Reconciliation and the Straitjacket: A Comparative Analysis of the Secession Reference and R v Sparrow

Robert Hamilton & Joshua Nichols

IN THE 1990S the Supreme Court of Canada delivered two opinions that have had important consequences for the country’s constitutional order. In R v Sparrow the Court sought to define the content of section 35 of the Constitution Act, 1982. In Reference re Secession of Quebec it was asked to assess the legality of a unilateral provincial secession from the federation. While the two cases seem distinct, and the Court treated them as categorically so, the relationship between the cases is far more open-textured than initially assumed. In both cases, the Supreme Court confronted situations where the explicit provisions of the Constitution did not offer them a clear path forward, in both the Court opted to use unwritten principles to avoid constitutional deadlock, and in both sub-state peoples challenged the constitutional order and their place in it, in the process challenging inherited notions of federalism, constitutionalism, and the nation-state. The resemblance between these cases is of pivotal importance to the future of Canada. With Indigenous peoples increasingly framing their constitutional demands in the language of self-determination, the limitations of the doctrine of Aboriginal rights, thirty years since Sparrow was decided, are beginning to show. This essay argues that the Court’s presuppositions about the place of Indigenous peoples and the Quebecois in the constitutional order led it to develop distinct constitutional doctrine in the response to the

DURANT LES ANNÉES 1990 la Cour suprême du Canada a rendu deux avis qui ont eu des répercussions importantes sur l’ordre constitutionnel du pays. Dans l’affaire R c Sparrow, la Cour suprême a cherché à définir le contenu de l’article 35 de la Loi constitutionnelle de 1982. Dans le Renvoi relatif à la sécession du Québec, on lui a demandé d’évaluer la légalité d’une sécession provinciale unilatérale de la fédération. Bien que les deux affaires semblent être bien distinctes et que la Cour les ait traitées catégoriquement ainsi, la relation entre ces deux affaires est beaucoup plus vague et complexe qu’on ne le pensait au départ. Dans les deux cas, la Cour suprême a été confrontée à des situations où les dispositions explicites de la Constitution ne lui proposaient pas de voie claire à suivre. Dans les deux cas, la Cour a choisi d’utiliser des principes non-écrits pour éviter une impasse constitutionnelle, et dans les deux cas, les peuples infranationaux ont contesté l’ordre constitutionnel et leur place au sein de celui-ci, remettant ainsi en question les notions héritées du fédéralisme, du constitutionnalisme et de l’État-nation. La similitude entre ces affaires est d’une importance capitale pour l’avenir du Canada. Étant donné que les peuples autochtones formulent de plus en plus leurs demandes constitutionnelles en utilisant un langage axé sur l’autodétermination, les limites de la doctrine des droits autochtones, commencent à faire leur apparition, trente ans après l’affaire Sparrow. Cet
demands of each, in Sparrow developing a constitution unevenly supported by uncomplimentary pillars of colonialism and constitutionalism, while relying on the pillars of legality and legitimacy in the Secession Reference. This essay explores the basis for, and consequences of, these distinct doctrinal approaches. Once the similarities and differences of these cases are seen clearly, they provide a judicially navigable route between colonialism and constitutionalism. In short, they provide a route to real and meaningful reconciliation.
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Reconciliation and the Straitjacket: A Comparative Analysis of the _Secession Reference_ and _R v Sparrow_

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**INTRODUCTION**

On May 25, 1984, Ronald Sparrow went fishing in a part of the Fraser River estuary known as Canoe Passage. As a member of the Musqueam Indian band, Mr. Sparrow fished under the terms of an Indian Food Fishing Licence issued earlier that year. Among other restrictions, the licence prohibited fishing with a drift net of more than 25 fathoms.¹ Mr. Sparrow was caught fishing with a net 45 fathoms in length and was charged under subsection 61(1) of the _Fisheries Act_.² In his defense, Mr. Sparrow argued that the net length restriction in the licence was inconsistent with his

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¹ See _R v Sparrow_ (1986), 36 DLR (4th) 246 at 250, 32 CCC (3d) 65 (BCCA). During the previous five years, the limit had been 75 fathoms: *Ibid*.

² See _R v Sparrow_, [1990] 1 SCR 1075 at 1083, 70 DLR (4th) 385 [Sparrow].
Aboriginal rights under subsection 35(1) of the *Constitution Act, 1982*. The case would find its way to the Supreme Court of Canada and give that Court its first opportunity to interpret subsection 35(1). Because political negotiations intended to determine the scope and content of section 35 had failed, the Court was left with the difficult task of giving meaning to the phrase “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The *R v Sparrow* decision was delivered in November 1990.

The same constitutional process that saw section 35 included in the Constitution created disquietude in Quebec, stirring a nationalist sentiment in the province. The Quiet Revolution of the 1960s had led to the election of the Parti Québécois (PQ) in 1976 and, in 1980, Quebec held its first independence referendum. The referendum was unsuccessful, but the issues that motivated it were aggravated by the patriation process. In particular, Quebec opposed the amending formula and the introduction of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Following the failure of the Meech Lake and Charlottetown Accords, the PQ was re-elected and, in 1995, they held a second referendum, which failed by a narrow margin. In 1996, Lucien Bouchard (the leader of the PQ) announced that his government would hold a third referendum. In response, Prime Minister Jean Chrétien initiated a reference on the legality of a unilateral

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3 s 35(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
5 There is another strong historical parallel here, as the struggle for Indigenous self-determination in Canada entered a new phase when the Trudeau government put forward a policy paper entitled the *Statement of the Government of Canada on Indian Policy, 1969* (the “White Paper”), which proposed to eliminate Indian status, place First Nations under provincial jurisdiction, and move to a system of private property. See Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy*, by Jean Chrétien, Catalogue No R32-2469 (Ottawa: Indian Affairs and Northern Development, 1969), online (pdf): <epe.lac-bac.gc.ca/100/200/301/inac-ainc/indian_policy-e/cp1969_e.pdf>. In other words, the federal government sought to complete the program of assimilation that was initiated in the pre-confederation era by the *Gradual Civilization Act, 1857* and the *Gradual Enfranchisement Act, 1869*, and carried into the foundations of the federation via the *Indian Act, 1876*. The rejection of the White Paper by Indigenous peoples was immediate. The groundswell of activism gave shape to the National Indian Brotherhood and the multifaceted Red Power movement, which set the stage for the post-patriation struggle for constitutional reconciliation. Here again, the parallels with the Québécois struggle for self-determination are striking, but largely unexplored. See Peter H Russell, *Canada’s Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) at 321–324.
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declaration of independence by a province. The Supreme Court delivered its Reference re Secession of Quebec decision in August 1998.6

These two foundational constitutional cases, and the histories giving rise to them, may at first seem unrelated. The Supreme Court itself treated the questions as categorically distinct at the time the cases were decided and has rarely, and then only superficially, brought their doctrinal developments into conversation. This, in our view, evidences a category mistake made by the Supreme Court in the earliest cases interpreting section 35 Aboriginal rights, one that has had important consequences for the development of Aboriginal rights and Crown-Indigenous relations. The mistake, however, is an understandable one; it has undoubtedly come into sharper relief with the benefit of hindsight and the knowledge of how subsequent caselaw has developed. Perhaps more importantly, our conventional legal taxonomies and shared legal grammar emphasize the dissimilarities of these cases;7 the cartographic instruments we rely on to sort our jurisprudence draw boundaries between them. It seemed natural for the Court to treat the issues as distinct.

Yet, these taxonomies do not exist in the natural order waiting to be discovered. They allow us to distinguish paradigms and cases, and accumulate the arguments and opinions that establish a given body of law, but they are not universal or invariable. They are forged, fashioned, and refined in relation to specific contexts. They function properly only in conditions and circumstances that are understood as being “typical.” In other words, we need to remember that the map is not the territory. These hard cases can serve as helpful reminders for us precisely because they expose the conditions and circumstances that we take for granted as being “typical.” They show us that the distinctions we make are localized guidelines for the practice of law, that the law can be otherwise than we had first imagined it to be; they show us that law is not a geometrical machine, but a living practice.8

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8 The term “living practice” draws both on Aristotle’s contrast between knowledge (episteme) and wisdom (phronesis) and on Lord Chancellor Viscount Sankey’s “living tree” doctrine of constitutional interpretation from Edwards v Canada (AG) (1929), [1930] 1 DLR 98 at 106–107, [1930] UKPC 86 (PC) (sub nom Reference Re Section 24 of the British North America Act, 1867).
If we turn our attention to the similarities between *Sparrow* and the *Secession Reference*, we quickly see the relationship between the cases is far more open-textured than initially assumed. The cases are connected by a complicated network of overlapping and crisscrossing similarities and differences; once we set them in the right light, we can see that they share striking family resemblances. In both cases, the Supreme Court confronted situations where the explicit provisions of the Constitution did not offer them a clear path forward; in both, the Court opted to use unwritten principles to avoid constitutional deadlock. In both cases, the Court recognized that public law is more than positive laws dealing with issues of governance and the relationships between government and individuals, but “the very constitution of political society, the conditions according to which a community constitutes legitimate authority.” In both, sub-state peoples challenged the constitutional order and their place in it, in the process challenging inherited notions of federalism, constitutionalism, and the nation-state.

The resemblance between these cases is, in our view, of pivotal importance to the future of Canada. The doctrine of Aboriginal rights, thirty years since *Sparrow* was decided, has been exhausted in important respects. With Indigenous peoples increasingly framing their constitutional demands in the language of self-determination, the limitations of section 35 doctrine are beginning to show; it is increasingly difficult to find productive solutions as the colonial underpinnings of the doctrine prune its more generative outgrowths. The similarities underpinning *Sparrow* and the *Secession Reference*, coupled with the vastly dissimilar approaches taken by the Court in each, provide us with a perspicuous view of the unstated presumptions that reside in the background of the Court’s interpretation of our constitutional order. The value of this vantage point is not merely critical—it does not consist of simply pointing out the tragic and necessary compulsion of a fatal flaw. It is more akin to correcting a map by going out to the territory and surveying it again. The task is to draw our attention to areas our map has failed to adequately represent, thereby clearing the ground for a principled reimagining of our constitutional

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10 For an instructive analysis of the Court’s use of unwritten law (or *lex non scripta*) following the patriation of the Constitution, see Mark D Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51:2 UTLJ 91.
We believe once the similarities and differences of these cases are seen clearly, they provide us with a judicially navigable route between colonialism and constitutionalism. In short, they provide a route to real and meaningful reconciliation.

