Popular Revolution or Popular Constitutionalism: Reflections on the Constitutional Politics of Quebec Secession

Sujit Choudhry

A. TWO CONCEPTIONS OF CONSTITUTIONALISM

Constitutionalist theorists are in the midst of a debate over the appropriate institutional arrangements for the interpretation and enforcement of constitutional norms in a constitutional democracy—that is, a liberal democratic polity in which all exercises of public power must comply with some higher-order or basic law. In the United States, Larry Kramer has usefully described the two extreme positions in this debate as “legal constitutionalism” and “popular constitutionalism.” For legal constitutionalists, supreme authority to interpret and enforce the constitution rests with the courts. Because court judgments are regarded as authoritative by other government institutions and, indeed, by the public, these political actors defer to judicial pronouncements in the face of their own conflicting constitutional interpretations. Popular constitutionalists, by contrast, permit and even require that members of the executive and legislative branches independently interpret the constitution alongside the courts in the course of performing their functions. Moreover, these branches are ultimately subject to the “active and ongoing control over the interpretation and enforcement of constitutional law” by the people themselves, “conceived as a collective body capable of independent action and expression.” Institutionally, although popular constitutionalists may accept the possibility of judicial review, they refuse to accept judicial supremacy.

As Frederick Schauer has insightfully suggested, it is possible to understand this debate over institutional design as turning on different underlying conceptions of the point and function of institutions themselves. To popular constitutionalists, “a constitution . . . becomes both a statement of our most important values and the vehicle through which these values are created and crystallized.” On this conception, Schauer concedes that “it would indeed be a mistake to believe that the courts should have the pre-eminent responsibility for interpreting the constitution,” as it

2 Ibid. at 962.
3 Ibid. at 964.
5 Ibid.

would eviscerate the fundamentally democratic function of constitutional charters. Legal constitutionalists, by contrast, subscribe to what Schauer variously describes as the “modest constitution” or the “negative constitution.” On this conception, a constitution serves to fetter majority decision making, especially when a majority is likely to disregard longer-term values to pursue short-term policy preferences. A constitution is therefore a precommitment device that “creates second-order constraints on wise and well-meaning first-order decisions.” For modest constitutionalists, interpretation and enforcement by an institution other than the one that is bound by these precommitments—that is, the courts—is integrally tied to “the external nature of the constitutional norms themselves.”

In this chapter, I want to question Schauer’s seemingly universal equation of constitutional strategies of precommitment with legal constitutionalism and judicial supremacy. I agree with Schauer that constitutions serve an important disabling function, in that they set up roadblocks in the way of political decision making. But it does not follow that external enforcement through judicial review is necessarily the sole institutional mechanism for enforcing those constitutional precommitments. Along with popular constitutionalists, I argue that it would be a mistake to infer that the boundaries of judicial decision making are coextensive with the limits of the constitution. The question in each case is whether institutional settlement—for example, through judicial review—can produce political settlement. Following Ronald Dworkin, we can usefully distinguish the justifications for constitutions from the practical question of what institutional mechanisms best enforce them. Thus, even for the modest constitutionalist, the choice is not between legal constitutionalism and its populist alternative. Rather, the true choice is when and to what extent to opt for one or the other. Indeed, the challenge may be to design arrangements that permit the responsive and even tentative allocation of institutional responsibility for resolving constitutional questions.

B. CONSTITUTIONAL CRISIS: SECESSIONS AND REVOLUTIONARY LEGALITY

I want to pursue this claim with respect to constitutional precommitments that are designed to prevent constitutional crises. A constitutional crisis is a term that constitutional theorists frequently deploy but rarely define. But one definition emerges from what I take to be the basic ambition of modest constitutionalism, one that Schauer would endorse: to channel political conflict that would otherwise spill into the streets, into institutions that operate peacefully according to law, and which reach decisions that members of a political community accept as authoritative. A constitutional crisis arises when some significant proportion of a political community refuses to accept as authoritative the decisions of its governing institutions, when defective constitutional design creates a constitutional blind alley which cannot be resolved from within the constitutional framework, or because of an

6 Ibid. at 1065 and 1065.
7 Ibid. at 1055-6.
8 Ibid. at 1046.
institutional stalemate created by the exercise of constitutionally assigned powers and which creates the political pressure to step outside the constitution.10

As a case study, I will focus on a recurrent Canadian constitutional crisis: the constitutional politics of Quebec secession. The relationship between Quebec and the rest of Canada has long been of interest to political theorists interested in how liberal democracies should address questions of ethnicultural difference. This is especially true in situations where there are national minorities who were collectively incorporated into the larger nation-state, who are territorially concentrated and linguistically distinct, and who demand powers of self-government—what Will Kymlicka and others have termed multinational federations.11 But Quebec’s place in Canada is also worthy of attention by constitutional theorists because it raises classic questions about revolutionary legality, and the relationship between legality and legitimacy. This issue has arisen in the context of whether Quebec could achieve independence as an independent state recognized in law as such through a unilateral declaration of independence (UDI) in contravention of the existing constitutional order.

