

CHAPTER NINE: ADVISORY OPINIONS AND CONSTITUTIONAL CONVENTIONS

KEY CONCEPTS FOR THE CHAPTER

- AMERICAN JUSTICES BELIEVE THAT THE POWER OF JUDICIAL REVIEW OF LEGISLATIVE ACTS IS BASED SOLELY ON THE JUDICIARY'S NECESSARY AND ESSENTIAL ROLE IN DECIDING LITIGATED "CASES OR CONTROVERSIES"
- AUSTRALIAN JUSTICES HAVE HELD THAT THE FACT THAT THE AUSTRALIAN CONSTITUTION CONFINES THE JURISDICTION OF THE HIGH COURT TO 'MATTERS' BARS ADVISORY OPINIONS.
- DRAWING ON 19TH CENTURY ENGLISH PRACTICE, CANADA ALLOWS REFERENCES TO THE SUPREME COURT OF CANADA ON "IMPORTANT QUESTIONS OF LAW OR FACT CONCERNING ANY MATTER"
- IN THE U.S., IT IS COMMONLY UNDERSTOOD THAT THE ONLY CONSTITUTIONAL LIMITS ON OFFICIAL BEHAVIOR ARE THOSE THAT WILL BE ENJOINED BY JUDGES; THE TRADITION OF THE BRITISH COMMONWEALTH OF "CONSTITUTIONAL CONVENTIONS" IS MORE EXPANSIVE, TO INCLUDE UNWRITTEN TRADITIONS THAT ARE WIDELY UNDERSTOOD AND ACCEPTED, BUT WHERE COURTS WILL NOT PROVIDE ANY LEGAL OR EQUITABLE RELIEF

I. The Concept of an "Unconstitutional" Law or Government Act

MARBURY v. MADISON

SUPREME COURT OF THE UNITED STATES
5 U.S. 137; 2 L. Ed. 60; 1 Cranch 137 (1803 terms)

[**Ed. note:** A bit of historic context may be helpful to the understanding of this landmark case. Although support for George Washington as the first American president was near-unanimous, two political parties quickly developed. One, under the leadership of Washington's Vice President, John Adams, were often called the Federalists. The other, led by his Secretary of State, Thomas Jefferson, were called the Republicans. (Actually, the Jeffersonian faction morphed into "Democrat-Republicans" and then "Democrats" by the time of the election of Andrew Jackson in 1828, the latter day Republican party being created anew in the 1850s.) Adams defeated Jefferson in the election of 1796, but Jefferson won the re-match in 1800, sweeping in a majority of allies in Congress as well, thus setting up the first peaceful transition of power from one party to another in U.S. history. The transition was not entirely uneventful, however. President-elect Jefferson was not to be sworn in until March 4, 1801. (The Twentieth Amendment changes the inauguration date to January 20.) In January of that year, President

Adams nominated, and the lame duck Federalist Senate confirmed, Adams' Secretary of State, John Marshall, as the new Chief Justice. In February, the lame duck Federalist Congress enacted the Judiciary Act of 1801, doubling the number of federal judges, and creating 42 new justices of the peace for the District of Columbia. President Adams sought to fill every possible judicial position with his Federalist allies, rushing their nominations through on the eve of the expiration of his term of office. Adams principal deputy in this matter was his Secretary of State, John Marshall, who did not take his oath and assume the duties of Chief Justice until just days before the end of Adams' term. The case arises when President Jefferson's Secretary of State, James Madison, refused to perform the ministerial duty of turning over the commissions of office to those Federalist "midnight appointees" whom the Adams administration was unable to fully invest in office.

The issue of judicial review arose in an interesting political context. The newly elected Republican Congress, outraged by Adams' tactics, repealed the Judiciary Act of 1801. The Federalist minority in Congress objected that such a repeal would be unconstitutional, since the Constitution protected the tenure of judges. In response, the Republican majority denied that the Supreme Court had the power to invalidate unconstitutional legislation. The delay in the decision in *Marbury* was due to legislation that not only repealed the prior judge-creating statute, but eliminated the 1802 term of the Supreme Court!]

MARSHALL, C.J.:

AT the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States [*i.e.*, a member of President Adams' cabinet], severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in the due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given to that enquiry, either by the secretary of state or by any officer of the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the 4th day of this term. This rule having been duly served,

Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace of the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is

founded.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this regard, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? [*163] The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case is not to be admitted.

By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary of war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. [*165] No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, "but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political powers, in the [*166] exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This office, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice [*168] of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, "a command issued in the King's name from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least supposed, to be consonant to right and justice."

Still, to render the *mandamus* a proper remedy, the officer to whom it is directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be

considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

[The Court proceeded to find that the statutory grant of original jurisdiction to the Supreme Court to issue writs of mandamus was inconsistent with the allocation of judicial power in Article III of the Constitution.]

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

* * * Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that "no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

* * *

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Marbury's holding that all legal rights require legal remedies is non-controversial, but also involves circular reasoning. Where a matter did involve the exercise of political discretion by the Secretary of State, *Marbury's* reasoning would preclude judicial relief, and thus the courts would say that the applicant lacked a "legal right." Where American and Canadian constitutional discourse differ is the significance of the lack of "legal right." For example, if a Canadian were injured and granted a cause of action by legislation passed by Parliament but refused royal assent, in a contra-conventional act, by the Governor General, we would say that they lacked any legal right, but were indeed the victim of unconstitutional behavior. In the U.S., we often seem to think that the absence of legal right relieves the public official of any constraints on crass political conduct. To illustrate, while *Marbury v. Madison* is one of the most widely discussed cases in American legal history, very little time has been spent discussing whether a constitutional system that retains a significant interregnum between elections and inauguration permits the sort of midnight court-packing that the Federalists engaged in, or whether the appropriate constitutional response to such court packing is to refuse a commission to a duly-appointed official.

There is a direct Canadian analogy to *Marbury*, which illustrates the role of constitutional convention discussed in the cases above. In 1896, Sir Charles Tupper -- one of Sir John A. MacDonald's chief political lieutenants, the son of a United Empire Loyalist who moved north in 1776, and the only Nova Scotian favoring confederation to be elected to the first parliament -- was asked by the Governor General to become Prime Minister after a rebellion in the Conservative cabinet. (Apparently, the majority conservatives were never able to settle on one leader after MacDonald's death in 1891.) After ten weeks, Parliament was dissolved and Tupper's Conservatives were soundly defeated by Wilfred Laurier's Liberals. Before the new Parliament reconvened and the new government was formed, Tupper advised the Governor General to appoint a number of senators and judges. (The convention that a Prime Minister resigned immediately upon losing an election did not develop until the 1920s.) Lord Aberdeen refused to do so, waiting until Laurier was sworn in to make appointments in

accordance with the advice of the new Prime Minister.⁺

MADZIMBAMUTO v. LARDNER-BURKE

PRIVY COUNCIL

[1969] 1 AC 645, [1968] 3 All ER 561

[Before Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Pearson]

[The case was a test case by Stells Madzimbamuto, an imprisoned black Rhodesian, against the Minister of Justice of the rebel government in Southern Rhodesia and other rebel officials. The purpose was] to test the status of the government in control (i.e., since the unilateral declaration of independence on Nov. 11, 1965), its capacity to declare states of emergency, to make regulations thereunder and to detain people in terms of those regulations. ***

[By way of historical background, in 1923 Southern Rhodesia was colonized by the United Kingdom. The Southern Rhodesian government practiced apartheid, copied from its neighbour in South Africa, so the government ruled on behalf of a tiny white minority. Pursuant to the Southern Rhodesia Constitution, a state of emergency was validly proclaimed in 1965 in response to an uprising by black Rhodesians. Pursuant to emergency powers, the appellant's husband was detained by the government. Shortly thereafter, Southern Rhodesian Prime Minister Ian Smith and his Ministerial colleagues issued a unilateral declaration of independence. On the same day, the British Governor issued a statement on behalf of Her Majesty that Mr. Smith and other government Ministers and deputy Ministers ceased to hold office and called on all citizens to refrain from acts which would further the objectives of the illegal authorities, but added that it was the duty of all citizens to maintain law and order and to carry out their normal tasks. The British Parliament responded to the unilateral declaration of independence by enacting the *Southern Rhodesia Act 1965*, declaring that it had responsibility and jurisdiction for Southern Rhodesia as theretofore and authorizing the British government "to make such provision as appeared to be necessary or expedient in consequence of any unconstitutional action." The cabinet implemented the statute by issuing The Southern Rhodesia Constitution Order 1965 (the "Order in Council"), declaring that any laws, regulations, or acts of the rebel government were void. The initial declaration of emergency that had been validly issued by the pre-rebellion government expired on its own terms. The appellant's husband remained under detention, however, pursuant to a new declaration of emergency proclaimed by the rebel government.]

⁺ Tupper's political career included service as premier of Nova Scotia. He is the last provincial premier to serve as Prime Minister. Since his tenure in 1896, by comparison, the United States has elected seven Presidents who had served as Governor (Woodrow Wilson, Calvin Coolidge, Franklin D. Roosevelt, Ronald Reagan, Jimmy Carter, Bill Clinton, and George W. Bush).

[Madzimabuto claimed that the new emergency declaration was void. The claim was based on the 1961 Southern Rhodesian Constitution, which created a government similar to Canada's, with a Governor as Her Majesty's representative holding formal executive power and a colonial legislature charged with making laws for the peace, order, and good government of Southern Rhodesia. The Constitution also contained a Declaration of Rights. Of particular relevance was s. 58, which provides "(1) No person shall be deprived of his personal liberty save as may be authorised by law", and s. 69 which provides "(1) Nothing contained in any law shall be held to be inconsistent with or in contravention of inter alia s. 58 to the extent that the law in question makes provision with respect to the taking during any period of public emergency of action for the purpose of dealing with any situation arising during that period...". Section 72 (2) defines "period of public emergency" as meaning, inter alia, any period not exceeding three months during which a state of emergency is declared to exist "by virtue of a proclamation issued in terms of any law for the time being in force relating to emergency powers, the reasons for the issue thereof having been communicated to the Legislative Assembly as soon as possible after the issue thereof, or by virtue of a further proclamation so issued on a resolution of the Assembly." Section 71 provides methods by which any person alleging contravention of any of the provisions of s. 57 to s. 68 can apply for redress, and sub-s. (5) provides "Any person aggrieved by any determination of the High Court under this section may appeal therefrom to Her Majesty in Council".⁺]

[The Southern Rhodesian government claimed its declaration of independence rendered lawful its own 1965 constitution, by which it declared a lawful emergency that justified the appellant's imprisonment. The rebel government argued that the *Southern Rhodesia Act, 1965* and accompanying Order in Council voiding their regulations was itself invalid, as violating an established constitutional convention that the British Parliament would not legislate with regard to matters in relation to dominions except on request of the dominion's parliament.⁺ It argued that the 1961 Southern Rhodesian Constitution had been enacted by the British Parliament pursuant to this convention, which was unwritten as applied to Southern Rhodesia.]

[The Southern Rhodesian judges] held that the 1965 Constitution was not the lawful Constitution and that Mr. Smith's government was not a lawful government. But they held that necessity required that effect should be given to the emergency power regulations and therefore the detention of the appellant's husband was lawful. ***

Their lordships can now turn to the three main questions in this case: 1. What was the legal effect in Southern Rhodesia of the *Southern Rhodesia Act 1965* and the Order in Council which accompanied it? 2. Can the usurping government now in control in Southern Rhodesia be regarded for any purpose as a lawful government? 3. If not, to what extent, if at all, are the courts of Southern Rhodesia entitled to recognise or give effect to its legislative or administrative acts?

If the Queen in the Parliament of the United Kingdom was Sovereign in Southern Rhodesia in 1965

⁺ The phrase "Her Majesty in Council" is a term of art that evolved from the original sovereign power of the Crown. With regard to executive powers, the phrase refers to the cabinet led by the Prime Minister. With regard to judicial powers, the phrase refers to the Judicial Committee of the Privy Council - the Law Lords.

⁺ This convention originated in an agreement reached in 1926 between the British government and the ministers of several dominions, including Canada, Australia, and New Zealand. It was codified in 1931, as to these countries, in the *Statute of Westminster*.

there can be no doubt that the *Southern Rhodesia Act 1965* and the Order in Council made under it were of full legal effect there. Several of the learned judges have held that sovereignty was divided between the United Kingdom and Southern Rhodesia. Their lordships cannot agree. So far as they are aware it has never been doubted that, when a colony is acquired or annexed following on conquest or settlement, the sovereignty of the United Kingdom Parliament extends to that colony, and its powers over that colony are the same as its powers in the United Kingdom. So in 1923 full sovereignty over the annexed territory of Southern Rhodesia was acquired. That sovereignty was not diminished by the limited grant of self government which was then made. It was necessary to pass the *Statute of Westminster, 1931*, in order to confer independence and sovereignty on the six Dominions therein mentioned, but Southern Rhodesia was not included. Section 4 of that Act provides:

"No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

No similar provision has been enacted with regard to Southern Rhodesia.

The learned judges refer to the statement of the United Kingdom government in 1961, already quoted, setting out the convention that the Parliament of the United Kingdom does not legislate without the consent of the government of Southern Rhodesia on matters within the competence of the legislative assembly. [**Ed. note:** The British legislation enacting the *Southern Rhodesia Act 1965* and suspending the "rebel" government was inconsistent with this principle, which had been applied in 1925 to Canada and other self-governing colonies.] That was a very important convention but it had no legal effect in limiting the legal power of Parliament.