We can now set the itinerary for our investigation. Part I provides a brief overview of the issues facing the Court in each case and the conclusions the Court reached. Given that this is well-trodden territory, we will focus on providing a serviceable outline of the main landmarks. Part II examines the novel constitutional doctrine the Court crafted in each case and the pillars they relied on to support that doctrine. We identify four pillars: in Sparrow the pillars of colonialism and constitutionalism support the doctrine, while in the Secession Reference the weight is carried by the pillars of legality and legitimacy. The pillars engage the Court’s use of history in each decision, showing that in each instance the Court proffered an ahistorical account of important legal and historical issues. Challenging the Court’s use of history reveals the extent to which the constitutional interpretation in the cases is guided not by historical fact or fealty to precedent but by the Court’s own normative vision of the constitutional order. Unwinding the Court’s questionable historical accounts brings the contingency of the decisions to the fore, illustrating that the decisions were by no means necessary, or even the logical, outcome of applying law to fact. History and law were used instrumentally to craft decisions that reflected the justices’ convictions about the nature of the constitutional order and the place of sub-state peoples in it. In particular, a historical perspective helps explain the Court’s framing of section 35 claims in terms of a sui generis species of Charter rights rather than as jurisdictional in nature. Part III outlines the competing visions of reconciliation that emerge from each case. Part IV moves from the identification of legal pillars to the implications and consequences of relying on them. Here, we re-focus the question to draw out

12 In other words, it is not only contradiction and error that resides behind the presumptions of our legal grammar (it is not a veil that guards against the risk of a state of nature or legal vacuum), there are also a host of unnoticed resources for reconfiguring our constitutional orders. While law can indeed be used as a sword for those in power, it also carries within itself the means for its victims to use it as a shield. This kind of mediating limitation is similar to how language can be used to convey lies, but always carries within itself the means of exposing the truth. On this point, and many others, we find ourselves in agreement with David Dyzenhaus’ claim that there is a “fruitful tension built into legal form” that serves to condition what can be done through lawful processes. See David Dyzenhaus, Hard Cases in Wicked Legal Systems: Pathologies of Legality, 2nd ed (Oxford: Oxford University Press, 2010) at 291 [Dyzenhaus, “Hard Cases”]. We explore this connection further below.
the consequences of the Court’s use of two distinct legal foundations for reconciling the challenges posed by “deep diversity” (to borrow Charles Taylor’s helpful concept) and the practical constitutional problems that emerge from it. Our aim in this part is thus twofold: to illustrate both the practical and theoretical problems that emerge from this framework. In Part V, we look at how the principled solution the Court set out in the Secession Reference can be adapted to address the problem that the Sparrow Court attempted to jump over. We conclude by offering some remarks on how this repurposing of the Secession Reference could be put into practice.

I. THE CASES

A. R v Sparrow

The facts of the case were outlined above: Ronald Sparrow was charged with a Fisheries Act violation and asserted a section 35 Aboriginal right as a defence. He argued the impugned Fisheries Act regulations were inconsistent with section 35 and of no force and effect owing to section 52. In the result, the Court said very little about what is required to prove the existence of an Aboriginal right—this would be set out six years later in the R v Van der Peet decision—focusing instead on defining the elements of the Aboriginal rights provision and elaborating on what constituted a justifiable infringement of a recognized section 35 right. Taking a clause-by-clause approach, the Court first examined the word “existing,” holding that it refers to rights “that were in existence when the Constitution Act, 1982 came into effect.” That is, section 35 did not have the effect

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13 Taylor identifies a kind of “first-level diversity” that covers those who “rallied around the Charter and multiculturalism” in order to reject the notion of a “distinct society” and allow for “great differences in culture and outlook and background in a population that nevertheless shares the same idea of what it is to belong to Canada”: see Charles Taylor, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism, ed by Guy Laforest (Montreal: McGill-Queen’s University Press, 1993) at 182. By contrast, “second-level or ‘deep’ diversity” refers to situations where there is a “plurality of ways of belonging” to Canada: ibid at 183. Taylor acknowledges that many would see the possibility of a nation-state that could cope with this second-level challenge as utopian, as it seems to cut against the dominant conceptions of political unity. He sets out three points in response, two of which are helpful here: first, this second-level or deep diversity is “the only formula on which a united federal Canada can be rebuilt”; and, secondly, “in many parts of the world today the degree and nature of the differences resemble those of Canada rather than the United States”: ibid.

14 [1996] 2 SCR 507, 137 DLR (4th) 289 [Van der Peet cited to SCR].

15 Sparrow, supra note 2 at 1091.
of reviving rights that existed at some point but were extinguished prior to April 17, 1982. The Court rejected the view, however, that the scope of those existing rights was determined by how they were regulated in 1982.\textsuperscript{16} The regulation of a right, in other words, cannot shape its scope: if a right to fish or hunt had not been extinguished prior to 1982, the “right” potentially protects a greater range of activities than the regulated form of the right permitted immediately prior to constitutionalization.\textsuperscript{17} This, in the Court’s view, avoids a “frozen rights” approach to defining Aboriginal rights, and permits their evolution over time.\textsuperscript{18}

The phrase “Aboriginal rights” was given little definition.\textsuperscript{19} The Court accepted that “the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day.”\textsuperscript{20} It considered these factual findings sufficient to establish the existence of a right to fish salmon for food, social, and ceremonial purposes.\textsuperscript{21} In doing so, the Court returned to the question of regulation, rejecting the argument that the regulation of the exercise of rights could effectively extinguish them. This put to rest the Crown’s argument, and that of Justice Judson in \textit{Calder v British Columbia (AG)},\textsuperscript{22} that an Aboriginal right could

\begin{itemize}
\item 16 \textit{Ibid.}
\item 17 The effect of this move was blunted to a considerable extent by two subsequent moves: one, the Court in \textit{Van der Peet}, supra note 14, tied the right to its “pre-contact” form, permitting an evolution of the means of exercising the right, but tying its scope and nature to pre-contact times in a problematic way; two, the Court has consistently held that section 35 rights may be regulated by the Crown if the regulation does not infringe them or if the regulation can be justified. Thus, while a right may not be determined in the abstract by the way it was regulated in 1982, in practice, the exercise of the right will continue to be subject to Crown regulation.
\item 19 This was by design. One, the Court felt that it could dispose of the case at hand without further defining Aboriginal rights. Second, the Court was internally divided on the proper approach. The case was decided by a bench of six, and LaForest J, in particular, was concerned that further developing the issue would result in an evenly split court. See Robert J Sharpe & Kent Roach, \textit{Brian Dickson: A Judge’s Journey} (Toronto: University of Toronto Press, 2003) at 442–53.
\item 20 \textit{Sparrow}, supra note 2 at 1094.
\item 21 \textit{Ibid.}
\item 22 [1973] SCR 313, 34 DLR (3d) 145 [Calder cited to SCR].
\end{itemize}
have been extinguished by virtue of being “necessarily inconsistent” with comprehensive Crown regulatory regimes.\textsuperscript{23} Holding otherwise, the Court reasoned, “confuses regulation with extinguishment.”\textsuperscript{24} Thus, the Court described Aboriginal rights as those traditional activities which had not been extinguished before 1982, with “clear and plain intention” being required to demonstrate such extinguishment.\textsuperscript{25} As would be made more explicit in later cases, this reflects the common law doctrine of continuity in respect of section 35 rights: Indigenous customs, laws, and traditions survived the assertion of Crown sovereignty and form the basis of common law Aboriginal rights.\textsuperscript{26}

The Court then defined “recognized and affirmed.” Here, the Court sought to answer the question: what protections does section 35 offer Aboriginal and treaty rights? The Court began by acknowledging that “[s]ection 35(1) is not subject to s. 1 of the Canadian Charter of Rights and Freedoms nor to legislative override under s. 33,”\textsuperscript{27} which reflects a plain reading of the text. Foregrounding this statement foreshadowed the Court’s concern: to what extent does section 35 limit the Crown’s discretionary authority, and what is the Court’s role in supervising that? The Court began investigating this question with the observation that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”\textsuperscript{28} We return to some of the implications of this statement below;

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\item \textsuperscript{23} Sparrow, supra note 2 at 1097.
\item \textsuperscript{24} Ibid at 1097.
\item \textsuperscript{25} Ibid at 1099.
\item \textsuperscript{26} See Mark D Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44:3 McGill LJ 711 [Walters, “‘Golden Thread’”].
\item \textsuperscript{27} Sparrow, supra note 2 at 1102.
\item \textsuperscript{28} Ibid at 1103. It is crucial to remember that while the existence of Crown sovereignty is not justiciable, the question of what legal powers flow from that sovereignty must be justiciable. If the courts accept the notion that Crown sovereignty necessarily comes with legislative power and underlying title (as the Sparrow Court does), they adopt what we have referred to as a thick version of Crown sovereignty. In this case, the non-justiciability of these powers results in deep tension with constitutional norms regarding the limits of prerogative power within the common law. Alternatively, a thin version of Crown sovereignty can resolve this tension and thereby open up a space for lateral negotiations on the terms of internal self-determination for Indigenous peoples. Chief Justice Marshall was struggling to resolve this tension in the Marshall Trilogy. From Johnson v M’Intosh, 21 US (8 Wheat) 543 (1823) [Johnson], through Cherokee Nation v State of Georgia, 30 US (5 Pet) 1 (1831) [Cherokee Nation], to Worcester v State of Georgia, 31 US (6 Pet) 515 (1832) [Worcester], Marshall CJ does not question the sovereignty of the United States; rather, he progressively limits the legal consequences that flow from it. In brief, the version of sovereignty
\end{itemize}
for now, it suffices to note that the statement was made in order to provide an explanation for the Crown’s authority in relation to Indigenous peoples, including the authority to regulate, infringe, and extinguish their rights. As the Court detailed, the Crown frequently articulated its obligations to Indigenous peoples in strictly political or moral terms rather than legal ones. The constitutionalization of Aboriginal and treaty rights under section 35 provided a legal basis for the Court to supervise the Crown’s discretionary authority, as well as that of Parliament, by incorporating the Crown’s fiduciary obligations into the Constitution. This gives rise to a tension in the doctrine. The Crown’s fiduciary obligations provide a basis for a judicial interpretation of section 35 that recognizes Aboriginal rights by supervising the Crown’s authority. Yet, those obligations arise only when the Crown has asserted control or authority over Indigenous peoples, and the fiduciary obligations provide only a partial limit on that authority, permitting the Crown to limit or abridge Aboriginal rights where presented in Johnson is thick as it is coupled with legislative power and underlying title and buffered by a version of the doctrine of discovery that diminishes the legal status of Indigenous peoples. By contrast, the version of sovereignty in Worcester is no longer buffered by that pernicious legal fiction. In this final case of the trilogy, the doctrine of discovery is reduced to a European doctrine that does little more than enable the discovering European nation to have the right of first offer to make legal agreements with the Indigenous peoples they encounter. The thin version of the concept of sovereignty from Worcester leaves legislative power and underlying title open to negotiation and contestation within the courts of the United States. While the US returned to a thick version of sovereignty in United States v Kagama, 118 US 375 (1886) [Kagama]—which held that Congress has plenary power over Indian tribes because they are wards of the state—the thin version of sovereignty from Worcester still holds open a path towards constitutional legitimacy via practices of mutual recognition and consent in a pluri-national federal order. For a detailed historical account of US federal Indian law, see Sidney L Harring, Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century (Cambridge, UK: Cambridge University Press, 1994). For a legal analysis of the plenary power of Congress, see Robert N Clinton, “There Is No Federal Supremacy Clause for Indian Tribes” (2002) 34:1 Ariz St LJ 113; Philip P Frickey, “(Native) American Exceptionalism in Federal Public Law” (2005) 119:2 Harv L Rev 431 [Frickey, “Exceptionalism”].

the Court considers such infringements justifiable. The justifiability of any given infringement, the Court held, should be assessed on the basis of a proportionality test not unlike that designed under section 1 of the Charter. On this basis, they held that this right should not be subjected to unnecessary limitation and should be accorded priority over the interests of other users of the resource. Having developed this framework, the Court sent the matter back to trial.

**B. Reference re Secession of Quebec**

On September 30, 1996, the Governor in Council referred three questions to the Supreme Court of Canada:

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?