For Commonwealth constitutional scholars, the central historical episode for raising and exploring this issue has been the Rhodesian constitutional crisis in the late 1960s, which prompted an extensive critical literature.12 Rhodesia was a British colony that was governed by a white minority government. Rhodesia’s black citizens did not enjoy political power, but Britain was moving toward universal suffrage and majority rule as a prelude to granting Rhodesia independence. Faced with the almost certain prospect of the loss of political power, the white minority government issued a UDI with the objective of transforming Rhodesia’s status from that of a British colony to an independent nation governed by a white majority, much as South Africa had done over a decade earlier.

Rhodesia’s UDI raised important constitutional issues that quickly turned this political dispute into a legal dispute. Although a British colony, Rhodesia had exercised its powers under Rhodesia’s colonial constitution, which was an enactment of the British Parliament. That constitution did not confer on Rhodesia a right to secede and declare its independence, which meant that the Rhodesian government had acted unconstitutionally. Rhodesia followed up its UDI with the enactment of a new constitution identical in most respects to its colonial constitution, and purported to govern under it. In response, the British government also turned to law. Within days of the UDI, Parliament enacted legislation that repealed Rhodesia’s colonial constitution and assigned direct control over Rhodesian affairs to the British cabinet.

These conflicting assertions of legal authority by the Rhodesian and British governments set the stage for a series of challenges in the Rhodesian courts to the legality of the Rhodesian regime. The cases were brought by individuals who challenged

the legality of their detentions, purportedly authorized by powers exercised under the new Rhodesian constitution. They argued that the Rhodesian authorities had acted unconstitutionally because the only legal sources of power were grants of authority ultimately traceable to the Imperial Parliament. The question for the courts was whether to accept this argument or to recognize and enforce the laws of the revolutionary regime. In Schauer’s terms, these cases raised fundamental questions of constitutional theory, because they forced courts to grapple with the question "[w]hat makes a constitution constitutional?"13

The Rhodesian courts framed this legal question in positivist terms. There is a venerable tradition in constitutional theory that holds that the legal validity of the basic fact of political sovereignty within a nation-state is not subject to legal scrutiny in a court of law. Although Kelsen argued that the validity of the rule of recognition (his Grundnorm) is presupposed, Hart rightly pointed out that validity is an internal statement about the relationship of rules within a legal system and the rule of recognition. The better view is that the rule of recognition merely exists, as a matter of sociological fact—defined by Hart as acceptance by the officials who govern themselves by it. Regardless of how this basic political fact arose—through legal mechanisms or a violent or velvet revolution—it nonetheless stands as the foundation of a valid constitutional order. Hart’s rule of recognition incorporates this understanding of the relationship of law to basic political facts. The Rhodesian courts reasoned that because the existence of a constitutional regime was ultimately not a question susceptible to legal analysis but rather a matter of fact, so too was the issue of whether one constitutional regime had died and a new regime had taken its place. The test to be applied was one of effective control—that is, whether the facts on the ground gave rise to the conclusion that the Rhodesian regime had asserted a sufficient degree of control over the territory and people of Rhodesia for it to have replaced the prior colonial regime. If so, the court held, the rule of recognition in Rhodesia would have changed, shifting the title of Rhodesia’s constitutional order away from Imperial statute to its revolutionary constitution. Over a series of cases, the Rhodesian courts ultimately came to this view.

The two extreme positions in the Rhodesian debate framed the Canadian discussion prior to the Supreme Court of Canada’s judgment in the Quebec Secession Reference,14 which I discuss below. On the one hand was the view that Canadian constitutional law provided the relevant legal framework. Although the Canadian Constitution confers no right of unilateral secession on provinces, it is widely accepted that Quebec’s independence could be achieved through constitutional amendment. Because the relevant amending procedures require federal and varying degrees of provincial consent, and provincial referenda carry no legal force, if Quebec were to secede unilaterally, even on the basis of an overwhelming referendum mandate, it would be acting unconstitutionally. Any commands issued by a Quebec government that had proclaimed independence to the citizens of

10 For a similar list, see Keith Whittington, "Yet Another Constitutional Crisis?" (2002) 43 Wm. & Mary L. Rev. 209.
C. SECESSION CLAUSES AS CONSTITUTIONAL PRECOMMITMENTS TO AVOID CONSTITUTIONAL CRISIS

The Canadian constitutional crisis thus presented the prospect of nothing less than the threat of a popular revolution in the event of a positive referendum result. And it would be a nonviolent revolution because, as good liberal democrats, all sides had eschewed resort to violence. The irreconcilable constitutional theories of the Quebec and federal governments set the stage for a disastrous struggle for legal supremacy. In the event of a positive referendum vote, the most likely response was for the federal government to insist that any change in Quebec’s political status occur from within the Canadian constitutional framework, and for Quebec to simply reject this position. The result would likely have been a UDI, followed by federal attempts to assert control over the territory of Quebec, with the very real potential for a descent into legal chaos.

And so, not surprisingly, it has been suggested that the appropriate means, as a matter of constitutional design, to preempt and prevent the constitutional crisis that would be prompted by unilateral secession is to craft a constitutional right to secession which permits secession if certain procedures are followed. The goal is to discipline secessionist politics according to the rule of law. Such a secession clause, put in place in advance of an attempt to secede, would accordingly serve as a precommitment device to prevent the wholesale disintegration of the legal and political order during rounds of secessionist politics. A secession clause would serve as a constitutional safety valve, to channel political pressures that would otherwise lead actors to step outside the constitutional order through a set of institutional procedures operating under that order itself.