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that is it beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid. It may be that it would have been thought before 1965 that it would be unconstitutional to disregard this convention. But it may also be that the unilateral declaration of independence released the United Kingdom from any obligation to observe the convention. Their lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.

Finally, on this first question their lordships can find nothing in the 1961 Constitution which could be interpreted as a grant of limited sovereignty. Even assuming that that is possible under the British system, they did not find an indication of an intention to transfer sovereignty or any such clear cut division between what is granted by way of sovereignty and what is reserved as would be necessary if there were to be a transfer of some part of the sovereignty of The Queen in the Parliament of the United Kingdom. They are therefore of opinion that the Act and Order in Council of 1965 had full legal effect in Southern Rhodesia.

[The Lords declined, in light of the policy of the British government to restore the constitutional order, to find that the rebel government should be recognized *de jure* or *de facto*. The Lords also distinguished American precedents affirming the legality of decisions made by states that had seceded during the American Civil War, on the grounds that those states had enjoyed a measure of sovereignty prior to secession not enjoyed by Southern Rhodesia, and that local domestic laws had not been voided by

congressional legislation equivalent to the *Southern Rhodesia Act*.]

The provisions of the Order in Council are drastic and unqualified. With regard to the making of laws for Southern Rhodesia, s. 3(1)(a) provides that no laws may be made by the legislature of Southern Rhodesia and no business may be transacted by the legislative assembly; then s. 3 (1)(c) authorises Her Majesty in Council to make laws for the peace, order and good government of Southern Rhodesia: and s. 6 declares that any law made in contravention of any prohibition imposed by the Order is void and of no effect. This can only mean that the power to make laws is transferred to Her Majesty in Council with the result that no purported law made by any person or body in Southern Rhodesia can have any legal effect, no matter how necessary that purported law may be for the purpose of preserving law and order or for any other purpose. It is for Her Majesty in Council to judge whether any new law is required and to enact such new laws as may be thought necessary or desirable.

*** [It] is not for their lordships to consider how loyal citizens can now carry on with their normal tasks, particularly when those tasks bring them into contact with the usurping regime. Their lordships are only concerned in this case with the position of Her Majesty's judges. Her Majesty's judges have been put in an extremely difficult position. But the fact that the judges among others have been put in a very difficult position cannot justify disregard of legislation passed or authorised by the United Kingdom Parliament, by the introduction of a doctrine of necessity which in their lordships' judgment cannot be reconciled with the terms of the Order in Council. It is for Parliament and Parliament alone to determine whether the maintenance of law and order would justify giving effect to laws made by the usurping government, to such extent as may be necessary for that purpose.

The issue in the present case is whether emergency powers regulations made under the 1965 Constitution can be regarded as having any legal validity, force or effect. Section 2(1) of the Order in Council of 1965 provides:

"It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect."

The 1965 Constitution, made void by that provision, provides by s. 3 that "There shall be an Officer Administering the Government in and over Rhodesia" -- an office hitherto unknown to the law. The emergency powers regulations which were determined by the High Court to be valid were made by the officer Administering the Government. For the reasons already given their lordships are of opinion that that determination was erroneous. And it must follow that any order for detention made under such regulations is legally invalid.

[The dissenting opinion of Lord Pearce is omitted.]

WALTER L. NIXON v. UNITED STATES

SUPREME COURT OF THE UNITED STATES
506 U.S. 224; 113 S. Ct. 732; 122 L. Ed. 2d 1 (1993)

[A Federal District Court judge was convicted of making false statements before a federal grand jury. When the judge refused to resign from office notwithstanding his conviction and imprisonment, the United States House of Representatives adopted articles of impeachment which charged the judge with giving false testimony before the grand jury. After the articles of impeachment were presented to the

United States Senate, the Senate voted to invoke one of its impeachment rules, under which (1) the presiding officer of the Senate is authorized to appoint a committee of senators to receive evidence and take testimony; and (2) the committee so appointed is to report to the Senate, in writing, a transcript of the proceedings and testimony given. The committee appointed presented the full Senate with a complete transcript of the proceeding and a report stating the uncontested facts and summarizing the evidence on the contested facts. The judge and House impeachment managers submitted final briefs to the full Senate and delivered arguments from the Senate floor during 3 hours of oral argument which had been set aside. In addition, the judge made a personal appeal, and several senators posed questions directly to the impeachment managers and the judge. The Senate voted to convict the judge, and a judgment was entered removing him from office. Thereafter, the judge filed an action in the United States District Court for the District of Columbia, in which the judge sought a declaratory judgment that his impeachment conviction was void on the ground that the Senate rule under which the committee had been appointed violated the Federal Constitution's impeachment trial clause (Art I, 3, cl 6), which provides that the Senate has the "sole" power to "try" all impeachments. Lower courts rejected the judge's attempts to seek judicial review of his impeachment.]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Walter L. Nixon, Jr., asks this Court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." But before we reach the merits of such a claim, we must decide whether it is "justiciable," that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.

A controversy is nonjusticiable -- *i. e.*, involves a political question -- where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . ." *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. It provides:

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."

The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word "sole" indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict, and when the President is tried the Chief Justice shall preside.

Petitioner argues that the word "try" in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. From there petitioner goes on to argue that this limitation precludes the Senate from delegating to a select committee the task of hearing the testimony of witnesses, as was done pursuant to Senate Rule XI. "'Try' means more than simply 'vote on' or 'review' or 'judge.' In 1787 and today, trying a case means hearing the evidence, not scanning a cold record." Brief for Petitioner 25. Petitioner concludes from this that courts may review whether or not the Senate "tried" him before convicting him.

There are several difficulties with this position which lead us ultimately to reject it. The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. Older dictionaries define try as "to examine" or "to examine as a judge." See 2 S. Johnson, *A Dictionary of the English Language* (1785). In more modern usage the term has various meanings. For example, try can mean "to examine or investigate judicially," "to conduct the trial of," or "to put to the test by experiment, investigation, or trial." Webster's Third New International Dictionary 2457 (1971). Petitioner submits that "try," as contained in T. Sheridan, *Dictionary of the English Language* (1796), means "to examine as a judge; to bring before a judicial tribunal." Based on the variety of definitions, however, we cannot say that the Framers used the word "try" as an implied limitation on the method by which the Senate might proceed in trying impeachments. "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require"

The conclusion that the use of the word "try" in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments. ***

Petitioner devotes only two pages in his brief to negating the significance of the word "sole" in the first sentence of Clause 6. As noted above, that sentence provides that "the Senate shall have the sole Power to try all Impeachments." We think that the word "sole" is of considerable significance. Indeed, the word "sole" appears only one other time in the Constitution -- with respect to the House of Representatives' [*231] "*sole* Power of Impeachment." Art. I, § 2, cl. 5 (emphasis added). The commonsense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. ***

The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers. See R. Berger, *Impeachment: The Constitutional Problems* 116 (1973). This silence is quite meaningful in light of the several explicit references to the availability of judicial review as a check on the Legislature's power with respect to bills of attainder, *ex post facto* laws, and statutes. See *The Federalist* No. 78, p. 524 (J. Cooke ed. 1961) ("Limitations . . . can be preserved in practice no other way than through the medium of the courts of justice").

The Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary. See 1 Farrand 21-22 (Virginia Plan); *id.*, at 244 (*New Jersey Plan*). Indeed, James Madison and the Committee of Detail proposed that the Supreme Court should have the power to determine impeachments. See 2 *id.*, at 551

(Madison); *id.*, at 178-179, 186 (Committee of Detail). Despite these proposals, the Convention ultimately decided that the Senate would have "the sole Power to try all Impeachments." Art. I, § 3, cl. 6. According to Alexander Hamilton, the Senate was the "most fit depositary of this important trust" because its Members are representatives of the people. See *The Federalist* No. 65, p. 440 (J. Cooke ed. 1961). The Supreme Court was not the proper body because the Framers "doubted whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task" or whether the Court "would possess the degree of credit and authority" to carry out its judgment if it conflicted with the accusation brought by the Legislature -- the people's representative. See *id.*, at 441. In addition, the Framers believed the Court was too small in number: "The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons." *Id.*, at 441-442.

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses -- the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. See Art. I, § 3, cl. 7. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments:

"Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision?" *The Federalist* No. 65, p. 442 (J. Cooke ed. 1961).

Certainly judicial review of the Senate's "trial" would introduce the same risk of bias as would participation in the trial itself.

Second, judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:

"The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.*" *Id.*, No. 79, at 532-533 (emphasis added).

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. See *id.*, No. 81, at 545. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. Nixon fears that if the Senate is given unreviewable authority to interpret the Impeachment

Trial Clause, there is a grave risk that the Senate will usurp judicial power. The Framers anticipated this objection and created two constitutional safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge. *Id.*, No. 66, at 446. This split of authority "avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches." The second safeguard is the two-thirds supermajority vote requirement. Hamilton explained that "as the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire." *Ibid.*

JUSTICE STEVENS, concurring.

For me, the debate about the strength of the inferences to be drawn from the use of the words "sole" and "try" is far less significant than the central fact that the Framers decided to assign the impeachment power to the Legislative Branch. The disposition of the impeachment of Samuel Chase in 1805⁺ demonstrated that the Senate is fully conscious of the profound importance of that assignment, and nothing in the subsequent history of the Senate's exercise of this extraordinary power suggests otherwise. Respect for a coordinate branch of the Government forecloses any assumption that improbable hypotheticals like those mentioned by JUSTICE WHITE and JUSTICE SOUTER will ever occur. Accordingly, the wise policy of judicial restraint, coupled with the potential anomalies associated with a contrary view, see *ante*, at 234-236, provide a sufficient justification for my agreement with the views of THE CHIEF JUSTICE.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

[White's judgement is that impeachment is reviewable, but that the Senate did not err in conducting the impeachment trial by committee.]

JUSTICE SOUTER, concurring in the judgment.

[Souter, J., concurred on the ground that the Court should exercise its discretion to refuse to review the case under the "political question" doctrine, as articulated in *Baker v. Carr*, 369 U.S. 186, 217 (1962), a decision declaring that reapportionment of state legislative districts did *not* fall into that category. In that case, the Court wrote:

⁺ [Ed. note: Chase was an outspoken and controversial Federalist justice appointed by John Adams. Republican supporters of President Jefferson impeached him, allegedly for misconduct in trying cases (this is when Supreme Court justices road on circuit individually as trial judges), although his defenders claimed the action was motivated by his pro-Federalist ideology (aided in part by some degree of intemperance and personal disagreeability). A number of Republican senators joined their Federalist opponents to reject conviction. Although the allegations of misconduct were "not devoid of merit," the acquittal established a principle of judicial independence. See generally William H. Rehnquist, *Grand Inquests: the Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*. (New York: William Morrow & Co., 1992).

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

[Although this case "does not demand an answer" given the language of the text, Souter, J., suggested that impeachment should be reviewable if the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply a bad guy.]

II. Advisory opinions by the Supreme Court

A. United States

During President Washington's administration some questions arose on the legality, under principles of international law, of various foreign relations initiatives. Secretary of State Thomas Jefferson attached 29 questions on points of international law to a letter sent to the Supreme Court with the following request for their advice:

GENTLEMEN:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. Their questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognisance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their advice on these questions? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honour to be with sentiments of the most perfect respect, gentlemen,

Your most obedient and humble servant,

Thos. Jefferson

Two days later, Chief Justice Jay and the Associate Justices present at the time responded, asking for time to consult with absent colleagues. When the President politely replied that he would welcome their decision after due consideration, they wrote the following:

SIR:

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court of the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as *expressly limited* to the executive departments.

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

We have the honour to be, with perfect respect, sir, your most obedient and most humble servants.

The view that the U.S. Constitution precluded advisory opinions has now been clearly established. The Court's rationale was clearly articulated in *MUSKRAT V. UNITED STATES*, 219 U.S. 346 (1911). Congress enacted a statute transferring Cherokee tribal property to individual ownership by citizens of the Cherokee Nation, and also imposed certain restraints on the land's alienation. In a later statute, Congress increased the number of Cherokees permitted to obtain an individual ownership interest, and increased the restraints on alienation. The plaintiffs in this case, Cherokees entitled to individual ownership under the original statute, sought to challenge the later statutes that took away some of their property and added de-valuing restrictions, claiming that these statutes constituted an unconstitutional taking of property.

The plaintiffs claim could have been lawfully contested in several ways. They could have sued the Secretary of Interior to enjoin him from increasing the enrollments under the later statute. (Actually, they did, and subsequently lost on the merits.) They could have also proceeded to alienate the property inconsistently with the statutory restraints, and then used private litigation to test the validity of the restraints. However, Congress gave them an easier way -- a specific statute authorizing them to bring a suit in the Court of Claims [like the Canadian or Australian Federal Courts], with appeal to the Supreme Court, to determine the validity of the statute. The Supreme Court found this latter approach unconstitutional, and refused to rule.

