian constitutional system as a principle of overriding importance for determining this issue. This central role of Canadian federalism was perceived by the court as a response to the larger political requirement of providing political expression for the diverse peoples of British North America, especially its French-speaking inhabitants. That fact, though relatively easy to establish, provided a basis for framing the general public debate on Quebec secession.[21] Therefore, the court's ensuing discussion of the principles of democracy incorporated a further consideration of the concept of federalism:

> It is of course true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.[22]

Perhaps, the most important aspect of this review of federal principles was left implied, rather than explicitly addressed. The controversy over the secession of Quebec depends, largely, upon the nature of Canada's federal system in relation to international law and the Canadian constitutional tradition, generally.[23] That issue can be addressed meaningfully by Canadians *only* when these broader principles are understood and appreciated.

21. [1998] 2 S.C.R. 217, 236–238.
Scholarship that confirms this interpretation includes Greg Craven, "Of Federalism, Secession, Canada, and Quebec" (1991) 14 Dalhousie L.J., 231; Alain G. Gagon and Guy Laforest, "The Future of Federalism: Lessons from Canada and Quebec" (1993) 48 Int'l.J. 470; Peter A. Manson, "The Concept of Federalism in Canada" (1991) 16 Int'l. Legal Prac. 11.

22. [1998] 2 S.C.R. 217, 237.

23. Patrick J. Monahan, "The Law and Politics of Quebec Secession" (1995) 33 Osgoode Hall L.J. 1.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

That result can be difficult to achieve within the normal discourse of political debate. Canadian federalists and Quebec officials have confronted this issue in a goal-oriented manner; they have presented it to the public, similarly. Quebec politicians who support separatism discuss these principles only in terms that will advance their goal of political sovereignty; federal officials discuss these principles only in terms that support their goal of preventing Quebec secession. The debate becomes, therefore, both acrimonious and selective.[24] The Supreme Court offered, within this reference case, an attempt to provide a survey of federalism as a general political ideal and as an intrinsic component of Canada's political identity.

This seemingly self-conscious attempt to illuminate a central tenet of the political system, as a goal that is distinct from the specific controversy of Quebec secession, offers an important testament to the unique political role of the judiciary within the Canadian political system. The Supreme Court assumes a role as constitutional mediator *and* public educator, as distinct from the specific policy motivations of the representatives of the various legislative bodies. The reference case, in effect, provides an important opportunity for the Canadian judiciary to define its place within the Canadian political system. It oversees and defines the nature of the polity and, thus, establishes a claim to be an institutional branch of Canadian government.[25]

This role is revealed by the manner of the court's discussion of federal principles of government, within democratic polities, like Canada and Quebec. The most important controversy addressed by these principles are the conditions necessary to legitimate the termination of a federal union. The limitation imposed by a federal compact upon the desire of a province to leave Canada (even if democratically determined) served an important purpose, in this respect. The court made a concerted effort to accomplish two purposes: to demystify federalism; and to avoid an oversimplification of its relationship to the democratic process:

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

24. Two examples of these writings include Yarema Gregory Kelebay, "Quebec Report: The Real Face of Separatism" (1997) 31 Can.Soc.Stud. 117; Kai Nielsen, "Positions on Sovereignty and Partition" (1996) 76 Dalhousie Rev. 226. A partisan interpretation of this controversy by the Canadian Government's principal advocate for its position is Stephane Dion, "Why is Secession Difficult in Well-Established Democracies? Lessons from Quebec" (1996) 26 Brit.J.Pol.Sci. 269.

25. This informal role of courts is addressed in David A. Anderson, "Democracy and the Demystification of Courts" (1995) 14 Rev.Litig. 627. The catalyst played by the press, within this process, is addressed in Judith S. Kaye, "The Third Branch and the Fourth Estate" (1998) 12 Media Stud.J. 74.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

> Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.[26]