The most extended argument along these lines for a secession clause has been made by Daniel Weinstock. Weinstock begins from the Madisonian premise that constitutional design not only institutionalizes our highest ideals, but must also address the probable, if not inevitable, political behavior that can threaten or destroy a constitutional order. Assuming that such behavior would likely occur even if it were unregulated, the Madisonian argument is that it may be better to permit and regulate such conduct rather than leave it uncontrolled. The thought is that the legal regulation of such conduct is warranted if, on balance, the consequences of legally regulated behavior are better than the consequences of legally unregulated behavior.

Applied to secession, Weinstock succinctly makes the case for a constitutional right to secede not on the basis of a moral right to self-determination, but rather on pragmatic grounds:

Proponents of the constitutional recognition of a right to secession believe that secessionist politics will occur anyway, regardless of legal silences and prohibitions, and that its occurring in a legal vacuum will be more harmful than were it to occur within well thought out legal and procedural parameters.

More specifically, Weinstock identifies two negative aspects to secessionist politics – namely, the strategic use of the threat of secession by a federal subunit “as a way of discouraging policies which run against their interests, rather than engaging in more arduous and demanding democratic deliberation with their fellow citizens” (termed the “blackmail threat”), and the responding attempts by the federal government “to nip any likelihood of autonomist stirring in the bud so as to diminish the likelihood of secession” (termed the “thrust of oppression”). Channelling secessionist politics through a suitably designed secession clause, on Weinstock’s view, would dampen both sets of behaviors. Procedural devices such as a supermajority requirement and a waiting period between referenda on secession would both make the threat of secession blackmail less credible and limit the frequency of occasions on which secessionist threats could be raised. The diminished threat of secession would in turn reduce the threat of oppression.

Although Weinstock makes a powerful argument, I think he is too narrow in his enumeration of the negative political consequences of secessionist politics that a secession clause would potentially combat. For alongside the damage that secessionist politics can cause to the functioning of multinational states prior to secession occurring, not subjecting the process of secession itself to legally constituted procedures could precipitate legal chaos and discontinuity. In particular, it places legal subjects who wish to act in good faith and obey the law in the impossible position of determining which sovereign’s commands to obey. Allan Rock, Canada’s former justice minister, put the point this way in a speech in the House of Commons: A unilateral declaration of independence would create the most serious difficulties for ordinary Quebecers. There would be widespread uncertainty within Quebec about which legal regime was effectively in control.

For the average citizen, business or institution in Quebec, there would be the greatest confusion. Individual Quebecers would be uncertain what laws applied, what courts and law officers to respect, to whom to pay their taxes. In such an environment, it is certain that Quebec society would be deeply divided over the course the provincial government would have adopted.

---

16 Ibid. at 196.
17 Ibid. at 195.
18 House of Commons Debates (Hansard), Vol. 134, Number 075 (September 26, 1996) at 4706, 35th Parliament, 2nd Session.
Conversely, if legal rules governing the process of secession itself were in place in advance, one might be able to lower these risks.

But my focus here is somewhat different. Weinstock is silent on the institutional question of whether a secession clause should be judicially enforced or left to constitutional politics. At one point, Weinstock rejects the idea of building into the terms of a right to secede substantive criteria, such as the imperilling of a group’s fundamental interests, because it is difficult to imagine “what body could legitimately step in to determine what a group’s fundamental interests are.” This passage suggests that Weinstock holds that a secession clause should not be judicially enforced. But more direct guidance can be gleaned from his characterization of the secession clause as a constitutional precommitment device, both in the timing of its entrenchment (i.e., at the founding of a multinational state or at a moment of political calm when secession is not a real possibility) and in its function to protect political actors from their own destructive behaviors. As Weinstock writes:

Provisions such as the ones that I have described should be negotiated and drafted by willing partners looking down the road at temptations and grievances that might get the better of them when the political climate is more difficult. They may be tempted to protect themselves against destructive motives which they know they may come to have, but which they antecedently do not want it to be too easy to act on. They might therefore find it rational on such occasions to “bind themselves” in such a way as not to make it too easy to quit the association they are constituting on a whim.

On Schauer’s logic, a secession clause definitely should be susceptible to adjudication because constitutional precommitments are precisely what legal constitutionalism and judicial supremacy are for. Indeed, this should be an easy case for Schauer and the legal constitution.

But this conclusion warrants further reflection in light of the Secession Reference, in which the Supreme Court of Canada seems to have crafted a secession clause that is not even subject to judicial interpretation, let alone judicial supremacy. A bit of background is in order. The federal government brought the Secession Reference by invoking the advisory jurisdiction of the Supreme Court of Canada. The Court was asked narrow questions – whether unilateral secession was legal under Canadian constitutional law and under international law – which it unsurprisingly answered in the negative. However, there were three highly unusual aspects to the judgment.