Justice Day took note of an early precedent, *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), where several justices commented in an otherwise mooted case that federal judges could not adjudicate Revolutionary War pensions under a statute that allowed the Secretary of War to overrule the court. The justices concluded that because the Constitution divides the government "into three distinct and independent branches," it thus "is the duty of each to abstain from, and to oppose, encroachments on either." Specifically, "neither the legislative

nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner." Any decision subject to political review was not judicial. Justice Day also cited *In re Pacific Ry. Comm'n*, 32 F. 241, where Justice Field explained that Article III's limitation of judicial power to "cases and controversies" was intended to mean "the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

The Court harkened back to *Marbury*:

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury v. Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination ...

Professor (later Justice) Felix Frankfurter, writing during the height of the *Lochner* era of conservative judicial activism against progressive social and economic legislation, offered an interesting perspective critical of advisory opinions. Distinguishing commentary that defended the issuance of such advice in the context of international law, Frankfurter wrote that "our national experience makes it clear that it is extremely dangerous to encourage extension of the device of advisory opinions to constitutional controversies, in view, of the nature of the crucial constitutional questions and the conditions for their wise adjudication." *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1002 (1924). The most difficult constitutional questions, Frankfurter asserted, concerned broad constitutional terms like the Commerce or Due Process Clauses, and the "stuff of these contests are facts, and judgment upon facts. Every tendency to deal with them abstractedly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities." *Id.* at 1002-03. He cited three examples of cases where the Massachusetts Supreme Court had issued advisory opinions striking down legislation where the U.S. Supreme Court (even under conservative control) upheld similar statutes when faced with a real challenge. *Id.* at 1006-07.

B. Canada

The *Supreme Court Act* formally authorizes the Supreme Court to render advisory opinions. Section 53 provides:

- (1) The Governor in Council [*i.e.*, the federal cabinet] may refer to the Court for hearing and consideration important questions of law or fact concerning
- (a) the interpretation of the Constitution Acts;
 - (b) the constitutionality or interpretation of any federal or provincial legislation;
 - (c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or
 - (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.
- (2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.
- (3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

In addition, most provincial statutes provide that the provincial cabinet may likewise refer matters to the provincial court of appeal. Because the Supreme Court of Canada is a general court of appeal for the country, these decisions are subject to appellate review, as was the case with the *Patriation Reference* excerpted in Part III.

REFERENCE RE SECESSION OF QUEBEC

SUPREME COURT OF CANADA [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385

[In 1995, for the second time Quebec held a referendum regarding possible withdrawal from the Canadian confederation. The sovereigntist Parti Quebecois government put to the voters the question: "Do you agree that Québec should become sovereign after having made a formal offer to Canada for a new economic and political partnership ...? In a bitterly fought election, going to the merits of Quebecois independence as well as the sort of continued association that might develop, Quebec voters narrowly defeated the proposal. As part of a post-referendum strategy to make it clear to Quebec voters that independence was undesirable and unacceptable, the federal government sought a judicial declaration that unilateral secession by Quebec was unlawful.]

[Before Lamer C.J. and L'Heureux-Dube, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.]

The following is the judgment delivered by

THE COURT --

I. Introduction

* * *

[2] The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read as follows:

"1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?"

[3] Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

[4] The *amicus curiae*⁺ argued that s. 101 of the *Constitution Act, 1867* does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the *Supreme Court Act, R.S.C., 1985, c. S-26*. Alternatively, it is submitted that even if Parliament were entitled to enact s. 53 of the *Supreme Court Act*, the scope of that section should be interpreted to exclude the kinds of questions the Governor in Council has submitted in this Reference. In particular, it is contended that this Court cannot answer Question 2, since it is a question of "pure" international law over which this Court has no jurisdiction. Finally, even if this Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s. 53 of the *Supreme Court Act*, it is argued that the three questions referred to the Court are speculative, of a political nature, and, in any event, are not ripe for judicial decision, and therefore are not justiciable.

[5] Notwithstanding certain formal objections by the Attorney General of Canada, it is our view that the *amicus curiae* was within his rights to make the preliminary objections, and that we should deal with them.

A. The Constitutional Validity of Section 53 of the *Supreme Court Act*

[6] In *Re References by Governor-General in Council* (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (*sub nom. Attorney-General for Ontario v. Attorney-General for Canada*), the constitutionality of this Court's special jurisdiction was twice upheld. The Court is asked to revisit these decisions. In light of the significant changes in the role of this Court since 1912, and the very important issues raised in this Reference, it is appropriate to reconsider briefly the constitutional validity of the Court's reference jurisdiction.

[7] Section 3 of the *Supreme Court Act* establishes this Court both as a "general court of appeal" for

⁺ [Ed. note: The sovereigntist government of Quebec refused to participate in this litigation, which was initiated by the Chrétien government as part of a well-publicized strategy to oppose secession. The Court appointed a leading separatist constitutional lawyer to act as a friend of the court to defend the separatist position.]

Canada and as an "additional court for the better administration of the laws of Canada". These two roles reflect the two heads of power enumerated in s. 101 of the Constitution Act, 1867. However, the "laws of Canada" referred to in s. 101 consist only of federal law and statute. As a result, the phrase "additional courts" contained in s. 101 is an insufficient basis upon which to ground the special jurisdiction established in s. 53 of the *Supreme Court Act*, which clearly exceeds a consideration of federal law alone (see, e.g., s. 53(2)). Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a "general court of appeal" for Canada.

[8] Section 53 of the Supreme Court Act is *intra vires* Parliament's power under s. 101 if, in "pith and substance", it is legislation in relation to the constitution or organization of a "general court of appeal". Section 53 is defined by two leading characteristics -- it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if (1) a "general court of appeal" may properly exercise an original jurisdiction; and (2) a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions.

(1) May a Court of Appeal Exercise an Original Jurisdiction?

[The Court concluded that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis.]

(2) May a Court of Appeal Undertake Advisory Functions?

[12] The *amicus curiae* submits that

"[TRANSLATION] either this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (*Constitution of India*, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. [Emphasis added.]

[13] However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, § 2 restricting federal court jurisdiction to actual "cases" or "controversies". See, e.g., *Muskrat v. United States*, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the "case or controversy" limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 § 12-2-10; Del. Code Ann. tit. 10, § 141 (1996 Supp.)).

[14] In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an "abstract or objective question" is sufficient. There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.

[15] Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer

certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the Supreme Court Act is therefore constitutionally valid.

B. The Court's Jurisdiction Under Section 53

* * *

[17] It is argued that even if Parliament were entitled to enact s. 53 of the *Supreme Court Act*, the questions submitted by the Governor in Council fall outside the scope of that section.

[20] The first contention is that in answering Question 2, the Court would be exceeding its jurisdiction by purporting to act as an international tribunal. The simple answer to this submission is that this Court would not, in providing an advisory opinion in the context of a reference, be purporting to "act as" or substitute itself for an international tribunal. In accordance with well accepted principles of international law, this Court's answer to Question 2 would not purport to bind any other state or international tribunal that might subsequently consider a similar question. The Court nevertheless has jurisdiction to provide an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation.

[23] More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the *amicus curiae* himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. Justiciability

[24] It is submitted that even if the Court has jurisdiction over the questions referred, the questions themselves are not justiciable. Three main arguments are raised in this regard:

- (1) the questions are not justiciable because they are too "theoretical" or speculative;
- (2) the questions are not justiciable because they are political in nature;
- (3) the questions are not yet ripe for judicial consideration.

[25] In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

[26] Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question

should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. As we stated in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545:

"While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.... In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch." [Emphasis added.]⁺

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

- (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

[27] 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 U.S. "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.

[28] As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

[29] Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference" sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

⁺ The Court's holding enabled it to avoid a political controversy, rejecting a claim that the government violated a federal statute by reducing funds for welfare. The Court affirmed that the right of Parliament to repeal a statute and the inability of a statute to bind future parliaments meant that there was no basis to claim a "legitimate expectation" of continuing federal financial support.

[30] Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer. Second, where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer.

[31] There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference*), at pp. 875-76:

"If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question ... or it may qualify both the question and the answer...."

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

The Court declined to answer an advisory opinion in *REFERENCE RE SAME-SEX MARRIAGE*, [2004] 3 S.C.R. 698. The federal government referred the constitutionality of proposed legislation that would define marriage as "the lawful union of two persons to the exclusion of all others" with a proviso that the law would not affect "the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs." The Court entertained three reference questions, holding that the bill's authorization of same-sex marriage was within Parliament's authority pursuant to s. 91(26) of the *BNA Act* ("marriage and divorce"), while the proviso respecting religious objections was *ultra vires* as it fell within provincial authority under s. 92(12) ("solemnization of marriage in the province"). The Court further held that the legislation was consistent with the equality provisions of the Charter, rejecting the argument that the law infringed the rights of those who object to same-sex marriage on religious grounds. Although the Court refused to opine as to a potential "collision between rights" if religious officials were compelled to perform same-sex marriages contrary to their beliefs - observing that "Charter decisions should not and must not be made in a factual vacuum" - the opinion noted that "state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the Charter" and, "absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the Charter." However, the Court rejected a fourth question asking whether the opposite-sex requirement for marriage established by the common law and the Quebec Civil Code was constitutional. The Court noted that five lower courts had held it was not, people had relied on those decisions, and the federal government had pledged to enact legislation to extend marriage to same sex couples regardless of the Court's decision. "Given the government's stated commitment to this course of action, an opinion on the constitutionality of an opposite-sex

requirement for marriage serves no legal purpose." *Id.* at 724.

C. Australia

Sections 75 and 76 of the Constitution provide:

75. In all matters

- (i.) Arising under any treaty:
 - (ii.) Affecting consuls or other representatives of other countries:
 - (iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
 - (iv.) Between States, or between residents of different States, or between a State and a resident of another State:
 - (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:
- the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter

- (i.) Arising under this Constitution, or involving its interpretation:
- (ii.) Arising under any laws made by the Parliaments:
- (iii.) Of Admiralty and maritime jurisdiction:
- (iv.) Relating to the same subject-matter claimed under the laws of different States.

IN RE JUDICIARY ACT 1903-1920 & IN RE NAVIGATION ACT 1912-1920

(1921) 29 CLR 257

HIGH COURT OF AUSTRALIA

Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ.

This was a reference by the Governor-General under sec. 88 of the Judiciary Act for the determination of the question whether, and to what extent, certain sections of the Navigation Act 1912-1920 are valid enactments of the Parliament of the Commonwealth. Mr. Dixon, for the Attorney-General of the State of Victoria, having raised the objection that Part XII. of the Judiciary Act, in which sec. 88 is found, was beyond the powers of the Commonwealth Parliament, the Court heard argument on that question before proceeding to hear and determine the question referred.

In order to decide the preliminary question it is necessary first to ascertain the meaning of the provisions of Part XII., which comprises secs. 88-94. By sec. 88 Parliament purports to confer on this Court "jurisdiction to hear and determine" "any question of law as to the validity of any Act or enactment of the Parliament" which "the Governor-General refers to the High Court for hearing and determination." Sec. 89 provides that any matter so referred shall be heard and determined by a Full Court consisting of all the available Justices. Sec. 90 provides for notice of the hearing to be given to the Attorney-General of each State, and for his right to appear or be represented at the hearing. Sec. 91 empowers the Court to direct that notice be given to other persons, and that they shall be entitled to appear or be represented at the hearing. Sec. 92 empowers the Court to request counsel to argue the matter as to any interest which in the opinion of the Court is affected and as to which counsel does not appear. Sec. 93 provides that the determination of the Court upon the matter shall be final and conclusive and not subject to any appeal.

Sec. 94 provides for the making of rules—none have yet been made.

