III. SOCIAL CONFLICT AND JUDICIAL DECISION-MAKING

The question we examine in this section of the materials is how courts can and should decide cases in circumstances of intense political controversy—circumstances where the case grows out of an ongoing controversy that cannot be settled by a judicial decision. Courts asked to declare rights and craft remedies in such circumstances can expect to face serious challenges to their legal authority. What is the proper course for a constitutional court to pursue in such contexts?

One possibility is that courts should simply announce the law without regard to political consequences. Thus Justice Scalia has asserted, "[t]o expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do." In the same spirit: "It is contrary to the ideal of justice for a court to take into account the reaction to its rulings, and the constitutional guarantees of independence enjoyed by federal judges are designed to immunize them from these types of considerations. The ideal is for judges to decide based only on the merits of the case before them. *Fiat justitia, ruat cœlum*, even if, when the heavens descend, the wrath of the world is visited upon the deciding judges."

George Wythe, sitting on the Virginia Supreme Court in 1782, famously proclaimed that if the legislature were to attempt an unconstitutional act, "I shall not hesitate, sitting in this place, to say. . . *Fiat justitia, ruat cœlum*; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further." These ideals have without doubt inspired judges throughout the centuries. They imply that, as Justice Barak has repeatedly said, "law is everywhere," and that the first and only obligation of a judge is to declare the law.

There is another view of the matter, however, which is, as Stephen Ellman has written, that "courts write in part to persuade, and the demands and conventions of persuasion constrain what they say. . . . The [United States Supreme] Court has no armies, and its power rests on the assent of those who do, and beyond that on the support of the people of the nation. If

the Court can justify its decisions in terms that are more familiar, more courteous and more palatable than the considerations that might in fact be uppermost in the judges' minds, perhaps it should do so." Ellman continues:

> So, for example, Chief Justice Earl Warren opened the Justices' deliberations following the re-argument of *Brown v. Board of Education* in 1953 by making clear that he believed segregation, and *Plessy*, could only be upheld on the basis of a belief in the inferiority of black people. That understanding, however, is not avowed in the *Brown* decision; there, Warren carefully says just that the separation of black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"—a powerful indictment, but not as accusatory as the point he had made in conference. Warren explicitly aimed to be "non-accusatory," in fact, and *Brown* carefully steers clear of any imputation of malign motives to the South. *Brown* does not even contain an explicit finding of discriminatory intent. The same phenomenon is at work whenever judges recognize their own freedom to shape the law, and exercise it, but do not declare it, and instead couch their innovations in the language of precedent and logical compulsion.[*]

As Neal Devins and Louis Fisher have remarked: "[F]or a Court that wants to maximize its power and legitimacy, taking social and political forces into account is an act of necessity, not cowardice. . . . The Supreme Court may be the ultimate interpreter in a particular case, but not in the larger social issues of which that case is a reflection."[**] Deciding cases in circumstances of ongoing social conflict requires accommodation and compromise, Devins and Fisher observe:

> It is sometimes argued that courts operate on principle while the rest of government is satisfied with compromises. This argument is sheer folly. A multimember Court, like government, gropes incrementally towards consensus and

[*] Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741, 743-45 (2004).

[**] Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 96 (1998).

> decision through compromise, expediency, and ad hoc actions. "No good society," as Alexander Bickel observed, "can be unprincipled; and no viable society can be principle-ridden." . . . [T]he Court's legitimacy—indeed, the Constitution's—must ultimately spring from public acceptance, for ours is a "political system ostensibly based on consent."[*]

In this section we examine the tension between these two views of constitutional adjudication. Do judges choose between them? Or do *both* understandings of role shape the ways judges articulate rights and craft remedies? Is this a matter of temperament? Philosophy? Or a context-dependent judgment about circumstances?

We examine three distinct pathways by which courts mediate between these two perspectives. The first concerns the definition of constitutional rights. Under conditions of extreme controversy, courts not infrequently define the substance of constitutional rights in ways that mediate between law and exigent political circumstances. The second concerns constitutional remedies, which are sometimes deployed so as to perform a similar function. And the third concerns the legal structuring of controversy.