First, although submissions had focused almost entirely on the text of the constitutional provisions governing amendment, the Court’s judgment was based on a set of unwritten constitutional principles: democracy, federalism, constitutionalism and the rule of law, and minority rights. In addition to functioning as interpretive aids, these principles are freestanding sources of binding constitutional obligations. The Court held that unilateral secession would be unconstitutional, not because the constitutional text did not permit it, but because the principle of democracy could not take priority over federalism and the rule of law.

Second, the Court held that even though a referendum vote for independence would not legally effect Quebec’s secession, a “clear majority” voting in favor of a “clear question” in a referendum on secession would trigger a constitutional duty on the “political actors” to negotiate the terms of secession in good faith. The Court crafted this obligation from the unwritten constitutional principles. Moreover, these same principles had to be taken into account by the negotiating parties and properly balanced in the terms of any secession agreement. I refer to this set of obligations, collectively, as the Canadian secession clause. Any negotiated agreement for secession resulting from these constitutionally triggered and structured negotiations would also require a constitutional amendment.

Third, and perhaps most importantly for our purposes, the Court held that it would not enforce the terms of the Canadian secession clause in subsequent constitutional litigation. After setting out the constitutional duties flowing from the Canadian secession clause, the Court expressly limited its role “to the identification of the relevant aspects of the Constitution in their broadest sense,” beyond which it had “no supervisory role.” Rather, as it said in its conclusion, it would “be for the political actors to determine what constitutes a clear majority on a clear question in the circumstances under which a future referendum vote may be taken,” in order to determine “the content and process of the negotiations.” The constitutional rules governing secession, in other words, are nonjusticiable. However, the Court took pains to explain that the nonjusticiable of these rules did not deprive them of their constitutionally binding status. As the Court said, these rules were “constitutional obligations.” This is a departure from normal Canadian constitutional practice, which categorizes those constitutional rules that are justiciable, and those that are not, into constitutional law and constitutional convention, respectively. Constitutional law is enforceable in the courts, whereas constitutional conventions “carry only political sanctions.” Set against this background, the Court could have been understood to be saying that the constitutional rules governing secession were constitutional conventions. However, it did not say that. Rather, it said that the duty to negotiate was an obligation arising under “the law of the Constitution.” And at the conclusion of its reasons, the Court could not have been clearer, when it stated that “[t]he obligations we have identified are binding obligations under the Constitution of Canada.”

This last point bears closer examination. The Court’s refusal to exhaustively specify the contours of the requirements of a clear majority and a clear question was not unusual in itself. Although the lack of detail on the clarity requirements may arguably have impaired the ability of the Canadian secession clause to function effectively as a precommitment device, the Court could have justified its refusal to flesh out the terms of the Canadian secession clause on prudential grounds, declining to offer further guidance until such time as was strictly necessary to resolve a concrete case, on the basis of a calculation that the positive effects and unintended consequences of its judgment would be more readily apparent. But the Court went one step further and closed the door to further judicial intervention.

19 Weinstock, supra note 15 at 199.
20 Ibid. at 199.
21 Secession Reference, supra note 14 at para. 100.
22 Ibid. at para. 153.
23 Ibid. at para. 102.
24 Ibid. at para. 98.
25 Ibid. (emphasis in original).
26 Ibid. at para. 153.
It explicitly rejected any future judicial role in interpreting the Canadian secession clause; it is implicit that judicial enforcement was off the table.

Thus, the Court held that the rules were both nonjusticiable and legally binding. But the Court left both the interpretation and enforcement of the Canadian secession clause—which imposes legal obligations to constitutional politics. This is clearly inconsistent with a legalist conception of constitutionalism but is clearly consistent with populist constitutionalism. The question then becomes why the Court took the populist route. The Court did attempt to offer a justification for this unusual holding based on the comparative institutional advantage of the political actors in this area of constitutional adjudication, stating that the Court itself lacked the “requisite information and expertise.”27 Elaborating on the informational limitations of the litigation process, the Court explained that “the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations.”28 Moreover, the Court reasoned that “the strong defense of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis.”29 In other words, judicially manageable standards are absent. Unfortunately, this justification is weak. It is not at all clear, for example, that the Court is incapable of adjudicating upon both the preconditions to, and the process and outcome of, constitutional negotiations. The interpretation of the terms “clear majority” and “clear question,” the enforcement of the obligation to negotiate in good faith, and even the compliance of the negotiated agreement with the unwritten constitutional principles are not totally beyond the realm of judicial competence.

So competence-based arguments based on a purported lack of judicial expertise cannot justify the Court’s refusal to enforce the Canadian secession clause according to the tenets of legal constitutionalism. Before I offer an explanation for why the Court left the enforcement of the Canadian secession clause to constitutional politics, I want to briefly review how constitutional politics has gone thus far.

D. POPULAR CONSTITUTIONALISM AND CONSTITUTIONAL PRECOMMITMENTS: THE CLARITY ACT AND BILL 99

The Secession Reference was welcomed by the federal government because it won on the legality of unilateral secession. But it was also welcomed by Quebec, which won judicial recognition of the legitimacy of the Quebec sovereignty movement, and the duty to negotiate as opposed to renewed federalism. However, these important differences in interpretation paled in significance to the shared and immediate understanding among governments which had disagreed profoundly that the judgment provided an acceptable legal framework within which secession could occur. Matters were relatively stable for about a year after the Secession Reference was handed down, until Quebec reverted to its earlier position that, in Quebec’s accession to statehood, legitimacy took priority over legality. The failing apart of this early consensus has produced two competing statutes.

