Draconian but not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada

VINCENT KAZMIERSKI*

More than a decade after the *Quebec Secession Reference*, the issue of whether unwritten constitutional principles may be applied as free-standing limits on legislation remains a contentious issue. Interestingly, academics and judges seem to be approaching the issue from different perspectives. Whereas scholars have adopted an "American" focus on the potential dangers to the legitimacy of judicial review that are raised by judges departing from the constitutional text to identify and apply constitutional principles as limits on legislation, Canadian judges appear to be adopting a "British" approach that recognizes the legitimacy of unwritten principles but favours the principle of parliamentary sovereignty above other principles.

This article argues that viewing decisions of Canadian courts through the lens of British common law constitutionalism provides a new perspective on some of the most important appellate and Supreme Court of Canada decisions that have considered the application of unwritten constitutional principles as limits on legislation. It suggests that while these decisions may appear (on their face) to limit the scope of the application of unwritten constitutional principles, the decisions actually include the building blocks for an approach that ultimately recognizes the potential for unwritten principles to limit legislation that substantially interferes with the democratic process.

The article proceeds beyond the parameters of the existing debate concerning the role of unwritten principles in Canadian constitutional law by providing a detailed analysis of several key cases from a new perspective. In so doing it builds a new framework for understanding the Supreme Court's approach to this issue.

Plus d'une décennie après le *Renvoi relatif à la sécession du Québec*, la question de savoir s'il est possible d'appliquer, en tant que limites distinctes, des principes constitutionnels non écrits à une loi demeure controversée. Il est intéressant de noter que les universitaires et les juges semblent aborder cette question selon différentes perspectives. Alors que les universitaires ont plutôt adopté un point de vue « américain » vis-à-vis des éventuels risques pour la légitimité du contrôle judiciaire que posent les juges qui s'écartent du texte constitutionnel afin de dégager et d'appliquer des principes constitutionnels en tant que limites imposées à une loi, les juges canadiens seraient enclins à adopter une approche « britannique », laquelle reconnaît la légitimité des principes non écrits tout en donnant préséance au principe de souveraineté parlementaire.

Dans cet article, on fait observer que l'examen des décisions prises par les tribunaux canadiens par la lunette du constitutionnalisme de la common law britannique permet de voir différemment certains des plus importants jugements rendus par des instances d'appel et par la Cour suprême du Canada entourant l'application des principes constitutionnels non écrits en tant que limites imposées à la législation. On laisse entendre que si ces décisions semblent (à première vue) limiter la portée de l'application de principes constitutionnels non écrits, elles comprennent en fait les fondements d'une approche qui, au bout du compte, reconnaît la possibilité pour les principes constitutionnels non écrits de limiter la possibilité qu'une loi empiète sur le processus démocratique.

Cet article va au-delà des paramètres du débat actuel entourant le rôle des principes non écrits en droit constitutionnel canadien en présentant une analyse approfondie de plusieurs causes déterminantes selon une nouvelle perspective. Ce faisant, on voit poindre un nouveau cadre d'interprétation de la manière dont la Cour suprême aborde cette question.

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> It is well within the power of the legislature to enact laws, even laws some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and other branches of government.
>
> Chief Justice McLachlin in *Babcock v. Canada (Attorney General)*[1]

I. INTRODUCTION

The late 1990s witnessed a watershed in Canadian constitutional law. In the course of 11 months between September 1997 and August 1998, the Supreme Court of Canada released two seminal decisions involving the application of unwritten constitutional principles: the *Provincial Judges Reference*[2] and the *Quebec Secession Reference*.[3] These decisions propelled unwritten constitutional principles into the forefront of Canadian constitutional discourse. Now, more than a decade later, the issue of the appropriate role for unwritten principles in a constitutional order that includes extensive constitutional texts continues to fuel debate among Canadian scholars and jurists. However, in many cases, the scholars and jurists appear to be engaged in different debates.

Among scholars, there appears to be a general consensus accepting less radical applications of unwritten constitutional principles in the process of constitutional and statutory interpretation and in the regulation of administrative authority.

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1. *Babcock v. Canada (A. G.)*, [2002] 3 S.C.R. 3 at para. 57, 214 D.L.R. (4th) 193 at para. 57 [*Babcock* cited to S.C.R.].
2. *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, (*sub nom. Reference Re Public Sector Pay Reduction Act (P.E.I.), s.10)*, 150 D.L.R. (4th) 577 [*Provincial Judges Reference* cited to S.C.R.].
3. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [*Quebec Secession Reference* cited to S.C.R.].

However, the issue of whether unwritten constitutional principles may be applied as free-standing limits on legislation remains contentious. Academic critics of the application of unwritten constitutional principles as limits on legislation have focused much of their attention on two specific concerns related to the relationship between unwritten constitutional principles and the legitimacy of judicial review.[4] First, critics have argued that the application of unwritten principles will result in judges moving beyond their legitimate role as interpreters of constitutional text and lead them to take on the legislators' rightful role as creators of constitutional text. Second, critics have raised the concern that judges may impose their personal value preferences in the course of identifying and applying unwritten principles that should receive constitutional protection. This academic critique has thus focused on themes most commonly associated with positivist critiques of judicial "activism" within the context of written constitutional instruments and particularly American debates concerning these themes.[5]

Generally speaking, appellate and lower court judges have also reacted cautiously to the Supreme Court's renewed interest in unwritten principles. Thus, while Canadian courts have been willing to apply unwritten constitutional principles to aid

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4. See e.g. Jamie Cameron, "The Written Word and the Constitution's Vital Unstated Assumptions" in Pierre Thibault, Benoît Pelletier & Louis Perret, eds. *Essays in Honour of Gérald-A. Beaudouin: The Challenges of Constitutionalism* (Cowansville, Qc.: Les Editions Yvon Blais Inc., 2002) 89; Sujit Choudhry & Robert Howse, "Constitutional Theory and The *Quebec Secession Reference*" (2000) 13:2 Can. J.L. & Jur. 143; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67; Jeffrey Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11:2 Const. Forum Const. 60; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389; Warren J. Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14 Sup. Ct. L. Rev. (2d) 197 [Newman, "Grand Entrance Hall"]; Warren J. Newman, "Pushing the Edge of the Rule of Law Envelope in Constitutional Litigation," (Presentation at Canadian Institute's 2nd National Forum on "The Legal and Practical Guide to Constitutional Litigation in Civil Matters," 17 June 2004 [unpublished] [Newman, "Pushing the Edge"]; Patrick J. Monahan, "The Public Policy Role of the Supreme Court in the *Secession Reference*," (1999) 11 N.J.C.L. 65.

5. Sujit Choudhry and Robert Howse constructed a model of the positivist perspective in their critique of the Supreme Court's decision in the *Quebec Secession Reference*. This positivist perspective views the express provisions of the Constitution's text as the source of constitutional norms in Canada; it places heavy reliance on judicial precedents; and it allows for amendment only by express addition to the constitutional text. It regards the courts as the exclusive (and therefore supreme) interpreters of constitutional meaning. Finally, given that the positivist account regards the text as the primary legitimate source of constitutional norms, it rejects moral reasoning as an interpretive tool in most cases. In other words, the positivist account "defends the possibility of distinguishing the construction of constitutional provisions from moral reasoning writ-large." See Choudhry & Howse, *ibid.* at 151–53, 164. See also Mark Carter, "The Rule of Law, Legal Rights in the *Charter*, and the Supreme Court's New Positivism" (2008) 33:2 Queen's L.J. 453. Writing more generally, David Dyzenhaus has identified various forms of positivism, distinguishing between legal, political and constitutional positivists. He notes that constitutional positivists "tend to see originalism, the idea that there is some original, factually determinable meaning of the constitution that is the judicial duty to transmit to legal subjects, as a way of disciplining judges in order to confine their activism and diminish their role in legal order." David Dyzenhaus, "The Incoherence of Constitutional Positivism" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 138 at 138 [Dyzenhaus, "Incoherence"].

in the interpretation of legislative or constitutional provisions,[6] or to guide the regulation of administrative discretion,[7] they have typically refused to apply unwritten constitutional principles to invalidate legislation.[8]

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6. See e.g. *Wilder v. Ontario (Securities Commission)* (2000), 47 O.R. (3d) 361,184 D.L.R. (4th) 165 (Ont. S.C.); *Giroux v. Ontario (Minister of Consumer and Business Services)* (2005), 75 O.R. (3d) 759, 199 O.A.C. 153 (Ont. S.C.) ; *Forum des maires de la Peninsule acadienne c. Canada (Agence canadienne de l'inspection des aliments)*, [2004] 4 F.C.R. 276, (2004) 243 D.L.R. (4th) 542 (C.A.); *Gigliotti v. Conseil d'administration du Collège des Grands Lacs* (2005), 76 O.R. (3d) 561, 200 O.A.C. 101 (Ont. S.C.); *Fédération Franco-Ténoise c. Canada (P.G.)*, 2006 NWTSC 20, [2006] N.W.T.J. No. 33 (QL), 150 A.C.W.S. (3d) 348; *Canadians for Language Fairness v. Ottawa (City)* (2006), 146 C.R.R. (2d) 268, 26 M.P.L.R. (4th) 163 (Ont. S.C.); *T.B. c. Québec (Ministre de l'Éducation)*, 2007 QCCA 1112, [2007] R.J.Q. 2150, J.Q. No. 9482 (QL); *H.N. c. Québec (Ministre de l'Éducation)*, 2007 QCCA 1111, [2007] R.J.Q. 2097, J.Q. No. 9410 (QL);; *Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12, [2007] 246 B.C.A.C. 159, 161 C.R.R. (2d) 331.

7. See e.g. *Lalonde v. Ontario (Health Restructuring Commission)* (1999), 48 O.R. (3d) 50, 181 D.L.R. (4th) 263 (Ont. S.C.), aff'd (2001) 56 O.R. (3d) 505, 208 D.L.R. (4th) 577 (C.A.) (the failure to consider the principle of protection of minorities in the course of the exercise of administrative discretion results in the requirement that the decision be reconsidered with proper consideration of the impact of the principle); *Grushman v. Ottawa (City)* (2000), 29 Admin. L.R. (3d) 41, 15 M.P.L.R. (3d) 167 (Ont. S.C. (Div. Ct.)) See also *Gigliotti*, *supra* note 6 (decision of the Ontario Minister of Training, Colleges and Universities to close a particular college must consider the principle of respect for and protection of the linguistic minority. The decision met this standard.).

8. See e.g. *Johnson v. British Columbia (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145, 64 C.R.R. (2d) 275 (B.C.S.C.) (the power of British Columbia Securities Commission to make enforcement orders under the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, s. 161(1) (c)-(d) does not violate the rule of law. Principles enshrined in the preamble of the *Constitution Act, 1982* inform the substantive sections of the *Charter*, they are not discrete justiciable principles intended to create rights); *Baie D'Urfé (City) v. Quebec (A.G.)*, [2001] R.J.Q. 2520, 27 M.P.L.R. (3d) 173 (C.A.) [*Baie D'Urfé*] (the protection of minorities principle cannot be used to invalidate legislation authorizing amalgamation of cities. Unwritten principles can be used to fill gaps in the Constitution, but not to invalidate legislation); *Mathew v. Canada*, [2003] 1 C.T.C. 2045, (*sub nom. TFTI Holdings v. The Queen*) 99 C.R.R. (2d) 189 (T.C.C.) (the rule of law cannot be used as an independent basis for striking down a provision of the *Income Tax Act*.); *UL Canada Inc. c. Québec (P.-G.)*, [2003] R.J.Q. 2729, 234 D.L.R. (4th) 398 (C.A.) (federalism principle does not include constitutional right to free movement of goods and services. Constitutional principles do not apply where there is no clear gap in the constitutional text); *R. v. MacKenzie (N.M.)*, 2004 NSCA 10, 221 N.S.R. (2d) 51, 181 C.C.C. (3d) 485 (the principle of protection of minorities cannot be used by itself to invalidate legislation and does not extend the coverage of language rights provided by the Charter); *Shaw v. Stein*, [2004] SKQB 194, [2004] 248 Sask. R. 23, 119 C.R.R. (2d) 143 (the rule of law could not be used as an independent ground to review retroactive legislation); *Office and Professional Employees' International Union, Local 378 v. British Columbia (Hydro and Power Authority)*, 2004 BCSC 422, 129 A.C.W.S. (3d) 1014, [2004] B.C.J. No. 623 (QL) (rule of law principle does not prevent legislature from passing arbitrary laws, as long as they are constitutional. Protection from passage of arbitrary laws lies in the ballot box); *Kingsway General Insurance Co. v. Alberta*, 2005 ABQB 662, 258 D.L.R. (4th) 507, 53 Alta. L.R. (4th) 147 [*Kingsway General Insurance*] (rule of law principle is not an independent source of rights); *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, [2007] 1 W.W.R. 331 [*Canadian Bar Assn.*] (unwritten principles are not free-standing principles that can trigger a cause of action if breached; but see the less categorical comments of the British Columbia Court of Appeal in the same case at 2008 BCCA 92, 290 D.L.R. (4th) 617, [2008] 6 W.W.R. 262. Courts have also been reluctant to apply unwritten constitutional principles to limit or challenge the exercise of powers granted by express provisions of the Constitution). See e.g. *Samson v. Canada (A.G.)* (1998), 165 D.L.R. (4th) 342, [1998] 155 F.T.R. 137 (F.C.T.D.) (constitutional principles cannot be used to enjoin the Governor General from appointing an unelected, but qualified, person from Alberta to the Senate. The applicants failed to raise a legal issue, as opposed to a political issue. In any case, the appointment of persons to the Senate is specifically addressed by the written provisions of the *Constitution Act, 1867*. Application for interlocutory injunction dismissed); *Brown v. Canada* (1999), 1999 ABCA 256, 244 A.R. 86, 177 D.L.R. (4th) 349 (constitutional principles cannot be used to declare that the senatorial selection process is undemocratic. The claimants failed to raise legal, as opposed to political, issues. Originating notice of motion struck out); *Hogan v. Newfoundland (A.G.)*, 2000 NFCA 12, 189 Nfld. & P.E.I.R. 183,183 D.L.R. (4th) 225 (principles of rule of law and protection of minorities cannot prevent the amendment of the terms of union between Newfoundland and Canada, pursuant to s. 43 of the *Constitution Act, 1867*, in order to abolish denominational schools.).