Mr. Leverrier, for the Commonwealth, contended that a determination of the Court pronounced under this Part of the Act was, on the true construction of these sections, merely advisory and not judicial. In our opinion this contention is untenable. After carefully considering the provisions of Part XII., we have come to the conclusion that Parliament desired to obtain from this Court not merely an opinion but an authoritative declaration of the law. To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth. If this be so, it is not within our province in this case to inquire whether Parliament can impose on this Court or on its members any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question. What, then, are the limits of the judicial power of the Commonwealth? The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes—legislative, executive and judicial (*New South Wales v. The Commonwealth* [[1915] HCA 17; 20 C.L.R., 54, at p. 88]). In each case the Constitution first grants the power and then delimits the scope of its operation. Sec. 71 enacts that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction. Secs. 73 and 74 deal with the appellate power of the High Court, and we need make no further reference to those sections as it is not suggested that the duty imposed by Part XII. of the Judiciary Act is within the appellate jurisdiction of this Court. Sec. 75 confers original jurisdiction on the High Court in certain matters. and sec. 76 enables Parliament to confer original jurisdiction on it in other matters. Sec. 77 enables Parliament to define the jurisdiction of any other Federal Court with respect to any of the matters mentioned in secs. 75 and 76, to invest any Court of the States with Federal jurisdiction in respect of any such matters, and to define the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States. This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction. The question then is narrowed to this: Is authority to be found under sec. 76 of the Constitution for the enactment of Part XII. of the Judiciary Act? Sec. 51 (XXXIX.) does not extend the power to confer original jurisdiction on the High Court contained in sec. 76. It enables Parliament to provide for the effective exercise by the Legislature, the Executive and the Judiciary, of the powers conferred by the Constitution on those bodies respectively, but does not enable it to extend the ambit of any such power. It is said that here is a matter arising under the Constitution or involving its interpretation, and that Parliament by sec. 30 of the Judiciary Act has conferred on this Court original jurisdiction in all matters arising under the Constitution or involving its interpretation. It is true that the answer to the question submitted for our determination does involve the interpretation of the Constitution, but is there a matter within the meaning of sec. 76? We think not. It was suggested in argument that "matter" meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention; we do not think that the word "matter" in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court. If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose may, we think, adopt any existing method of legal procedure or invent a new one. But it cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law. The word "matter" is used several times in Chapter III. of the Constitution (secs. 73,

74, 75, 76, 77), and always, we think, with the same meaning. The meaning of the expression "in all matters between States" in sec. 75 was considered by this Court in *State of South Australia v. State of Victoria* [[1911] HCA 17; 12 C.L.R., 667]. Griffith C.J. said that it must be a controversy of such a nature that it could be determined upon principles of law, and in this Barton J. agreed. O'Connor J. said that the matter in dispute must be such that it can be determined upon some recognized principle of law. Isaacs J. said that the expression "matters" used with reference to the Judicature, and applying equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties. Higgins J. appeared to think that the expression involved the necessity of the existence of some cause of action in the party applying to the Court for a declaration. He said [12 C.L.R., at p. 742]:—"Even assuming that the State is to be regarded as being substantially the donee of the power, I know of no instance in any Court in which a donee of a power such as this—a power in gross—has obtained by action a declaration that he has the power. Under the Constitution, it is our duty to give relief as between States in cases where, if the facts had occurred as between private persons, we could give relief on principles of law; but not otherwise." All these opinions indicate that a matter under the judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law. The adjudication of the Court may be sought in proceedings inter partes or ex parte, or, if Courts had the requisite jurisdiction, even in those administrative proceedings with reference to the custody, residence and management of the affairs of infants or lunatics. But we can find nothing in Chapter III. of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.

During the argument a strenuous attempt was made to show that this Court had, in earlier cases, approved of the exercise of original jurisdiction in circumstances like those of the present case. We have examined the cases relied on in support of this proposition, and we are satisfied that in all of them the use of the judicial power was approved only when it was used for the purpose of effecting or assisting in effecting a settlement of existing claims of right under the law of the Commonwealth.

The *Jumbunna Case* [6 C.L.R., 309] declared that the provisions of Part V. of the Arbitration Act relating to the formation and registration of organizations were within the legislative power of the Commonwealth. This conclusion was based upon the provisions of sec. 51 (XXXV.) and (XXXIX.) of the Constitution. The formation and registration of an organization is not and could not be part of the judicial power of the Commonwealth, and there is nothing in the case to suggest that it is. The decision of the Court is rested upon the view that proper representation of parties before the arbitral tribunal set up under the Arbitration Act was necessary to the execution of the arbitral power under sec. 51 (XXXV.) of the Constitution, and that to provide for their organization by means of registration was an incident to that power. The case has no relevance, in this respect, to the judicial power of the Commonwealth or its exercise.

Higgins, J. [dissenting]:

Under sec. 51 of the Constitution the Parliament has power to make laws for the peace, order and good government of the Commonwealth "with respect to" many subjects, including trade and commerce with other countries and among the States; and it has also power (pl. xxxix.) to make laws "with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth." Part XII. of the Judiciary Act seems to me

to come precisely under these words. The Government must execute the laws so far as valid; and in order to carry out its duty it is enabled by Part XII. to get the highest legal opinion in the country as to the validity of the sections before acting on them. In my opinion, Part XII. is valid, whether our determination is to be treated as mere advice or as a judicial decision.

That a determination would be an aid to the Government is unquestionable. It would not be a judgment binding all the world, as has been suggested, or binding as *res judicata* between parties who have not been heard; but it would be an authority of great weight—a decision which, unless overruled, the Courts would follow in actions between parties; just as a decision between A and B is an authority in a subsequent action between C and D. C and D are certainly "affected" by the decision between A and B; but it is open to C or D to satisfy this Court that the law of the decision was wrong. ***

These considerations bring me to say something as to Chapter III. of the Constitution—"The Judicature." It is said that this Court, as a Court, is forbidden by the Constitution to perform any functions which are not within "the judicial power of the Commonwealth," and that the function of determining the validity of an Act except between litigating parties is not within that judicial power. I cannot accept either proposition. To say that Blackacre shall be vested in A (and in A only) does not carry as a corollary that Whiteacre shall not be vested in A; to say that the judicial power of the Commonwealth shall be vested in the High Court (and other Federal Courts and such other Courts as Parliament invests with Federal jurisdiction—sec. 71 of Constitution) does not imply that no other jurisdiction, or power, shall be vested in the High Court or in the other Courts. This is surely obvious, on the mere form of words. There is a great deal of force in the argument, favoured by lawyers, that decisions of a Court where there is no active controversy between interested parties are not so valuable as when there is such controversy; and that, when a litigated case comes before the Court subsequently, the Court would approach it with prejudiced minds. But this argument is an argument of expediency, and is not for us. It may be that we shall have in the future attempts at preventive law as well as at preventive medicine, and that, on a balance of expediencies, the law-makers may prefer judicial proceedings before acting, rather than to keep all judicial proceedings till after the doubtful step has been taken. The point is that the Constitution does not expressly forbid the vesting of other powers in this Court, and that there is no necessary implication to that effect. In the next place, I think that an application under Part XII. does come (if that is necessary) within the words of sec. 76, "matter arising under this Constitution, or involving its interpretation." Counsel for the State of Victoria says that "matter" in this contest means a "claim of right": but this definition is too broad, I think, in that it omits the idea of some curial proceeding; and too narrow, in that it assumes that there must be a contest between parties. It is not necessary that a "matter" should be between parties. I pass by the fact that in the Judiciary Act itself, "matter" includes any proceeding in a Court "whether between parties or not"; for it may be urged that the Act was not in force at the time of the Constitution. But in the English Judicature Act 1873 the word "matter" is defined as "every proceeding in the Court not in a cause"; and "cause" includes "any action, suit, or other original proceeding between a plaintiff and a defendant." This is the language of the Parliament which enacted our Constitution; and the distinction between "causes" and "matters" or "suits" and "matters" was common in still earlier legislation (15 & 16 Vict. c. 80; 15 & 16 Vict. c. 86; General Orders of 1841). In the Oxford Dictionary the meaning of "matter," as used in law, is "something which is to be tried or proved." It may be that the connotation of words used in the Constitution may not be extended by Parliament; but surely not the denotation. The Constitution does not stereotype the denotation of words for all subsequent time. The States can create new matters. Any State may hereafter adopt the French law of prodigues, under which a wife may apply for an interdict against extravagance on the part of her husband; and if such a law were adopted the High Court would have jurisdiction of the matter (or cause) if it involve in any way the interpretation of the Constitution. What the State can do, the Commonwealth can do—within the ambit of its specific subjects;

and if the Commonwealth Parliament see fit to create a new legal proceeding under sec. 51 (XXXIX.), that legal proceeding comes under the High Court jurisdiction to decide matters involving the interpretation of the Constitution (sec. 76).

But, in my opinion, the only real question necessary to decide here is the meaning of sec. 51 in its relation to sec. 61 of the Constitution. Hitherto, this Court has given the widest construction to pl. xxxix. and to the words "with respect to" in the opening words of sec. 51.*** "Matter" does not mean merely legal proceeding, but some legal proceeding is probably implied—not necessarily a proceeding where some immediate right, duty or liability is to be established by the determination of the Court; for under such a limited meaning the High Court could not decide as to the existence of an industrial dispute under sec. 21AA.

Nor is the jurisdiction given to this Court to entertain and give a determination as to law in non-litigious matters anything startling or novel. In the British Act which organized the Judicial Committee of the Privy Council (3 & 4 Will. IV. c. 41) His Majesty was empowered to refer to the Judicial Committee "for hearing or consideration" any matters (other than appeals, &c.) as His Majesty thought fit; and the Committee has to hear or consider the same, and advise His Majesty (sec. 4). It appears that the Judicial Committee, when acting under this section, does not make a pronouncement in a formal reasoned judgment, but merely advises His Majesty (Bentwich's *Privy Council Practice*, p. 241). As Lord Loreburn L.C. said in *Attorney-General for Ontario v. Attorney-General for Canada* [(1912) A.C., 571], the Judicial Committee exercises most important judicial functions, yet it is bound to answer His Majesty under this section; and there never has been any suggestion of inconvenience or impropriety. In Canada in several successive Acts the Government was enabled to put before the Supreme Court of Canada questions touching the validity of Dominion or Provincial legislation. In the Act of 1906 (sec. 6): "The opinion of the Court upon any such reference although advisory only shall for all purposes of appeal to His Majesty in Council be treated as a final judgment of the said Court between parties." These words imply that for other purposes the opinion is not to be treated as a *res judicata* between parties, and yet an appeal lies to the Judicial Committee therefrom. Many such appeals have been heard. In this case sec. 6 was held to be valid; although the argument was used that it was an interference with the judicial character of the Supreme Court, and that the Judges would approach litigation with preconceived opinions. That, the Judicial Committee said, was a matter of policy for Parliament to consider. But for the fact that in Canada the residuary powers of legislation belong to the Dominion, not to the Provinces, this case would be a direct authority in favour of Part XII. of our Act. Why should the Canadian Court have jurisdiction to give an opinion that may be the subject of an appeal, and yet the Australian Court be incapable of giving a determination that is not subject to appeal? In both cases, there is no litigation between parties.

It is true that in the United States the Supreme Court has steadfastly refused to advise the Executive on its request. The principle has been recently stated and explained in *United States v. Evans*[17]. In 1793 Washington, as President, sought to take the opinion of the Supreme Court as to various questions arising under treaties with France; but there was no response. Marshall C.J. thus speaks of the matter in his *Life of Washington*: "Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, the Judges deemed it improper to enter into the fields of politics by declaring their opinions on questions not arising out of the case before them." But it will be observed that the question put by Washington was a question under a treaty; and, whatever the question was, it was assumed to be a question of politics, as to external relations—a matter for the Executive, or for Congress. No American case has been cited to us in which, under the Constitution of 1789, an Act of Congress has been held to be invalid which purported to give to the Supreme Court jurisdiction to state

the interpretation of the Constitution, or to pronounce as to the validity of an Act made as under the Constitution. Probably the difficulty in the way of such an Act is greater than under our Constitution; because in the article of the United States Constitution as to judicial power the words used are not so wide as in our Constitution. Here, the words are "matters arising under this Constitution, or involving its interpretation" (sec. 76); in the United States the words are "all cases in law and equity arising under the Constitution." There must be in the United States, a case or a controversy, at law or in equity, between litigating parties. The position is very different.

The separation of the legislative, executive and judicial powers under the Constitution leaves these arms of the Commonwealth interdependent. In Australia executive Ministers must sit in the Legislature (sec. 64) (not as in the United States); and Parliament can regulate the working of the judicial power. There is nothing in the separation of powers that necessarily involves that the High Court cannot be employed to aid the Executive—judicially, at all events.

I much regret to find myself differing from my learned colleagues, but I can see no sufficient ground for holding Part XII. of the Judiciary Act to be invalid

In contrast to the U.S. and Canadian polar opposite approaches, which are well-settled and relatively uncontroversial in their respective countries, there have been repeated efforts to overturn this landmark case and empower the HCA to issue advisory opinions. A 1929 Royal Commission endorsed a constitutional amendment to so provide, although the proposal was never referred by Parliament to a referendum. The issue was re-visited during the ongoing Constitutional Convention which ran, pursuant to a statute enacted by the Whitlam Labor government in 1973, periodically until 1985. The 1978 session considered and endorsed a constitutional amendment; however the Constitutional Commission deliberating between 1986-88 rejected the proposal.

A number of leading Australian legal thinkers continue to seek re-consideration. Justice Michael Kirby called the precedent "rather narrow" and suggested a change "as the Court adapts its process to a modern understanding of its constitutional and judicial functions." *North Ganalanga Aboriginal Corp. v. Queensland*, (1996) CLR 595, 666. Professor John Williams argues that rule of law principles require that law must be "open and clear" if it is to be "capable of guiding the behaviour of its subjects," and this principle is undermined by the Court's "refusal to hear and clarify what *is* the law in a situation where a citizen is unsure which of two competing laws he or she must obey." 'Re-thinking Advisory Opinions' (1996) 7 *Pub. L. Rev.* 205, 206-7.

One of us has suggested, to the contrary, that advisory opinions "may well create only the illusion of certainty." The High Court will not test and review every law. Even Higgins J., dissenting in *In re Judiciary and Navigation Acts*, acknowledged that advisory opinions would not preclude real parties in a real case from re-litigating the issue later. There is also a concern with maintaining the separation and independence of the judiciary that could suffer, especially if the court were required rather than permitted to offer advice. Moreover, existing procedures, such as suits for declaratory judgment, can present justiciable controversies that allow for early judicial resolution of constitutional questions. Finally, this analysis echoes Justice Frankfurter's concerns about American advisory opinions: the

decisions tend to be conservative and sterile. See Helen Irving, 'Advisory Opinions, The Rule of Law, and the Separation of Powers,' 4 *Macquarie L.J.* 105 (2004).