27 Ibid. at para. 100.
28 Ibid. at para. 101.
29 Ibid.

Popular Revolution or Popular Constitutionalism

The federal government made the first move by enacting the Clarity Act.30 The Act requires the House of Commons to determine whether the question Quebec has chosen and the level of support that that question obtains would trigger the federal government’s constitutional duty to negotiate secession. The Act also limits how the House of Commons can make these determinations. At the federal level, the power to enter into constitutional negotiations, including negotiations for secession, is vested with the executive, meaning that without the Act, the federal executive would be charged with interpreting and complying with the Canadian secession clause. The Act, however, delegates to the House of Commons the power of the executive to frame interpretations of the clear majority and question requirements.

The clear question determination would be made by the House of Commons ex ante. Although the Clarity Act neither lays down the text of an acceptable question nor provides that the House of Commons could set out the text of a question that would meet the requirement of clarity, the Act sets out what would not constitute a clear question. In particular, it rules out the 1995 referendum question, which envisaged a positive referendum result as a mandate for Quebec to negotiate a new economic and political partnership with Canada, as opposed to outright independence. The thrust of the provision is that in order to trigger the duty to negotiate, whatever question Quebec poses must be a question on secession or independence.

In parallel to how it treats the clarity of a question, the Clarity Act does not define what could constitute a clear majority. But the Act takes a different approach to determining whether a majority vote in favor of secession is clear. It does not contain a numerical threshold for a clear majority (i.e., a negative definition of a clear majority, analogous to the negative restraints on the wording of the question). Nor does it delegate to the House of Commons the power to determine what a clear majority would constitute before the vote takes place. Rather, the Act leaves that assessment to after the vote has been held, based on factors including the size of the majority and voter turnout. The Act also affirms the unconstitutionality of a UDI and the need for a constitutional amendment.

Thus, under the Clarity Act, Quebec can hold whatever referendum it wants, but if the House of Commons were to determine the question to not be a clear question on secession or the resulting majority to not be clear, the federal government would be legally barred from entering into secession negotiations.

The Clarity Act reflects a number of critical interpretive choices concerning the scope of the Canadian secession clause. Perhaps most importantly, it does not attempt to use the Secession Reference as a jurisdictional basis for federal legislation on the rules for a provincial secession referendum, although one way of understanding the Canadian secession clause is as a subtraction from exclusive provincial jurisdiction over some of the procedures governing secession. The Act also reflects other important interpretive choices. It precommits the federal executive in advance of a future referendum to the procedures spelled out in the Act to determine both a clear question and a clear majority, as opposed to giving the federal executive a free hand. Indeed, it prohibits the federal government from
negotiating Quebec secession if the House of Commons determines that the question or the majority are not clear. Moreover, by choosing the House of Commons as the forum for determining the clarity of the question and the majority, the federal government has committed itself to a public process for examining these issues. The Act, however, treats the two assessments of clarity differently: although it requires the House of Commons to determine the clarity of the question before the referendum vote, the clarity of the majority is determined afterward in light of all the circumstances (e.g., turnout, votes of minority groups, etc.).

Quebec responded to the Clarity Act almost immediately with Bill 99, the Fundamental Rights Act, also enacted in 2000. The key provisions of Bill 99 make a series of strong claims of exclusive provincial jurisdiction over the process surrounding a future referendum on Quebec secession. Bill 99 states that the people of Quebec have the right to freely decide its political regime and legal status. Bill 99 buttresses this provision by coupling it with a claim of exclusive provincial jurisdiction—that is, that the manner of exercising this right is a matter for Quebec alone to determine through its political institutions. The implication is that any attempts by the federal government to rely on the Secession Reference to regulate the referendum process would contravene Bill 99.

As I just mentioned, the Clarity Act does not purport to lay down federal rules for a Quebec referendum on secession; rather, it sets conditions for the federal recognition of such a referendum. Two further provisions of Bill 99 take direct aim at this aspect of the Clarity Act. One states that "[n]o condition or mode of exercise of that right, in particular the consultation of the Quebec people by way of a referendum, shall have effect unless" accepted by the people of Quebec. Another states that "[n]o other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint [sic] on the democratic will of the Quebec people to determine its own future." Finally, Bill 99 affirms that a clear majority in a referendum is 50 percent plus one.

It would seem that the Secession Reference's move to send the Canadian secession clause back to constitutional politics has failed. The Court likely contemplated that political actors would interpret the secession clause in the context of a future referendum. Although the Court was silent on how this would occur, its probable expectation was that the federal and Quebec governments would engage in negotiations, at an appropriate time and through mutually acceptable procedures, to arrive at a shared understanding of the wording of a referendum question and the level of majority required. This is the manner in which the federal and provincial governments interact routinely and, indeed, the Court thinks secession should occur—that is, through a process of negotiation.