Interestingly, the reluctance of Canadian courts to apply unwritten constitutional principles to invalidate legislation has not always reflected the same theoretical concerns about the legitimacy of judicial review that have been raised by academics. Rather than categorically rejecting the application of unwritten constitutional principles as limits on legislation, a number of Canadian judges have applied the principle of parliamentary supremacy to uphold legislation in the face of claims based on the application of other unwritten constitutional principles. In other words, these Canadian judges have accepted the legitimacy of unwritten principles but have tended to privilege the principle of parliamentary supremacy over other fundamental principles, such as the rule of law and the separation of powers.[9] In so doing, these judges have often emphasized the near absolute authority provided by the principle of parliamentary sovereignty in those areas that the *Charter* does not apply.[10]

Thus, rather than embroiling themselves in the debates concerning the importance of constitutional text as a discipline on judicial discretion, these Canadian judges have tended to situate their consideration of the application of unwritten principles within the context of the heritage of unwritten constitutionalism that Canada inherited from the United Kingdom through the *Constitution Act, 1867*.[11] In this way, Canadian judges have taken a similar approach, if not always reaching a similar result, as Canadian academics who have argued in favour of a more aggressive application of unwritten constitutional principles.[12] This approach fits more readily into the British debate concerning the legitimacy of judicial review rather than the American debate, as the British debate focuses on the proper role of judges in the context of unwritten constitutional principles, including the principle of parliamentary sovereignty. By contrast, the American debate concerns itself primarily with the importance of the text of the Constitution as the anchor of legitimate judicial review and as a necessary restraint on judicial preferences.[13]

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9. Cases dealing with judicial remuneration are notable exceptions. For an analysis of this fact see Leclair, *supra* note 4.
10. This approach has also been advocated by a number of critics of the application of unwritten constitutional principles. See especially Cameron, *supra* note 4; Newman, "Grand Entrance Hall," *supra* note 4; Newman, "Pushing the Edge," *supra* note 4. I discuss the most notable examples of this judicial approach in the next section.
11. *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, s. 17, reprinted in R.S.C. 1985, App. II, No. 5.
12. For arguments in favour of the application of unwritten constitutional principles in Canada see Marc Cousineau, "Le renvoi sur la sécession du Québec: La résurrection des droits linguistiques au Canada" (1999) 11 N.J.C.L. 147; Marc Cousineau, "L'Affaire Montfort, l'article 15 de la *Charte* et le droit de la communauté franco-ontarienne à ses institutions" (1997–98) 29.2 Ottawa L. Rev. 369; Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:2 Dal. L.J. 5; Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* As Fundamental Law" (2001) 51 U.T.L.J. 91 [Walters, "The Common Law Constitution in Canada"]; Mark D. Walters, "Incorporating Common Law into the Constitution of Canada: *EGALE v. Canada* and the Status of Marriage" (2003) 41:1 Osgoode Hall L.J. 75.
13. For a very abbreviated introduction to this debate, see e.g. Robert H. Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47:1 Ind. L.J. 1; Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990); Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

In this article, I consider several major Canadian cases in which judges have applied the principle of parliamentary sovereignty to limit the application of other unwritten constitutional principles. In so doing, I focus on the ways in which these decisions may be understood in the context of the British debate concerning the legitimacy of judicial review imposing limits on the principle of parliamentary sovereignty. I argue that the account of parliamentary sovereignty that is advanced in these cases appears to reflect a traditional conception of absolute parliamentary sovereignty at first blush. However, upon deeper analysis, these cases include important elements of the more recent critical understanding of that principle among some British scholars. As a result, judicial decisions that appear, on their face, to have limited the normative scope of the application of unwritten constitutional principles in Canada also provide the foundation for the application of these principles as limits on legislation in some circumstances.

I begin by outlining two important early decisions in which Canadian appellate courts applied the principle of parliamentary sovereignty to reject claims that other unwritten constitutional principles may be used to invalidate legislation. I consider how these early decisions may be understood within the context of the British debate concerning the limits of parliamentary sovereignty. I then analyze a number of the Supreme Court's recent decisions concerning the application of unwritten constitutional principles using the lens of this British debate. I suggest that the Supreme Court's approach in these cases reflects a common law approach to judicial review and constitutional theory that has been adopted by some British scholars. This approach recognizes that the principle of parliamentary sovereignty may be limited in some circumstances and thus provides a foundation for applying unwritten constitutional principles to limit legislation.

In Canada, the circumstances for limiting parliamentary sovereignty may be linked directly to the account of the principle adopted by the Supreme Court. The important weight accorded to the principle of parliamentary sovereignty in the Court's decisions is often justified by the Supreme Court by the representative function of Parliament. As such, I argue that the principle of parliamentary sovereignty may not be used to justify attempts by Parliament to undermine this representative function for to do so would be to undermine the source of legitimacy of the principle itself. In my view, imposing such a limitation on parliamentary sovereignty is consistent with the Supreme Court's understanding of its role in defending the Constitution. In particular, in the final section of the paper, I identify and discuss a number of cases in which members of the Supreme Court have recognized and affirmed the judiciary's responsibility to protect against substantial impediments to the parliamentary system of democratic governance that is at the heart of our constitutional order. In short, while the Court may be willing to tolerate draconian legislative measures as a legitimate product of parliamentary sovereignty, it should not tolerate despotic measures that would undermine the democratic foundations of Parliament itself. In particular, I argue that the Court should protect

against legislative measures that would undermine the core democratic functions of Parliament, namely ensuring political representation of citizens and accountability of government.

II. The Case for Parliamentary Sovereignty: Early Appellate Decisions

In the years immediately following the Supreme Court's decision in the *Quebec Secession Reference*, two decisions by the Saskatchewan Court of Appeal and the Federal Court of Appeal, respectively, set the tone for judicial consideration of the normative scope of unwritten constitutional principles both by trial judges and by the judges of the Supreme Court. On first review, these cases appeared to close the door to the application of unwritten constitutional principles as limits on legislation. However, a closer examination demonstrates that these decisions not only leave open the possibility of the application of unwritten constitutional principles as normative limits on legislation but actually establish the foundation of such an approach, as well.

A. *Bacon v. Saskatchewan Crop Insurance Corp.*

The first case to be examined is *Bacon v. Saskatchewan Crop Insurance Corp.*[14] The *Bacon* case arose out of a dispute between Saskatchewan farmers and the Saskatchewan government, together with the Saskatchewan Crop Insurance Corporation (SCIC), a Crown corporation. Wayne Bacon and Gary Svenkson, as representatives of 386 farmers, sued the Saskatchewan government and the SCIC, challenging the constitutionality of legislation that retroactively changed the terms of GRIP 91, a gross revenue insurance plan that was designed to provide an economic safety net to farmers.[15]

The farmers claimed that the government was liable for breach of contract and that it could not retroactively legislate to cancel its contractual obligations under the GRIP 91 program. They argued that such legislation was arbitrary and would violate the rule of law. The government of Saskatchewan argued that the amending leg-

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14. (1990), 180 Sask. R. 20, [1999] 11 W.W.R. 51, (C.A.) [*Bacon CA* cited to W.W.R.].

15. In essence, GRIP was a voluntary insurance program for farmers; premiums for the plan were paid by the farmers, as well as by the federal and provincial governments. In 1992, as a result of affordability issues, the Saskatchewan government decided to modify the plan that had originally been implemented in 1991 (GRIP 1991). The Saskatchewan government maintained that it had the power to alter the terms of the plan, pursuant to the original GRIP 1991 program and the contracts it entered into with the farmers who joined the program. Nonetheless, as a result of an injunction order issued against it, the Saskatchewan government decided to legislatively amend the plan. As a result, in 1992 the province passed *The Farm Income Insurance Legislation Amendment Act, 1992*, S.S. 1992, c.51. The *Act* implemented the revised GRIP 1992 plan, introduced retroactive changes to the GRIP 1991 plan and removed the farmers' right of legal action with respect to any breaches of the 1991 program.

islation was a proper exercise of its sovereign authority within its constitutional jurisdiction. It argued that the rule of law could not in itself be used to render legislation *ultra vires*.[16]

The trial judge, Justice Laing, focused his reasons on the interplay of the rule of law with the principle of parliamentary supremacy. He found that the "principle of parliamentary sovereignty is subordinate where it conflicts with the principle of the Rule of Law. . . ."[17] However, he found that the rule of law principle does not provide an absolute restriction on the principle of parliamentary sovereignty, rather it requires that legislative powers must not be exercised arbitrarily. Justice Laing went on to note that a government that enacts retroactive legislation to excuse itself from a contractual obligation may be considered to be acting contrary to the normative legal order. Nonetheless, he reasoned that a government may rely on such retroactive legislation where it is acting in the public interest.[18] Justice Laing concluded that the legislation that implemented the changes to the GRIP program was enacted in the public interest and thus could not be construed as arbitrary and did not offend the rule of law principle.[19]

Bacon and Svenkson appealed the judgment of Justice Laing, arguing principally that the Saskatchewan legislature did not have the authority to pass the legislation and that the issue of whether the legislation involved an arbitrary use of power was irrelevant. In the alternative, they argued that the legislation was arbitrary in any case. The Saskatchewan Court of Appeal dismissed the appeal, but also rejected elements of the reasoning of Justice Laing. In particular, Justice Wakeling, writing for the Court of Appeal, rejected Justice Laing's findings that the rule of law might impose a substantive limit to the sovereignty of the legislature. In so doing, Justice Wakeling emphasized the long-standing roots of the principle of parliamentary supremacy. Justice Wakeling cited the 1909 case of *Florence Mining Co. v. Cobalt Lake Mining Co.* as "the most compelling judicial comment" about the principle of parliamentary sovereignty. He specifically highlighted Justice Ridell's summary of parliamentary sovereignty in *Florence Mining*, which stated:

> In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition, "Thou shall not steal," has no legal force upon the sovereign

16. SCIC maintained that the original terms of the GRIP entitled it to change the terms of the program. As such, the effect of the amending legislation was of secondary importance to its argument.
17. *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 157 Sask. R. 199 at para. 113, [1997] 9 W.W.R. 258 (Q.B.) at para. 116 [*Bacon QB* cited to W.W.R.]
18. *Ibid.* at para. 115.
19. *Ibid.* at paras. 121–22.