The Court first addressed these questions from strictly doctrinal perspectives at domestic and international law. In each instance, the Court held there was no legal right to unilateral secession. Domestically, there is no provision in the Canadian Constitution for unilateral secession. At international law, a qualified right to secede exists, but the Court held that

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30 *Sparrow, supra* note 2 at 1121.
31 *Ibid* at 1113–16. While there are some important differences between the *Sparrow* and *Oakes* tests, notably the role of the Crown’s fiduciary duty and the imposition of some distinct procedural aspects of the justification test, *Sparrow* adopts a proportionality-based limitations clause conceptually similar to that outlined in the interpretation of section 1 of the *Charter*.
33 *Ibid* at 1120.
34 *Secession Reference, supra* note 6 at para 2.
Quebec did not satisfy the requirements: the people of Quebec were not subjected to colonial or foreign rule and have provisions to meaningfully exercise internal self-determination, undermining a right to unilateral secession.\textsuperscript{35}

Yet, the Court resisted these bright-line responses; instead, it clarified the legal framework within which the political actors operate. This clarification is by no means a simple feat. In doing so, the Court emphasized the need to balance the demands of \textit{legality} and \textit{legitimacy}.\textsuperscript{36} Legality speaks to the formal provisions of the Constitution. The constitutional order, however, derives its legitimacy from popular sovereignty (it is the “expression of the sovereignty of the people of Canada”) and the people retain the ability, “acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory.”\textsuperscript{37} If the Court provided a simple “yes or no” response to the question of the legality of secession, it would inevitably be constitutionally incoherent: if unilateral secession is constitutional, then the weight given to the democratic principle may be such that constitutions are little more than political relationships of convenience that can be formed and dissolved at will; yet, if unilateral secession is unconstitutional, then the weight given to the principle of legality is such that constitutions are agreements that once entered cannot be dissolved. The sovereign will of the present would be permanently subject to the dead hand of the past—in this case, the Court argued, the Constitution would be a “straitjacket.”\textsuperscript{38} The cross-cutting tensions between legitimacy and legality seem to leave the Court stranded on the horns of a dilemma, but they perspicaciously reject this:

Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec’s rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation.\textsuperscript{39}


\textsuperscript{36} \textit{Secession Reference}, supra note 6 at para 33.

\textsuperscript{37} \textit{Ibid} at para 85.

\textsuperscript{38} \textit{Ibid} at para 150.

\textsuperscript{39} \textit{Ibid} at para 93.
The Court avoids the dilemma and the constitutional deadlock that would have inevitably followed by balancing the demands of legality and legitimacy.

This balance is achieved by drawing upon both written texts that form the Constitution and the unwritten principles, rules, and conventions that give shape to the living constitutional tradition: the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities, the Court held, animate the development of the constitutional order. In this, “our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values.” This has allowed constitutional change to be accomplished by methods that have helped to ensure “continuity, stability and legal order.”

Taken together, the written and unwritten sources of the Constitution led the Court to conclude that where a party to the constitutional order expresses a democratic will to re-negotiate the terms of its inclusion in that order, this places a duty to negotiate the terms of the relationship on the other parties. To allow either party to act unilaterally would undermine the legitimacy of the constitutional order. Crucially, the Court also understood its own position in the constitutional order and recognized that legitimacy could not be created by a judicial determination of the rights of the parties: only a negotiated solution could produce a legitimate outcome.

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40 Ibid at para 148.
41 Ibid at para 33.
42 Ibid at paras 32–33.
44 Secession Reference, supra note 6 at para 101.
II. CONSTITUTIONAL PILLARS AND THE USES AND ABUSES OF HISTORY FOR LAW

We can now shift our focus to the problems of historiography and constitutional doctrine. The pillars that support the constitutional visions in these two cases are telling. As in classical Greek architecture, where distinct orders developed with their “own characteristics and rules, refinements of detail and appropriate ornament,”45 the rules that pertain to the interpretation of a constitutional order are determined by a kind of grammatical choice made at the outset, a choice which then constrains subsequent possibilities. That the Court adopted a different grammar of architecture in Sparrow and the Secession Reference demonstrates that the Court considered the cases different in kind and explains the application of not only different rules, but different languages of interpretation. These choices have tangible consequences, as they determine the rights and obligations of the parties and the nature of their constitutional associations. The choice of grammar also must be considered in light of the Court’s use of history in each case. The historical narratives the Court casts help to determine what it considers the proper mode of engagement, and the ahistorical conclusions in each case illustrate the extent to which the underlying presuppositions about the parties and their place in the constitutional order shaped the novel doctrines the Court developed.

A. R v Sparrow

From one vantage point, the decision in Sparrow can be seen as an important victory for Indigenous peoples and the jurisprudence it led to as significantly advancing Indigenous interests. The Court in Sparrow, after all, rejected much more limited readings of section 35—notably that “existing” rights included only those activities engaged in 1982 and that the scope of the rights was determined by the manner in which they were regulated at that time. In so doing, the Court placed significant limits on the discretionary authority of the Crown and the legislature in relation to Aboriginal rights.46 Subsequent case law, building on Sparrow, recognized a Crown duty to consult and accommodate that mandates that the


46 Sparrow, supra note 2 at 1093, 1110.
Crown substantially engage with Indigenous peoples where their rights are at stake, or where they can put forward a credible claim of an as-of-yet unrecognized right, and articulated a vision of Aboriginal title that recognizes exclusive control on a territorial basis. How far one gets with this line of argument, however, depends to a considerable extent on the unstated presumptions underlying the analysis and the framework within which we consider these cases typical. Our assessment of the case law will be shaped by conceptual apparatuses we bring to bear, including the taxonomies through which we sort our jurisprudence.

If we question where we have reflexively placed Indigenous claims on our jurisprudential map, we can see that Sparrow and its progeny constructed borders around section 35. These borders have limited the range of legal tools the courts have brought to bear in interpreting the provision and, in the process, resulted in a doctrine that too often responds to Indigenous claims of self-determination by diminishing them in advance. In this, the Court fixes Indigenous peoples within a certain vision of the constitutional framework. This vision has been built on two doctrinal pillars that continue to set the structural limits of section 35 jurisprudence. We have labelled these pillars constitutionalism (based on the doctrine of continuity and negotiated forms of constitutional association) and colonialism (variations of the doctrine of discovery and the civilization thesis, given effect through unilateralism). While both of these pillars are foundational, they are also separate and distinct. In this case, they are not complementary. Each has its own load bearing capacities. Our contention is that the Court has placed the majority of the interpretive weight on the

47 See Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 [Haida Nation]; Tsilhqot’in Nation v British Columbia, 2014 SCC 44 [Tsilhqot’in Nation].


49 This metaphor has been frequently deployed in respect of the Constitution. See MacMillan Bloedel Ltd v Simpson, [1995] 4 SCR 725, 130 DLR (4th) 385 (“[o]ne of the fundamental pillars upon which the Canadian Constitution rests is a unified national judiciary...[t]his pillar in turn rests on a compromise made by the Fathers of Confederation in 1867” at para 51); Toronto v York Township, [1938] 1 DLR 593, 1 WWR 452 (“pillars in the temple of justice” at 594); R v Stinchcombe, [1991] 3 SCR 326, [1992] 1 WWR 97 (“[t]he right to make full answer and defence is one of the pillars of criminal justice” at 336); Chagnon v Syndicat de la fonction publique et parapublique du Québec, 2018 SCC 39 (“[p]arliamentary privileges are therefore not an exception to the rule of law, but rather a distinct pillar in Canada’s constitutional architecture” at para 79 [emphasis in original]).
pillar of colonialism; as a result, the current constitutional framework is unstable.

The more promising and generative aspects of the section 35 doctrine rely on the pillar of constitutionalism and its constitutive elements, the doctrine of continuity and negotiated forms of authority and jurisdiction. Mark Walters notes that continuity has been used in at least three senses in Aboriginal rights jurisprudence. The first is continuity of what Walters calls Aboriginal “identities.” He explains: “[t]hese identities (national, cultural, political, and/or legal), and their concomitant territorial foundations (the lands and resources upon which they were based) pre-dated colonialism, survived (de facto at least) colonialism and, it is argued, ought to be recognized and protected today.” 50 The second is continuity of the common law itself: common law judges prefer, where possible, to at least couch their decisions in historic precedent. 51 The third, Walters calls “inter-systemic” continuity, which refers to the position that Indigenous legal orders survived the assertion of Crown sovereignty and that common law Aboriginal rights derive from the recognition of this continuity at common law. 52 Taken together, these three forms of continuity provide a basis not only for the recognition of “Aboriginal rights,” but for those rights to be shaped by the historic development of shared Crown-Indigenous legal norms, the historical recognition of Indigenous title 53 and internal self-determination, and the ongoing relevance of Indigenous legal orders. This third form of continuity also includes, crucially, those forms of negotiated constitutionalism that precluded the imposition of unilateral rule.

This pillar of constitutionalism, however, supports only part of the section 35 structure. The other pillar is that of colonialism. The pillar of colonialism is an amalgam of pernicious 19th century legal fictions: the so-called doctrine of discovery and the civilization thesis. This is reflected most clearly in the Court’s statement that “there was from the outset never

50 Walters, “Golden Thread”, supra note 26 at 713.
51 Ibid. In this sense, it can be argued that “there is a natural inter-dependence between our present day common law and that of the thirteenth century. Without an open acknowledgment of this continuity, it would be impossible to maintain the theory of judicial precedent”: Borris M Komar, “The Doctrine of Common Law’s Continuity” (1923) 96 Central LJ 151 at 152. This is by no means an uncontested position, as argued and demonstrated by JGA Pocock. See JGA Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, revised ed (Cambridge, UK: Cambridge University Press, 1987).
53 See Amodu Tijani v Secretary, Southern Nigeria, [1921] UKPC 80 (PC).
any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”\textsuperscript{54} The often-quoted phrase emerged in the course of the Court’s discussion of the phrase “recognized and affirmed” in section 35. The Court deemed the phrase “recognized and affirmed” to be the basis for any limitations on the Crown’s discretionary power in relation to section 35 rights.\textsuperscript{55} That is, any limitations on the Crown’s power derived from section 35 were said to be derived from these words alone. The statement that the Crown’s sovereignty and legislative power were never in doubt establishes the “background,” in the Court’s words, to this provision; yet, this simply cannot be plausibly characterized as “background.”\textsuperscript{56} This statement captures only a partial perspective on the history of Crown-Indigenous relations: it fails to account for the diverse range of perspectives that animate Canada’s past and the partial and attenuated nature of the Crown’s legal and political authority through much of Canada’s history.\textsuperscript{57} Yet, it is presented by the Court as a mere statement of historical fact; the Crown has possessed—\textit{from the outset}—underlying title and legislative power. No evidence is provided for this claim; rather, the historical claim is meant to ground contemporary legal doctrine. The Crown has sovereignty, legislative power, and underlying title now because it has never been doubted that it possessed them. This historical move is by no means benign: it is the source of the Crown’s authority to extinguish Aboriginal rights prior to 1982 and unilaterally infringe them since.

And yet, for such a consequential statement, it is remarkably lacking in historical grounding. As Hamar Foster has argued, “in law the claim that there was ‘never any doubt’ is often a sign of distant rumblings, and the passage [in \textit{Sparrow}] is tantalizingly incomplete”\textsuperscript{58}; it raises a number of difficult questions, such as what historical point the Court has in mind when it refers to “the outset” and “how sovereignty and title could, without conquest or formal expropriation, be unilaterally transferred.”\textsuperscript{59} The thin

\begin{footnotes}
\item[54] \textit{Sparrow}, supra note 2 at 1103.
\item[55] Ibid at 1077.
\item[56] Ibid at 1102.
\item[59] Ibid.
\end{footnotes}
(to the point of being nonexistent) basis for the “background” the Court articulates is apparent when we consider the precedents the Court relied on: the 1823 decision of the US Supreme Court in *Johnson v M'Intosh*, the *Royal Proclamation of 1763* (the *Proclamation*),\(^{60}\) and three specific pages from the Supreme Court of Canada’s 1973 decision in *Calder*. The citations, though, raise only more confusion. It is not clear, for example, the precise principle the Court cites *Johnson* as supporting.\(^{61}\) Certainly, it would be a stretch to suggest that *Johnson* stands for the proposition that Indigenous peoples lost all sovereign and self-governing authority upon European “discovery” and that such discovery subjects them to unfettered Crown regulatory authority.\(^{62}\) Yet, this seems to be the precise sense in which the *Sparrow* Court uses the case.\(^{63}\) Further, *Johnson* is the first case in the Marshall Trilogy and lays out a version of the doctrine of discovery that the subsequent two cases go on to reject.\(^{64}\)

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60 See George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Proclamation*].