This conclusion seemed, to many commentators, to represent an attempt by the Supreme Court of Canada to reach a compromise between two conflicting aspirations. However, a comparison with previous reference cases, particularly including *Attorney General of Manitoba et al.* v. *Attorney General of Canada et al., 1981* (better known as the "patriation reference"), reveal a more profound purpose behind this sort of conclusion that corresponds with this broader public role of the Canadian judiciary. This reference did not achieve the same level of "public instruction" as the Quebec reference case. It addressed a conflict among political elites, as the federal government attempted to compel the British Parliament to yield to its demand for a unilateral amendment and patriation of the British North American Act, without seeking provincial legislative approval. The language of the Supreme Court of Canada, within the patriation reference, was directed more closely to the resolution of a parochial legal dispute than to an attempt to define and resolve a clash of contentious political ideals and aspirations. The court's treatment of the claim to provincial sovereignty, within Canada, provides a good example of this more narrow treatment:

> This leads to the submission made on the sovereignty of the provinces in respect of their powers under the British North America Act, the term "sovereignty" being modified in the course of argument to "supremacy". Allied to this was the contention that Canada cannot do indirectly what it cannot do directly; it could not by an enactment of its own accomplish that which is proposed by the Resolution. Such an enactment would be clearly *ultra vires* as to most of the provisions put forward by the Resolutions, and it should not be able to improve its position in law by invoking the aid of the United Kingdom Parliament. Moreover, even if the Parliament of the

26. [1998] 2 S.C.R. 217, 244.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

> United Kingdom retained its formal legal authority over the British North America Act, as one of its enactments, it was in the words used by the late and at the time, former Justice Rand, "a bare legislative trustee", subject as a matter of law to the direction of the beneficiaries, namely the Dominion and the Provinces, in respect of the Resolution. ...
>
> The direct-indirect contention, taken by itself, amounts to this: that whether or not the federal Houses can seek to obtain enactment of the draft statute appended to the Resolution, it would, in any event, be illegal to invoke United Kingdom authority to do for Canada what it cannot do itself.[27]

Even a consideration of broader political and philosophical issues, in relation to the patriation reference, was offered in a relatively cursory and legalistic manner. An examination of the relationship of the concept of "convention" to the Canadian constitutional process did make fleeting notice of the fact that "... many Canadians would perhaps be surprised to learn that important parts of the Constitution of Canada ... are nowhere to be found in the law of the Constitution".[28] But most of that examination focused upon specific historical enactments, legal scholarship, and relatively technical applications of this concept. The court's explanation of the relationship between convention and democracy provides a good example of an approach that, in comparison with the more profound response offered within the Quebec secession reference, seems to be relatively superficial:

> For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate; and the constitutional value or principle which anchors the conventions regulating the relationship between the members of the Commonwealth [of Nations] is the independence of the former British colonies.[29]

IV. THE COURT AS INTERPRETER AND TEACHER OF POLITICAL CULTURE

THE court thus made an allusion to a perpetual debate concerning the political culture that guides the Canadian polity and informs its constitutional tradition. Liberal democracy is a broad ideological heritage that permeates the Western world and includes many variations. Many Canadian scholars have claimed that Canada's political culture embraces a communitarian tradition, in contrast with the alleged dominance of a libertarian tradition, within the United States. Canadian national identity often has been linked to this contrast, particularly as a way of dis-

27. [1981] 1 S.C.R. 753, 769.
28. [1981] 1 S.C.R. 753, 773.
29. [1981] 1 S.C.R. 753, 775.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

tinguishing Canada from its potentially dominant neighbor. The Supreme Court of Canada made this fundamental assumption an explicit point of public education.

> Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.[30]

Additional competing interpretations of Canada's democratic legacy have been offered, by various scholars and commentators, as an explanatory source for understanding its political and constitutional order, from the conservative writings of George Grant to the pluralism of Michael Sandel and Charles Taylor. A common feature of these approaches has been the contention of a sense of collective identity, as well as individual identity, regarding society and its composition. This image is reflected within the Constitution Act of 1982, especially in terms of its references to language rights, multiculturalism, affirmative action, and other features that promote, allegedly, group interests and collective rights and liberties.[31]

Attempts have been made to contrast Canadian and Quebec societies, in terms of ideological heritage. The classic but, now, largely repudiated use of the "fragment theory" to claim that Quebec was the recipient of a political culture derived from feudal France, while the rest of Canada was the heir of a British liberal tradition that was strongly influenced by displaced Tories especially Loyalist refugees from the United States continues to persuade some critics to label Quebec society as being

30. [1998] 2 S.C.R. 217, 251.