Instead, both levels of government have proceeded unilaterally. Moreover, the processes each Act creates or presupposes primarily or solely involve institutions within each level of government. At the federal level, the sole institution is the House of Commons, which determines the clarity of the question and the majority. Within Quebec, the National Assembly is the lead institution. Neither statute, for example, mandates that the resolutions or decisions of the other legislative body be taken into account or that there be consultation with the executive branch of the other level of government.

Proceeding unilaterally would not have posed difficulty had the Quebec and federal interpretations been compatible. But that has not happened either. Bill 99 defines a majority as 50 percent plus one. Although the Clarity Act deliberately does not lay down a numerical standard, the federal government took great pains during the debate over the Clarity Act to criticize the absolute majority standard, both as a misinterpretation of the Secession Reference—which always referred to a "clear" majority, never to an "absolute" or "simple" majority or just a "majority"—and also as a matter of constitutional design, reasoning that irreversible negotiations over secession should only be undertaken on the basis of a clear and stable majority, not a momentary and temporary majority of circumstance. The two bills therefore set the stage for a serious disagreement between the federal government and Quebec in the event of a future referendum vote, which many observers expect to be held in the next few years.

Moreover, if Quebec and the federal government do disagree on the level of support required, the divergent approaches taken by Bill 99 and the Clarity Act on when that numerical standard is to be set will exacerbate this disagreement. Bill 99 sets the threshold of 50 percent in advance of the next vote. The Clarity Act, by contrast, forestalls the House of Commons' assessment of whether there has been a clear majority vote until after the referendum. The accusation voiced by Quebec sovereignists is that such a process is inherently unfair because it would allow the House of Commons to set the standards for the federal government's response to the referendum result after the vote has occurred—judging the referendum by standards not known at the time of the campaign and vote. Moreover, it would allow the federal government to mask a political disagreement with the Quebec government over the merits of secession as a constitutional disagreement over whether the requirements of the Canadian secession clause had been met.

Finally, perhaps the most fundamental point is that the Clarity Act and Bill 99 conceptualize their relationship to the Secession Reference radically differently. The full title of the Clarity Act is "An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference." Five clauses in the preamble summarize the salient points of the judgment, and the key provisions of the statute speak directly to the Canadian secession clause. Bill 99, by contrast, contains only one direct reference to the judgment in its preamble, noting its "political importance" and thus by implication denying its legal status. Bill 99 is not a direct attempt to engage and entrench Quebec's interpretation of the judgment; rather, it operates within an alternative constitutional vision that gives pride of place to the democratic will of Quebeckers. As a consequence, it deliberately does not match the federal response point for point.

E. FROM POPULAR REVOLUTION TO POPULAR CONSTITUTIONALISM?

At this point, it might seem that the Secession Reference got it terribly wrong in leaving the interpretation and enforcement of the Canadian secession clause to constitutional politics and the vagaries of popular constitutionalism. A legal constitutionalist could argue that if the constitutional strategy of precommitment is
designed to regulate political decision making precisely because one cannot trust political actors to regulate their own conduct, then one cannot leave important interpretive issues to political actors to work out in advance of the event. The legal constitutionalist might suggest that the Court should have mandated intergovernmental negotiations over the Canadian secession clause, spelled out a decision-rule whereby divergent interpretations could be reconciled, and left open the door to judicial enforcement so the threat of future litigation could encourage a political settlement. Or, perhaps even more dramatically, the legal constitutionalist might argue that perhaps the Court should have eschewed constitutional politics entirely, and agreed to fully interpret and enforce the Canadian secession clause.

I think that this view is too simplistic. To understand why, let us return to the Rhodesian constitutional crisis. The Rhodesian courts had applied a test of effective control inspired in Kelsen to determine whether the old constitutional order had died and a new one had been born. This test conceptualized judges as passive observers of constitutional transitions, who would assess when one constitutional regime had been successfully replaced by another. But as critics of the Rhodesian courts persuasively argued, this way of structuring the question obscured and buried the true role played by the courts, which did not simply recognize, but actually consolidated, the new constitutional regime. Because the rule of recognition’s existence flows from its acceptance, judges would presumably have to assess the attitudes and behaviors of other governmental actors and the public. However, as one of the principal organs of government, the courts’ acceptance of the regime was not merely an inevitable consequence of constitutional regime change. Rather, it was in itself an element of effective control and, hence, part of the process of successful constitutional transition. So, under the guise of acting as external observers, judges were in fact exercising a choice whether to declare allegiance to the revolutionary regime.

Once the fact of judicial choice is brought to the surface, so are new questions about the nature of revolutionary legal change. In other writing, Schauer suggests an approach to tackling this issue. He has stated that the existence of a constitutional order depends on “presuppositions” which are “logically antecedent” to the rule of recognition, and which give that rule its constitutional status. Schauer does not define what the presuppositions of a constitutional order consist of. But they appear to encompass the various reasons why a constitution is accepted as the highest law—a mix of historical, political, economic, moral, and cultural reasons that are highly contingent, potentially varying across political communities, and, indeed, potentially varying within a political community across time—perhaps even for constitutional regimes that are identical in both form and substance. Schauer explains extralegal change to constitutions in terms of, and as flowing from, changes to their presuppositions. As he writes, “because constitutions owe their ‘constitutionality’ to logically and politically antecedent conditions, the process of constitutional amendment may also take place at another level, when these logically and politically antecedent conditions are themselves amended.”