61 Supra note 28

62 As we explain below, the views of Chief Justice Marshall developed in the decade following the decision of *Johnson*, supra note 28, and it is clear by *Worcester*, supra note 28, that the assertion of sovereignty did not, in his view, undermine the political character of Indigenous nations. In *Cherokee Nation*, for example, he wrote that “[s]o much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community”: *Cherokee Nation*, supra note 28 at 16.

63 Mark Walters notes the dubious historical and legal basis for the Court’s statement regarding doubt. He argues, “[o]n the basis of the authorities they cited, then, Dickson CJ and La Forest J should have said, at very least, ‘There was from the outset considerable doubt about whether sovereignty vested in the Crown so as to displace fully the sovereignty and territorial rights of Aboriginal nations.’ In truth, however, it is more accurate to say that there was, from the outset, no doubt at all that some kind of Indigenous sovereignty persisted and was acknowledged by the Crown”: Mark D Walters, “‘Looking for a Knot in the Bulrush’: Reflections on Law, Sovereignty, and Aboriginal Rights” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 35 at 43 [emphasis in original].

64 The arc in the legal reasoning of Chief Justice Marshall from *Johnson*, supra note 28, through *Cherokee Nation*, supra note 28, to *Worcester*, supra note 28, can be seen as working through the question of the legal implications of the claim of sovereignty in order to find a balance between arbitrary sovereign power and the rule of law. See Philip P Frickey,
Calder, by turn, include Justice Hall’s move from Johnson to Worcester v State of Georgia and the statement of Justice Judson that the origin of title does not come by way of European recognition, but the fact “that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”

The historical lack of doubt concerning absolute Crown sovereign authority is also said to be evidenced by the Proclamation. Again, though, it is unclear what precise finding the Proclamation is meant to support. While it can certainly be read as evidencing the Crown’s belief that it held sovereignty over the territories the Proclamation applied to (as prerogative Crown legislation, it could hardly apply where the Crown was not sovereign), it is not clear at all that this extended the legislative authority of the Imperial Parliament over the territories recognized as Indian hunting grounds. Colonial governments were prohibited from acting in those areas in either executive or legislative capacities. Under the Proclamation, these territories could not be settled until ceded by consent of the Indigenous parties, and individual colonies had no legislative authority outside their borders. The tension in the Proclamation can be seen here: it is both an assertion or affirmation of Crown sovereignty and a recognition of Indigenous nationhood and political autonomy. Notable in the context of Sparrow, of course, is that underlying this tension is another question of whether the Proclamation was intended to apply to British Columbia. Also of note is that the reach of the Crown’s authority to act in a legislative capacity and the Imperial Parliament’s authority were both subject to considerable debate within imperial constitutional law, a debate which would shortly contribute in significant measure to the American Revolution. Among British and colonial legal thinkers, then, there was indeed considerable doubt as to the effect of the Proclamation,
the extent of legislative authority, and, crucially, the attributes of Crown sovereignty in colonial spheres. While the *Proclamation* may well evidence a belief that the Crown held sovereignty, the concept of sovereignty at play should not be confused with contemporary state sovereignty.

It perhaps goes without saying that, while there are serious questions about the historical account that can be raised on the basis of the western historical record, the Court’s analysis does not consider the Indigenous perspectives on these questions in the least. In the mid-18th century, for example, the Blackfoot were at the peak of their power and influence, and there was no non-Indigenous presence in what is now Alberta. The notion that the Blackfoot would have accepted—*without doubt*—that the Crown held sovereignty and legislative power in relation to their territory is fanciful. The notion that a contemporary Canadian court could justify the present authority of the Crown over that territory on the basis that there was no doubt that it existed in the 18th century enters the realm of the absurd. Yet this is precisely what the *Sparrow* Court proposes, grounding the validity of this proposition in early 19th century American case law that only supports such a conclusion on the most superficial reading.

Rather than careless citation practices, however, another explanation for these inconsistencies lays in the way the Court deployed historical narratives to support a vision of the constitutional order. Hamar Foster explains:

> To these rather complex questions of interpretation one should add a simple question of fact: was there really “never any doubt” that sovereignty vested in the Crown from “the outset”? I shall attempt to show that there was in fact considerable doubt, primarily by examining evidence that goes beyond the confident assertions of trial and appellate decisions made decades after the relevant events. Such assertions are, of course, to be expected. Law achieves its clarity partly by constructing an orthodoxy determined more by political theory than historical accuracy, an orthodoxy that masks competing points of view. Words disappear, or slowly change their meaning, until certain ideas are no longer sayable in legal language. A remark by Justice Meredith of the Ontario Court of Appeal in 1908 is illustrative. The proposition “that the Criminal [law] does not

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“apply to Indians,” he said, is “so manifestly absurd as to require no refutation.” As we shall see, there have been times when to assert such a proposition in court was not absurd at all. But in the courts of Ontario in 1908 it was absurd, and the reason is not hard to find. As the colonial machine grinds forward through time and space, the law tends to repress alternatives rejected by power, sometimes even to deny that these alternatives ever existed. If this “legitimating” enterprise is so effective that it makes what was once a coherent and competing view unthinkable, then it has succeeded most admirably. And by succeeding, distortion ceases to distort: bad history becomes good law.

By casting aspects of the contemporary legal doctrine as the necessary outcome of historical “facts,” the Court places those aspects of the doctrine beyond question: the legal conclusions are the natural and inevitable conclusions to be drawn from the historical account. Historical statements are used to ground contemporary doctrine by establishing a baseline of factual reference. To borrow Robert Cover’s phrase, they establish a “judicial ‘can’t,’” a boundary that demarcates the bounds of judicial decision-making. It is a well-worn technique. Consider the holding of Justice Patterson in the 1928 *R v Syliboy* decision: “[T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages’ rights of sovereignty even of ownership were never recognized.”

The same move was made in the US context by Justice Reed in *Tee-Hit-Ton Indians v United States*: “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.” Yet, “you know it when you see...”

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73 Foster, *supra* note 58 at 347.
76 (1928), [1929] 1 DLR 307 at 313, 50 CCC 389 (NS Co Ct).
77 348 US 272 at 289–90 (1955). This confusion of childhood stories and historical fact brings to mind Marc Bloch’s criticism of “those dreary textbooks” that “conspire to surrender
it” is not a stand-in for legal reasoning. The ethos of *stare decisis* is relied on to make historical claims about the law—even where demonstrably false—a basis for the legitimation of contemporary doctrine: with the historical reference in place, the doctrine could not be other than what it is. Once the court is drawn to accept a pseudo-historical claim as a fact, then it views itself as bound by the authority of precedent to accept the notion that thick Crown sovereignty applies to Indigenous peoples without question, simply because of who they are. In other words, their legal standing is diminished in advance and taken as non-justiciable because of this pseudo-historical backdrop.

From the *Sparrow* Court’s perspective, it simply has no choice: the Crown has underlying title and legislative power because there was “never any doubt” that it possessed them, much as the criminal law applies to “Indians” because it always has, and it is absurd to suggest otherwise. What the Court seems to want to say here is what Chief Justice Marshall put clearly in *Johnson*: “[c]onquest gives a title which the Courts of the conqueror cannot deny.” Yet the *Sparrow* Court does not say this directly, instead pointing to the lack of doubt as apparent evidence of the scope of the Crown’s legal authority. We refer to this as the “colonial pillar” for two reasons. The first is the effect of the legal doctrine it supports: it is the basis for the Crown’s unilateral authority, including the authority to extinguish and infringe Aboriginal rights (and, though not spelled out in the

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78 For a helpful legal example of the question of criminal jurisdiction, see the changes in US constitutional doctrine relating to federal Indian law from *Ex Parte Crow Dog*, 109 US 556 (1883), which retained the jurisdictional approach taken in the Marshall Trilogy, to *Kagama*, *supra* note 28, where the US Supreme Court effectively reversed their entire theory of constitutional law to uphold the constitutionality of the *Major Crimes Act of 1885*. In simple terms, the Court took the constitutional theory from one of shared jurisdiction within a federal union, based on consent via the treaties, to a model based on congressional plenary power over “Indians,” based on the savagery thesis. For a detailed historical account of this transition, see Harring, *supra* note 28. For a legal analysis of the plenary power of Congress, see Clinton, *supra* note 28; Frickey, “Exceptionalism”, *supra* note 28.

79 *Supra* note 28 at 588.

80 Lower courts have at times put the point more clearly, citing this same passage in *Sparrow*. See e.g. *R v Kahpeechoose*, [1997] 4 CNLR 215 at 218, 30 MVR (4th) 239 (Sask Prov Ct) [*Kahpeechoose*].
doctrine, the authority of the courts to define those rights). Second is the very basis and justification itself, which, as we have noted, can point only to the doctrine of discovery and the hierarchy of civilization as a ground for Crown authority of the type the Court envisions.

By failing to address the historical reality (or lack thereof) of these foundations, the courts have given the Crown’s assertion of sovereignty over Indigenous peoples a strange extratextual quality. Within the current theory of the Constitution, the Crown simply has what it claims to have—thick sovereignty—and is not required to tether either its legislative power over Indigenous peoples or its underlying title to their lands to the constitutional order. This has left the courts effectively justifying colonialism in the pursuit of keeping up with the day-to-day demands of constitutionalism. Because of this, Canadian Aboriginal law has been (to repurpose Philip Frickey’s assessment of the US jurisprudence) “remarkably incoherent.”

The colonial pillar is thus employed to determine the legal dimensions of the box of rights that section 35 “recognized and affirmed.” It functions to silently strip away the political rights of Indigenous peoples. In one moment, they exist as self-governing peoples on their traditional territories, and then, with the words “there was from the outset never any doubt,” they are transformed into a minority with little more than common law rights of occupancy. This unilateral diminishment of Indigenous peoples from self-governing nations to a racialized minority is entangled with the thick version of sovereignty that the Court attributes to the Crown. The thick version of Crown sovereignty already has legislative power and underlying title as fundamental attributes. It fills the constitutional frame so completely that the only remaining spaces are the devolved powers granted to municipalities and other creatures of statute. It facilitates the perception of Indigenous peoples as holders of rights rather than jurisdiction. This thick version of sovereignty may appear somehow “normal” or “natural”—almost as if it could go without saying—but that is only when we assume that Indigenous peoples are a minority within the Canadian state.

82 Hamilton & Nichols, supra note 43.
83 Anna Stilz discusses the ways that contemporary justifications of state authority tend to take the existence of a state with absolute sovereignty through fixed territorial bounds as a given. In her view, a legitimate state must adopt a more circumscribed conception of sovereignty. See Anna Stilz, Territorial Sovereignty: A Philosophical Exploration (Oxford: Oxford University Press, 2019).
While this may seem a needlessly ungenerous reading of the case, a review of the application of Sparrow in the lower courts illustrates the point. A number of cases have relied on the quote emphasized above (“never any doubt”) as the final word on not only the existence, but the scope, of Crown sovereignty and underlying title. For example, in R v Day Chief, the Alberta Court of Appeal faced a claim that the province had no jurisdiction over lands where the defendants were charged (for traffic violations) because the treaties purporting to have ceded the land were invalid. The Court held, citing the Sparrow passage in question:

It is unnecessary for me to consider either the admissibility or the accuracy of the applicants’ evidence in support of their claim that the “surrender documents” between Aboriginal peoples and the Crown are not valid. Even were I to accept that these documents might be fraudulent, such dubious provenance would not, without more, affect the Crown’s underlying sovereignty over the land on which the applicants were charged.84

Further, “[t]hese comments [concerning the lack of doubt] were made in relation to land to which no treaty applied, and demonstrate conclusively that Crown title exists independently of surrender agreements or treaties.”85 In short, this single quote from Sparrow has been used to ground a notion of sovereign incompatibility that excludes Indigenous self-governance.