A. Defining Constitutional Rights

In situations of extreme social conflict, courts often must carefully characterize the substance of the rights that they are willing to enforce. There are many judicial techniques for accomplishing this task. Sometimes courts build prudential considerations into their very definition of substantive constitutional rights. The general test of "proportionality" seems a virtual invitation to this approach. Sometimes, by contrast, courts describe the scope of rights so as to circumscribe their potential social impact. Compare, in this regard, the distinct methods of *Beit Sourik* and *Mabo.*

[*] *Id.* at 97-8.

Beit Sourik Village Council v. The Government of Israel & Commander of the IDF Forces in the West Bank*

The Supreme Court Sitting as the High Court of Justice
HCJ 2056/04 [2004]

PRESIDENT A. BARAK. The Commander of the Israeli Defense Forces ("IDF") in Judea and Samaria issued orders to take possession of plots of land in the area of Judea and Samaria. The purpose of the seizure was to erect a separation fence on the land. The question before us is whether the orders and the fence are legal.

Background

[1] Since 1967, Israel has been holding the areas of Judea and Samaria [hereinafter—the area] in belligerent occupation. . . . [In 2000] the Israeli-Palestinian conflict reached new heights of violence. . . . [T]he Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area and in Israel. They are directed against citizens and soldiers, men and women, elderly people and infants, regular citizens and public figures. Terror attacks are carried out everywhere: in public transportation, in shopping centers and markets, in coffee houses and in restaurants. Terror organizations use gunfire attacks, suicide attacks, mortar fire, Katyusha rocket fire, and car bombs. . . . The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. . . .

[2] These terror acts have caused Israel to take security precautions on several levels. The government, for example, decided to carry out various military operations, such as operation "Defensive Wall" (March 2002) and operation "Determined Path" (June 2002). . . . Despite all these measures, the terror did not come to an end. The attacks did not cease. Innocent people paid with both life and limb. This is the background behind the decision to construct the separation fence. . . .

The Decision to Construct the Separation Fence

[3] The Ministers' Committee for National Security reached a decision (on April 14, 2002) regarding deployment in the "Seam Area" between Israel and the area. [Note to English translation: the "Seam Area" is roughly the interface between Judea and Samaria on the one hand, and

* English translation available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf

Israel as per the 1949 armistice agreement on the other.] . . . .

The Separation Fence

[7] The "Seam" obstacle is composed of several components. In its center stands a "smart" fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50–70 meters. Due to constraints, a narrower obstacle, which includes only the components supporting the electronic fence, will be constructed in specific areas. In certain cases the obstacle can reach a width of 100 meters, due to topographical conditions. In the area relevant to this petition, the width of the obstacle will not exceed 35 meters, except in places where a wider obstacle is necessary for topographical reasons. . . .

The Petition

[9] The petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A'anan, Beit Likia, Beit Ajaza and Beit Daku. . . .They argue that the orders of seizure are illegal. . . .The injury to petitioners, they argue, is severe and unbearable. . . . Access to these agricultural lands will become difficult and even impossible. Petitioners' ability to go from place to place will depend on a bureaucratic permit regime which is labyrinthine, complex, and burdensome. Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. Moreover, the separation fence injures not only landowners to whom the orders of seizure apply; the lives of 35,000 village residents will be disrupted. The separation fence will harm the villages' ability to develop and expand. The access roads to the urban centers of Ramallah and Bir Naballa will be blocked off. Access to medical and other services in East

Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centers, and of students to universities, will be impaired. Petitioners argue that these injuries cannot be justified. . . .

[10] [F]irst, petitioners claim that respondent lacks the authority to issue the orders of seizure. . . . The separation fence serves the needs of the occupying power and not the needs of the occupied area. The objective of the fence is to prevent the infiltration of terrorists into Israel; as such, the fence is not intended to serve the interests of the local population in the occupied area, or the needs of the occupying power in the occupied area. Moreover, military necessity does not require construction of the separation fence along the planned route. The security arguments guiding respondents disguise the real objective: the annexation of areas to Israel. . . .