> body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States.[20]

Justice Wakeling rejected all of the appellants' arguments that were based on the normative role of unwritten constitutional principles, including the rule of law. In particular, he distinguished the Supreme Court's discussion of unwritten principles in the *Quebec Secession Reference*, describing it as though it was merely a context-setting discussion, with no other impact than to set the stage for the rest of the decision.[21]

Later, Justice Wakeling again underlined the dominance of the principle of parliamentary supremacy stating:

> I am unable to accept that these justices of the Supreme Court, whilst providing an analysis of our federal system, were at the same time engaged in changing that system. That is particularly so when we are not talking of a subtle or marginal change, but one which would reduce the supremacy of Parliament by subjecting it to the scrutiny of superior court judges to be sure it did not offend the rule of law and if it did, to determine whether it was an arbitrary action. If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them. This is particularly so when they are not only cognizant of the many cases in various jurisdictions acknowledging the supremacy of Parliament, but must also be aware of their own previous judgments which have endorsed that principle such as: *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424 (S.C.C.), *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), *Esquimalt & Nanaimo Railway v. British Columbia (Attorney General)* (1949), [1950] A.C. 87 (British Columbia P.C.). Furthermore, I am unable to accept that when the justices were laying a foundation for their decisions in the *Secession* case by reviewing the historical and legal development of federalism in this country, that they were also engaged in changing that foundation. If that were so, it would surely not be done in such a subtle manner as to be questionable whether it had happened at all.[22]

On its face, the decision of the Saskatchewan Court of Appeal in the *Bacon* case grudgingly accepted a role for unwritten constitutional principles and accorded them a static treatment in which parliamentary sovereignty retains a superior status and the rule of law principle occupies a formal role of disciplining the exercise of delegated powers. This contrasts starkly with the approach adopted by the trial judge. The trial

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20. (1909), 18 O.L.R. 275 (Ont. C.A.) at 279, 12 O.W.R. 297 (H.C.) at 301, as cited in *Bacon CA*, *supra* note 14 at para. 14.
21. *Bacon CA*, *supra* note 14 at para. 27 Justice Wakeling stated:
I see the above comments taken from the *Secession* case as nothing more than providing a necessary examination of the foundation of federalism as it exists in this country. That examination involved reaffirmation of an earlier statement that the rule of law is a "fundamental postulate" of our Constitution. This examination of federalism was not undertaken with the intent of changing historically accepted notions of parliamentary supremacy but to lay a foundation for the question they were required to consider, namely, the right of one province to secede.
22. *Ibid.* at para. 29.

judge's approach acknowledged the importance of unwritten principles, held that the content of unconstitutional principles such as the rule of law has not been diminished by the enactment of the *Charter*, that such principles continue to evolve over time, and that the principle of parliamentary sovereignty may be subordinated in certain instances where it conflicts with the rule of law principle.[23]

B. *Singh v. Canada (Attorney General)*

The approach of the Saskatchewan Court of Appeal in *Bacon* was mirrored by the Federal Court of Appeal in *Singh v. Canada (Attorney General)*.[24] The *Singh* case concerned a challenge to the constitutionality of section 39 of the *Canada Evidence Act*.[25] Section 39 provides the government with a right to refuse disclosure of information containing Cabinet secrets during litigation proceedings. The issue arose during the course of hearings held by the Royal Canadian Mounted Police Public Complaints Commission (the "Commission") concerning allegations of misconduct by the RCMP during demonstrations held to protest the Asian Pacific Economic Cooperation Conference ("APEC Conference") in Vancouver in November 1997. The APEC Conference witnessed the infamous "Sergeant Pepper" incident in which an RCMP officer was filmed using liberal amounts of pepper spray to disperse protesters. Some of the protesters alleged that the heavy-handed tactics used by the RCMP were linked to discussions between the Prime Minister's Office and the RCMP concerning security at the APEC Conference.[26]

During the course of the hearings, counsel for the Commission requested that the Government of Canada disclose to the Commission all government records relevant to the hearing.[27] The requests for disclosure were denied as the Clerk of the

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23. Arguably, the Saskatchewan Court of Appeal was justified—if one relies strictly on the Supreme Court's previous discussions of the parameters of the rule of law principle—in rejecting Justice Laing's finding that the rule of law principle could effectively require all legislation to be held to a reasonableness standard in order to determine that it did not involve an arbitrary exercise of government power. However, I would argue, at a minimum, that the Court of Appeal's decision did not give proper consideration to the Supreme Court's discussion of the role to be played by unwritten constitutional principles. By contrast, Justice Laing's conception of the role of unwritten principles as capable of evolution and as requiring a balancing between different principles according to the context of the case, more accurately reflects that of the Supreme Court, as outlined in the *Provincial Judges Reference* and the *Quebec Secession Reference*.

24. *Singh v. The Minister of Citizenship and Immigration*, 2005 FCA 417, [2006] 3 F.C.R. 70 (*sub nom. Westergard-Thorpe v. Canada (A.G.)*) 3 F.C. 185, 183 D.L.R. (4th) 458) [*Singh* cited to F.C.R.].

25. *Canada Evidence Act*, R.S.C. 1985, c. C-5, s 39.

26. Commission for Public Complaints Against the RCMP, *APEC Interim Report* (Commission for Public Complaints Against the Royal Canadian Mounted Police, 2001).

27. The request arose out of an earlier ruling by the Commissioner that he may inquire into whether there had been improper political interference in RCMP operations if the evidence were to be supportive of him doing so. See *Singh*, *supra* note 24 at para. 4.

Privy Council filed certificates under section 39(1) of the *Canada Evidence Act* certifying that the information contained in certain documents included Cabinet secrets. Pursuant to section 39, this meant that the documents could not be disclosed and that the Court was prohibited from reviewing the documents in order to verify the veracity of the certificate.

Counsel for the Commission did not continue to seek the requested documents in the face of the certificate of the Clerk of the Privy Council. However, several of the complainants commenced an application to challenge the constitutionality of section 39 on the basis that it contravened sections 2(b) and 7 of the *Charter* and that it was inconsistent with the preamble of the *Constitution Act, 1867* and certain unwritten constitutional principles. Justice McKeown of the Federal Court Trial Division dismissed the application, finding no violation of the *Charter* and ruling that unwritten constitutional principles had no application in the case.[28]

The complainants appealed Justice McKeown's decision to the Federal Court of Appeal, arguing that section 39 violated fundamental unwritten principles of the Constitution, including the principles of the independence of the judiciary, the rule of law and the separation of powers.[29] The Federal Court of Appeal panel, consisting of Justices Strayer, Robertson and McDonald, was not convinced. The judgment of the Court was delivered by Justice Strayer, who expressed general agreement with the reasons of the trial judge and rejected all of the complainants' arguments. Justice Strayer rejected the application of unwritten constitutional principles in the case, dismissing the discussion of such principles in the *Provincial Judges Reference* and the *Quebec Secession Reference* as "observations" of a "general nature."[30] More importantly, he emphasized the continued dominance of the notion of parliamentary supremacy. He stated:

> Furthermore, [the *Provincial Judges Reference* and the *Quebec Secession Reference*] dealt with matters not specifically dealt with in the Constitution and not subject to a well-established jurisprudence. I do not interpret them as having put an end to another constitutional principle, namely the supremacy of Parliament or the supremacy of legislatures when acting in their own domain.[31]

Justice Strayer suggested that the applicants' arguments were based on the premise that the enactment of the *Charter* ousted parliamentary sovereignty as one of the principles of the Constitution. He rejected this premise, noting that:

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28. *Singh v. Canada*, [1999] 4 F.C. 583, 170 F.T.R. 215.
29. The complainants further argued that the trial judge should have read down section 39 such that it would not apply in circumstances where the Executive allegedly acted unconstitutionally and where the documents being sought would disclose the existence of such unconstitutional conduct.
30. *Singh*, *supra* note 24 at para 14.
31. *Ibid.*

> Both before and after 1982 our system was and is one of parliamentary sovereignty exercisable within the limits of a written constitution. These were solely quantitative limits on the exercise of legislative power prior to 1982. It is true that the adoption of the Charter in 1982 added a multitude of qualitative limitations on the exercise of power, but it is difficult to ascertain any change in the principle that the Constitution of Canada was and is supreme over ordinary laws. As a result one is driven as before 1982 to looking at the specific requirements of the Constitution to determine whether in a given case Parliament has infringed a constitutional limit (express or implied) on its power.[32]

Justice Strayer also relied on the Supreme Court's decision in *Commission des droits de la personne v. Canada (Attorney General)* in which the Court upheld subsection 41(2) of the *Federal Court Act*,[33] which was a predecessor of section 39 of the *Canada Evidence Act*. In his reasons, Justice Strayer referred to the following excerpt of the Court's reasons from that case:

> Once Parliament and the provincial legislatures are admitted to have the power to legislate on this matter in their respective fields (and the power cannot be denied), the risk exists. However, the risk that the Executive will apply legislation that has been validly adopted by Parliament with malice or even arbitrarily does not have the effect of divesting Parliament of its power to legislate. It is important not to confuse the statute adopted by Parliament with the action of the Executive performed in accordance with that statute.
>
> *Once it is admitted that Parliament and the provincial legislatures have the power to legislate, it necessarily follows that they can make the privilege absolute. In my view, saying that Parliament and the legislatures cannot make the privilege absolute amounts to a denial of parliamentary supremacy, and to denying Parliament and the legislatures their sovereign power to legislate in their respective fields of jurisdiction.*[34]

In Justice Strayer's view, the principle of parliamentary sovereignty protects the legislature's right to define privileges of the Executive "in the furtherance of the well-established and well-accepted principles of Cabinet secrecy. In the absence of some clear and compelling constitutional imperative to the contrary the legislation is valid and effective."[35] Justice Strayer concluded that the constitutional principles of separation of powers, judicial independence and rule of law were not compelling enough to counteract the impetus of parliamentary sovereignty in the *Singh* case.[36]

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32. *Ibid.* at para. 16.
33. *Federal Court Act*, R.S.C. 1970, (2d Supp.) c. 10. Section 41(2) provided a wider class of non-justiciable immunity, covering not only Cabinet secrets, but also documents certified to be injurious to international relations, national defence or security, or federal-provincial relations.
34. *Commission des droits de la personne v. Canada (A.G.)*, [1982] 1 S.C.R. 215 at 228, 41 N.R. 318 at paras. 39–40 [*Commission des droits de la personne*], cited in *Singh*, *supra* note 24 at para. 17 [emphasis in *Singh*].
35. *Singh*, *supra* note 24 at para. 23.
36. *Ibid.* at para. 29ff.

The approach adopted by the Federal Court of Appeal in *Singh* mirrors the approach adopted by the Saskatchewan Court of Appeal in *Bacon* in three important respects:

(a) the Supreme Court's discussion of the normative role of constitutional principles in the *Quebec Secession Reference* is marginalized;
(b) when constitutional principles are acknowledged, the principle of parliamentary sovereignty is accorded preferential status; and
(c) the rule of law principle is accorded a "thin" or formal content.[37]

These three factors form a template that has been applied in many appellate and lower court decisions dealing with unwritten constitutional principles since the Supreme Court's decision in the *Quebec Secession Reference*.[38] More importantly, in several cases involving applications to strike statements of claim, judges have used the rulings in *Singh* and *Bacon* to find that it is a matter of settled law that unwritten constitutional principles cannot be used to strike down legislation.[39]

III. VIEWING *BACON* AND *SINGH* THROUGH THE LENS OF THE BRITISH DEBATE

The impact of these early appellate decisions warrants a careful consideration of the analysis applied by the courts in the two cases. In particular, it is important to consider how the decisions in *Bacon* and *Singh* both relied heavily on the assumption of

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37. For a discussion of "thin" contrasted to "thick" conceptions of the rule of law principle, see Carter, "The Supreme Court's New Positivism," *supra* note 5 at para. 9ff.

38. See e.g. *JTI-Macdonald Corp. v. British Columbia (A.G.)*, 2000 BCSC 312, 74 B.C.L.R. (3d) 149, 184 D.L.R. (4th) 335 at para. 150 where Justice Holmes states: "I also accept the reasoning and the result in *Singh v. Canada (A. G.)* and *Bacon v. Saskatchewan Crop Insurance Corp.*, and by Edwards J. in *Babcock v. Canada (A. G.)*, *supra*, that in any event the rule of law itself is not a basis for setting aside legislation as unconstitutional;" *Moncton (City) v. Charlebois*, 2001 NBCA 117, 242 N.B.R. (2d) 259 at para. 58, 25 M.P.L.R. (3d) 171, where Chief Justice Daigle states:

> As I understand the effect of the statements made by the Supreme Court concerning the use of these principles, I think that the argument that this unwritten and underlying principle can also be used independently of any constitutional text, as a basis of an application for judicial review to strike down government action is not very convincing. I believe that the "powerful normative force" referred to by the Supreme Court concerns the interpretation of constitutional texts and not the creation of rights outside of the constitutional texts.

See also *Baie D'Urfé*, *supra* note 8; *Canadian Bar Assn.*, *supra* note 8.

39. See *Pfizer Inc. v. Canada*, [1999] 4 F.C. 441, 2 C.P.R. (4th) 298 (T.D.); *Public Service Alliance of Canada v. Canada* (2000), 192 F.T.R. 23, 97 A.C.W.S. (3d) 1099, F.C.J. No. 754; *British Columbia v. Imperial Tobacco Canada Inc.*, 2003 BCSC 877, 227 D.L.R. (4th) 323, 122 A.C.W.S. (3d) 851; *Kingsway General Insurance*, *supra* note 8. But see *contra Domtar Inc. v. Canada*, 2008 FC 1057, 170 A.C.W.S. (3d) 468, [2008] F.C.J. No. 1303 (QL).

continued dominance of the principle of parliamentary sovereignty in Canadian constitutional law. In my view, both decisions were based on two basic arguments that are in tension with each other. These two arguments reflect the two opposing views in the contemporary British debate concerning the scope of parliamentary sovereignty and the legitimacy of judicial review.