III. The Concept of Constitutional Convention

The oft-cited definition of a constitutional convention comes from English scholar K.C. Wheare: it is "a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the Constitution." What distinguishes conventions from constitutional law is that conventions are not judicially enforceable. (Sometimes as discussed below, conventions become enacted into law - then they are enforceable, but are no longer conventions.)

The *British North America Act* illustrates the concept. First, the preamble states that provinces are to be federally united "with a Constitution similar in Principle to that of the United Kingdom." Since the UK has no written constitution, this refers to the body of constitutional conventions accepted by the British. Second, the *BNA Act* confers a variety of powers on the Queen and her representative, the Governor General, including the power to veto in section 55:

Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

With regard to the Governor General's authority, as Wheare notes, "it is accepted that, by convention, this power will not be exercised." With regard to the Queen's power of disallowance, after 1926 a new convention was agreed to so that "the Queen would take no action in regard to a reserved bill contrary to the wishes of the government of the member of the Commonwealth concerned, and that her exercise of the power of disallowance is no longer possible."

Conventions can also evolve. Thus, Queen Victoria regularly corresponded with fellow monarchs (who often were relatives) independently of the Government; Queen Elizabeth II would not think of independently writing King Juan Carlos of Spain on a matter of Anglo-Spanish relations without vetting it with the Foreign Ministry. On the other hand, to keep a watchful eye on the still-powerful Monarch, a 19th-century convention had developed allowing the Prime Minister to appoint cronies to be the Queen's ladies-in-waiting; Gordon Brown does not get to select the women who dress Queen Elizabeth. A more serious example concerns the power to commit foreign troops. Section 68 of the Australian Constitution provides that the "command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative." Even in 1900, this didn't mean the monarch

herself; at enactment, this was understood to mean that the Governor-General would take instructions from the British imperial government. Even by 1914, however, the decision to commit Australian troops to World War I was made by Australia's Prime Minister, not the British. See Helen Irving, *Five Things to Know About the Australian Constitution* (Cambridge Press 2004).

Although this concept may seem foreign to Americans, there are several notable examples of American constitutional conventions. For example, the written Constitution provides for the President's cabinet (Art. II, §2 provides that the President "may require the opinion, in writing, of the principal officer in each of the executive departments" and authorizes Congress by legislation to vest the appointment of inferior officers in the "heads of departments") and requires Senate confirmation of cabinet members ("officers of the United States"). Although the Senate occasionally refuses to confirm nominees deemed unfit or unqualified, even when the Senate is controlled by the opposition party the Senate never refuses to confirm a President's choice on policy grounds. In contrast, under the French Constitution an elected President must present a cabinet that enjoys the confidence of the legislature, and when the President's party does not control the legislature a "cohabitation" agreement must be worked out. Another convention is that persons elected to the Electoral College will cast their votes for the candidate to whom they are pledged.

The *Mazimbamuto* case read earlier illustrates two key aspects of conventions. First, when they are violated, it is said that the acts are "unconstitutional." Second, there is no judicial remedy. If the Queen or the Governor General were to refuse royal assent to legislation passed by Parliament because they thought the legislation unwise, it would be regarded as a breach of convention, which would be an unconstitutional act. However, the remedy would have to be political, not legal. The legislation would not go into effect, and would not be enforced by courts (although Canada would probably soon become a republic!) In *Mazimbamuto*, when a statute was passed contrary to the convention created by the *Statute of Westminster, 1931* that henceforth the British Parliament would not legislate with regard to former colonies achieving self-governing status, courts will still enforce it.

Because conventions are judicially unenforceable, any judicial declarations with regard to conventions are necessarily advisory. Because the U.S. Supreme Court will not render advisory opinions, American constitutional conventions are not subject to judicial precedents. However, because the Supreme Court of Canada will issue advisory opinions, that is not the case north of the border.

A. Declaring the Existence of Conventions

The *Patriation Reference*, excerpted below, is the first case where the Supreme Court answered a reference with regard to a constitutional convention. The case arose in an extraordinary setting. Throughout recent Canadian history, many efforts had been made to craft a new constitution to supplement or replace the *British North America Act of 1867*, enacted by the British Parliament to establish the country of Canada. The “repatriation” of a Constitution to Canada, with a charter of rights, was a key priority of Prime Minister Pierre Trudeau. In 1981, after lengthy negotiations with provincial premiers failed to produce a consensus on a new constitution, Trudeau announced plans to introduce a resolution in the federal Parliament requesting that the British Parliament amend the *British North America Act* in accordance with his latest draft proposal. Most of the provincial premiers opposed this plan, setting off a constitutional confrontation.

“THE PATRIATION REFERENCE”**SUPREME COURT OF CANADA
[1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1**

[This extraordinary opinion comes in two segments. First, the majority (followed by a dissent from Justices Martland and Ritchie) conclude that there is no legal basis to enjoin the federal Parliament from seeking any amendment to the *British North America Act* that it might choose. Second, another majority (followed by a dissent from Chief Justice Laskin and Justices Estey and McIntyre) conclude that an unwritten constitutional convention, not directly enforceable in a court of law or equity, required the federal government to obtain consent of all or a substantial number of the provinces before requesting the British parliament to amend the constitution.]

THE CHIEF JUSTICE AND DICKSON, BEETZ, ESTEY, McINTYRE, CHOUINARD AND LAMER
JJ.--

I

Three appeals as of right are before this Court, concerning in the main common issues. They arise out of three References made, respectively, to the Manitoba Court of Appeal, to the Newfoundland Court of Appeal and to the Quebec Court of Appeal by the respective governments of the three provinces.

Three questions were posed in the Manitoba Reference, as follows:

- "1. If the amendments to the Constitution of Canada sought in the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada', or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected, and if so, in what respect or respects?
2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?
3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?"

II

The References in question here were prompted by the opposition of six provinces, later joined by two others [only New Brunswick and Ontario supported the Trudeau plan], to a proposed Resolution which was published on October 2, 1980 and intended for submission to the House of Commons and as well to the Senate of Canada. It contained an address to be presented to Her Majesty the Queen in right of the United Kingdom respecting what may generally be referred to as the Constitution of Canada. The address laid before the House of Commons on October 6, 1980, was in these terms:

"To the Queen's Most Excellent Majesty:

Most Gracious Sovereign:

We, Your Majesty's loyal subjects, the House of Commons of Canada in Parliament assembled, respectfully approach Your Majesty, requesting that you may graciously be pleased to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses hereinafter set forth:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The Constitution Act, 1981 set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.
2. No Act of Parliament of the United Kingdom passed after the Constitution Act, 1981 comes into force shall extend to Canada as part of its law.
3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.
4. This Act may be cited as the Canada Act."

[All provinces except Ontario, New Brunswick, and Saskatchewan took the position that, both conventionally and legally, the consent of all the provinces was required for the address to go forward to Her Majesty with the appended statutes.]

VII

[The majority held there was no legal bar to the federal Parliament's passage of a resolution asking the British Parliament to enact the *Canada Act* and repatriate a Constitution to Canada. Whether the British Parliament was conventionally required to act in accordance with the request of the Canadian Parliament was not a matter "upon which this Court would presume to pronounce." As to the argument that the *Statute of Westminster* – and specifically a provision in that statute expressly providing that the statute did not affect in any way the British North America Act and provided that the statute applied to both the Canadian Parliament and provincial legislatures, but that each could only enact laws within their own jurisdiction as established in that Act – had rendered the proposed resolution illegal, the Court rejected the notion that absent specific codifying legislation a convention could be transformed into law. Citing *Madzimbamuto v. Lardner-Burke*, the Court found that the proposed resolution would be lawful.]

VIII

Turning now to the authority or power of the two federal Houses to proceed by resolution to forward the address and appended draft statutes to Her Majesty the Queen for enactment by the Parliament of the United Kingdom. There is no limit anywhere in law, either in Canada or in the United Kingdom (having regard to s. 18 of the *British North America Act*, as enacted by 1875 (U.K.), c. 38, which ties the privileges, immunities and powers of the federal Houses to those of the British House of Commons) to the power of the Houses to pass resolutions. Under s. 18 aforesaid, the federal Parliament may by statute define those privileges, immunities and powers, so long as they do not exceed those held and enjoyed by the British House of Commons at the time of the passing of the federal statute.

For the moment, it is relevant to point out that even in those cases where an amendment to the *British North America Act* was founded on a resolution of the federal Houses after having received provincial consent, there is no instance, save in the *British North America Act, 1930* where such consent was recited in the resolution. The matter remained, in short, a conventional one within Canada, without effect on the validity of the resolution in respect of United Kingdom action. The point is underscored in relation to the very first amendment directly affecting provincial legislative power, that in 1940 which added "Unemployment Insurance" to the catalogue of exclusive federal powers. Sir William Jowitt, then Solicitor-General, and later Lord Chancellor, was asked in the British House of Commons about provincial consent when the amendment was in course of passage. The question put to him and his answer are as follows (see 362 U.K. Parl. Deb. 5th Series, H.C. 1177-81);

"Mr. Mander ... In this Bill we are concerned only with the Parliament of Canada, but, as a matter of interest, I would be obliged if the Solicitor-General would say whether the Provincial Canadian Parliaments are in agreement with the proposals submitted by the Dominion Parliament

The Solicitor-General [Sir William Jowitt]: ... One might think that the Canadian Parliament was in some way subservient to ours, which is not the fact. The true position is that at the request of Canada this old machinery still survives until something better is thought of, but we square the legal with the constitutional position by passing these Acts only in the form that the Canadian Parliament require and at the request of the Canadian Parliament.

My justification to the House for this Bill--and it is important to observe this--is not on the merits of the proposal, which is a matter for the Canadian Parliament; if we were to embark upon that, we might trespass on what I conceive to be their constitutional position. The sole justification for this enactment is that we are doing in this way what the Parliament of Canada desires to do.

...

In reply to the hon. Member for East Wolverhampton (Mr. Mander), I do not know what the view of the Provincial Parliaments is. I know, however, that when the matter was before the Privy Council some of the Provincial Parliaments supported the Dominion Parliament. It is a sufficient justification for the Bill that we are morally bound to act on the ground that we have here the request of the Dominion Parliament and that we must operate the old machinery which has been left over at their request in accordance with their wishes."

IX

The stark legal question is whether this Court can enact by what would be judicial legislation a formula of unanimity to initiate the amending process which would be binding not only in Canada but also on the

Parliament of the United Kingdom with which amending authority would still remain. It would be anomalous indeed, overshadowing the anomaly of a constitution which contains no provision for its amendment, for this Court to say retroactively that in law we have had an amending formula all along, even if we have not hitherto known it; or, to say, that we have had in law one amending formula, say from 1867 to 1931, and a second amending formula that has emerged after 1931. No one can gainsay the desirability of federal-provincial accord of acceptable compromise. That does not, however, go to legality. As Sir William Jowitt said, and quoted earlier, we must operate the old machinery perhaps one more time.

MARTLAND AND RITCHIE JJ. (dissenting)-- ***

The foregoing review shows that the enactment of the *B.N.A. Act* created a federal constitution of Canada which confided the whole area of self-government within Canada to the Parliament of Canada and the provincial legislatures each being supreme within its own defined sphere and area. It can fairly be said, therefore, that the dominant principle of Canadian constitutional law is federalism. The implications of that principle are clear. Each level of government should not be permitted to encroach on the other, either directly or indirectly. The political compromise achieved as a result of the Quebec and London Conferences preceding the passage of the *B.N.A. Act* would be dissolved unless there were substantive and effective limits on unconstitutional action.

[The dissent held that it was beyond the constitutional power of the federal Parliament, in a constitutional system where federalism was enforced by the courts, for it to pass a resolution requesting British parliamentary approval of changes in the *British North America Act* without provincial consent. Such a resolution, the dissent maintained, exceeded the specified powers authorized to the federal Parliament in s.91.]

MARTLAND, RITCHIE, DICKSON, BEETZ, CHOUINARD AND LAMER JJ.—***

I--The nature of constitutional conventions

A substantial part of the rules of the Canadian constitution are written. They are contained not in a single document called a constitution but in a great variety of statutes some of which have been enacted by the Parliament at Westminster, such as the *British North America Act*, 1867, 1867 (U.K.), c. 3, (the *B.N.A. Act*) or by the Parliament of Canada, such as *The Alberta Act*, 1905 (Can.), c. 3, *The Saskatchewan Act*, 1905 (Can.), c. 42, the *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, or by the provincial legislatures, such as the provincial electoral acts. They are also to be found in orders in council like the Imperial Order in Council of May 16, 1871 admitting British Columbia into the Union, and the Imperial Order in Council of June 26, 1873, admitting Prince Edward Island into the Union.

Those parts of the Constitution of Canada which are composed of statutory rules and common law rules are generically referred to as the law of the constitution. In cases of doubt or dispute, it is the function of the courts to declare what the law is and since the law is sometimes breached, it is generally the function of the courts to ascertain whether it has in fact been breached in specific instances and, if so, to apply such sanctions as are contemplated by the law, whether they be punitive sanctions or civil sanctions such as a declaration of nullity. Thus, when a federal or a provincial statute is found by the courts to be in excess of the legislative competence of the legislature which has enacted it, it is declared null and void and the courts refuse to give effect to it. In this sense it can be said that the law of the constitution is

administered or enforced by the courts.