31. George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (1970).

Charles Taylor, "Le pluralisme et le dualisme", in Alain-G. Gagnon (Ed.), *Québec: État et société* (1994), pp.61–84.

Michael J. Sandel, *Liberalism and the Limits of Justice* (1982).

An excellent overview of these perceptions of political culture and ideology, including as they relate to Canada, is provided in Avigail I. Eisenberg, *Reconstructing Political Pluralism* (1995).

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

hierarchical, rigidly collectivist, authoritarian, and even undemocratic.[32] Certain French-Canadian authors of the nineteenth and early twentieth centuries, including clerics such as Abbé Lionel Groulx, tended to confirm that image.[33] However, the greater intellectual freedom promoted by *la revolution tranquille* has revealed a profound liberal democratic heritage that Quebec shares with other Western societies and which is reflected within its genuine practice of the rule of law and the strong guarantees provided by the Quebec Charter of Human Rights.[34]

The Supreme Court of Canada avoided this debate by asserting the essentially democratic nature of the entire Canadian polity, including Quebec.[35] Its insistence upon demonstrable popular support for separatism, within Quebec, prior to further action upon this issue, affirmed, nonetheless, the legitimacy of Quebec's use of the referendum as a means of making these sort of sovereign claims, regardless of whether or not these claims should be recognised by the broader Canadian sovereign authority. The court expressed this definition, within a Canadian context that includes Quebec:

> The court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[36]

32. This oversimplified contention that relatively recently established societies can trace their ideological development to homogeneous social segments (or "fragments") of the heterogeneous "mother country" that founded them influenced some initial assessments of the political culture of "New World" countries, like Canada. It was first advanced in Louis Hartz (Ed.), *The Founding of New Societies* (1964). Its application to Canada led to the generalised conclusion that the English-speaking and French-speaking populations of that country were the products of two different colonising "fragments", with modern Quebec reflecting the influence of a conservative, Catholic, and authoritarian legacy, as suggested in Kenneth McRae, "The Structure of Canadian History", in *idem*, pp.234–274; Gad Horowitz, *Canadian Labour in Politics* (1968), pp.29–44. That assessment was influenced, however, by a superficial interpretation of Quebec's modern history, and it has been largely rejected. An excellent summary of this repudiation is provided in F. D. Forbes, "Hartz-Horowitz at Twenty" (1987) 20 Can.J.Pol.Sci. 292.

33. Lionel Groulz, *Les Chemins de l'Avenir* (1964).

Other nineteenth century authors reflected similar outlooks upon the national identity of French-speaking Canadians. Their opinions represented certain influential elites (particularly clerical ones) but not, necessarily, Quebec society, as a whole, as noted in Norman E. Cornett, "Lionel Groulx's Rationale for French-Canadian Nationalism" (1989) 18 Stud. in Religion, 407.

34. This assertion is made, in greater detail, in James T. McHugh, "The Quebec Constitution" (1999) 28 Que. Stud. 1.

35. An analysis of the nature and dominance of liberal democratic values within Quebec, and in comparison with the rest of Canada, is provided in Léon Dion, *Nationalisme et Politique au Québec* (1975); Ralph Heintzmann, "The Political Culture of Quebec" (1983) 16 Can.J.Pol.Sci. 3; Denis Monière, *Le Développement des Idéologies au Québec* (1977).

36. [1998] 2 S.C.R. 217, 254.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

The lessons regarding those values, the political and "moral" responsibilities of the members of a democratic polity, and their overriding importance to Canadian and Quebec citizens were conveyed to the public, throughout this ruling. It also served as a necessary component for appreciating and justifying the ultimate rejection of a claim to entirely unilateral separation from Canada, on the part of Quebec. This approach represents, again, the instructional nature that the court has assumed and, therefore, the truly public function that it seeks to fulfil. It is a justification that meets a broadly political need, rather than a parochial legal one; therefore, it achieves an ideal role for a component (if not an American-style "branch") of a liberal democratic government, which was evident in the court's apparent instruction to the Canadian public, regarding its responsibilities as the ultimate sovereign that binds itself to basic procedures and limits of conduct:

> The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.[37]