Not surprisingly, the British debate concerning the legitimacy of judicial review has largely ignored the role of constitutional text in legitimating the judicial review of legislation. Rather, it has focused on the scope of the unwritten principle of parliamentary sovereignty. Interestingly, the British debate first emerged from consideration of whether the *ultra vires* doctrine is the proper foundation for judicial review. Traditionalists, such as Sir William Wade[40], and more recently, Christopher Forsyth [41] and Mark Elliott[42], have argued that judges may only review administrative action if they can demonstrate that Parliament intended them to have that power, either expressly or impliedly. As such, judges can only restrain administrative action if they can show that action is outside of the grant of power provided by the legislature and thus *ultra vires*. This approach, which is most often traced back to the conception of parliamentary sovereignty attributed to Dicey, limits the power of the judiciary to assess the constitutional validity of legislation and requires judges to determine the *intention* of Parliament when interpreting legislation or assessing the actions of administrative officials pursuant to that legislation.

By contrast, common law critics of the traditional view have questioned whether the *ultra vires* doctrine should still be considered the foundation of judicial review.[43] Some, but not all, critics have argued that heads of judicial review are a common law creation and that resort to the notion of parliamentary intent is not necessary. More importantly, critics of the traditional approach have rejected the absolute scope of the principle of parliamentary sovereignty that is relied upon in the *ultra vires* approach. Indeed, some British scholars have questioned the very essence of parliamentary sovereignty, suggesting that Parliament may not have the power to violate certain fundamental rights.[44] As a result, a debate that was once focused on the nar-

40. H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) Cambridge L.J. 172.
41. Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55:1 Cambridge L.J. 122.
42. Mark Elliott, "The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review" (1999) 115 L.Q.R. 119; "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" (1999) 58:1 Cambridge L.J. 129.
43. Dawn Oliver, "Is the *Ultra Vires* Rule the Basis of Judicial Review?" [1987] P.L. 543.
44. I will provide a more detailed discussion of this critical approach below.

row issue of the *ultra vires* doctrine has expanded to consider the proper relationship between Parliament and the judiciary and, more specifically, the issue of whether the judiciary may set limits on the principle of parliamentary supremacy.[45]

Returning to the Canadian context, the first argument raised in support of the dominance of the principle of parliamentary sovereignty over other constitutional principles in the *Bacon* and *Singh* decisions is that the principle of parliamentary sovereignty has traditionally dominated within the Canadian constitutional framework. Both decisions point to the continuing importance of the principle of parliamentary sovereignty in the post-*Charter* era, noting that the principle allows Parliament a virtually unlimited scope of power in those areas where its jurisdiction is not restricted by the written terms of the Constitution.

In the *Bacon* decision, this argument is supported by Justice Wakeling's reference to the 1909 *Florence Mining* case and its finding that "the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine." In the *Singh* case, the argument is best illustrated by Justice Strayer's reliance on the reasoning of Chief Justice Dickson in the *Auditor General* case. In particular, Justice Strayer relied on the following excerpt from the Chief Justice's reasons in that case:

> In the realm of *Charter* adjudication, s. 1 is "the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it" (Wilson J. in *Operation Dismantle*, *supra*, at p. 491). Ultimately, the courts are constitutionally charged with drawing the boundaries of justiciability, except as qualified by s. 33. By way of contrast, in the residual area reserved for the principle of Parliamentary sovereignty in Canadian constitutional law, it is Parliament and the legislatures, not the courts, that have ultimate constitutional authority to draw the boundaries. It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes. While the courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning. *If, then, the courts interpret a particular provision as having the effect of ousting judicial remedies for entitlements contained in*

45. Strictly speaking, this is not exclusively a "British" debate as it has engaged many scholars from outside the United Kingdom. Noteworthy international contributors include David Dyzenhaus, Jeffrey Goldsworthy and Mark Walters. See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006); Dyzenhaus, "Incoherence," *supra* note 5 at 138; Jeffrey Goldsworthy, "Unwritten Constitutional Principles" in Huscroft, *supra* note 5 at 277; Mark Walters, "The Common Law Constitution in Canada," *supra* note 12; Walters, "Common Law, Reason, and Sovereign Will" (2003) 53 U.T.L.J. 65; Walters, "Written Constitutions and Unwritten Constitutionalism" in Huscroft, *supra* note 5 at 245. For a critique of the common law constitutional approach see Thomas Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 Oxford. J. Legal Stud. 435.

> *that statute, they are, in principle, giving effect to Parliament's view of the justiciability of those rights. The rights are non-justiciable not because of the independent evaluation by the court of the appropriateness of its intervention, but because Parliament is taken to have expressed its intention that they be nonjusticiable.*
>
> *The just-stated view sits comfortably with the occasions on which the courts give effect to so-called privative clauses that explicitly oust judicial review. As a constitutional matter, it is not appropriate for the court to intervene by virtue of the simple fact that Parliament has directed that they must not.*[46]

Chief Justice Dickson's discussion of the respective roles of Parliament and the courts in the *Auditor General* case—namely that Parliament determines the role of the courts and the courts must only determine the intention of Parliament when reviewing legislation—is a textbook application of the traditional *ultra vires* theory of judicial review.

The second argument embedded in the *Bacon* and *Singh* decisions is that the normative scope of the principle of parliamentary sovereignty could only have been changed by the Supreme Court's decision in the *Quebec Secession Reference* if the Supreme Court addressed the issue directly, and the Court did not do so in that case. This second argument assumes that the Supreme Court has the power to limit the scope of the principle of parliamentary sovereignty. Indeed, both decisions assert that the scope of parliamentary sovereignty must be assumed to be unchanged since the Supreme Court did not directly address the issue in the *Quebec Secession Reference*. This point was made most directly by Justice Wakeling in *Bacon* when he considered the hypothetical conditions under which the Supreme Court might place limits on the principle of parliamentary sovereignty, stating: "If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them."[47] He later assumed that such a change *may* be possible but that it would have to be clearly identified by the Court. In particular, he noted that *if* the Court did impose such a limitation, "[I]t would surely not be done in such a subtle manner as to be questionable whether it had happened at all."[48]

While Justice Strayer provided less discussion on this issue, he too appears to have assumed in *Singh* that the Court has the power to recognize limits on the princi-

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46. *Canada (Auditor General) v. Canada (Ministry of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 at 91–92 [*Auditor General*], cited in *Singh*, *supra* note 24 at para. 17 [emphasis added]. Interestingly, Justice Strayer does not question whether the Chief Justice's comments in the *Auditor General* case correspond to the development of administrative law since 1977.

47. *Bacon CA*, *supra* note 14 at para. 29.

48. *Ibid.*

ple of parliamentary sovereignty. Thus, rather than categorically rejecting the possibility of such a limitation on the principle, Justice Strayer suggested that "I do not interpret [the decisions in the *Provincial Judges Reference* and the *Quebec Secession Reference*] as having put an end to another constitutional principle, namely the supremacy of Parliament or the supremacy of legislatures when acting in their own domain."[49]

This second argument thus suggests that, even if the Supreme Court has not previously recognized that the principle of parliamentary sovereignty may be limited by another constitutional principle, it has the power to recognize such a limitation now or in the future. By extension, the second argument also allows for the possibility that our constitutional framework has always included the potential that parliamentary sovereignty may be limited by the rule of law, or some other constitutional principle, but the Supreme Court has simply not had to implement such limitations to date.

These assumptions embedded in the second argument—that our constitutional framework has always included some unwritten restrictions on the principle of parliamentary sovereignty, that even if the courts have not recognized such restrictions historically the jurisprudence may have recently evolved to include such restrictions or that it may evolve to allow such restriction in the future—reflect the approach of British scholars who reject the traditional *ultra vires* approach to judicial review and who argue that the principle of parliamentary sovereignty may be limited by the courts. In particular, it is worth noting the work of Sir John Laws, Sir Stephen Sedley, Paul Craig and Trevor Allan. While each of these authors offers distinct justifications for limiting the principle of parliamentary sovereignty, they all build on a common law approach to constitutional theory that recognizes the duty of courts to identify and protect fundamental principles against legislative encroachment.

A. Sir John Laws

Interestingly, the British debate over the limits of parliamentary sovereignty has been fuelled by the extra-judicial writings of a number of English judges. Sir John Laws, then a justice of the High Court, Queen's Bench Division, invigorated the debate in his seminal article "Law and Democracy" in which he emphasizes the important role of the judiciary in controlling government.[50] In an oft-quoted passage, Laws argues that the heads of judicial review are judicial creations and dismisses the notion that

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49. *Singh*, *supra* note 24 at para. 12.
50. The Honourable Sir John Laws, "Law and Democracy" [1995] P.L. 72. He is now a judge of the Court of Appeal of England and Wales.

they can be the result of legislative intention. He writes: "They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins. We do not need the fig-leaf any more."[51]

At the core of Laws' argument is his belief that a constitution that gives all power to its elected government is undemocratic because it fails to protect fundamental freedoms.[52] He explains:

> As a matter of fundamental principle, it is my opinion that the survival and flourishing of a democracy in which basic rights (of which freedom of expression may be taken as a paradigm) are not only respected but enshrined requires that those who exercise democratic, political power must have limits set to what they may do: limits which they are not allowed to overstep. If this is right, it is a function of democratic power itself that it be not absolute.[53]

According to Laws, the only way that these fundamental rights can be secured is through the acknowledgement of a "higher-order law" that cannot be reversed by a simple majority in Parliament.[54] Such higher-order laws secure the fundamental rights of citizen from interference by the government, including those rights necessary to protect democracy itself:

> Ultimate sovereignty rests, in every civilized constitution, not with those who wield governmental power, but in the conditions under which they are permitted to do so. The constitution, not the Parliament, is in this sense sovereign. In Britain these conditions should now be recognised as consisting in a framework of fundamental principles which include the imperative of democracy itself and those other rights, prime among them freedom of thought and expression, which cannot be denied save by a plea of guilty to totalitarianism.[55]

Laws acknowledges that the existing jurisprudence has not traditionally supported his view that legislative authority can be limited by judicial review in England. However, he argues that public law jurisdiction should not, and probably will not, remain static. Rather, he notes that the legal distribution of power consists of a "dynamic settlement" between different arms of government: "The settlement is dynamic because, as our long history shows, it can change; and in the last three hundred years has done so without revolution."[56]

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51. *Ibid.* at 78–79.
52. *Ibid.* at 73.
53. *Ibid.* at 81.
54. *Ibid.* at 84.
55. *Ibid.* at 92.
56. *Ibid.* at 80–81.

B. Sir Stephen Sedley

Sir Stephen Sedley has also joined the chorus for greater judicial oversight.[57] Sedley argues that Dicey's notion of a supreme Parliament whose will could not be challenged is no longer valid. Instead, he suggests the existence of a "bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable—politically to Parliament, legally to the courts."[58] Contrary to Laws, Sedley does not suggest that Parliament can be subjected to higher-order laws. Rather, he emphasizes that the rights valued by any given society as fundamental are always temporary, local and contextual. He thus cautions against treating any rights as universal or absolute and notes that courts are sometimes responsible for illiberal decisions. Nonetheless, it is the courts' role to uphold those rights which society holds as fundamental: "if in our own society the rule of law is to mean much, it must at least mean that it is the obligation of the courts to articulate and uphold the ground rules of ethical social existence which we dignify as fundamental human rights, temporary and local though they are in the grand scheme of things."[59]

C. Paul Craig

Paul Craig is perhaps the author most associated with the common law critique of the *ultra vires* doctrine. Common law critics of the traditional view argue that heads of judicial review are a common law creation and that resort to the notion of parliamentary intent is neither necessary nor desirable.[60] Craig has also questioned the legitimacy of the absolute model of parliamentary sovereignty.[61] Craig argues that modern proponents of parliamentary sovereignty have failed to provide a normative justification for parliamentary sovereignty and have instead relied unquestioningly on the work of Dicey and Blackstone, without recognizing the context in which those constitutional theorists wrote about parliamentary sovereignty.

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57. The Honourable Sir Stephen Sedley, "Human Rights: a Twenty-First Century Agenda" [1995] P.L. 386.
58. *Ibid.* at 388–89.
59. *Ibid.* at 391. While Sedley acknowledges the pitfalls of this approach, including the potential commodification of human rights, he views the alternative of retreating from the protection of fundamental rights as the greater evil:

    > The only choice in this situation—and it is a choice which the judiciary can make for itself but which Parliament can no longer realistically make for it—is to retreat from rights adjudication into the long sleep of *Wednesbury* and before, or to develop the role with which we are now becoming familiar and to continue to move in the direction of a rights culture compatible with constitutional adjudication in a democracy. *Ibid.* at 395.