But many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution. For instance it is a fundamental requirement of the constitution that if the opposition obtains the majority at the polls, the government must tender its resignation forthwith. But fundamental as it is, this requirement of the constitution does not form part of the law of the constitution.

It is also a constitutional requirement that the person who is appointed prime minister or premier by the Crown and who is the effective head of the government should have the support of the elected branch of the legislature; in practice this means in most cases the leader of the political party which has won a majority of seats at a general election. Other ministers are appointed by the Crown on the advice of the prime minister or premier when he forms or reshuffles his cabinet. Ministers must continuously have the confidence of the elected branch of the legislature, individually and collectively. Should they lose it, they must either resign or ask the Crown for a dissolution of the legislature and the holding of a general election. Most of the powers of the Crown under the prerogative are exercised only upon the advice of the prime minister of the cabinet which means that they are effectively exercised by the latter, together with the innumerable statutory powers delegated to the Crown in council.

Yet none of these essential rules of the constitution can be said to be a law of the constitution. It was apparently Dicey who, in the first edition of his *Law of the Constitution*, in 1885, called them the "conventions of the constitution", (see W. S. Holdsworth, "The Conventions of the Eighteenth Century Constitution" (1932), 17 Iowa Law Rev. 161), an expression which quickly became current. What Dicey described under these terms are the principles and rules of responsible government, several of which are stated above and which regulate the relations between the Crown, the prime minister, the cabinet and the two Houses of Parliament. These rules developed in Great Britain by way of custom and precedent during the nineteenth century and were exported to such British colonies as were granted self-government.

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period. 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 is the independence of the former British colonies.

Being based on custom and precedent, constitutional conventions are usually unwritten rules. Some of them, however, may be reduced to writing and expressed in the proceedings and documents of imperial conferences, or in the preamble of statutes such as the *Statute of Westminster*, 1931, or in the proceedings and documents of federal-provincial conferences. They are often referred to and recognized in statements made by members of governments.

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

system from which they are distinct does not contemplate formal sanctions for their breach.

Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.

Some examples will illustrate this point.

As a matter of law, the Queen, or the Governor General or the Lieutenant Governor could refuse assent to every bill passed by both Houses of Parliament or by a Legislative Assembly as the case may be. But by convention they cannot of their own motion refuse to assent to any such bill on any ground, for instance because they disapprove of the policy of the bill. We have here a conflict between a legal rule which creates a complete discretion and a conventional rule which completely neutralizes it. But conventions, like laws, are sometimes violated. And if this particular convention were violated and assent were improperly withheld, the courts would be bound to enforce the law, not the convention. They would refuse to recognize the validity of a vetoed bill. This is what happened in *Gallant v. The King* [[1949] 2 D.L.R. 425].⁺ The Lieutenant Governor who had withheld assent in *Gallant* apparently did so towards the end of his term of office. Had it been otherwise, it is not inconceivable that his withholding of assent might have produced a political crisis leading to his removal from office which shows that if the remedy for a breach of a convention does not lie with the courts, still the breach is not necessarily without a remedy. The remedy lies with some other institutions of government; furthermore it is not a formal remedy and it may be administered with less certainty or regularity than it would be by a court.

Another example of the conflict between law and convention is provided by a fundamental convention already stated above: if after a general election where the opposition obtained the majority at the polls the

⁺ [Ed. note: This somewhat bizarre case arose during the end of the prohibition era. Liquor possession was prohibited with limited exceptions in the Prince Edward Island *Prohibition Act, 1937*, and the exceptions were somewhat expanded by passage of legislation in 1945 known as the "Cullen Amendment." Prohibition was replaced by regulation of liquor in legislation that repealed the criminal provisions, but provided that the Lieutenant Governor would not proclaim the repeal to be effective until July 6, 1948, and only then subject to confirmation by a plebiscite on June 28. Gallant was convicted of possessing rum on June 28 (probably celebrating the victory!).

On appeal of his conviction, based on his claim that his conduct was consistent with modified provisions of the Cullen Amendment, Campbell, C.J. determined that the Lieutenant Governor had never given royal assent to the 1945 legislation. Without even discussing the constitutional convention requiring royal assent to be granted on advise of the government, the judge simply noted that the *British North America Act* specifically required royal assent, and thus the 1945 legislation was void. Thus, Gallant's conduct was clearly illegal, since the only valid legislation in place was the original 1937 prohibition law.

Under the circumstances, the court affirmed the conviction, reduced the penalty from a \$300 fine to \$200, and awarded costs against the *Crown* and in favour of the appellant.]

government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to a coup d'etat. The remedy in this case would lie with the Governor General or the Lieutenant Governor as the case might be who would be justified in dismissing the ministry and in calling on the opposition to form the government. But should the Crown be slow in taking this course, there is nothing the courts could do about it except at the risk of creating a state of legal discontinuity, that is, a form of revolution. An order or a regulation passed by a minister under statutory authority and otherwise valid could not be invalidated on the ground that, by convention, the minister ought no longer be a minister. A writ of quo warranto aimed at ministers, assuming that quo warranto lies against a minister of the Crown, which is very doubtful, would be of no avail to remove them from office. Required to say by what warrant they occupy their ministerial office, they would answer that they occupy it by the pleasure of the Crown under a commission issued by the Crown and this answer would be a complete one at law, for at law the government is in office by the pleasure of the Crown although by convention it is there by the will of the people.

This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption.

* * *

It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system. They come within the meaning of the word "Constitution" in the preamble of the *British North America Act, 1867*:

"Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united ... with a Constitution similar in Principle to that of the United Kingdom:"

That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words "constitutional" and "unconstitutional" may also be used in a strict legal sense, for instance with respect to a statute which is found *ultra vires* or unconstitutional. The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.

II--Whether the questions should be answered

It was submitted by counsel for Canada and for Ontario that the [questions concerning constitutional conventions] ought not be answered because they do not raise a justiciable issue and are accordingly not appropriate for a court. It was contended that the issue whether a particular convention exists or not is a purely political one. The existence of a definite convention is always unclear and a matter of debate. Furthermore conventions are flexible, somewhat imprecise and unsuitable for judicial determination.

* * *

[The conventional question] is not confined to an issue of pure legality but it has to do with a fundamental issue of constitutionality and legitimacy. Given the broad statutory basis upon which the Governments of Manitoba, Newfoundland and Quebec are empowered to put questions to their three respective courts of appeal, they are in our view entitled to an answer to a question of this type.

Finally, we are not asked to hold that a convention has in effect repealed a provision of the *B.N.A. Act*, as was the case in the *Reference re Disallowance and Reservation of Provincial Legislation* [[1938] S.C.R. 71]. Nor are we asked to enforce a convention. We are asked to recognize it if it exists. Courts

have done this very thing many times in England and the Commonwealth to provide aid for and background to constitutional or statutory construction. Several such cases are mentioned in the reasons of the majority of this Court relating to the question whether constitutional conventions are capable of crystallizing into law. ***

III--Whether the convention exists

It was submitted by counsel for Canada, Ontario and New Brunswick that there is no constitutional convention, that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament at Westminster a measure to amend the Constitution of Canada affecting federal-provincial relationships, etc., without first obtaining the agreement of the provinces.

It was submitted by counsel for Manitoba, Newfoundland, Quebec, Nova Scotia, British Columbia, Prince Edward Island and Alberta that the convention does exist, that it requires the agreement of all the provinces and that the second question in the Manitoba and Newfoundland References should accordingly be answered in the affirmative.

Counsel for Saskatchewan agreed that the question be answered in the affirmative but on a different basis. He submitted that the convention does exist and requires a measure of provincial agreement. Counsel for Saskatchewan further submitted that the Resolution before the Court has not received a sufficient measure of provincial consent.

We wish to indicate at the outset that we find ourselves in agreement with the submissions made on this issue by counsel for Saskatchewan.

1. The class of constitutional amendments contemplated by the question

These proposed amendments present one essential characteristic: they directly affect federal-provincial relationships in changing legislative powers and in providing for a formula to effect such change.

2. Requirements for establishing a convention

The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must be normative. We adopt the following passage of Sir W. Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at p. 136:

"We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it."

i) The precedents

[The opinion proceeded to summarize each previous constitutional amendment].

Of these twenty-two amendments or groups of amendments, five directly affected federal-provincial

relationships in the sense of changing provincial legislative powers: they are the amendment of 1930 [confirmed the natural resources agreements between the Government of Canada and the Governments of Manitoba, British Columbia, Alberta and Saskatchewan], the *Statute of Westminster, 1931* [granting power to the Parliament of Canada to make laws having extraterritorial effect, and, most importantly, granting both Parliament and the provincial legislatures the authority, within their powers under the *British North America Acts*, to repeal any United Kingdom statute that formed part of the law of Canada, expressly excluding, however, the *BNA Act* itself], and the amendments of 1940 [grant of exclusive federal power to make laws in relation to Unemployment Insurance], 1951 and 1964 [granting concurrent federal and provincial power regarding legislation concerning old age pensions].

These five amendments are the only ones which can be viewed as positive precedents whereby federal-provincial relationships were directly affected in the sense of changing legislative powers.

Every one of these five amendments was agreed upon by each province whose legislative authority was affected.

In negative terms, no amendment changing provincial legislative powers has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld.

There are no exceptions. [The opinion cited a variety of examples: (i) a 1951 amendment giving provinces limited powers re indirect taxation was blocked after Ontario and Quebec objected; (ii) a 1960 patriation proposal was not pursued when a minority objected to the amending formula; (iii) a 1964 unanimous agreement on an amending formula was not pursued after Quebec reconsidered; and (iv) a 1971 agreement between the federal government and eight of the provinces was not pursued because Quebec objected to the amending formula and a new Saskatchewan government did not take a position because it perceived Quebec's objection to be fatal.]

The accumulation of these precedents, positive and negative, concurrent and without exception, does not of itself suffice in establishing the existence of the convention; but it unmistakably points in its direction. Indeed, if the precedents stood alone, it might be argued that unanimity is required.

[The Court then suggested that five amendments regarding the internal workings and powers of the federal Parliament, submitted to Westminster without provincial consultation, were of a different category. The only relevant precedents, in the Court's view, were those that altered legislative powers or provided a method to effect such change. Two particular precedents received further comment: the amendment of 1907 increasing the scale of financial subsidies to the provinces and the amendment of 1949 confirming the Terms of Union between Canada and Newfoundland.]

It was contended that British Columbia objected to the 1907 amendment which had been agreed upon by all the other provinces.

Even if it were so, this precedent would at best constitute an argument against the unanimity rule.

But the fact is that British Columbia did agree in principle with the increase of financial subsidies to the provinces. It wanted more and objected to the proposed finality of the increase. The finality aspect was deleted from the amendment by the United Kingdom authorities. Mr. Winston Churchill, Under-Secretary of State for the Colonies made the following comment in the House of Commons:

"In deference to the representations of British Columbia the words "final and unalterable" applying to the revised scale had been omitted from the Bill."

(Commons Debates, (U.K.), June 13, 1907, at p. 1617.)

In the end, the Premier of British Columbia did not refuse to agree to the Act being passed (see A. B. Keith, *The Constitutional Law of the British Dominions* (1933), at p. 109).

[The Court also distinguished Quebec's objections to the 1949 amendment, wherein the Premier of Quebec is reported to have stated at a press conference simply that the province should have been "consulted" or "advised" as a matter of "courtesy". He is not reported as having said that the consent of the province was required.]

Each of those five constitutional amendments effected a limited change in legislative powers, affecting one head of legislative competence such as unemployment insurance. Whereas, if the proposed Charter of Rights became law, every head of provincial (and federal) legislative authority could be affected. Furthermore, the Charter of Rights would operate retrospectively as well as prospectively with the result that laws enacted in the future as well as in the past, even before Confederation, would be exposed to attack if inconsistent with the provisions of the Charter of Rights. This Charter would thus abridge provincial legislative authority on a scale exceeding the effect of any previous constitutional amendment for which provincial consent was sought and obtained.

ii) The actors treating the rule as binding

The procedures for amending a constitution are normally a fundamental part of the laws and conventions by which a country is governed. This is particularly true if the constitution is embodied in a formal document, as is the case in such federal states as Australia, the United States and Switzerland. In these countries, the amending process forms an important part of their constitutional law.

In this respect, Canada has been in a unique constitutional position. Not only did the *British North America Act* not provide for its amendment by Canadian legislative authority, except to the extent outlined at the beginning of this chapter, but it also left Canada without any clearly defined procedure for securing constitutional amendments from the British Parliament. As a result, procedures have varied from time to time, with recurring controversies and doubts over the conditions under which various provisions of the Constitution should be amended.

Certain rules and principles relating to amending procedures have nevertheless developed over the years. They have emerged from the practices and procedures employed in securing various amendments to the *British North America Act* since 1867. Though not constitutionally binding in any strict sense, they have come to be recognized and accepted in practice as part of the amendment process in Canada.

***The White Paper⁺ then goes on to state these principles, at p. 15:

"The first general principle that emerges in the foregoing resume is that although an enactment by

⁺ [Ed. note: A White Paper is a report issued by a cabinet ministry. It reflects the official policy of the government and is normally the prelude to the introduction of legislation. The White Paper referred to in the text was the government paper entitled, "The Amendment of the Constitution of Canada", published in 1965 under the authority of The Hon. Guy Favreau, the federal Minister of Justice, and approved by the provinces.]

the United Kingdom is necessary to amend the *British North America Act*, such action is taken only upon formal request from Canada. No Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.