A similar use of history can be seen in the development of the pillar of constitutionalism in Sparrow. The pillar of constitutionalism is grounded in the doctrine of continuity and negotiated forms of political rule, including areas of shared and exclusive jurisdiction. The doctrine of continuity has the benefit that it accords much more closely with the historical reality—that Indigenous customs, laws, and traditions survived the assertion of Crown sovereignty—than an account that retroactively applies a contemporary notion of state sovereignty to the entirety of the Canadian land mass during a period in which European descendants were minorities, if

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present at all, in virtually every part of it. Yet, colonial force, fraud, and theft were undoubtedly an important part of the history as well. As Robert Gordon and Morton Horowitz have outlined, legal arguments that emphasize the continuity of the common law can be equally ahistorical and instrumentalist as others. 86 They selectively draw on law and history to support a contemporary legal doctrine and constitutional vision in the same way. There is an important caveat here, though. In emphasizing the continuity of Indigenous law and custom, the legal pluralism of the imperial era, and the negotiated forms of constitutionalism that shaped Crown-Indigenous relations, the court is explicit in trying to craft a legitimate constitutional order, “a morally and politically defensible conception of aboriginal rights.” 87 With a view to fulfilling the “promise” of section 35, the Court has, at times, been explicitly normative in outlining the constitutional pillar. The colonial justification, on the other hand, resides in the “background” and remains unstated. 88 As a result, Indigenous peoples exist within a “twilight zone” between wardship and self-determining peoples. 89

B. Reference re Secession of Quebec

In contrast with the uneven pillars of continuity and colonialism that the Court sets out in Sparrow, the Court in the Secession Reference offers us the pillars of legality and legitimacy, which provide the foundation for a legal framework of “reconciliation” that enables the parties to resolve their differences through open political negotiation. 90 This version of reconciliation holds most promise in the Crown-Indigenous context. How, then, do the pillars of legality and legitimacy support the constitutional vision and

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86 Gordon, supra note 74.
88 Of course, in Guerin, supra note 29, the Supreme Court of Canada was, in fact, plain on this point, holding that the doctrine of discovery provides the justification to underlying Crown title.
89 We are repurposing David Dyzenhaus’ use of the concept of a “twilight zone” in his excellent book Hard Cases in Wicked Legal Systems: Pathologies of Legality. Dyzenhaus argues that “black South Africans during apartheid were in a twilight zone between slavery and full humanity” and that the contradictory legal standing of black South Africans allowed judges to use the rule of law to expose the incoherence and illegitimacy of the apartheid regime. Dyzenhaus, “Hard Cases”, supra note 12 at 235–36.
90 Secession Reference, supra note 6 at para 101.
mode of reconciliation the Court proffers in the *Secession Reference*? While this will be developed further below, a few words can be said here.

When the Court refers to “legality” in the *Secession Reference*, it refers to the formal (by which it means written) legal principles of a given legal order. The question of the legality of unilateral secession in domestic law, the Court held, is a question that it can properly answer. In doing so, the Court held that there was no legal right to unilateral secession in either domestic or international law. Reaching this conclusion required the formal application of the written provisions of the Constitution to the facts of the case. The principle of legality requires that courts ensure all parties act according to their legal obligations and is one pillar that supports the constitutional vision of the Court in the *Secession Reference*. Yet, in the Court’s view, legality in itself is not enough to stabilize a constitutional order. Thus, the Court draws a distinction between legality and legitimacy. The legitimacy of a constitutional order goes beyond the formalistic law: “law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the ‘sovereign will’ or majority rule alone, to the exclusion of other constitutional values.” While the Court does not venture to define “law” as inclusive of the broader normative worlds that inform the interpretation and application of formal written law, it nonetheless concludes that an interpretation of written law that is insufficiently attentive to the normative beliefs of those to whom the law will apply will lack legitimacy and, consequently, stability.

In crafting this response, the Court made a similar historical move to the one we observed in *Sparrow*. The Court in the *Secession Reference* held:

> We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.

The Court relied on the country’s constitutional history to support its application of the unwritten constitutional principles of federalism,
constitutionalism and the rule of law, democracy, and respect for minority rights. As Blake Brown has noted, however, in identifying these four principles as particularly foundational to the Canadian constitutional order, “the Court crafted a historical narrative that supported its judgment, and, more broadly, imagined Canada as a nation founded upon principles to which many Canadians now aspire.” In their discovery of these principles, the Court “carefully crafted a narrative that omitted more troublesome historical developments” and “was designed to support its legal conclusions.” The Court relied on this highly selective reading of Canadian history to lend credibility to “current national myths,” but the narrative the Court produced stumbled through “numerous debates about the history of Confederation and federalism” without so much as mentioning the work of professional historians writing on Confederation.

The actual historical survey that the Court provided to justify the constitutionality of these four principles is, at best, doubtful. Their brief description of the “legal evolution” of the Constitution is puzzlingly limited to the mid-19th century. In fact, the earliest date considered in their review of the historical context is 1864 (aside from the passing mention of the Magna Carta and the English Bill of Rights). While it makes sense to spend some time reviewing the debates surrounding the passing of the British North America Act, 1867 and the formation of the Dominion of Canada, the omission of any consideration of the pre-Confederation era leads to inconsistencies that have deeply troubling constitutional implications. For example, the Proclamation is undoubtedly a part of the “global system of rules” that makes up our constitutional order: it is referred to in section 25 of the Constitution Act, 1982 and some of its central provisions have been held to have become part of the common law. Yet, the Secession Reference does not refer to it. It is impossible to explain the significance of

97 Ibid at 15–16.
98 Ibid at 16.
99 Secession Reference, supra note 6 at paras 34–38, 63.
100 Secession Reference, supra note 6 at para 32, citing Reference Re Resolution to Amend the Constitution, [1981] 1 SCR 753 at 874, 125 DLR (3d) 1 [Patriciaion Reference].
the Treaty of Niagara, 1764 or the Quebec Act, 1774 without first considering the constitutional significance of the Proclamation.

The pre-Confederation Crown-Indigenous treaties and treaties among Indigenous nations themselves intermingled with imperial constitutional law to form a complex constitutional order that predated and survived the written statutory constitution, the Constitution Act, 1867. None of this is discussed. The effects of these omissions are difficult to overstate, as they distort the “underlying political and cultural realities” of the constitutional order. This is what allows the Court to ignore the long and complicated legal history of the relationship between the Imperial Crown, Indigenous peoples, and Quebec. The narrative that the Court “finds” in the historical record determines the legal standing of Indigenous peoples in relation to the other “initial members of Confederation” and positions Quebec as simply one of the initial members, stripping it of its unique character. Yet, the unwritten constitutional principles that allow the Court to recognize the constitutional agency of the Quebeccois as a people are found in the constitutional history.

While we argue that the approach in the Secession Reference could ultimately guide a generative framework for section 35, the reason the Sparrow Court adopted its Charter-like vision may have been most clearly articulated in the Secession Reference itself. There the Court referred to Quebec as “initial members of Confederation” who were involved in the “act of nation-building.” Indigenous peoples were categorized as “minorities” within Canada. Their “contribution to the building of Canada” is thus categorically distinct by virtue of a political assertion and a judicial lack of doubt. Their “ancient occupation of land” gives rise not to political rights of distinct peoples, but to Charter-like rights. Their treaties are not placed alongside the set of conventions, statutes, decisions, debates, principles, and other marginalia that make up the “global system of rules” that

103 Secession Reference, supra note 6 at para 43.
104 Ibid. For some recent accounts of the relationship between law and history on this point, see Joshua Ben David Nichols, A Reconciliation Without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada (Toronto: University of Toronto Press, 2020); Russell, supra note 5.
105 Secession Reference, supra note 6 at para 43.
106 Ibid at para 82.
107 Ibid.
108 Ibid.
is our constitutional order. Instead, the treaties are held outside of this system and categorized as “special commitments made to them by successive governments.” The problem in both Sparrow and the Secession Reference is that Indigenous peoples are presented as a minority without explanation. The benefit of this diminishment is that the existing division of powers can seem to remain unchanged. But the cost of this appearance is high: there is no account of the legitimacy of the process whereby their legal status was diminished from self-determining peoples to subjects of the Crown. Sparrow attempts to compensate for this absence by sweeping the question of constitutional legitimacy under the rug of the non-justiciability of Crown sovereignty. This does little but beg the question: the mysterious diminished legal standing of Indigenous peoples simply becomes the mysteriously inflated (or thickened) legal standing of the Crown. The imbalanced pillars of colonialism and constitutionalism cannot support a coherent constitutional order; they can only maintain a “twilight zone” where the Constitution exists as a straitjacket for some, but not for others. When the legitimacy of this incoherent model of constitutionalism is questioned, all we are told is “there was from the outset never any doubt.” If we are to leave this twilight zone, we will need to remove the colonial pillar and begin from the presumption that Indigenous peoples are also “initial members of Confederation” who were involved in the “act of nation-building,” and thereby their constitutional grievances can only be resolved by balancing the pillars of legality and legitimacy.

III. VARIETIES OF RECONCILIATION

In both Sparrow and the Secession Reference, the Court engaged in highly selective historical readings to lend support to the legal doctrine it developed: to recall Professor Foster, “bad history becomes good law.” In each case, the Court had a constitutional vision in mind that it sought to bring about through crafting legal doctrine supported with historical claims. These historical claims were blurred with legal claims such that the court became bound on two fronts: historical fact on the one hand and stare decisis on the other. The value of recognizing this repeating pattern is that it allows us to see how the Court brought divergent constitutional

109 Secession Reference, supra note 6 at para 32, citing Patriation Reference, supra note 100 at 874. 
110 Ibid.
111 Sparrow, supra note 2 at 1103.
112 Foster, supra note 58 at 347.
visions to the two cases; recognizing the degree to which the doctrine is untethered to history and precedent allows us to see that the Court was in fact crafting highly novel doctrine in each case. This is not to say that its use of history was disingenuous or intentionally misleading; rather, it was coloured by prior held convictions about the nature of the constitutional relationship both in the past and in the future. The insight that the law is a fundamentally interpretive exercise that acts as “a bridge linking a concept of a reality to an imagined alternative” is apposite: the Court’s legal interpretation of the Constitution is shaped by its normative assessment (which remains unexamined) of the development and essential foundations of the constitutional order. What we find in each case is less a history than it is a retroactive revision of the historical record to suit the needs of the present nation-state and the constitutional visions of the Court.