So two truly interesting questions raised by revolutionary legality are how to best understand the character of constitutional presuppositions that underlie the prior regime, and the reasons why those presuppositions might change. Moreover, in trying to understand shifts in constitutional presuppositions, it would be a mistake to focus exclusively on the courts. The literature generated in response to the Rhodesian constitutional crisis focused narrowly on judicial decision making because the question of revolutionary legality arose as a legal issue for adjudication. However, this methodological choice should be understood as flowing from the facts of the Rhodesian case, as opposed to indicating the general way revolutionary legal change should be studied. Hart’s rule of recognition turns on the fact of its acceptance by those officials who use it on a constant basis to frame and make their decisions, and as a lens through which to interpret, judge, and react to the decisions of others. Even on this narrow understanding, the range of acceptance required for a rule of recognition to exist, the question also arises of why nonjudicial officials in a constitutional regime accept a certain rule of recognition—that is, what the presuppositions are for their acceptance—and why those presuppositions might shift as well. Indeed, it is possible to push the point further and extend the scope of choice to citizens as well. In a liberal democratic political community that eschews the use of physical violence to settle political disputes, even over the basic question of the locus of political sovereignty, legal subjects must make the substantive choice of whether to accept the commands of the new regime. As John Finnis writes, “the problem of the jurist is the same as the problem... for the good man wondering where his allegiance and duty lie.”

It is this context, more than anything else, which explains why legal constitutionalism is not an option for the enforcement of a secession clause. The fact that citizens would be grappling with the fundamental question of whether Quebec should have its own independent constitutional order in the context of a referendum vote makes sense of the Court’s decision to not enforce the terms of the Canadian secession clause itself and to instead rely on political actors to do so. As I explained earlier, a basic ambition of constitutionalism is to channel political conflict that would otherwise spill into the streets, into institutions that operate peacefully according to law, and which reach decisions that members of a political community accept as authoritative. In a constitutional state, institutional settlement translates into political settlement. A referendum vote understood as an exercise of popular will over the locus of sovereignty creates a context in which institutional settlement cannot easily, and perhaps even possibly, produce political settlement because what is at issue is the very source of the authority of those institutions.

So the wisdom of the Secession Reference lies in its recognition that in this kind of situation—an existential moment in the life cycle of a constitutional order—a court injunction against a Quebec UDI, even if issued by the Supreme Court of Canada, would have little or no effect. Legal constitutionalism is not an option. Popular will is necessarily, and unavoidably, engaged. The question then becomes what criteria should and will inform this choice by legal subjects. In a highly skeptical

---

32 Schauer, Amending Presuppositions, supra note 13 at 147.
33 Schauer, ibid. at 160–1.
As a consequence, the judgment is clearly directed at them. Indeed, the terms of the Canadian secession clause clearly govern the conduct of the federal and Quebec governments in the event of a referendum on sovereignty.\footnote{36}

But there is another audience for the Court's judgment: the citizens of Quebec and the rest of Canada. The context in which the Canadian secession clause would operate is a referendum, which is a particular kind of political decision-making procedure. Here, rather than acting through elected representatives, held accountable through periodic elections, the members of a political community act directly as political decision makers in an exercise of popular will. Although referenda are, strictly speaking, consultative political exercises without enacting or lawmaking authority, the perception during the Quebec referendum was rather different. All political actors accepted that Quebeckers were engaging in a collective political choice— in other words, that the referendum was an exercise in popular sovereignty.

The Court recognized the limitations of institutional settlement in producing political settlement and indicated that citizens would ultimately choose the constitutional regime to which they wished to declare allegiance. The Court's reasoning should thus be read as setting out the kinds of reasons on the basis of which citizens could assess the legitimacy of the differing positions of the parties. The Court imagined that the citizens of Quebec perceived themselves as legal subjects in a political community whose very self-description incorporates a commitment to the rule of law. These kinds of citizens would not want to act outside the law and would not wish to declare allegiance to a government that acted outside the law. This is true not only of normal periods in the operation of a constitutional regime, but even at the moment of existential crisis for the Canadian constitutional order, when the very survival of a positive legal framework would itself be in question. The Court conceptualized this moment as one of popular constitutionalism, not one of popular revolution.

This explains why, I think, the Court described the Canadian secession clause as giving rise to legal obligations that were binding on the parties, even in the absence of the prospect of judicial enforcement. As Mark Walters has explained, in light of the importance of legality to Canadian culture, the Canadian secession clause's status as law, as opposed to mere principles of political morality, would fundamentally change the politics of secession going forward. He says, “[I]t would seem that the normative force of these legal arguments is felt by political actors on both sides in very different ways from the normative force of political and moral arguments, notwithstanding... the absence of judicial sanction.”\footnote{37} Political claims would become legal claims. Indeed, framing the Canadian secession clause as giving rise to legal obligations may have been designed to inject a sense of


\footnote{36} Section Reference, supra note 14 at para. 106.