60. The common law critique of the *ultra vires* approach should be distinguished from common law constitutionalism more generally as not all common law constitutionalists share Craig's view that the notion of parliamentary intent should be abandoned.
61. See generally P. P. Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) 11 Y.B. Eur. L. 221; Paul Craig, "Public Law, Political Theory and Legal Theory" [2000] P.L. 211 [Craig, "Public Law"]; Paul Craig, "Ultra Vires and the Foundations of Judicial Review" (1998) 57:1 Cambridge L.J. 63.

According to Craig, Dicey advocated parliamentary sovereignty in the context of a self-correcting parliament which would prevent the executive from acting contrary to the interests of the electors. In Craig's view, "our system of democracy probably never operated in this self-correcting way, and . . . this vision of the relationship between electors, Parliament and the executive certainly does not accord with present reality." [62] Similarly, Blackstone advocated parliamentary sovereignty only within the context of a balanced constitutionalism which, according to Craig, did not exist in Blackstone's day and certainly does not exist in this era of executive dominance of the parliamentary system.[63]

Craig acknowledges that the existing English jurisprudence has not historically supported a strong judicial challenge to the notion of parliamentary sovereignty, although he suggests that the law might develop in this way.[64] Craig contends that the notion of parliamentary sovereignty can survive only if an adequate normative justification for this power can be provided. In Craig's view, this "opens the way for legal argument about whether a legally untrammeled Parliament is justified in the present day. There are stimulating contributions to both sides of this debate. . . . These should be regarded as firmly within the mainstream of legal argument about sovereignty which continues a discourse dating back over three hundred years."[65]

D. Trevor Allan

Finally, Trevor Allan has argued that the traditional notion of parliamentary sovereignty, which holds that the principle endows Parliament with virtually limitless power, has never been an accurate description of the British constitutional order.[66] In particular, Allan argues that proponents of the *ultra vires* approach have misconstrued Dicey's theory of British constitutionalism. He argues that Dicey perceived parliamentary supremacy as only one of the pillars of the Constitution. The other pillar,

62. Craig, "Public Law," *ibid.* at 222.
63. *Ibid.* at 219.
64. *Ibid.* at 229.
65. *Ibid.* at 230. Interestingly, Craig emphasizes that, historically, supporters of parliamentary sovereignty such as Dicey and Blackstone viewed the common law as the natural vehicle for the development of legal doctrine on the basis of sound, principled arguments. In Craig's view, the *ultra vires* doctrine of judicial review, which ascribes the power of judicial review to the intent of the legislature, is not based on sound, principled arguments and cannot be supported any longer. *Ibid.* at 235.
66. See especially T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) [Allan, *Constitutional Justice*].

which is just as important, is the rule of law. Allan complains that not enough attention has been paid to this second pillar of constitutional law, allowing the notion of parliamentary sovereignty to expand beyond its intended reach.[67]

Allan's work has emphasized the importance of judicial interpretation of statutes as a means to ensure that the rule of law is abided.[68] In Allan's view, the intentions of Parliament and the rule of law must both be respected. This is usually possible because legislation necessarily deals with general guidelines which can always be interpreted so as to ensure the rule of law is respected in specific instances. Thus, Allan advocates a qualified notion of parliamentary sovereignty that coexists with a qualified doctrine of *ultra vires* in which legislative intention, properly understood, remains important but where it is possible for the courts to reject breaches of the rule of law. This leads Allan to characterize sovereignty as bipolar, shared between Parliament and the courts.[69]

The limitation of parliamentary sovereignty is not a rejection of British constitutional tradition, according to Allan, but rather a necessary part of the evolution of British constitutional theory. As such, limits on parliamentary sovereignty do not portend the revolutionary imposition of foreign legal principles on the common law Constitution of England, but rather constitute a natural outgrowth of a maturing constitutional democracy.[70]

Allan argues that absolute parliamentary sovereignty, in addition to being inconsistent with British constitutionalism, is not compatible with democratic principles:

> It would clearly be absurd to permit a Parliament whose sovereign law-making power was justified on democratic grounds to exercise that power to destroy democracy, as by removing the vote from sections of society or abolishing elections. Moreover, an appropriately sophisticated conception of democracy will be likely to recognise the existence of certain basic individual rights, whose importance to the fundamental idea of citizenship in a free society, governed in accordance with the rule of law, will properly place them beyond serious legislative encroachment.[71]

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67. T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" [1985] Cambridge L.J. 111. Allan argues that, rather than risk radical reform such as the adoption of an entrenched bill of rights, the British constitutional order can be restored to balance by placing an appropriate amount of weight on the principle of the rule of law: "It is the failure to recognise the importance and scope of the rule of law as a juristic principle, it will be argued, which has distorted our understanding of parliamentary supremacy and led in part to our present fears of constitutional imbalance." *Ibid.* at 114.
68. *Ibid.* at 119.
69. Allan, *Constitutional Justice*, *supra* note 66 at 13. For a similar defence of the importance of fundamental principles within British constitutionalism, see Tom R. Hickman, "In Defence of the Legal Constitution" (2005) 55 U.T.L.J. 981.
70. Allan, *Constitutional Justice*, *ibid.* at 1.
71. T.R.S. Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 Law Q. Rev. 443 at 448–49 [Allan, "Parliamentary Sovereignty"]. Allan goes on at 449 to link his position to a constitutional theory based on fundamental principles:

Allan, Laws, Sedley and Craig represent an important challenge to the traditional conception of parliamentary sovereignty in Great Britain. Admittedly, scholars and judges who fit within this broad critical approach differ on important questions such as the importance of parliamentary intention and whether fundamental rights are universal or contextual. However, these tensions within the British critique of parliamentary sovereignty need not be completely resolved for the purposes of this article. At present, it is sufficient to note that the critics of the *ultra vires* approach all share the common view that the courts have an important role to play in protecting fundamental values, particularly those necessary to sustain the democratic process. As a result, they share the view that the courts may impose limits on parliamentary sovereignty where Parliament seeks to undermine the democratic process. In short, they all advocate that the courts may step in to prevent legislators from imposing despotic measures that would render legislative power unaccountable.

It is worth noting that British jurisprudence may be evolving as predicted by Laws and Craig. In *R. (Jackson) v. Attorney General*[72] three members of the British House of Lords directly raised the possibility that there may be limits imposed on parliamentary sovereignty in *obiter* comments in their reasons for decision. The *Jackson* case concerned the validity of the *Hunting Act, 2004* which restricted the use of dogs for hunting. The *Hunting Act* was passed into law without the assent of the House of Lords. This was possible as a result of provisions in the *Parliament Act, 1949* (which amended the *Parliament Act, 1911*) that allow a bill to receive royal assent and become legislation if the House of Lords refused to consent to the bill over the course of two successive sessions of Parliament during a period of one year. In effect, the *Parliament Act, 1911* and the *Parliament Act, 1949* legislatively circumscribed the power of the House of Lords within the parliamentary process by restricting the capacity of the House of Lords to delay the passing of legislation.

The primary issue to be determined on the appeal of the *Jackson* case was whether Parliament itself had the authority to make such a change to the role of the House of Lords. The Appeal Committee of the House of Lords determined, unanimously, that the *Parliament Acts* were valid and that the *Hunting Act, 2004* that had been enacted using the revised procedure established by the *Parliament Acts* was also valid.

An adequate constitutional theory, appropriate to current circumstances, would recognise limitations on legislative power in order to ensure an adequate separation of powers, which Blackstone—often treated as an authority for the doctrine of unlimited sovereignty—rightly thought essential to the prevention of tyranny. The validity of traditional assertions of absolute sovereignty can only be determined by analysis of their normative grounding in political theory. When constitutional debate is opened up to ordinary legal reasoning, based on fundamental principles, we shall discover that the notion of unlimited parliamentary sovereignty no longer makes any legal or constitutional sense.

72. [2005] UKHL 56, [2006] 1 A.C. 262, [2005] 4 All E.R. 1253 [*Jackson* cited to A.C.].

While much of the commentary of the Law Lords in this case focused on the importance of parliamentary sovereignty as a foundation of the British constitutional order, three of the Law Lords (Lord Hope, Lord Steyn and Baroness Hale) considered the possibility that the courts might impose limits on Parliament in some circumstances. Lord Hope started his reasons by noting that the concept of absolute parliamentary sovereignty has been eroded gradually in Britain, and baldly stated, "parliamentary sovereignty is no longer, if it ever was absolute. . . . It is no longer right to say that its freedom to legislate admits of no qualification whatever."[73] Lord Hope acknowledged that most of these qualifications of parliamentary sovereignty were the product of enactments of Parliament; however, he also stated that "[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based."[74]

Lord Steyn and Baroness Hale also raised the possibility of imposing limits on parliamentary sovereignty, particularly where Parliament attempted to interfere with the role of the courts. Lord Steyn recognized the ways in which limits on the sovereignty of Parliament had been imposed through the *European Convention of Human Rights* and the *Human Rights Act, 1988*. As such, he found that "[t]he classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom."[75] He went on to note that the "judges created this principle"[76] of parliamentary sovereignty and that "circumstances could arise where the courts may have to qualify"[77] the principle. Lord Steyn described one such circumstance as follows:

> In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is [*sic*] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[78]

Baroness Hale agreed that the courts might intervene where Parliament attempted to restrict the authority of judges. Thus, although she noted the fundamental status of the principle of parliamentary sovereignty and the fact that the principle "means that Parliament can do anything"[79] she also stated that "[t]he courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny."[80] Thus, while Baroness Hale indicated that the constraints on

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73. *Ibid.* at para. 104.
74. *Ibid.* at para. 107.
75. *Ibid.* at para. 102.
76. *Ibid.*
77. *Ibid.*
78. *Ibid.*
79. *Ibid.* at para. 159.
80. *Ibid.*

Parliament are, in general, "political and diplomatic rather than constitutional," the general rule appears to allow for exceptions, particularly in the face of despotic measures aimed at insulating the legislature or government from any oversight.

The above *obiter* comments of three Law Lords in the *Jackson* case have fuelled the academic debate concerning the potential limits of parliamentary sovereignty. Some commentators have argued that the comments in *Jackson* portend the formal recognition of judicially imposed restrictions on parliamentary sovereignty in Britain.[81] At the same time, supporters of the traditional conception of parliamentary sovereignty have argued that the case has not succeeded in displacing the dominant position of the principle in the British constitutional order.[82] From the Canadian perspective it is particularly interesting to note that Lord Hope, Lord Steyn and Baroness Hale each recognized the fundamental nature of the principle of parliamentary sovereignty while also acknowledging that the scope of parliamentary sovereignty could be limited by the courts in exceptional circumstances. In so doing, these Law Lords reflected the primary assumptions of common law constitutionalism.

In the next section, I will consider how the British debate concerning the legitimacy of judicial review, and specifically the common law approach, may also assist us in understanding the Supreme Court's recent decisions concerning the application of unwritten constitutional principles as free-standing limits on legislation.

IV. The Principle of Parliamentary Sovereignty: The Supreme Court's Approach

The Supreme Court has discussed the normative scope of unwritten constitutional principles in a number of decisions over the past decade. While the Court's most recent decisions appear to have taken a more restrictive approach to the application of these principles than might have been suspected after the *Quebec Secession Reference*, a close review of the cases indicates that the Court's consideration of the application of unwritten constitutional principles has been embedded within a common law approach to judicial review. This common law approach provides a foundation for limitations on parliamentary sovereignty, and more specifically legislation, in certain circumstances.

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81. See e.g. Jeffrey Jowell, "Parliamentary Sovereignty under the New Constitutional Hypothesis" [2006] P.L. 562; Mark Elliott, "Bicameralism, sovereignty and the unwritten Constitution" (2007) 5 International Journal of Constitutional Law 370.

82. See e.g. Tom Mullen, "Reflections on *Jackson v Attorney General*: questioning sovereignty" (2007) 27 L.S. 1.

A. *Babcock v. Canada (Attorney General)*

Babcock[83] was one of the Supreme Court's first major cases concerning the application of unwritten constitutional principles to legislation after the *Quebec Secession Reference*. Like *Singh*, the *Babcock* case concerned Cabinet secrets and specifically the constitutional validity of section 39(1) of the *Canada Evidence Act*. The case arose when staff lawyers of the Vancouver office of the federal Department of Justice ("Vancouver DOJ lawyers") sued the federal Crown for breach of contract and breach of fiduciary duty after the Department of Justice decided to raise the pay of lawyers in the Toronto office but not that of lawyers in other offices around the country. The case found its way to the Supreme Court primarily as the result of the decision of the federal government to invoke a certificate of the Clerk of the Privy Council, pursuant to section 39(1) of the *Canada Evidence Act*, to resist the disclosure of a number of documents it claimed contained Cabinet secrets.[84]

At the Supreme Court, the Vancouver DOJ lawyers argued that section 39 was *ultra vires* Parliament as a result of the application of the unwritten constitutional principles of the rule of law, the independence of the judiciary and the separation of powers. The Supreme Court rejected the arguments advanced by the Vancouver DOJ lawyers and allowed the appeal.