When we look at how the court employs the term “reconciliation” in each case, the distinction between approaches is clear. In *Sparrow*, the Court held that the purpose of section 35—that is, the reason that Aboriginal rights were given explicit constitutional protection—is the reconciliation of federal power and federal duty. Reconciliation, that is, accepts the Crown’s unilateral claims to authority, but limits the discretionary exercise of that authority by imposing a fiduciary duty on the Crown. In the *Secession Reference*, by contrast, the Court held:


115 Stanton, supra note 114 at 25. Reconciliation was first interpreted in *Sparrow*, supra note 2 at 1109, where the Court noted that while section 35 rights were not absolute, reconciliation demanded that the infringement or denial of Aboriginal rights be justified. Six years later, in *Van der Peet*, supra note 14 at para 31, the Court narrowed the term, setting aside any notions of partnership between Crown-Indigenous relations to afford itself such authority as to define Aboriginal rights to a greater extent; the following year, in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 153 DLR (4th) 193, the Court interpreted reconciliation as a recognition of Indigenous societies pre-dating Crown sovereignty, whereby “colonialism [became] a justifiable infringement of Aboriginal title”: John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) 46:3 McGill LJ 615 at 648. This paternalistic understanding of reconciliation shifted somewhat in the early 2000s with the cases of *Haida Nation*, supra note 47, and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74. Here, the Court interpreted reconciliation as imposing a greater onus on the Crown by suggesting the potential
The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the **reconciliation** of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “trumps” the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.\(^{116}\)

The term “reconciliation” is given a fundamentally different meaning in each case, owing to the distinct constitutional grammar the Court adopted on the basis of unquestioned assumptions about the constitutional relationships of the parties. While in **Sparrow** reconciliation permits unilateral infringement, and the Court itself determines the constitutional position of the parties, in the **Secession Reference** the democratic expression of a desire to re-work the constitutional relationship requires that the rights and obligations of the parties be negotiated without the interests of one trumping the other. It makes no sense to speak of the “justifiable” infringement of rights, nor in the language of a “veto,” with which the courts have become increasingly concerned in the context of duty to consult jurisprudence, enter the latter frame.\(^{117}\) The Court does not define the rights and obligations of the parties, nor their constitutional position: it leaves these political matters to be settled by negotiations. The architectural grammar chosen by the Court carries important consequences, as it signals that they are aware of the disastrous potential consequences of confusing majoritarian fiat with constitutional principles. The meaning of “reconciliation” in **Sparrow**, however, replaces political

\(^{116}\) Supra note 6 at para 93 [emphasis added].

\(^{117}\) For examples of where the courts have interpreted (and rejected) Indigenous peoples’ use of uncompromising consultation as a form of “vetoing,” see **Coldwater**, supra note 115 at para 55.
agency—self-determination—with fiduciary obligations, obligations held only because of the unilateral imposition of authority.

IV. SPARROW’S CONSTITUTION: GREY HOLES AND CRISES OF LEGITIMACY

Now that we have clearly identified the legal pillars that ground these two pictures of the constitutional order, we shift our attention to the structural integrity, or load bearing capacity, that they offer. As we have noted, the Sparrow Court sought to balance the pillars of colonialism and constitutionalism in developing the framework for section 35. In doing so, it placed significant weight on the colonial pillar. This is evident when we consider the justification the Court provided for structuring the constitutional relationships the way that it did and examine the unstated presuppositions that support the doctrine. One salient example is the notion that the “background” of subsection 35(1) establishes that there “was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”

The stakes of this “background” are clearly exposed when considering the following statement from the Reference re Manitoba Language Rights decision:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the Constitution Act, 1982 declares, the “supreme law” of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

This illustrates two problems for the “background” that the Sparrow Court identified: first, a constitution is a “statement of the will of the people to be governed” and, second, that those people are governed in accordance with “certain prescriptions” that restrict the powers of the legislature and government. The “background” the Court relies on in Sparrow undermines both these essential constitutional features. The benefit of this arrangement is that it vests the Crown with sovereignty, legislative power,

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118 Sparrow, supra note 2 at 1103.
and underlying title. But crafting doctrine on the basis of this version of Crown sovereignty comes at a high cost. Pragmatically speaking, there is no space for Indigenous peoples to express their will and practice meaningful self-determination in the constitutional order. This places Indigenous peoples into a position where the Canadian legal system appears to be little more than a “gunman situation writ large.” The constitutional basis for this extraordinary degree of sovereign power is also thin. As we see in Sparrow, the Court relies on the validity of subsection 91(24) and the unstable pairing of British Imperial policy and 19th century US case law, which allows them to use the so-called doctrine of discovery without needing to explicitly name it. This leaves the Court in the precarious position of favouring validity over and against the principles of legality.

In effect, the courts have interpreted the Constitution in a way that enables the Crown to unilaterally fix the frame of the constitutional order: Indigenous peoples are stripped of their national character and positioned as subjects. This is legally inexplicable precisely because the doctrine of discovery is no longer accepted as a legitimate legal concept. This forms the pillar of colonialism—it cannot bear weight because it is ultimately a “one-way projection of authority originating with government.” Courts have attempted to respond to this challenge by using the legal vocabulary of rights to limit the sovereign power of the Crown. That is, they have added the pillar of constitutionalism to attempt to maintain its commitment to the rule of law. But this limitation begins after Crown sovereignty has already been bundled with legislative power and underlying title. Thus, all that Indigenous peoples can hope for is what remains once sovereignty, legislative power, and underlying title are allocated to the Crown.

While it may seem to some that there is no real constitutional crisis here, there are two reasons to believe that there is. The first reason is a practical one: the persistent ability of the Crown to act unilaterally in the face of Indigenous opposition distributes bargaining power unevenly, making negotiated solutions more difficult to achieve. Further, the “certainty” that many people crave remains elusive as Indigenous peoples dispute the legitimacy of court decisions that uphold Crown unilateralism. The result is, indeed, copious litigation, disruptive resistance, and civil disobedience. The second reason to interpret the doctrine as leading to

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constitutional crisis is the expanded role of the executive in the constitutional order. We will take each in turn.

First, the practical considerations. The doctrine as currently designed does not do enough to motivate negotiated solutions; it distributes bargaining power unevenly between the parties, always leaving the Crown with the crutch of unilateralism to fall back on. The incentive for the Crown is to negotiate only until it feels its legal obligations have been fulfilled—procedural obligations that do not require consent—and then to effectively dare Indigenous peoples to litigate if they do not like the result. The duty to consult, in many respects an important development for Indigenous peoples, has only increased this trend, as issues have begun to be litigated twice: once for consultation, once for infringement. In recent decisions, negotiated solutions have come not after a judicial decision, but only after nationwide civil disobedience. Coastal GasLink Pipeline Ltd v Huson resulted in nationwide demonstrations and railway blockades and forced political leaders at all levels of government to initiate negotiations to find a workable resolution. At the time of writing, it seems highly likely that a similar process will unfold when construction of the Trans Mountain pipeline reaches the territories of the Indigenous nations who oppose it. What can be said in favour of a legal doctrine whose application leads to nationwide civil disobedience? How effective can a doctrine, whose frequent aim is to foster the negotiation of outstanding claims, be if it requires nationwide civil disobedience to lead to a negotiated solution? Recall, in 1997, the Supreme Court essentially put the provincial government on notice in the Delgamuukw v British Columbia decision: the Gitxsan and Wet’suwet’en may well have had outstanding Aboriginal title, and it was imperative the issue be dealt with. Rather than make a declaration of title at that point, the Court considered it more appropriate to suggest the parties negotiate. Approximately 22 years later, the issue had not been resolved through negotiation and the Crown continued to act as though Aboriginal title was non-existent; it considered itself bound only by the

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123 See West Moberly First Nations v British Columbia (Chief Inspector of Mines), 2011 BCCA 247, rev’d 2010 BCSC 359, leave to appeal to SCC refused, 34403 (23 February 2012).
124 2019 BCSC 2264. For more extended commentary on this case, see Joshua Nichols & Sarah Morales, “Finding Reconciliation with Available Light: Bill 41 and the Possible Futures of Federalism”, UBC L Rev [forthcoming in 2021].
125 See generally Owen Lippert, ed, Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision (Vancouver: Fraser Institute, 2000).
lower legal requirements of the duty to consult. Only once the Wet’suwet’en and their supporters brought pressure through civil disobedience was a negotiated solution reached. This is an evident failure of the doctrine to provide clarity, certainty, or predictability.

A further practical consideration is the effect of persistent litigation on constitutional doctrine, particularly where the court is working to mediate political issues through the ad hoc development of a Charter-rights analogous jurisprudence (the category error we identified at the outset). This endless process of litigation will continue to shape our constitutional order, adding nebulous principles, circular doctrines, and absurd tests to shore up claims that have been constructed on groundless principles, all of which will seem completely natural given the presuppositions held about Indigenous peoples’ place in the constitutional order. Indigenous peoples are finding that what once seemed to be promising lines for constitutional reconciliation are little more than shifting barriers. Instead of securely limiting Crown sovereignty within the constitutional order, and, to use Noel Lyon’s phrase quoted in Sparrow, question the sovereign claims of the Crown,126 the courts have positioned Indigenous peoples as a special minority within Canada with access to a sui generis set of group rights. Thus, the courts use the residual powers of their robustly conceived notion of Crown sovereignty to continuously determine and re-determine the size and shape of Aboriginal and treaty rights. In Canadian courts, Crown sovereignty and Aboriginal rights grow and shrink unpredictably; our constitutional order is set out to sea in pursuit of reconciliation guided by little more than the blank map of ungrounded judicial discretion. This ever-building accumulation of legal nonsense leaves us with a constitutional order well suited to contain Indigenous peoples by means of sheer bewilderment, but it also leaves the courts less able to coherently respond to the needs of the other two orders of government. A constitution cannot be both a labyrinth and a lighthouse. And given the rising tides of political conflict on diverse issues such as interprovincial trade, the status of municipal governments, and Charter rights, we may find ourselves left with little more than a blank map to navigate our way through the looming return of constitutional crisis.

The second way the pillar of colonialism leads to constitutional crises is in how it allows executive authority to shape the constitutional order and undermines the rule of law. In Sparrow, the place of Indigenous peoples in

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the constitutional order remains fixed from the outset. The “new rules” of the game do little to alter the attributes of Crown sovereignty that minimize Indigenous governance and self-determination; Indigenous peoples remain within the constitutional order as a minority within Canada. But that is not a position to which they consented. The new rules that the Constitution Act, 1982 introduced are not flexible on this point, at least where the colonial pillar is concerned. Instead, when it comes to where Indigenous peoples fit within the constitutional order, the Court believes that the rules of the game are “neither challenged nor assailable.”

It is not that section 35 of the Constitution Act, 1982 is entirely without effect; the court can supervise exercises of Crown and legislative authority to ensure they do not infringe a section 35 right or, if they do, that they do so proportionally. But this interpretation relies on a sui generis categorization that creates blind spots in the rule of law and imposes a constitutional order on distinct peoples without their consent, creating crises of legitimacy.

In one respect, the doctrine of Aboriginal rights is nothing less than the expression of constitutional necessity (viz. sovereign power can only be characterized as legal when it is limited). But where these sui generis rights are slotted, the diminished position that they are given, creates a deep constitutional disquietude. The diminished legal standing of Indigenous peoples is accomplished by the doctrine of discovery and civilization thesis. In the hands of the sovereign, these legal fictions have miraculous powers: when they are used, they convert an evaluative assertion by the Crown into an unquestionable legal fact. In one moment, the British Crown could be making nation-to-nation agreements for the purposes of mutual defence and trade with Indigenous peoples (which was the position of Chief Justice Marshall in Worcester), and in the next, it could simply describe Indigenous peoples as savages and reduce the pre-existing agreements to surrenders, categorizing Indigenous peoples as wards of the state. The power of the doctrine of discovery and the civilization thesis are “miraculous” precisely because they manage to overcome the very constitutional limitations that make the common law possible (viz.

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127 See Re Objection to a Resolution to Amend the Constitution, [1982] 2 SCR 793 at 806, 140 DLR (3d) 385.

to achieve the legal benefits of a successful conquest: taking lands, converting self-governing peoples into subjects, etc.) without needing to provide any of the required factual evidence. If the Crown was able to avail itself of these kinds of powers at will, then law, custom, and rights could be disregarded and dispensed with through clear and plain legislation. This explains why Indigenous peoples are slotted into a sui generis position within the constitutional order in both Sparrow and the Secession Reference. The courts are attempting to simultaneously use and constrain the “miraculous” powers of the Crown by confining the effects of these powers to a sui generis minority of the population.