The second general principle is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the *British North America Act*. This principle was established early in the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address of the Canadian House of Commons and Senate to the Crown.

The third general principle is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province. A number of attempts to secure such amendments have been made, but none has been successful. The first such attempt was made as early as 1868, by a province which was at that time dissatisfied with the terms of Confederation.⁺ This was followed by other attempts in 1869, 1874 and 1887. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.

The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition."

In our view, the fourth general principle equally and unmistakably states and recognizes as a rule of the Canadian constitution the convention referred to in the second question of the Manitoba and Newfoundland References as well as in Question B of the Quebec Reference, namely that there is a requirement for provincial agreement to amendments which change provincial legislative powers.

This statement is not a casual utterance. It is contained in a carefully drafted document which had been circulated to all the provinces prior to its publication and had been found satisfactory by all of them (see Commons Debates, 1965, at p. 11574, and Background Paper published by the Government of Canada, *The Role of the United Kingdom in the Amendment of the Canadian Constitution* (March 1981), at p. 30). It was published as a white paper, that is as an official statement of government policy, under the authority of the federal Minister of Justice as member of a government responsible to Parliament, neither House of which, so far as we know, has taken issue with it. This statement is a recognition by all the actors in the precedents that the requirement of provincial agreement is a constitutional rule.

⁺ [Ed. note: The first election held under the new *British North America Act* for the new federal government of Canada was held simultaneously with a provincial election in Nova Scotia. At the time, almost all Nova Scotian MPs elected, as well as the new premier and an overwhelming majority of the new Nova Scotia legislature, were opposed to confederation on the terms of the *BNA Act*. They petitioned the British Parliament to rescind or amend the Act to permit their withdrawal from confederation, a petition that was rejected.]

Furthermore, the Government of Canada and the governments of the provinces have attempted to reach a consensus on a constitutional amending formula in the course of ten federal-provincial conferences held in 1927, 1931, 1935, 1950, 1960, 1964, 1971, 1978, 1979 and 1980 (see Gerald A. Beaudoin, *supra*, at p. 346). A major issue at these conferences was the quantification of provincial consent. No consensus was reached on this issue. But the discussion of this very issue for more than fifty years postulates a clear recognition by all the governments concerned of the principle that a substantial degree of provincial consent is required.

It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with this requirement. The situation is one where Ontario and New Brunswick agree with the proposed amendments whereas the eight other provinces oppose it. By no conceivable standard could this situation be thought to pass muster. It clearly does not disclose a sufficient measure of provincial agreement. Nothing more should be said about this.

iii) A reason for the rule

The reason for the rule is the federal principle. Canada is a federal union. ***

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. It would indeed offend the federal principle that "a radical change to ... [the] constitution [be] taken at the request of a bare majority of the members of the Canadian House of Commons and Senate" (Report of Dominion Provincial Conference, 1931, at p. 3).

It is true that Canada would remain a federation if the proposed amendments became law. But it would be a different federation made different at the instance of a majority in the Houses of the federal Parliament acting alone. It is this process itself which offends the federal principle.

THE CHIEF JUSTICE AND ESTEY AND MCINTYRE JJ. (dissenting)--There are different kinds of conventions and usages, but we are concerned here with what may be termed 'constitutional' conventions or rules of the constitution. They were described by Professor Dicey in the tenth edition of his *Law of the Constitution* (1959), at pp. 23-24, in the following passage:

"The one set of rules are in the strictest sense "laws," since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction be called collectively "the law of the constitution."

* * *

And further, at pp. 30-31, he added:

"With conventions or understandings he [the lawyer and law teacher] has no direct concern. They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail to-day differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authority are cited

on either side of this knotty question; the dicta or practice of Russell and Peel may be balanced off against the dicta or practice of Beaconsfield and Gladstone. The subject, however, is not one of law but of politics, and need trouble no lawyer or the class of any professor of law. If he is concerned with it at all, he is so only in so far as he may be called upon to show what is the connection (if any there be) between the conventions of the constitution and the law of the constitution."

This view has been adopted by Canadian writers, e.g. Professor Peter W. Hogg in *Constitutional Law of Canada* (1977), dealt with the matter in these terms, at p. 7:

"Conventions are rules of the constitution which are not enforced by the law courts. Because they are not enforced by the law courts they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all."

At page 8, he said:

"If a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official's act or omission as "unconstitutional". But this use of the term unconstitutional must be carefully distinguished from the case where a legal rule of the constitution has been disobeyed. Where unconstitutionality springs from a breach of law, the purported act is normally a nullity and there is a remedy available in the courts. But where "unconstitutionality" springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available. If a court did give a remedy for a breach of convention, for example, by declaring invalid a statute enacted for Canada by the United Kingdom Parliament without Canada's request or consent, or by ordering an unwilling Governor General to give his assent to a bill enacted by both houses of Parliament, then we would have to change our language and describe the rule which used to be thought of as a convention as a rule of the common law. In other words a judicial decision could have the effect of transforming a conventional rule into a legal rule. A convention may also be transformed into law by being enacted as a statute."

* * *

[Conventions such as that limiting the British Parliament's power to legislate for Canada, that the Governor General's will act only according to the advice of the Prime Minister, and that a government losing the confidence of the House of Commons must itself resign, or obtain a dissolution] have an historical origin and bind, and have bound, the actors in constitutional matters in Canada for generations. No one can doubt their operative force or the reality of their existence as an effective part of the Canadian constitution.]

These then are recognized conventions; they are definite, understandable and understood. They have the unquestioned acceptance not only of the actors in political affairs but of the public at large. Can it be said that any convention having such clear definition and acceptance concerning provincial participation in the amendment of the Canadian Constitution has developed? It is in the light of this comparison that the existence of any supposed constitutional convention must be considered. It is abundantly clear, in our view, that the answer must be no. The degree of provincial participation in constitutional amendments has been a subject of lasting controversy in Canadian political life for generations. It cannot be asserted, in our opinion, that any view on this subject has become so clear and so broadly accepted as to constitute a constitutional convention. It should be observed that there is a fundamental difference between the

convention in the Dicey concept and the convention for which some of the provinces here contend. The Dicey convention relates to the functioning of individuals and institutions within a parliamentary democracy in unitary form. It does not qualify or limit the authority or sovereignty of Parliament or the Crown. The convention sought to be advanced here would truncate the functioning of the executive and legislative branches at the federal level. This would impose a limitation on the sovereign body itself within the Constitution. Surely such a convention would require for its recognition, even in the non-legal, political sphere, the clearest signal from the plenary unit intended to be bound, and not simply a plea from the majority of the beneficiaries of such a convention, the provincial plenary units.

In examining these amendments it must be borne in mind that all do not possess the same relevance or force for the purpose of this inquiry. Question 2 of the Manitoba and Newfoundland References and the conventional segment of Question B in the Quebec Reference raise the issue of the propriety of non-consensual amendments which affect federal-provincial relationships and the powers, rights and privileges of the provinces. The questions do not limit consideration to those amendments which affected the distribution of legislative powers between the federal Parliament and the provincial legislatures. Since the distribution of powers is the very essence of a federal system, amendments affecting such distribution will be of especial concern to the provinces. Precedents found in such amendments will be entitled to serious consideration. It does not follow, however, that other amendments which affected federal-provincial relationships without altering the distribution of powers should be disregarded in this inquiry. Consideration must be given in according weight to the various amendments, to the reaction they provoked from the provinces. This is surely the real test of relevance in this discussion. On many occasions provinces considered that amendments not affecting the distribution of legislative power were sufficiently undesirable to call for strenuous opposition. The test of whether the convention exists, or has existed, is to be found by examining the results of such opposition. Professor William S. Livingston in *Federalism and Constitutional Change* (Oxford University Press, 1956), made this comment, at p. 62, when considering the 1943 amendment which did not affect the distribution of powers,⁺ and the 1940 amendment which did:

"The important difference between the two amendments lies, of course, in the fact that that of 1940 clearly and significantly altered the distribution of powers, a part of the constitution which, it has been argued, is especially deserving of the protection afforded by the principle of unanimous consent. But the facts themselves demonstrate that at least one of the provinces considered the alteration of 1943 sufficiently important to call for long and bitter protests at the disdainful attitude of the Dominion Government. If unanimity is for the protection of provinces, whether singly or collectively, it is reasonable to think that the provinces should be the ones to judge when it should be invoked. By the very operation of the principle, a province will not protest unless it considers the matter at hand worth protesting about."

The true test of the importance of the various amendments for our purpose is a consideration of the degree of provincial opposition they aroused, for whatever reason, the consideration that such opposition received, and the influence it had on the course of the amendment proceedings.

Prior to the amendment effected by the *B.N.A. Act of 1930* there were at least three amendments, those of 1886, 1907 and 1915, which substantially affected the provinces and which were procured without the

⁺ [Ed. note: The *British North America Act of 1943* amended the Constitution to delay the reapportionment of seats in the Canadian House of Commons among the provinces for the duration of World War II.]

consent of all the provinces. The amendment of 1886 gave power to Parliament to provide for parliamentary representation in the Senate and House of Commons for territories not forming part of any province, and therefore altered the provincial balance of representation. That of 1907 changed the basis of federal subsidies payable to the provinces and thus directly affected the provincial interests. That of 1915 redefined territorial divisions for senatorial representation, and therefore had a potential for altering the provincial balance. Those of 1886 and 1915 were passed without provincial consultation or consent, and that of 1907 had the consent of all provinces save British Columbia, which actively opposed its passage both in Canada and in the United Kingdom. The amendment was passed with minor changes. These precedents, it may be said, should by themselves have only a modest influence in the consideration of the question before the Court. It is clear, however, that no support whatever for the convention may be found on an examination of the amendments made up to 1930. None had full provincial approval.

The amendment of 1940 transferring legislative power over unemployment insurance to the federal Parliament also had full provincial consent. It must be observed here, however, that when questioned in the House of Commons on this point Mr. Mackenzie King, then Prime Minister, while acknowledging that consents had been obtained, specifically stated that this course had been followed to avoid any constitutional issue on this point and he disclaimed any necessity for such consent. * * *

In summary, we observe that in the one hundred and fourteen years since Confederation Canada has grown from a group of four somewhat hesitant colonies into a modern, independent state, vastly increased in size, power and wealth, and having a social and governmental structure unimagined in 1867. It cannot be denied that vast change has occurred in Dominion-provincial relations over that period. Many factors have influenced this process and the amendments to the B.N.A. Act-- all the amendments--have played a significant part and all must receive consideration in resolving this question. Only in four cases has full provincial consent been obtained and in many cases the federal government has proceeded with amendments in the face of active provincial opposition. In our view, it is unrealistic in the extreme to say that the convention has emerged.

The conventional question left unanswered by the *Patriation Reference* -- whether unanimous provincial approval was required to repatriate the Constitution -- was answered by the Court in *Re Objection by Quebec to Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, holding that consent of nine of the ten provinces constituted the "substantial measure of provincial agreement" required by convention.

For a suggestion that the Supreme Court justices deciding the *Patriation Reference* were completely political, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, rev. ed. 1994), at 30. Noting that the Charter was favored by allies of Trudeau and generally by Ontarians, Mandel observes that the three justices who completely supported the Prime Minister's view that he was under no legal or conventional obligation to get other provinces to approve the Charter were all Trudeau appointees, two of whom were Ontarians and one (McIntyre, from B.C.), was filling a seat conventionally allocated to Ontario lawyers. The only two justices to completely oppose the Trudeau position were appointees of Conservative Prime Minister John Diefenbaker.

The propriety of judicial advice concerning constitutional convention established in the

Patriation Reference was cabined by the British Columbia Court of Appeal in REFERENCE RE CONSTITUTIONAL QUESTION ACT (B.C.), 78 D.L.R. (4th) 285 (1991). The case arose in the context of what itself was arguably a breach of constitutional convention. Because Senators serve until age 75, a government that has been in office a long time (as were the Liberals, who with minor exception governed from the early 1960s until 1984) would command an overwhelming majority of the Upper House despite being in opposition. Convention dictated self-restraint by senators from the party in opposition, but Liberal senators acted contra-conventionally in refusing to enact controversial measures proposed by the Progressive Conservative government of Brian Mulroney and passed over heated Liberal opposition in the House of Commons. In 1988, they refused to implement the Free Trade Agreement with the United States, which actually precipitated an election on the issue, although the Liberal senators acquiesced after the Tories were re-elected. With a gradually declining majority, the Liberal-controlled Senate narrowly rejected the Goods and Services Tax Bill in 1990. This led Prime Minister Mulroney to invoke, for the only time in Canadian history, s. 26 of the *British North America Act*, allowing the appointment of eight additional senators (two each from the Maritimes, Quebec, Ontario, and the western provinces).⁺ A number of those opposed to this process filed suit. The plaintiffs argued that the original understanding of the section, requiring formal approval by both the Governor General and the Queen, meant that the appointments required the conventional approval of both the Canadian government and the Imperial Privy Council in London. The role of Her Majesty's British advisers was critical, according to those bringing the lawsuit, because of the role of the Senate to constrain the elected government could otherwise be overruled by the current majority in Ottawa. Since the Imperial Privy Council was no longer operative in Canada, and modern sensibilities precluded the Queen from exercising independent political discretion, the whole section was assertedly no longer valid. The Court of Appeal rejected these arguments and concluded that the appointments were *legally* proper. The Court refused, however, to consider a declaration that the appointments violated constitutional convention. The court distinguished the *Patriation Reference* on two grounds. First, the court found the *Patriation Reference* went to the "very heart of a current constitutional issue in Canada," which the case *sub judice* did not, 78 D.L.R. (4th) at 265. Second, the governments litigating the *Patriation Reference* had not established hard and fast positions. Here, the senators were already appointed, and thus the court concluded that it would not intervene "in the political arena by answering on a reference a matter which is not a question of law and where no assistance can be rendered with respect to any contemplated government action." *Id.* See also *Hogan v. Newfoundland (Attorney General)*, 1999 C.R.D.J. 88 (Nfld. S.C.) (refusing to opine on existence of

⁺ [Ed. note: Potential clashes between bi-cameralism and the principle that the government must be responsible to the House of Commons were resolved in 19th Century England by the convention that, in case of a deadlock between Lords and Commons, the Queen would upon advice of the government appoint a sufficient number of additional peers as to permit the government to pass desired legislation. This solution would not work in Canada, where the Senate served to provide a balanced representation among provinces. Thus, the particular solution of s.26, permitting the appointment of either four or eight senators.]

convention that rights of minority Catholics granted at union with Canada cannot be abridged without their consent); *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 (refusing to rule, as beyond scope of reference question, on whether breach of federal-provincial agreement regarding welfare spending was contrary to convention).