The majority reasons were written by Chief Justice McLachlin.[85] Although the Chief Justice acknowledged that "unwritten constitutional principles are capable of limiting government actions" she concluded that "they do not do so in this case."[86] According to the Chief Justice, the "unwritten principles must be balanced against the principle of parliamentary sovereignty."[87] In her view, the principle of parliamentary sovereignty carried greater weight in this case.

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83. *Supra* note 1.

84. The Vancouver DOJ lawyers brought an application to compel production of the documents listed on the certificate of the Clerk of the Privy Council. The chambers judge rejected the application, finding that the certificate of the Clerk of the Privy Council under s. 39 provided absolute protection for the documents listed, which could not be challenged. The chambers judge also rejected the argument that the privilege had been waived by the previous listing of the documents as producible or by the disclosure of information in the affidavit of the officer of the Treasury Board. Finally, he found that section 39 did not infringe the core jurisdiction of the superior courts protected by section 96 of the *Constitution Act, 1867* in light of the long-standing recognition of Cabinet privilege as a legitimate part of Parliament's power. (*Babcock v. Canada (A. G.)* (1999), 70 B.C.L.R. (3d) 128, 176 D.L.R. (4th) 417 (B.C.S.C.)). The Vancouver DOJ lawyers appealed the chambers judge's decision to the British Columbia Court of Appeal. The majority of the Court of Appeal allowed the appeal, ordering production of the documents on the basis that the federal government waived its right to claim confidentiality because it previously listed some of the documents as producible and it selectively disclosed information in the affidavit of the officer of the Treasury Board Secretariat. (*Babcock v. Canada (A. G.)*, 2000 BCCA 348, 188 D.L.R. (4th) 678, [2000] 6 W.W.R. 577).

85. Chief Justice McLachlin's reasons were supported by seven other justices; Justice L'Heureux-Dubé provided brief concurring reasons of her own.

86. *Babcock*, *supra* note 1 at para. 54.

87. *Ibid.* at para. 55.

At the outset of her reasons, the Chief Justice framed the issue in the case as one of a conflict between values:

> Cabinet confidentiality is essential to good government. The right to pursue justice in the courts is also of primary importance in our society, as is the rule of law, accountability of the executive, and the principle that official actions must flow from statutory authority clearly granted and properly exercised. Yet sometimes these fundamental principles conflict. How are such conflicts to be resolved? This is the question posed by this appeal.[88]

According to the Chief Justice, the key to resolving the conflict between values within the *Babcock* case lay simply in an understanding of the role of Cabinet confidentiality in Canada and the role of section 39 of the *Canada Evidence Act* in protecting Cabinet confidentiality. Chief Justice McLachlin's conclusion that section 39 should not be invalidated by the unwritten principles relied upon by the Vancouver DOJ lawyers was based primarily on the existence of the longstanding tradition of protecting Cabinet secrets in Canada.[89]

In *Babcock,* Chief Justice McLachlin accepted the Federal Court of Appeal's reasoning in the *Singh* case, stating that Justice Strayer conducted a "thorough and compelling review of the principle of parliamentary sovereignty in the context of unwritten constitutional principles. . . ."[90] She concluded her analysis of the constitutionality of section 39, stating:

> I share the view of the Federal Court of Appeal that s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary. It is well within the power of the legislature to enact laws, even laws some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.[91]

The principle of parliamentary sovereignty thus appears to have been allocated a place of privilege among constitutional principles by the Chief Justice. In this particular case, the concept of parliamentary sovereignty was applied to protect a tradition of allowing the legislature to protect Cabinet secrets. However, there are two other important elements of the *Babcock* decision. First, Chief Justice McLachlin reaffirmed the fact that unwritten constitutional principles have normative force, stating unequivocally that "unwritten constitutional principles are capable of limiting gov-

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88. *Ibid.* at para. 15.

89. In the course of her reasons, Chief Justice McLachlin noted that the Supreme Court upheld the constitutionality of the predecessor to section 39 in *Commission des droits de la personne, supra* note 34. The precursor to section 39 of the *Canada Evidence Act* was section 41(2) of the *Federal Court Act*, R.S.C. 1970 (2d Supp.), c. 10, s. 41. Section 41(2) permitted the government to claim absolute privilege over a broader class of confidences than section 39(1) currently does.

90. *Babcock, supra* note 1 at para. 56.

91. *Ibid.* at para. 57.

ernment actions. . . ."[92] Indeed, she went so far as to suggest that there may be situations where legislation may be limited by unwritten constitutional principles. According to the Chief Justice, the type of legislation that might be vulnerable to limitation by unwritten constitutional principles is that which "fundamentally alter[s] or interfere[s] with the relationship between the courts and the other branches of government."[93]

The Supreme Court's approach in the *Babcock* case is similar to the approach adopted by the Saskatchewan Court of Appeal in *Bacon* and the Federal Court of Appeal in *Singh*. The decisions in all three cases found that the principle of parliamentary sovereignty outweighed the operation of other constitutional principles in the particular circumstances. However, the possibility of a limitation on the principle of parliamentary sovereignty is recognized in each case. This acknowledgement that there are certain circumstances that might justify judicial intervention to restrict parliamentary sovereignty and limit legislation through the application of unwritten constitutional principles is a reflection of the common law approach to the application of unwritten constitutional principles. Indeed, the comments of Chief Justice McLachlin in *Babcock* are strikingly similar to the later comments of Lord Steyn and Baroness Hale in *Jackson*. Recall, in particular, that Lord Steyn suggested the possibility of judicial intervention in "exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts."[94]

In light of the fact that the *Babcock* case dealt specifically with the issue of judges reviewing documents alleged to contain Cabinet secrets, it is not surprising that the Chief Justice confined her remarks concerning possible limits on parliamentary sovereignty to the structural relationship between the courts and other branches of government in that case. However, applying the same logic, it is arguable that the notion of a fundamental alteration or interference with an aspect of the democratic process in this country would also necessitate some limitation of the principle of parliamentary sovereignty. We shall see below that the Supreme Court's most recent discussions of the role of unwritten principles, though generally suggesting restrictions on the application of unwritten principles as independent limits on legislative authority, also provide an indication of why such limitations on parliamentary sovereignty may be necessary in some circumstances.

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92. *Ibid.* at para 54. See also Chief Justice Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2005 Lord Cooke Lecture delivered at Wellington, New Zealand, 1 December, 2005), [unpublished], online: <http://www.scc-csc.gc.ca/court-cour/ju/spedis/bm05-12-01-eng.asp>.

93. *Babcock*, *supra* note 1 at para. 57.

94. *Jackson*, *supra* note 72 at para. 102.

B. *Imperial Tobacco* and *Charkaoui*

The scope of the application of unwritten constitutional principles was once again addressed by the Supreme Court in *Imperial Tobacco*.[95] In *Imperial Tobacco*, the Supreme Court upheld the constitutionality of provincial legislation that established a cause of action (including specific procedural rules) that would facilitate legal claims launched by the government of British Columbia against tobacco manufacturers for recovery of health care costs linked to cigarette smoking.[96] The new rules allowed the government to bring direct, retroactive claims against the tobacco manufacturers, to rely on aggregate data to support its claims and shifted the burden of proof onto the manufacturers to show that exposure to cigarettes was not caused by the manufacturer and that exposure to cigarettes did not give rise to disease in the population as claimed by the government.[97] Justice Major, writing for the Court, rejected the tobacco manufacturers' arguments that the particular rules implemented by the provincial legislation to govern lawsuits against them were unconstitutional as invalidating the rule of law principle. He did so for several reasons. First, he rejected the notion that the rule of law principle, as articulated by the Supreme Court, could be applied to invalidate legislation based on its content.[98] Justice Major also doubted whether unwritten principles in general could be used to invalidate legislation. Thus, while he admitted that the rule of law principle had normative force, he suggested that that normative force was likely limited to restricting the action of the executive and the judiciary as opposed to the legislature.[99]

Justice Major went on to note that the application of the rule of law principle suggested by the tobacco manufacturers would undermine the legitimacy of judicial review for two reasons. First, he noted that many of the substantive elements of the rule of law principle that were proposed by the tobacco manufacturers were broader versions of rights contained in the *Charter*.[100] As such, to give effect to these sub-

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95. *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, 257 D.L.R. (4th) 193 [*Imperial Tobacco* cited to S.C.R].

96. *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.

97. *Imperial Tobacco*, *supra* note 95 at paras. 10–14. For a critical commentary of the Supreme Court's decision in this case see F.C. Decoste, "Smoked: Tradition and the Rule of Law in *British Columbia v. Imperial Tobacco Ltd.*" (2006) 24:1 Windsor Y.B. Access Just. 327.

98. *Imperial Tobacco*, *supra* note 95 at para. 59. In particular, Justice Major noted that "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation . . . based on its content."

99. *Ibid.* at para. 60, Justice Major stated:

> This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, "unwritten constitutional principles," including the rule of law, "are capable of limiting government actions." See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e. the procedures by which legislation is to be enacted, amended and repealed).

100. *Ibid.* at para. 65.

stantive elements as part of the rule of law principle would undermine the existing written provisions of the Constitution, rendering those written provisions effectively redundant. Second, Justice Major found that application of the rule of law principle as argued by the tobacco manufacturers would undermine the principles of democracy and constitutionalism, since those principles "very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms)."[101] Justice Major went on to note that "the appellants' arguments . . . fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box."[102]

At this point, it is important to note an apparent contradiction in Justice Major's reasoning. On the one hand, Justice Major argued that the Court should not give independent effect to unwritten principles, such as the rule of law, that support broader versions of existing rights. On the other hand, Justice Major implied that legislation should conform with the requirements that flow by "necessary implication"[103] from the written terms of the Constitution, such as judicial independence. However, it must be recalled that the majority judgment of the Supreme Court in the *Provincial Judges' Reference* extended the constitutional protection accorded by the principle of judicial independence beyond the scope of the explicit provisions of the Constitution to include provincial judges operating outside of criminal law settings. The Supreme Court did not regard this broader version of the rights included in the *Charter* to undermine the existing provisions of the *Charter* in the *Provincial Judges' Reference*. Instead, the extension of the existing rights was seen as supplementing, rather than

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101. *Ibid.* at para. 66. It is interesting to note that Justice Major appears to accord equal weight to both "express terms of the Constitution" and "the requirements . . . that flow by necessary implication from those terms." This mirrors the approach advocated by Robin Elliott and by Patrick Monahan concerning the recognition of unwritten constitutional principles. Both authors argue that courts should be more willing to recognize and apply unwritten constitutional principles to fill in gaps in the Constitution where the application of the principles is a "necessary implication" from the organization and text of the Constitution. See Elliot, *supra* note 4 at 83–84. See also Monahan, *supra* note 4 at 76–77.

102. *Imperial Tobacco*, *supra* note 95 at para. 66. For a similar view of the role of the rule of law principle, see Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715.

103. *Imperial Tobacco*, *ibid.*

undermining, the protection of judicial independence that was reflected in the explicit text of the *Constitution Act, 1867* and the *Constitution Act, 1982*.[104]

In the more recent case of *Charkaoui v. Canada (Citizenship and Immigration)*, the Supreme Court acknowledged that Justice Major's discussion of the application of the rule of law principle in *Imperial Tobacco* "leaves room for exceptions."[105] Moreover, despite his near categorical rejection of the power of unwritten principles to invalidate legislation in *Imperial Tobacco*, Justice Major, like Chief Justice McLachlin in the *Babcock* case, noted that legislation may be found to be unconstitutional where it substantially interferes with judicial independence:

> None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in *Babcock*, at para. 57:
>
> > It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.[106]

The decision in *Imperial Tobacco*, like the decision in *Babcock*, thus leaves open the possibility that legislation might be found to be unconstitutional for violating an unwritten constitutional principle. In both *Babcock* and *Imperial Tobacco*, the Supreme Court focused on the potential danger of legislative interference with the relationship between courts and legislatures. But this begs the question why fundamental

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104. *Constitution Act, 1867*, *supra* note 11; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]; *Provincial Judges Reference*, *supra* note 2 at paras. 126–129 and ff. In that case, Chief Justice Lamer extended the scope of protection afforded to the principle of judicial independence beyond the then existing interpretation of section 96 of the *Constitution Act, 1867* and section 11(d) of the *Charter*. As a result, he found that that the protection of judicial independence afforded by section 11(d) of the *Charter* should be extended beyond judges dealing with criminal "offences," as explicitly stated in the text of the section, to also include provincial court judges not seized with criminal law matters. However, the Chief Justice noted that the level of independence enjoyed by provincial court judges may not be the same as that enjoyed by superior court judges. Justice Lamer's approach is an example of inductive reasoning that Mark Walters argues is at the heart of common law constitutionalism. This inductive approach views express constitutional provisions as specific instances or examples of more general principles that can then be used to deduce additional rights or protections. See Walters, "Written Constitutions and Unwritten Constitutionalism," *supra* note 45 at 263 ff.