V. THE COURT AS POLITICAL PARTICIPANT AND GUIDE

SOME observers might argue that a more narrow, legalistic ruling is a more appropriate judicial response to the handling of a reference case. Indeed, a correlation can be made between the role of a judicial body, when issuing a reference opinion, and the "political questions" doctrine, as articulated within the neighboring American constitutional tradition. American courts have disclaimed the authority to rule on any matter that does not reflect directly justiciable controversies, presented through "... Cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority".[38] Therefore, a reference ruling by the United States Supreme

37. [1998] 2 S.C.R. 217, 256.
38. US Const., Art.III, s.2.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

Court would violate of the American "separation of powers" doctrine, since the judicial branch would be involved in the sort of policy speculation and development that is regarded as belonging exclusively to the "political" branches of American government.[39]

However, rather than simply shifting the burden to legislative and executive forces of government, the Canadian version of this doctrine appears (at least, within the format of the reference case) to provide a clearer context for judicial determination of the broader constitutional propriety of specific policies. This role necessitates the sort of attention to fundamental components of the political system and its values that the Supreme Court of Canada appears to provide within the Quebec reference case.[40] This point was made, by the Supreme Court, in response to objections that this issue was purely "political" and, thus, nonjusticiable:

> As to the "proper role" of the court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this reference do not ask the court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the US "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.[41]

This role even mandates an exploration of Canada's place within the world. Indeed, the court's consideration of international law provides an important way to link the issues of sovereignty and federalism that are intelligible to the public. The court acknowledged the applicability of the international doctrine of self-determination upon Canada's municipal law. It also accepted the claim of the *Québécois* as a "people" under

39. Several United States Supreme Court decisions have affirmed this position, including *Luther* v. *Borden*, 48 U.S. 1 (1849); *Colman* v. *Miller*, 307 U.S. 433 (1939); *Baker* v. *Carr*, 369 U.S. 186 (1962). The express constitutional prohibition against federal American judicial reference cases was articulated definitively in *Muskrat* v. *United States*, 219 U.S. 346 (1911), especially at 362. Excellent overviews of this doctrine are provided in Alexander Bickel, *The Least Dangerous Branch* (1986), pp.23–28, 69–71; Laurence Tribe, *American Constitutional Law* (1988), pp.96–107.

Perceptions of the increasingly "political" role of Canadian courts are addressed in Ghislain Otis, "Les Obstacles constitutionnels à la Jurisdiction de la Cour Federale en Matiere Responsabilité Publique pour Violation de la Charte Canadienne" (1992) 71 Revue de Barreau Canadien 647.

40. This role is acknowledged in T. A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995) 46 S.C.L. Rev. 1027.

41. [1998] 2 S.C.R. 217, 229.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

international law who merit political expression, allowing the court to make an additional point regarding the relationship of federalism to the Canadian polity, in general.[42] The desire of the *Québécois* to achieve self-determination may justify political independence, but that aspiration also could be achieved through the present federal arrangement, especially given the nature of those political ideals:[43]

> It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis with the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purposes.[44]

The court provided a theoretical framework for understanding the practical parameters of these intersecting concepts. This discussion makes possible an appreciation of the varied implications of this conflict that members of the public might not be capable of achieving through the public debate presented by partisan politicians.[45] The opinion of the court did not, however, offer a political compromise; instead, it provided both basic guidelines and a means for discerning the controversy in terms of conflicting ideals, rather than partisan objectives. Arguably, it was not intended to sway opinions but, rather, it was offered to provide the public with access to some of the intellectual tools needed for a meaningful participation within this political debate.[46] Therefore, it acknowledged

42. This issue is addressed, from a comparative perspective, in Calvin R. Massey, "The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States" (1990) Duke L.Rev. 1229, and *Note*, "Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence" (1997) 20 B.C. Int'l. & Comp.L.Rev. 85.

43. This ability of a society to secure an expression of self-determination without, necessarily, achieving the *full* sovereignty of independence is evaluated in Mitchell A. Hill, "What the Principle of Self-Determination Means Today" (1995) 1 J.Int'l. & Comp.L. 119; Lars Johansson, "*Raison d'Etat*: The State as a Vehicle for Self-Determination" (1996) 2 U.C. Davis J.Int'l. L. & Pol'y. 295; Eric Kolodner, "The Future of the Right to Self-Determination" (1994) 10 Conn.J.Int'l.L. 153.