The role of the colonial pillar results in a makeshift and unstable constitutional doctrine precisely because the legal recognition of the Crown’s use of the doctrine of discovery and civilizational thesis is not directly expressible within the vocabulary of constitutional law. The courts can and do make use of these doctrines, but they cannot do so directly; they must treat them as inexpressible but necessary preconditions of their constitutional analysis. Thus, by accepting the Crown’s assertions of authority over Indigenous peoples and territories as constitutional law, they are compelled to repeat similar incantations; “there was from the outset never any doubt.” There are no facts for this proposition to hang onto. It is simply put forward by the Court as setting the necessary but inexpressible conditions of possibility in this area of the constitutional order. While this kind of legal reasoning certainly attempts to incorporate the legal distortion in such a way that it “ceases to distort”—and Foster is certainly correct if we take this to mean that these distortions become accepted as commonplace legal realities—the truth is that the distortion grows. In other words, the continued recognition of the legal effects of the doctrine of discovery by the courts compromises the coherence and stability of the constitutional order as a whole. The legal effects of this jumbled maze are not strictly limited to Aboriginal law. This is why Felix Cohen, the eminent scholar of American Indian law, referred to this area as the “miner’s canary” of constitutional law: where extraordinary sovereign authority is allowed a foothold in the constitutional order, it has a corrosive effect elsewhere; where ad hoc doctrine is shaped on judicial whim, the concomitant confusion and destabilization spread (consider, for example, the

129 Sparrow, supra note 2 at 1103.
130 Foster, supra note 58 at 347.
effects of the change of law concerning interjurisdictional immunity in *Tsilhqot’in Nation v British Columbia*).\(^{132}\)

The undoubtable propositions of *thick* Crown sovereignty over Indigenous peoples blend together with related propositions of national interest or public interest to form a kind of “façade or form of the rule of law rather than any substantive protections.”\(^{133}\) This is what David Dyzenhaus has termed “grey holes” within the constitutional order.\(^{134}\) Dyzenhaus is clear on the need for judges to avoid taking any part in the creation of these kinds of holes, “[f]or grey holes are disguised black holes, and if the disguise is left in place governments will claim that they govern in accordance with the rule of law and thus garner the legitimacy that attaches to that claim.”\(^{135}\) In other words, the practice of the courts accepting the Crown’s assertion of *thick* sovereignty as legally converting Indigenous peoples into cultural minorities and restricting their political rights, places the legitimacy of the rule of law in a precarious position.

The executive and legislative branches have defined Indigenous peoples as wards, and by doing so they have dispensed with the need for constitutional limitations on their exercise of sovereign authority. By placing only limited restrictions on that exercise, the Court effectively accepts this assertion as constitutionally valid, and in so doing passes through the looking glass into a space where the most foundational constitutional principles are subverted. The sovereign takes the stage and sets the limits of its jurisdiction by self-assertion. The courts take this as an objective fact that sets the frame of the legal interpretation. In sum, the *Sparrow* Court constructs a framework for reconciliation where Indigenous peoples “are given some legal protections but the protections are not sufficient to permit them to contest the basis of the preventive measures taken against them.”\(^{136}\) The *sui generis* constitutional space that they have created is not


\(^{134}\) *Ibid*.

\(^{135}\) *Ibid*.

\(^{136}\) We are making use of David Dyzenhaus’ concept of “grey holes” as it is articulated in his article “The Puzzle of Martial Law” (2009) 59:1 UTLJ 1 at 48 [Dyzenhaus, “Puzzle”].
entirely without law; rather, it is a “grey hole” where arbitrariness is covered over by a “thin veneer of legality.”

It is not simply that the two versions of the constitutional order put forward in *Sparrow* and the *Secession Reference* are different from one another: they contradict one another. In this sense, what we have been referring to as the colonial pillar does not simply gather dust in the basement of our constitutional order, it progressively undermines it. The longer our courts and system of government continue to use this pillar, the more we lose sight of that “sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority” and expand the grey hole within our constitutional order. If we fail to attend to this crisis of legitimacy, we may well find ourselves being governed by unknowable legal rules and unaccountable executive authority. In other words, if we ignore this grey hole or attempt to cover it over with more ambiguous phrases, the entire constitutional order could eventually fade from sight into the looming grey fog.

It may seem that this critique of *Sparrow* simply seeks to destroy a constitutional framework that the courts have spent decades constructing and remodeling, but our argument is ultimately a redemptive one. As Dyzenhaus rightly argues, the fact that it is possible to clearly exhibit this subversion of constitutionalism “demonstrates that it is possible to govern outside the legal frame while pretending, or even believing, that one is inside it.” The possibility of this kind of pretense or mistake means that we are not undermining living parts of our shared constitutional order. Rather, by clearly exposing the origin, structure, and function of the

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137 See *Re MB*, [2006] EWHC 1000 (Admin) at para 103. David Dyzenhaus cites this phrase in *ibid* at 61 in explaining how the “compulsion of legality”—which he defines as “the compulsion to justify all acts of state as having a legal warrant, the authority of law” (at 42)—can set two very different cycles of legality in motion. The first or “virtuous” cycle is one in which “the institutions of legal order cooperate in devising controls on public actors that ensure that their decisions comply with the principle of legality, understood as a substantive conception of the rule of law” (at 60–61). In contrast, in the second cycle (which could well be termed vicious, but Dyzenhaus does not add the label) “the compulsion of legality result in the subversion of constitutionalism...[as] arbitrariness is covered over by what an English judge referred to recently as a ‘thin veneer of legality’” (at 61). It is important to note Dyzenhaus’ articulation of these two cycles because we agree with his solution to the puzzle of martial law—basically that the possibility of identifying the subversion of constitutionalism opens up the possibility of constitutional remediation—and believe that this solution can be extended to Aboriginal law.

138 Patriation Reference, *supra* note 100 at 806.

139 Dyzenhaus, “Puzzle”, *supra* note 136 at 61.
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colonial pillar, we can develop ways to remediate the subverted foundations of our constitutional order: it is possible to remove the colonial pillar by methods that will help to “set in motion the virtuous cycle of legality”\textsuperscript{140} that will maintain the continuity and stability of the constitutional order for future generations. Put another way, “[w]hat we are destroying is nothing but houses of cards and we are clearing up the ground of language on which they stood.”\textsuperscript{141}

So where exactly are we and how do we find our way back to reason? The Court provides us with a compelling argument that can help us get our constitutional bearings:

It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates—indeed, makes possible—a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. \textit{Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.}\textsuperscript{142}

In this selection, the Court puts forward a compelling picture of how the principles of legality and legitimacy work together. The relationship is one of dynamic tension; the principle of democracy brings the machinery of law-making to life. It allows a legal order to learn from its past by continually writing and rewriting its legislative corpus. But, unchecked, this power can lead to the dissolution of the legal order. The will of the majority can be used to fundamentally transform the machinery of law-making, replacing it with a “one-way projection of authority originating with government.”\textsuperscript{143} The possible excesses of the principle of democracy are thus held in check by the principle of legality. The principle of legality (which is made up of constitutionalism and the rule of law) ensures that legislation conforms to the fundamental values of the legal order.

In other words, through the principle of legality, the courts interpret law in relation to a constitutional background and thereby maintain both the sense of the law they are interpreting and the coherence of the legal order as a whole. This is, at least, what is supposed to be the case when

\begin{itemize}
  \item \textsuperscript{140} \textit{Ibid.}
  \item \textsuperscript{141} Wittgenstein, supra note 9 at no 118.
  \item \textsuperscript{142} Secession Reference, supra note 6 at para 78 [emphasis added].
  \item \textsuperscript{143} Fuller, supra note 121 at 207.
\end{itemize}
everything goes well. Law can be used as an instrument of power by those who happen to hold it at a particular time—this is precisely how the colonial pillar was brought into our legal order. The colonial pillar is put to use by the courts as the foundation for the thick version of Crown sovereignty, but it is incoherent within the foundational values of the Canadian legal order and thus constitutes a “legal pathology.” Its pathological character is evident as soon as we compare the model of reconciliation that the Court puts forward in Sparrow with the one we find in the Secession Reference. In the latter, the pillars of legality and legitimacy exist in a dynamic tension that is complimentary—under ideal conditions, they hold each other in check. In Sparrow, the pillars of colonialism and constitutionalism contradict one another: one stands for the arbitrary power of European sovereigns over Indigenous peoples, whereas the other maintains the rule of law and constitutionalism. As a result, the law that is built upon the model of reconciliation from Sparrow is an incoherent amalgam of arbitrary commands and legal principles. This body of jurisprudence is, in other words, pathological.

But we should not despair. As Dyzenhaus helpfully reminds us, “to wield power through law is to commit to a form that conditions or disciplines what one can do in law’s name.” This means that even when a legal order is caught in a cycle where “the content of legality is understood in an ever more formal or empty manner, resulting in the mere appearance, or even the pretence, of legality,” the principle of legality is maintained. Even within a legal order that is caught in a pathological cycle, it is possible for other participants to expose the sham for what it is by simply holding it to the standards of legality that it claims to uphold.

In our view, the thick version of Crown sovereignty is no longer coherent as law within the foundational values of the Canadian constitutional order. Thus, its retention has introduced a creeping (and pathological) incoherence that is drawing us towards a crisis of legitimacy. But this is by no means the necessary outcome. It is possible to move back to the kind of balanced and mutually reinforcing morality of law that the Secession Reference provides for us, and thereby unlock the generative possibilities of section 35.

145 Ibid at 286.
146 Dyzenhaus, “Puzzle”, supra note 136 at 61.
V. THE SECESSION REFERENCE AND GENERATIVE POSSIBILITIES FOR SECTION 35

What we have put forward above provides an assessment of two distinct visions of the constitutional order set forth by the Court in Sparrow and the Secession Reference and considers the structural integrity of the two processes of reconciliation developed on the basis of these visions. We have attempted, by untangling the knots so that the individual strands can be plainly seen, to shed light on precisely how history, law, and fiction have been knotted together in Sparrow and the Secession Reference. This allowed us to set in place a series of reference points that show how these cases cover the same constitutional territory. Yet, as we discussed, the Court adopted such dissimilar approaches to traversing this territory that they effectively obscured the commonalities. This, in turn, has hidden the limitations that follow from the incoherent approach to the challenge of deep diversity developed in Sparrow. This has left the Court in the unhappy position of attempting to encourage negotiations between Indigenous peoples and the Crown, while continuing to use colonial frameworks that ensure that Indigenous peoples cannot address the actual basis of the conflict. The Special Committee on Indian Self-Government captured the absurdity of this relationship in 1983 with the epigraph they selected for the Penner Report: “I sit on a man’s back choking him and making him carry me and yet assure myself and others that I am sorry for him and wish to lighten his load by all possible means—except by getting off his back.”