105. 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 135, 276 D.L.R. (4th) 594 at para. 135 [*Charkaoui* cited to S.C.R.]. See also *British Columbia (A.G.) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at para. 21, 280 D.L.R. (4th) 528 at para. 21, where the Court stated: "in *Imperial Tobacco*, this Court left open the possibility that the rule of law may include additional principles."

106. *Imperial Tobacco*, *supra* note 95 at para. 54.

interferences with the democratic process should not receive the same type of treatment as fundamental interferences with the relationship between the courts and other branches of government. Certainly, it would be difficult to argue that the protection of the judicial process arises by necessary implication from the express terms of the Constitution while protection of the democratic process does not. Textual anchors for the protection of the democratic process include sections 3, 4 and 5 of the *Charter*[107] and sections 17 and 50 of the *Constitution Act, 1867*.[108] Similarly, it would be difficult to sustain an argument that protection of the democratic process must be rooted exclusively in the process itself. Surely, the argument advanced by Justice Major—that protection against arbitrary legislation is found in the ballot box—rings hollow if the results of the ballot box are not representative of the preferences of the electorate.

In my view, the conception of the principle of parliamentary sovereignty articulated by the Supreme Court itself generates an imperative for protection against interferences with the democratic process. In particular, if the ultimate protection against arbitrary legislation is the ballot box, the ballot box itself must be protected. In this approach, it is this representative function of Parliament, and the correlated power of the people to hold Parliament (and through it, the government) accountable, that justify Parliament's claim to authority.[109]

Another way to frame this is to suggest that the principle of parliamentary sovereignty must be balanced against the principle of democracy. Of course, the substantive contents of the democratic principle are themselves contested. At its foundation, however, is the notion that members of the government are elected as representatives of the people. In Canada, there is also general recognition that the core values that are meant to be protected through our representative democratic process and institutions include political participation and accountability.[110] It would be counter-intuitive to apply the principle of parliamentary sovereignty to limit participation of citizens in the political process or, alternatively, to limit the capacity of

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107. *Charter*, *supra* note 104 at ss. 3, 4, 5.

108. *Constitution Act, 1867*, *supra* note 11 at ss. 17 and 50. For a detailed discussion of circumstances in which protection of the democratic process may require more than the protection accorded by these explicit constitutional provisions, see my discussion in Vincent Kazmierski, "Something to Talk About: Is There a *Charter* Right to Access Government Information?" (2008) 31 Dal. L.J. 351. I will return to this issue briefly below.

109. Thus, it may be said that, within this particular articulation of the principle of parliamentary sovereignty, parliamentary sovereignty is properly understood not as a principle in and of itself but as a claim of authority based on a particular aspect of the principle of democracy—the representative nature of our democratic institutions. Such a claim would be rejected by those who argue that the principle of parliamentary sovereignty constitutes a "rule of recognition" and thus requires no internal justification. This debate is beyond the scope of this article.

110. See especially the Supreme Court's discussion of the principle of democracy in the *Quebec Secession Reference*, *supra* note 3 at paras. 61–69.

citizens to hold elected representatives and government officials accountable. It follows that an assertion of parliamentary sovereignty, rooted in the representative function of our democratic institutions, may be limited where the assertion of that sovereignty would undermine the very source of its legitimacy. In other words, the principle of democracy may be applied to limit attempts to undermine the democratic process. In my view, it may even be used to invalidate legislation that substantially interferes with the democratic process.

To date, the Supreme Court has not offered any plausible justification for elevating the principle of judicial independence over other important constitutional principles such as the principle of democracy. As such, it is unclear how the Court could justify applying unwritten constitutional principles to invalidate legislation that imposed substantial interferences on the adjudicative role of the courts while refusing to apply unwritten principles to invalidate legislation that imposed substantial interferences on the representative role of the legislature. Indeed, the motivation behind enforcing the principle of judicial independence and the principle of democracy in either situation is fundamentally the same, namely preventing the government from using its control of the legislature to undermine the limits on its own power. In the case of the principle of judicial independence, the government and the legislature should be restricted from interfering with the ability of the judiciary to act as an independent arbiter of the exercise of government or legislative power. With respect to the principle of democracy, the government and the legislature should be restricted from interfering with the representative function of the legislature, including its role in promoting the capacity of citizens to participate in the political process and to hold their representatives (and through them the government) accountable.

A review of *Babcock*, *Imperial Tobacco* and *Charkaoui* thus suggests that, while the Supreme Court has sought to limit the potential application of unwritten constitutional principles as mechanisms for invalidating legislation, it has left open the possibility that certain principles may be used to invalidate legislation in some circumstances. This is consistent with the common law approach to judicial review in so far as it recognizes that there must be some limitation on the scope of parliamentary supremacy. While the Supreme Court has thus far focused exclusively on the capacity of the principle of judicial independence to invalidate legislation where it substantially interferes with the adjudicative role of the courts, it has offered no principled reason why the principle of democracy could not also be used to invalidate legislation that imposed substantial interference with the democratic process.

V. The Principle of Democracy and the Limits of Parliamentary Sovereignty

The notion that parliamentary sovereignty may be attenuated where the exercise of parliamentary power would threaten the very foundations of our democratic order is supported by a number of Supreme Court cases. It finds some of its earliest roots in the Implied Bill of Rights cases, particularly the *Alberta Press* case. It has also been reinforced in several cases following the entrenchment of the *Charter*.

A. *Reference re Alberta Legislation*[111]

The *Alberta Press* case was the first case to raise the possibility that a right of political speech could be inferred from the *Constitution Act, 1867*.[112] The case involved a reference from the Alberta government that asked the Supreme Court to pronounce on the validity of three provincial bills introduced by Alberta's provincial government in order to implement a system of social credit in the province.[113]

During the course of his decision, Chief Justice Duff considered whether the provincial power to regulate newspapers might be limited in light of the importance of freedom of expression to the democratic process. He stated:

> Some degree of regulation of newspapers everybody would concede to the Provinces. Indeed, there is a very wide field in which the Provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the *B.N.A. Act* and the statutes of the Dominion of Canada.[114]

These *obiter* comments were relied upon by judges of the Supreme Court in a number of subsequent pre-*Charter* cases and became the foundation for an argument that the Constitution mandated limits on legislation that would substantially interfere

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111. [1938] S.C.R. 100, [1938] 2 D.L.R. 81 [*Alberta Press* cited to S.C.R.].

112. *Supra* note 11.

113. The *Alberta Social Credit Act*, S.A. 1937, c. 10 and ancillary legislation, was drafted to create a complex system designed to regulate the credit available in the province in an attempt to increase the standard of living without giving rise to undue inflation. The Social Credit system was viewed by the Alberta government as a replacement for the existing monetary system and included the provision of Alberta Credit to consumers through channels created by the legislation. During the course of considering the three bills specifically referred to it, the Supreme Court found that the *Alberta Social Credit Act*, which was the central legislative measure in the Social Credit scheme, was *ultra vires*. Although they differed over the precise reasons, the various members of the Court ruled that the legislation exceeded the province's jurisdiction over property and civil rights and over matters merely local and private in the province since it established a system of banking and was concerned with the regulation of trade and commerce, both of which fall within the jurisdiction of the federal government. The Court found that the ancillary legislation that was the specific subject of the reference case must also be found *ultra vires*.

114. *Supra* note 111 at 134–35.

with the parliamentary process in Canada.[115] This line of reasoning was taken the furthest by Justice Abbott in concurring reasons in *Switzman v. Elbling*, where he argued that the efficacy of Parliament was so dependent on public debate of important issues that no level of government could "abrogate [the] right of discussion and debate."[116]

B. *O.P.S.E.U. v. Ontario (Attorney General)*

Claims that limits on parliamentary sovereignty could be inferred from the nature of our constitutional order, particularly the parliamentary system it was established to protect, continued after the entrenchment of the *Charter* in cases such as *O.P.S.E.U. v. Ontario (Attorney General)*.[117] *O.P.S.E.U.* involved a challenge to several sections of Ontario's *Public Service Act*[118] on the grounds that they were *ultra vires* the Ontario government. The impugned provisions prohibited civil servants from participating in particular political activities such as running for election to Parliament and canvassing or soliciting funds on behalf of political parties.[119]

In addition to division of powers arguments, the appellants sought to impugn the legislation on the basis of *Charter* grounds. However, the Supreme Court refused to hear the *Charter* arguments. In the alternative, the appellants advanced an argument that the legislation violated fundamental rights to participate in certain political activities. In the course of examining this argument in his reasons, Justice Beetz accepted the basic premise that there are fundamental rights that may be inferred from the Constitution, independent of the *Charter*. Justice Beetz stated:

> Perhaps the appellants' strongest argument was the one based on the existence in Canada of certain fundamental rights to participate in certain political activities. For this argument, they relied on such cases as *Reference re Alberta Legislation* and *Switzman v. Elbling*.
>
> There is no doubt in my mind that the basic structure of our Constitution as established by the *Constitution Act, 1867* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words

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115. *Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337 [*Switzman* cited to S.C.R.]; *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.

116. *Switzman*, *ibid.* at 328. *Contra*: *Canada (A.G.) v. Montreal (City)*, [1978] 2 S.C.R. 770, 84 D.L.R. (3d) 420.

117. [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1 [*O.P.S.E.U.* cited to S.C.R.].

118. R.S.O. 1970, c. 386.

119. Justice Beetz, writing for the majority of the Supreme Court, concluded that the impugned legislation could be considered as amendments to the Ontario Constitution. He found that the impugned sections were constitutional in nature in so far as they imposed duties on members of a branch of government in order to implement the principle of impartiality of the public service. He identified this principle as an essential prerequisite of responsible government. Justice Beetz also found that the provisions fell within the provincial government's jurisdiction over the establishment and tenure of provincial offices pursuant to section 92(24) of the *Constitution Act, 1867*. He held that the provisions did not impinge on federal jurisdiction even though they related to both provincial and federal elections. Rather, he found that they aimed to reinforce the operation of responsible government within a federal framework.

> of Duff C.J.C. in *Reference re Alberta Legislation* at p. 107 D.L.R., p. 133 S.C.R., "such institutions derive their efficacy from the free public discussion of affairs . . ." and, in those of Abbott J. in *Switzman v. Elbling* at p. 371 D.L.R., p. 328 S.C.R., neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate." Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.[120]

Justice Beetz thus found, in *obiter,* that the basic constitutional structure, which includes freely elected legislatures functioning in an environment of free discussion of political issues, must be protected from substantial interference. His comments concerning the inability of either Parliament or the provincial legislatures to substantially interfere with the operation of a basic constitutional structure supporting political participation are strikingly similar to the comments made by Sir John Laws, noted earlier.

Interestingly, in his minority opinion, Chief Justice Dickson also discussed the existence of constitutional principles. He noted that several decisions of the Supreme Court "manifest a clear recognition that freedom of speech and expression is a fundamental animating value in the Canadian constitutional system."[121] However, Chief Justice Dickson was quick to point out that no one constitutional principle should be held as the ultimate constitutional principle. Different constitutional principles may come into conflict with each other and must each be accorded appropriate respect. He stated:

> It must not be forgotten, however, that no single value, no matter how exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which may sometimes conflict. It is for that reason that the passage in *Fraser* upon which the appellants rely so heavily is followed immediately by these words, at p. 128 D.L.R., p. 463 S.C.R.:
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> > But [freedom of speech] is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values.[122]

Chief Justice Dickson's warning applies as readily to the principle of parliamentary sovereignty as it does to the principle of freedom of expression. Neither

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120. *O.P.S.E.U., supra* note 117 at paras. 143–44. Justice Beetz concluded that the argument based on the Implied Bill of Rights cases did not apply in this case because the *Public Service Act* only incidentally affected provincial and federal elections.

121. *O.P.S.E.U., supra* note 117 at para. 33.