44. [1998] 2 S.C.R. 217, 252.

45. Advocacy of that role can be found in Charles W. Collier, "The Use and Abuse of Humanistic Theory in Law" (1991) 41 Duke Law Journal 191; Robert J. Cottrol, "Legal Scholarship and Interdisciplinary Inquiry" (1992) 38 Loyola L.Rev. 83; Mark Tushnet, "Interdisciplinary Legal Scholarship: The Case of History-in-Law" (1996) 71 Chi.-Kent L.Rev. 909.

46. These tools are discussed, within a different context, in Rosemary J. Owens, "Interveners and *Amicus Curiae*: The Role of the Courts in a Modern Democracy" (1998) 20 Adel.L.Rev. 193.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

the theoretical capacity of the *Québécois* to seek full sovereignty, but it also noted the theoretical aspects of federalism that can circumvent the need to resort to that option as part of the pursuit of a legitimate political expression of self-determination:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral expression) arises only in the most extreme of cases and, even then, under carefully defined circumstances.[47]

VI. THE COURT AS CONSTITUTIONAL MEDIATOR AND TEACHER

NONETHELESS, principles of democracy cannot, in the opinion of the court, be ignored either for the purpose of establishing the parameters for addressing a potential political closure to this controversy. Therefore, the Supreme Court of Canada declined to impose a definitive conclusion, upon this dispute. It did, however, clarify the options available for the achievement of a political solution by the Canadian and Quebec electorate and their respective governments:

> Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.
>
> The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities,

47. [1998] 2 S.C.R. 217, 252, with emphasis provided within the original text.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

> namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights and the ultimate acceptance of the result by the international community.[48]

This sort of judicial participation within the political process offers an interesting model for other constitutional systems. Reference opinions provide an extremely important opportunity for a high court, like the Supreme Court of Canada, to define its place within its respective political system, perhaps even as a legitimate "branch of government".[49] Rather than attempting to answer a "political question", this sort of case can be used to frame the constitutional context for the public and its elected officials to address and, hopefully, "answer" these "questions". This role demands that the courts offer a constitutional analysis that is accurate, thoughtful, intelligible, approachable, and useful to the general public, and not just legal practitioners.[50]

The Supreme Court of Canada's opinion within the Quebec reference case appears to present that sort of response. If that assessment is correct, it could herald a clarification of the role for the "judicial branch" of Canadian government and, hopefully, restore this aspect of public law to its political and, thus, its "public" role, within Canadian society.[51] Arguably, it could provide a model for other liberal democratic societies that seek to evaluate, or re-evaluate, the political role of appellate courts and an independent judiciary as part of the democratic process. It could be particularly of use as a critical approach for comparative law scholars who wish to influence this process.[52] This trend could be particularly of use for countries dedicated to the broad political and moral principles of

48. [1998] 2 S.C.R. 217, 258–259.

49. The tendency to regard the Canadian court system in this way has increased, greatly, as illustrated in Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987).

50. These concerns are intimated, within a larger context, in Samuel Freeman, "Political Liberalism and the Possibility of a Just Democratic Constitution" (1994) 69 Chi.-Kent L.Rev. 619.

51. Another evaluation of the role of the judiciary within the Canadian political system is offered in Mark C. Miller, "Judicial Activism in Canada and the United States" (1998) 81 Judicature 262.

52. One example of this alternative critical approach to the study and application of comparative law is Daniel P. Franklin and Michael J. Baun (Eds), *Political Culture and Constitutionalism: A Comparative Approach* (1995). It complements more traditional approaches towards comparative law, as expressed within the "functional approach" towards this field, as most prominently represented by Konrad Zweigert and Hans Kötz, *Introduction to Comparative Law* (1987; trans. Tony Weir), and the more parochial "institutional approach", as represented by Mary Ann Glendon, Michael W. Gordon, and Christopher Osakwe, *Comparative Legal Traditions* (1982).

An interesting commentary on this issue, from a Canadian perspective, is offered in Peter H. Russell, "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts, and Judicial Behavior in Canadian Political Science" (1986) 1 J.L. & Soc'y 1.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press

liberal democracy, including the advancement of individual rights and liberties.

https://doi.org/10.1017/S0020589300064228 Published online by Cambridge University Press