B. Distinguishing Conventions from long-standing policies

One cannot fully understand the concept of convention without appreciating the distinction between a binding convention and a “mere” usage or tradition of sound public policy. For example, in *ONTARIO ENGLISH CATHOLIC TEACHERS’ ASSN. v. ONTARIO (ATTORNEY GENERAL)*, [2001] 1 S.C.R. 470, the Court rejected the claim that a constitutional convention preserved the authority of Ontario school boards to levy property taxes. The Court found that there “is no generally accepted principle in Canada as to the design of the public education system.” Although the Court acknowledged that local taxation had been the norm for years, this “reflects consistency in public policy. It does not announce the arrival of a new principle of responsible government.”

C. Conventions and crisis in the absence of advisory opinions

As we have seen, Canada has conventions and advisory opinions; the United States has neither. Australia operates on the Westminster system based on convention, but lacks a tribunal providing authoritative guidance. An interesting comparison is between the Canadian crisis detailed in *Patriation Reference*, caused by Prime Minister Trudeau’s efforts to repatriate the Constitution without reaching a compromise with provincial premiers, and the 1975 crisis between the Australian Labor government of Prime Minister Gough Whitlam and his conservative opponents. (The following is drawn largely from George Winterton, ‘1975: The Dismissal of the Whitlam Government,’ in *Australian Constitutional Landmarks* (H.P. Lee & George Winterton, eds. Cambridge Press 2003.)

For the first time in 23 years, a Labor government had narrowly prevailed over a centre-right coalition of the Liberal and National Parties in the 1972 federal election for the House of Representatives.⁺ Labor party leader Gough Whitlam enjoyed a 9-seat majority in the House of Representatives, but because the Senate did not face an election at that time, the upper-house was still controlled by the centre-right coalition. Many conservatives could not accept that Whitlam had prevailed: the Coalition’s Senate Leader, Sen. Reg Withers, declared that the Labor victory was the result of the “temporary electoral insanity” of voters in Melbourne and Sydney. Thus, drawing upon a precedent when Labor senators blocked conservative

⁺ The term “liberal” came to apply to European political parties in the 19th century and traditionally meant a party supporting free enterprise and limited government, in contrast with a “conservative party” that supported government policies to prop up a landed aristocracy or socialist parties supporting government control of industry to prevent worker exploitation. In North America, it has been applied to centre-left parties, such as the Liberal Party of Canada and the Democratic Party in the United States. In Australia, Liberal Party policies are more likely to find sympathy with Canadian Conservatives and American Republicans.

legislation in the 1950s, opponents saw the Senate as the principal vehicle for bringing down the Whitlam government.

First, in arguable violation of another constitutional convention, conservative State Premiers filled vacancies in the Senate created by resignation or death of elected Labor senators with ideological opponents to the Whitlam government. (The convention, which has subsequently been constitutionally entrenched (see below) is thus now legally binding, flows from the fact that senators are elected on the basis of proportional representation; the whole process would be frustrated if Party A is entitled to 3 senators based on popular vote but then only has 2 because one of their partisans quits and is replaced by someone from another party.) Next, the Senate proceeded to reject more Government bills than any in history: over 93 bills were rejected.⁺

Conservatives then escalated the confrontation by announcing that they would refuse to support a budget to operate the government (called "Supply") unless Whitlam agreed to an election for the House to parallel the partial election for senators in 1975 (public opinion polls suggested that Labor would lose such an election; Whitlam was not required to call a new election until 1977). A resolution conditioning Supply on a House election was passed 30-29, a victory many claim was due to the refusal of the conservative Queensland government

⁺ This practice triggered yet another potential violation of convention: an effort by the Whitlam government to create openings for six, rather than five, elected senators from Queensland in a 1975 senate election, by naming a conservative senator (and harsh government critic) as Ambassador to Ireland. The tactic failed when the news leaked and the Queensland Premier promptly filled the vacancy.

to replaced a deceased Labor senator.⁺ Whitlam refused the demand.

To put this in comparative context, in Britain the convention that the unelected House of Lords would not block Supply was breached in 1912, resulting in new legislation stripping the Lords of any veto (which the Lords themselves passed after Prime Minister Asquith secured King George V's promise to pack the upper house with new Liberal peers if they didn't acquiesce). In the United States, the President does not control either legislative chamber. Indeed, the United States government did indeed shut down for several days because of lack of Supply, during a stand-off between Democratic President Bill Clinton and Republican House Speaker Newt Gingrich that was resolved largely in Clinton's favor when public opinion supported him.

With no budget in sight, a Liberal MP and former Solicitor-General, Robert Ellicott, publicly called on the Governor-General to demand assurances that Whitlam could secure Supply. If not, he asserted that "it would be within the Governor-General's power and duty to dismiss his Ministers and appoint others." (The quotation comes from Paul Kelly, *November 1975* (Sydney, 1993)). With Whitlam's approval Governor-General John Kerr - formerly Chief Justice of the New South Wales Supreme Court and an attorney for trade union clients with strong ties to the ALP, who had been named to the post by Queen Elizabeth on Whitlam's recommendation - consulted legal authorities who opined that he was not required to dismiss Whitlam, and also with Liberal leader Malcolm Fraser on whether a compromise could be found. Without Whitlam's approval, Kerr also consulted with the Commonwealth Chief Justice, Sir Garfield Barwick, who had previously served as Attorney General in a Liberal government. Barwick advised:

a prime minister who cannot ensure supply to the crown, including funds for carrying on the ordinary services of government, must either advise a general election ... or resign. If, being unable to secure supply, he refuses to take either course, your Excellency has a constitutional authority to withdraw his commission as prime minister.

Based on this advice, Kerr dismissed Whitlam, commissioned Fraser as a caretaker Prime Minister, and then dissolved Parliament.⁺

Professor Winterton's analysis suggests that:

⁺ For arguments pro and con on this point, see Winterton at pp. 235-6.

⁺ In his memoirs (all of the major players wrote books about this), the Governor-General stated that he deliberately declined to consult or inform the Queen in advance, to shield her from controversy. John Kerr, *Matters for Judgement* (Melbourne: McMillan, 1978), at p.330. The Labor House Speaker wrote Her Majesty asking her to restore Whitlam to office. Winterton concludes that she was clearly correct not to intervene, but that Kerr should have been more forthcoming with Whitlam about his novel views of the Governor-General's power, and had he been candid earlier Whitlam might have acted to dismiss him.

(1) Conservative state premiers violated convention by replacing Labor senators with Whitlam's opponents; Whitlam may well have been able to secure Supply's passage in the Senate had that not occurred.

(2) The Senate is constitutionally authorized to block Supply but whether it was a convention not to do so is "debatable"

(3) The Barwick-Kerr principle justifying Whitlam's dismissal was novel, and likely contrary to the contemporary view that the principle of responsible government as applied in Australia required the confidence of the House but not the Senate

(4) The Chief Justice should not have informally advised the Governor-General on this issue.

In the end, Professor Winterton characterizes the crisis as "the most dramatic event in Australian political history," profoundly affecting the power of the Senate, the public perception of the office of Governor-General, the role of constitutional conventions, and even the future of the monarchy; and arguably hardened political behaviour and contributed to the public cynicism regarding government and politicians." [at p.229]. At the same time, the lack of consensus among commentators illustrates the difficulties of determining the existence of a convention based on "the conduct and speech of politicians." Geoffrey Sawer, *Federation Under Strain: Australia 1972-75* (Melbourne: Hill of Content, 1976), at p.124.

The crisis did have a constitutional effect (whether this was a direct or indirect effect is debatable). In a referendum in 1977, the Australian voters agreed to amend the Constitution, to alter section 15 which provides for the method of selecting a replacement Senator when a 'casual vacancy' occurs (that is, a vacancy outside the regular electoral cycle, caused by resignation or death). Previously, the nomination of a replacement was made by the relevant State Parliament or Governor (acting on executive advice). As noted above, the Convention that the replacement should always be chosen from the same Party as the outgoing Senator, had been breached by two State Premiers, thus altering the balance of power in the Senate, crucial to the events of 1975. Section 15 of the Constitution now states that

'... Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy ... shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.'

This referendum result indicated, at the very least, that it is not impossible to turn unwritten conventions into constitutional commitments.

As a political matter, the results are also interesting. Fraser won the election despite strong Labor resentment. Labor returned to power seven years later, albeit in a politically more moderate form. The most significant legacy, according to Winterton, is the growth of republicanism, which he notes is ironic because Kerr acted to keep the Queen from controversy. (One of us, on holiday in Yellowstone National Park in 1999, found a group of

touring Australian youths, none born during this affair, bearing t-shirts proclaiming "Sack the Queen, Not Whitlam.") Winterton concludes:

The US Constitution has no 'ultimate constitutional guardian' like the Governor-General, empowered to protect fundamental constitutional principles by forcing the Government to face its ultimate master – the electors. Consequently, the Americans have to resolve political disputes through political means. They have demonstrated how political sense and reluctance to push issues to their ultimate limit operate in a system of checks and balances. In the years since the Dismissal, Australia has done likewise in dealing with the legacy of 1975. That legacy is still with us, and has not run its course.

D. Relationship between conventions and statutes

Occasionally, courts will opine on conventions because they have become codified in law. For example, the Constitution of Western Nigeria had express provisions for the dismissal of the prime minister by the Governor when the former no longer enjoyed the confidence of the legislature. The Prime Minister had not lost a vote of confidence but was dismissed based on a petition to the Governor from a majority of legislators. In *Adegbenro v. Akintola*, [1963] A.C. 614, the Privy Council held this was sufficient.

Sometimes, the interpretation of enacted law is dependent on the understanding of a constitutional convention, which therefore requires the latter's interpretation. For example, consider *A-G Quebec v. Blaikie*, [1981] 1 S.C.R. 312, discussed in Chapter 5 above. There, the Court held that the constitutional requirement in s. 133 of the *BNA Act* that all Quebec legislation be passed in English and French extended to administrative regulations issued by the Lieutenant Governor in Council, because of the convention that these regulations were only issued upon recommendation of the provincial cabinet - i.e. the legislative leadership - and hence were effectively the same as legislation passed by the National Assembly.

The *Madzimbamuto* case excerpted above clearly demonstrates the legislature's power to override convention by legislation. Similarly, in *Penikett v. The Queen*, 43 D.L.R. 4th 324 (Yuk.S.C. 1987), *rev'd on other grounds*, 45 D.L.R. (4th) 108 (Yuk. C.A.), the court found that any convention in favour of increasing self-determination for territories, leading to provincial status, was no longer valid after the *Constitution Act, 1982* expressly required consent of other provinces to change in Yukon's status. Even here, courts will occasionally declare that the convention has no binding effect and, in what is clearly *obiter dicta*, that the convention didn't exist anyway. *See, e.g., Currie v. McDonald*, 29 Nfld. & P.E.I.R. 294 (rejecting challenge to referendum approving union of Newfoundland and Canada and finding no convention that union would only be instituted after post-World War II reinstatement by the British government of an independent colonial government in Newfoundland).

Finally, to return to the American context, sometimes conventions, once broken, can be re-enacted into law. One classic example is the convention that a President will not seek more than two terms in office. This was scrupulously adhered to since the tradition was created by President Washington until broken by President Roosevelt. After Roosevelt's

death, Congress proposed and the states ratified the Twenty-Second Amendment legally limiting a person to two terms.

The combination of unwritten binding obligations and the enactment of the Twenty-Fifth Amendment now provides a major loophole in the Twenty-Second Amendment, which literally provides that “no person *shall be elected* to the office of the President more than twice.” If the voters and Congress were so inclined, two Americans could run for President and Vice President pledging that, if elected, the Vice President will resign, the President will appoint a former President as Vice President and, upon confirmation, then resign the Presidency. The two-term President could then serve another term since they had only been “elected” to the Presidency once.