122. *Ibid.* at para. 34.

principle may be taken as absolute, but rather each must be understood in light of the other and in light of its role in promoting the democratic system of governance that is the ultimate foundation of the Canadian Constitution. This balancing process is required under the Supreme Court's approach to the application of unwritten constitutional principles.[123]

C. Reference Cases

O.P.S.E.U. was not the only case in which members of the Supreme Court have favourably commented on the limitations on parliamentary sovereignty suggested by the Implied Bill of Rights approach. In the *Provincial Judges Reference*, Chief Justice Lamer noted the approach adopted in the Implied Bill of Rights cases and pointed out that the approach was based on the recognition that the Court could prescribe limits on government's ability to "undermine the mechanisms of political accountability."[124]

Similarly, in the *Patriation Reference,* Justices Martland and Ritchie noted that, at times, the Supreme Court has had to consider issues for which the text of the Constitution provided no answer. In such situations, they found, the Court "denied the assertion of any power which would offend against the basic principles of the Constitution."[125] Justices Martland and Ritchie themselves relied on the approach adopted by Chief Justice Duff in *Alberta Press Reference*. This approach held that "the powers requisite for the protection of the constitution itself arise by necessary implication from the B.N.A. Act as a whole. . . ."[126] Justices Martland and Ritchie noted that the approach adopted by Chief Justice Duff in the *Alberta Press* case was an example of "judicially developed legal principles and doctrines" that had been "accorded full legal force in the sense of being employed to strike down legislative enactments."[127] In the *Quebec Secession Reference*, the Supreme Court endorsed this view that such legal principles, derived from the basic structure of the Constitution, may have full legal force.[128]

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123. *Quebec Secession Reference*, *supra* note 3 at paras. 49, 91–93.

124. *Provincial Judges Reference*, *supra* note 2 at para. 103. The Chief Justice stated:

> In this way, the preamble's recognition of the democratic nature of Parliamentary governance has been used by some members of the Court to fashion an implied bill of rights, in the absence of any express indication to this effect in the constitutional text. This has been done, in my opinion, out of a recognition that political institutions are fundamental to the "basic structure of our Constitution" (*O.P.S.E.U.*, *supra* at p. 57) and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy.

125. *Reference Re Resolution to Amend the Constitution,* [1981] 1 S.C.R. 753 at 841 (*sub nom. Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*), 125 D.L.R. (3d) 1 at 73 [*Patriation Reference* cited to S.C.R.].

126. *Alberta Press*, *supra* note 111 at 133–34.

127. *Patriation Reference*, *supra* note 125 at 844–45.

128. *Quebec Secession Reference*, *supra* note 3 at para. 54.

The recognition that the courts have the power to restrict the government from interfering with the basic democratic structures established by the Constitution is also consistent with the approach to *Charter* interpretation advocated in the Chief Justice's majority reasons in *Sauvé v. Canada (Chief Electoral Officer)*.[129] In considering whether denying the vote to prisoners serving sentences of two years or more violated the right to vote protected by section 3 of the *Charter*, Chief Justice McLachlin emphasized the fundamental importance of the right to vote to the democratic framework established by the Constitution. She went on to underline the importance of judicial protection of such fundamental aspects of the democratic framework:

> The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.[130]

The above cases suggest that parliamentary sovereignty may be limited where legislation threatens fundamental elements of the democratic process. The mechanisms of political participation and democratic accountability are basic structures of the Constitution, which the courts must vigilantly protect. Fundamental interferences with these basic structures must be rejected by the judiciary; this is not a matter of judicial discretion, but rather is a duty imposed on judges by the Constitution. Chief Justice McLachlin's reasons in *Sauvé* focus on the duty imposed on courts by the *Charter*. However, the passages cited above from *O.P.S.E.U.*, the *Patriation Reference*, the *Provincial Judges Reference*, and the *Quebec Secession Reference* emphasize the fact that the important institutional role the courts must play in ensuring that legislatures do not undermine the very source of their legitimacy is one that extends beyond protecting the rights explicitly set out in the *Charter*.

Admittedly, in Canada, much of the protection of the democratic process may be achieved through the application of written provisions of the Constitution, particularly, sections 2 to 5 of the *Charter*. As such, the need to rely on the principle of democracy as an independent limitation on legislative interferences with the democratic process is likely to be rare. However, there are areas where the democratic process may remain vulnerable to attack. One example is the absence of explicit con-

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129. 2002 SCC 68, [2002] 3 S.C.R. 519, 168 C.C.C. (3d) 449 [*Sauvé* cited to S.C.R.].
130. *Ibid.* at para. 15.

stitutional protection for access to government information, which is widely regarded as crucial for meaningful participation in the democratic process. To date, the right to vote protected by section 3 of the *Charter* has not been applied by the Supreme Court to protect access to government information. However, it would be inconceivable for a representative democracy to function effectively if access to government information was completely eliminated or even significantly constrained.[131] For example, it is difficult to see how voters could make meaningful choices when selecting their political representatives unless they have access to sufficient information about both the different candidates (and their parties) and about the conduct of the government.

I have argued elsewhere that the scope of section 3 of the *Charter* should be interpreted to protect access to government information necessary to ensure that voters can make informed choices in the electoral process.[132] Such an extension of the scope of section 3 beyond the limits of its historical application would use the principle of democracy to build on the Supreme Court's existing jurisprudence and its identification of the role of section 3 in ensuring meaningful democratic participation.[133] Yet even the extension of section 3 to protect access to government information necessary to ensure that citizens can make informed electoral decisions may leave access to government information unprotected in many instances, particularly if the protection of section 3 is limited to protecting access in electoral contexts alone.

Access to government information is also essential to ensure that the elected representatives are able to effectively hold the government to account between elections. The notion of responsible government becomes meaningless if the members of the legislature do not have access to sufficient information to judge whether they continue to have confidence in the cabinet and prime minister. The imperative of access to government information extends beyond information necessary to inform the votes of citizens to information necessary for the proper functioning of other mechanisms of accountability including the day-to-day parliamentary process and parliamentary committees. It also extends to other mechanisms of accountability including the work of Officers of Parliament and commissions of inquiry.

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131. For a discussion of the importance of access to government information to democratic governance see: Alasdair Roberts, "Structural Pluralism and the Right to Information" (2001) 51 U.T.L.J. 243; Gregory Tardi, *The Law of Democratic Governing: Principles (Vol. 1)* (Toronto: Thomson Carswell, 2004) at 38; Craig Forcese, "Clouding Accountability: Canada's Government Secrecy and National Security Law 'Complex'" (2004–2005) 36:1 Ottawa L. Rev. 49 at paras. 30–31; Kazmierski, *supra* note 108. A more detailed discussion of this issue is beyond the scope of this article.

132. Kazmierski, *supra* note 108.

133. See especially Justice Iacobucci's majority reasons in *Figueroa v. Canada*, 2003 SCC 37, [2003] 1 S.C.R. 912 at paras. 19–37, 227 D.L.R. (4th) 1.

There are numerous legislative restrictions that may be relied upon by government to impede access to information deemed necessary to hold government to account outside of the electoral process.[134] While most existing legislative restrictions on access would likely survive constitutional scrutiny, the far greater concern is that more severe restrictions on access may be imposed in the future.[135] It is not at all certain that section 3 of the *Charter* will be applied by the courts to protect against such restrictions on access to information in non-electoral contexts, although I have argued that it should. Similarly, the protection of access to information through section 2(b) of the *Charter* remains uncertain, although the Supreme Court's recent decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* suggests the Court may protect access to information as a derivative right under section 2(b) in limited circumstances.[136] Again, while I have argued that section 2(b) *should* be interpreted to protect access to government information, the limits of the existing jurisprudence must be accounted for.

The limits suggested by existing *Charter* jurisprudence highlight the access gap in the explicit terms of the Constitution. If section 3 is restricted to protect only the meaningfulness of political participation through the formal electoral process and section 2(b) is narrowly applied to protect against government restrictions on expression, then legislative restrictions on access to government information will escape *Charter* scrutiny in many contexts. By contrast, the approach advocated in this

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134. See e.g. *Access to Information Act*, R.S.C. 1985, c. A-1, ss. 14, 15, 21, 69 [*Access Act*]; *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 36–38, particularly section 38.13. Robert Walsh, Law Clerk and Parliamentary Counsel, has argued that parliamentary privilege likely trumps the application of legislation to restrict the power of parliamentary committees to request the production of documents by government officials. Nonetheless, government ministers have publicly stated that the government is restricted from disclosing information to the House of Commons Special Committee on the Canadian Mission in Afghanistan by "legal restrictions," including restrictions imposed by the *Canada Evidence Act*. See letter from Robert Walsh to the Honourable Ujjal Dosanjh, December 7, 2009, online: CBC News <http://www.cbc.ca/canada/story/2009/12/08-/walsh-letter-dosanjh008.html>. For the ruling of the Speaker of the House of Commons on this issue see *House of Commons Debates*, No. 034, (27 April 2010) at 2039 (Hon. Peter Milliken).

135. For a discussion of recent attempts to increase restrictions on access to government information in Canada, see Stanley L. Tromp, *Fallen Behind: Canada's Access to Information Act in the World*, Context (September 2008), online: Canadian FOI Resource Website <http://www3.telus.net/index100/foi> at 24–28; see also Kazmierski, *supra* note 108 at note 1.

136. 2010 SCC 23. The decision in this case was released shortly before publication of this article. As such, the impact of the decision on access rights is very difficult to predict. It is also worth noting that the Court's decision identified very strict preconditions that must be met before a denial of access to information could be recognized as an infringement of freedom of expression. Interestingly, the Court's general discussion of the protection of access to information under s. 2(b) was extremely brief (spanning only ten paragraphs) and avoided many of the arguments raised by the parties. Notably, the decision considered the importance of protecting access to information without direct mention of the principle of democracy; it also effectively ignored the debate about whether requiring access to information would amount to protection of a positive right.

article recognizes that the protection of the democratic process extends beyond the strict application of the written provisions of the Constitution. As such, it provides that, even if the explicit provisions of the *Charter* do not protect access to the information necessary for the democratic process to function effectively, the principle of democracy may stand ready to do so.

VI. CONCLUSION

The Supreme Court's renewed interest in unwritten constitutional principles has highlighted the continued relevance of the principle of parliamentary sovereignty within our constitutional framework. Undoubtedly, the principle had lost much of its impact after the entrenchment of the *Constitution Act, 1982*, complete with a *Canadian Charter of Rights and Freedoms*, and a clause declaring the Constitution to be the supreme law of Canada.[137] However, claims that unwritten constitutional principles might be applied to limit legislation have inspired judges to explicitly explore the ways in which the principle of parliamentary sovereignty continues to operate in areas of jurisdiction not included within the ambit of the *Charter*. In many cases, Canadian judges have relied on the application of the principle of parliamentary sovereignty to reject claims to limit legislation through the application of other unwritten constitutional principles. These cases may seem, at first reading, to restrict the normative scope of unwritten constitutional principles as independent limits on legislation. However, in my view the application of the principle of parliamentary sovereignty in these cases should be understood in the broader context of what may be called a common law approach to the role of unwritten principles in constitutional interpretation.

This common law approach, which has been nurtured in Great Britain but is by no means limited to the British context, includes two important components. First, the common law approach holds that courts play an important role in identifying and applying fundamental principles within the constitutional framework. Second, the common law approach appreciates the importance of the principle of parliamentary sovereignty while also recognizing the need to protect other fundamental principles, including those that protect the democratic process. As such, the common law approach rejects an absolute conception of parliamentary sovereignty on the basis that such an absolute conception is inconsistent with modern conceptions of democratic governance.

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137. *Supra* note 104.

Canadian courts have engaged this common law approach when considering the application of unwritten constitutional principles. Thus, while emphasizing the continued importance of the principle of parliamentary sovereignty, Canadian judges have acknowledged that judges might recognize limits on parliamentary sovereignty. Although Canadian courts have not expressly articulated such limitations on parliamentary sovereignty in recent cases, the need to protect the fundamental principles that support the democratic process has been expressed in a number of cases decided by the Supreme Court. In addition, the Supreme Court's articulation of the principle of parliamentary sovereignty is explicitly linked to the importance of legislatures as representative institutions within the democratic process. As such, the strength and legitimacy of the principle of parliamentary sovereignty, as it has been articulated by the Court, is ultimately bound to the capacity of legislatures to function effectively as part of the democratic process. Legislation that substantially interferes with the effectiveness of the democratic process may thereby undermine the legitimacy of the legislature itself. Such legislation should be subject to limitations imposed by judges applying the principle of democracy. In the vast majority of cases, this will be achieved through the application of explicit provisions of the *Charter*. However, in those rare cases where explicit constitutional provisions are not applicable, courts may also rely on the principle of democracy to restrict attempts by the government or legislature to substantially interfere with the democratic process. In the end, the principle of parliamentary sovereignty may continue to allow legislatures to enact draconian laws outside of the reach of the *Charter*, but it cannot be allowed to justify despotic ones.