\footnote{37} Ibid. at para. 94 [emphasis in original].
constitutional obligation on all the actors involved, to distinguish the task at hand from ordinary politics, in which self-interest and partisanship are central.

Political actors seem to have understood the role of the *Clarity Act* and Bill 99 in this way as well, because they chose to respond to the judgment through enacting statutes. For example, as Quebec’s Minister of Intergovernmental Affairs explained in the concluding debate surrounding Bill 99, Quebec felt compelled to respond to the *Clarity Act* with legislation of its own, as opposed to a resolution of the Quebec National Assembly, because, if it did not, “is there not a danger . . . that the Quebeccois people, faced only with one law, the federal Parliament’s law, come to believe that the only legitimate legal order is that of the federal Parliament, and that, if we are not in agreement with them, we are outside of the laws.”

E. CONCLUSION

The more general lesson is this: even if one accepts the legal constitutionalists’ conception of constitutionalism and accordingly acknowledges the need for constitutional precommitments, it does not follow that one must necessarily adopt judicial supremacy as the appropriate institutional mechanism for enforcement. The institutional question is a separate matter altogether and must be sensitive to the nature of the issue at hand. When it comes to existential legal issues going to the very identity and existence of a constitutional order, judicial supremacy is unlikely to produce political settlement. However, it does not follow that the alternative is popular revolution. Popular constitutionalism may be able to prevail over popular revolution, against the backdrop of a liberal political culture whose subjects see themselves as legal subjects committed to the rule of law. So trusting the enforcement of constitutional precommitments to constitutional politics may be the best we can do.

There may be another lesson of somewhat broader significance. The *Quebec Secession Reference*, and the constitutional politics of secession, can be viewed not just through the lens of constitutional crises but also of federalism. In an important sense, the dispute between the federal government and the provincial government concerned which level of government was entitled to participate in the framing of the rules governing secession, including the manner in which a provincial population could express its views through a referendum. Prior to the *Quebec Secession Reference*, this process lay entirely within the control of the provincial government. Subsequent to that judgment, at least those aspects of that process that fall within the ambit of the Canadian secession clause arguably lie within both federal and provincial jurisdiction, as is reflected by the enactment of both the *Clarity Act* and Bill 99.

Under the Canadian constitution, the delineation of the respective scope of federal and provincial jurisdiction, and the resolution of conflicts between validly enacted legislation, have fallen to the courts. Indeed, leading students of comparative federalism have long assumed that judicial supremacy is an integral component of federal governance. K. C. Wheare famously argued that because the project of federalism is to set up two independent levels of government existing in a coordinate, not a subordinate, relationship, “it follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the general government alone or the regional governments alone.” Rather, he continued, “what is essential for federal government is that some impartial body, independent of general and regional governments, should decide upon the meaning of the division of powers.” Wheare’s preferred institution for this task was the courts. Indeed, if one understands a federal form of government as a pact between nations who have chosen to politically associate for some purposes while retaining the scope for independent action for others, written constitutions and judicial review are a form of constitutional precommitment to protect national minorities against breaches of the terms of the original federal bargain. Federalism, for these reasons, is an easy case for judicial supremacy.

The *Secession Reference* suggests that students of comparative federalism should revisit the view that federalism necessarily connotes legalism in every single case. Quite aside from the American literature on the “political safeguards” of federalism—whose applicability to Canada and other federations, because of differences in the design of the federal legislature and the structure of the party system, is unclear—it may be that judicial enforcement of the division of powers should not be universal. Paul Weiler’s argument that “[t]here is no logical necessity for judicial review in a federal system, even though that system by its very nature involves the creation of limited legislative powers,” and that “the better technique for managing conflict is continual negotiation and political compromise,” deserves closer consideration.

Let me conclude by tying the argument in this chapter to an argument I have made elsewhere that the birth and death of constitutional regimes are moments of what I term constitutive constitutional politics. At these moments, the rules governing constitutional change (i.e., the rules governing constitutional amendment) are incapable of constituting and regulating constitutional politics, and are instead drawn into it because they reflect one of the competing conceptions of political community on the table. I have suggested that at these moments, we might reach the limits of constitutional design and constitutionalism itself. I may now need to qualify this conclusion. For if this conclusion were true, it would argue against the efficacy of a Canadian secession clause of any sort, as such a provision would be designed precisely to regulate the birth of a new constitutional order. The more accurate point may be this: for constitutionalism and legal continuity to prevail over legal discontinuity and revolution, the rules that regulate existential legal change (e.g., a secession clause) must be perceived as not being biased or

---

41 Ibid. at 60.
42 Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government" (1954) 54 Colum. L. Rev. 549; Larry D. Emden, "Putting the Politics Back into the Political Safeguards of Federalism" (2000) 100 Colum. L. Rev. 215.
unduly committed to the maintenance of the existing constitutional order. And, similarly, the choice of enforcement institution cannot be tied too closely to the constitutional regime whose survival is at issue—such as its courts.

ACKNOWLEDGMENTS

Thanks to Tsvi Kahana and Ira Parghi for helpful comments and Saad Ahmad for editorial assistance.