How, then, can this critique be turned into something constructive? If the Secession Reference suggests an alternative, what features make it well suited to application in the Indigenous context? In order to begin a process of reconciliation that goes beyond simply attempting to finesse the problem—thereby putting the courts into a position where they

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147 In 1982, the House of Commons gave Orders of Reference to the Special Committee on Indian Self-Government to provide them with a report covering the Indian Act administrative system in light of its constitutional basis. It is helpful to remember that the Constitution Act, 1982 was proclaimed as law by Queen Elizabeth II in Ottawa on April 17, 1982. The report was meant to assist Parliament in determining the practical meaning of the new relationship promised by section 35. This report is commonly referred to as the Penner Report. See House of Commons, Indian Self-Government in Canada: Report of the Special Committee on Indian Self-Government, 32-1, 40 (20 October 1983) (Chair: Keith Penner) at 2, citing Leo Tolstoy, What Then Must We Do?, translated by Aylmer Maude (London, UK: Oxford University Press, 1960) at 99–100 (a non-fiction work on the social conditions of Russia first published in 1886). The Penner Report credits the citation itself to a submission to the Special Committee by the Mayo Indian Band.
feel compelled to justify colonialism in order to keep the constitutional machinery moving—we need to do the hard work of removing the colonial pillar from our constitutional order. There are two answers to how the *Secession Reference* provides guidance in this: one straightforward, the other somewhat less so, but no less important.

The first, straightforward, answer is that the reasoning in the *Secession Reference* provides a basis for the negotiated resolution of outstanding issues. Because the Court in the *Secession Reference* recognized that it was dealing with jurisdictional disputes, it applied the tools appropriate to that circumstance, requiring negotiation to maintain the legitimacy of the constitutional order. This is, of course, not without controversy. Notably, it could be argued that this approach sidesteps the amendment formula. Yet, there are at least two important reasons to favor the Court’s approach. First, it recognizes the appropriate role of the court. Where distinct peoples contest the constitutional order and their very place in it—particularly peoples who did not consent to their inclusion in the constitution by which they are bound—the court cannot help but be implicated in the imposition of a legal regime on unwilling participants if it ventures to determine the political disputes between them. In doing so, it would in effect prove itself to be an organ of the state working to minimize the claims of sub-state peoples, re-framing them to protect the prevailing order. Not only the legitimacy of the resulting constitutional order, but the court’s legitimacy as a neutral arbiter would then come into question. In the Court’s view, responding to Quebec’s claims by merely pointing to the amending formula would acquiesce to the tyranny of majority rule and undermine the Court’s legitimacy and that of the constitutional order.

Second, the *Secession Reference* is well-suited to lead to negotiated solutions because the Court provided an open and even field between the parties. In *Sparrow*, by contrast, the Court recognized the Crown’s claims to an absolutist conception of sovereignty that diminishes the legal standing of Indigenous peoples. *Sparrow*’s model of reconciliation begins with a constitutional imbalance and can only provide an unbalanced negotiating table. By compelling the negotiated resolution of outstanding constitutional issues—rather than imploring negotiated solutions while fixing the constitutional order, as section 35 doctrine does—the Court in the *Secession Reference* offered a model for negotiated solutions. Bringing the

principles of the *Secession Reference* to bear on Crown-Indigenous disputes would mean the imposition of a duty to negotiate outstanding claims—a duty that takes unilateralism out of the toolkit of all parties—and require that the “conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.” These principles stand to provide much more robust protections for the self-determination of sub-state peoples than liberal rights.

The second answer is that the *Secession Reference* opens a path to decolonizing the constitutional order. The model of reconciliation put forward in *Sparrow* relies on the pillar of colonialism to do the work that the pillar of legitimacy does in the *Secession Reference*. As a result, the question of legitimacy is treated as if it were non-justiciable. This leaves us with the unattractive prospect of a constitutional order whose normative foundations maintain the legitimacy of the democratic principle of self-government and the legality of the unilateral assertion of sovereignty over Indigenous peoples. In contrast, by adopting the position that it did in the *Secession Reference*, the Court seems to have recognized two points. One, law must be attentive to the interpretive communities that give it meaning. Pronouncements of the courts mean little unless they are intelligible or normatively acceptable to the plurality of communities to which they are intended to apply.

Two, open and transparent reasoning about the mediation between normative systems and the reasons for prioritizing one over the other is the only way to create legitimate outcomes. To adopt Robert Cover’s frame, judicial law-making is always jurispathic—it eliminates the legal interpretation of a given community in favour of that of another. Yet, the jurispathic nature of judicial decision-making can be mitigated through transparency. Because of the stakes of constitutional adjudication, it will not do to hide behind proceduralism and formalistic legal reasoning.

In the case of the *Secession Reference*, the Court was able to achieve this by clarifying the constitutional framework in which the parties operated, and requiring that a range of political questions be

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149 As the Court noted in the *Secession Reference*, supra note 6 at para 91, if one party can “dictate the terms... that would not be a negotiation at all.”
150 Ibid at para 90.
153 Resnik, *supra* note 151.
negotiated rather than determined judicially. It set aside formalistic reasoning that would have prioritized the norms of one community over another in order to allow negotiated solutions to emerge. It is an analysis suited to the mediation of plural legal and normative orders in the context of a single constitutional association.

Replacing the model of reconciliation from *Sparrow* with the one the Court developed in the *Secession Reference* may strike some as an unworkable proposal that would introduce unmanageable uncertainty into daily governance in the country. In our view, this is misguided. First, the present arrangement does little to create certain or predictable outcomes. Some commentators allege that this uncertainty is the result of an overly generous interpretation of section 35 rights that gives Indigenous peoples a veto over government decisions. In their view, the remedy is to move towards a less compromising imposition of state authority backed by force. This way of framing the issue provides an easy to understand narrative once we accept its premises: all we see is a conflict between democratically elected governments and a minority that refuses to accept the government’s legal authority. The problem is that this national security (or rule of law) narrative framing fails to capture adequately the complicated realities involved in using the coercive power of law and government. As HLA Hart helpfully reminds us, this coercive power may be used in two principal ways:

> It may be exerted only against malefactors who, though they are afforded the protection of the rules, yet selfishly break them. On the other hand, it may be used to subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master group, may be large or small, depending on the means of coercion, solidarity, and discipline available to the latter, and the helplessness or inability to organize of the former. For those thus oppressed there may be nothing in the system to command their loyalty but only things to fear. They are its victims, not its beneficiaries.154

Once we move beyond simplistic narratives and political talking points and actually begin to make use of these powers, we quickly find that there is no surefire method for determining who is who. What could well seem to be a malefactor from one vantage point could easily end up being the victim from another. It is a question of perspective whose consequences find expression in the deepest principles of the common law (*e.g.*, *audi

154 Hart, *infra* note 120 at 201.
alteram partem and nemo judex in sua causa). When we begin to ground our arguments in the doctrines of political expediency and necessity, we are quickly drawn into the “popular delusion” that “at a great crisis, you cannot have too much energy.”

Under the spell of this delusion, we easily slip into Humpty Dumpty’s theory of semantics and believe that our perspective is the only one that legally counts. This approach provides the appearance of certainty, but it does so by compromising the stability and integrity of the constitutional order. After all, when groups begin to find themselves in positions of “permanent inferiority” they do not simply accept their plight; they resist, often in ways that those within the “master group” fail to recognize. This is what the Court has failed to appreciate, and why its repeated emphasis that the Crown has the authority to infringe rights, and that the duty to consult does not include a veto, undermines meaningful reconciliation.

The Court is by no means unaware of the deep constitutional tensions that persist below the patchwork cover that the colonial pillar from Sparrow provides. In fact, the Secession Reference has made a number of appearances in section 35 jurisprudence. And, while its use has typically been only superficial, it has been relied on to support the argument that “[t]he principles of legality, constitutionality and the rule of law” ought to be considered when adjudicating section 35 claims and that a broad conception of the rule of law must be adopted where conflicts between Indigenous peoples and the state emerge. While the use of the Secession

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156 For Humpty Dumpty’s theory of semantics see Lewis Carroll, Through the Looking-Glass, and What Alice Found There (New York: Macmillan, 1875) at 124: “‘[w]hen I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less. ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all’.”
157 On the application of the principles articulated in the Secession Reference to section 35 claims, see Manitoba Metis Federation Inc v Canada (AG), 2013 SCC 14 at para 140, where the Court held: “[t]he unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less.” The Court invoked the principle of democracy in Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at para 116, 173 DLR (4th) 1 holding that, “[b]ecause the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. The link between public
Reference in section 35 cases is by no means consistent, in our view, the dissent of Justices Abella and Martin in Mikisew Cree First Nation v Canada (Governor General in Council)\(^\text{158}\) offers an example of the kind of legal reasoning that, if developed further, could open the way for removing the colonial pillar. For our purposes, the most compelling and (potentially) transformative aspects of their argument are the following two interrelated points.

Firstly, recognizing that section 35 is not Charter-analogous, but part of the division of powers: as Justice Abella rightly points out, “the Charter defines a sphere of rights for individuals that are protected from state action,” whereas “the majority of the Constitution, including s. 35, allocates power between governing entities, such as the division of powers between the provincial and federal governments, or the separation of powers between the branches of government.”\(^\text{159}\) By focusing on the uniqueness of section 35 within the Constitution Act, 1982, she is able to shift the focus away from the Charter-like infringement analysis that Sparrow introduced and towards the deeper constitutional principles that led the Sparrow Court to their remedy. In her reading, Sparrow should not be understood as equating Aboriginal rights to Charter rights; rather in Sparrow the Court recognized that it is “impossible to conceive of s. 35 as anything other than a constitutional limit on the exercise of parliamentary sovereignty.”\(^\text{160}\) This leads Justice Abella to hold that section 35 “defines the relationship between the sovereignty of the Crown and the ‘aboriginal peoples of Canada’, mandating a process of reconciliation between the Crown and Indigenous groups.”\(^\text{161}\)

Secondly, section 35 provides a generative constitutional order for reconciling Aboriginal and Crown sovereignty: this point follows from the first and draws out its consequences. By recognizing that section 35 rights are more similar to the division of powers than subject-to-sovereign rights found in the Charter, it is clear that section 35 “are political in

\(^{158}\) Mikisew Cree First Nation v Canada (Governor General in Council), 2018 SCC 40 [Mikisew Cree 2].

\(^{159}\) Ibid at para 88.

\(^{160}\) Ibid at para 86 [emphasis in original].

\(^{161}\) Ibid at para 88.
implication.” 162 The Court is thus clearly engaged in more than simply recognizing and reconciling rights; they are playing their role in the broader project of reconciling sovereignties.

While Justice Abella does not suggest that Sparrow should be overturned, she manages to read it in a redemptive light so as to shift the weight from the colonial to the constitutional pillar. Following Brian Slattery, she characterizes this broader constitutional project as the development of a “generative constitutional order.”163 She does not manage to complete the project of removing the colonial pillar—which is a labour whose Herculean dimensions outstrip what can be accomplished in a single decision, let alone a dissent. But she provides us with an example of how this might be framed, despite the legal pathologies of colonialism the constitutional pillar has maintained throughout the last 150 years. As she rightly reminds us:

While the judiciary must respect the separate roles of each institution in our constitutional order, its own role is to maintain the rule of law and protect the rights guaranteed by the Constitution. It would be a mistake, in my respectful view, to interpret parliamentary sovereignty in a way that eradicates the obligations under the honour of the Crown that arose at its assertion. Like all constitutional principles, parliamentary sovereignty must be balanced against other aspects of our constitutional order, including the duty to consult. “Sovereign will” alone does not itself indicate legitimacy in the context of a constitutional democracy characterized by competing values, rights, and obligations.164

Justice Abella cites the Secession Reference for the last proposition in this selection. This one example does not provide us with the answer to our current crisis of legitimacy; rather, it opens the door for a principled re-imagining of Sparrow that emphasizes constitutionalism at the expense of colonialism and makes generative conceptions of section 35 plausible. In other words, this example shows how it is “possible for other participants to set in motion the virtuous cycle of legality.”165

162 Ibid at para 87.
164 Mikisew Cree 2, supra note 158 at para 91 [citations omitted].
165 Dyzenhaus, “Puzzle”, supra note 136 at 61.