[11] Third, [petitioners argue that] the separation fence violates many fundamental rights of the local inhabitants, illegally and without authority. . . .

The Response to the Petition

[12] Respondents, in their first response, argued that the orders of seizure and the route through which the separation fence passes are legal. The separation fence is a project of utmost national importance. Israel is in the midst of actual combat against a wave of terror, supported by the Palestinian population and leadership. At issue are the lives of the citizens and residents of Israel, who are threatened by terrorists who infiltrate into the territory of Israel. At issue are the lives of Israeli citizens residing in the area. . . .

[13] Respondents explain that, in planning the route of the separation fence, great weight was given to the interests of the residents of the area, in order to minimize, to the extent possible, the injury to them. . . .

[14] Respondents claim that the process of seizure was legal. The seizure was brought to the knowledge of petitioners, and they were given the opportunity to participate in a survey and to submit appeals. The contractors responsible for building the obstacle are instructed to move (as opposed to cutting down) trees wherever possible. . . .

[15] Respondents' position is that the orders of seizure are legal. The

power to seize land for the obstacle is a consequence of the natural right of the State of Israel to defend herself against threats from outside her borders. . . .

[28] We examined Petitioners' arguments, and have come to the conclusion, based upon the facts before us, that the fence is motivated by security concerns.

[32] Petitioners' second argument is that the construction of the fence in the area is based, in large part, on the seizure of land privately owned by local inhabitants, that this seizure is illegal, and that therefore the military commander has no authority to construct the obstacle. We cannot accept this argument. . . . Regarding the central question raised before us, our opinion is that the military commander is authorized—by the international law applicable to an area under belligerent occupation—to take possession of land, if this is necessary for the needs of the army. . . .

The Route of the Separation Fence

[33] The focus of this petition is the legality of the route chosen for the construction of the separation fence. This question stands on its own, and it requires a straightforward, real answer. It is not sufficient that the fence be motivated by security considerations, as opposed to political considerations. The military commander is not at liberty to pursue, in the area he holds in belligerent occupation, every activity primarily motivated by security considerations. The discretion of the military commander is restricted by the normative system in which he acts, which is the source of his authority. Indeed, the military commander is not the sovereign in the occupied territory. He must act within the law that establishes his authority in a situation of belligerent occupation. What is the content of this law? . . .

In *Zaloom v. The IDF Commander for the Area of Judea and Samaria*, I held:

> In using their authority, Respondents must consider, on one hand, security considerations and, on the other hand, the interests of the civilian population. They must achieve a balance between these different considerations. . . .

Proportionality

[36] The problem of balancing security and liberty is not specific to the discretion of a military commander of an area under belligerent

occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, which include reasonableness and good faith. . . .

[37] Proportionality is recognized today as a general principle of international law. . . .

The Meaning of Proportionality and its Elements

[40] According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize its governmental objective are of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is attempted, and the means used to achieve it. This principle is a general one. It requires application. As such, both in international law, which deals with different national systems—from both the common law family (such as Canada) and the continental family (such as Germany)—as well as in domestic Israeli law, three subtests grant specific content to the principle of proportionality. . . .

[41] The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective that the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the "appropriate means" or "rational means" test. According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means that can be used to achieve the objective, the least injurious means must be used. This is the "least injurious means" test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the "proportionate means" test (or proportionality "in the narrow sense.") The test of proportionality "in the narrow sense" is commonly applied with "absolute values," by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a "relative manner." According to this approach, the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act—by employing alternate means, for example—

ensures a substantial reduction in the injury caused by the administrative act.

[42] It is possible to say that the means used by an administrative authority are proportionate only if all three subtests are satisfied. . . .

[48] The second question regards the proportionality of the route of the separation fence, as determined by the military commander. This question raises no problems in the field of military considerations. Rather, it relates to the severity of the injury caused to the local inhabitants by the route decided upon by the military commander. Within the context of this question, we are dealing not with military considerations, but rather with humanitarian considerations. The question is not the proportionality of different military considerations. The question is the proportionality between the military consideration and the humanitarian consideration. The question is not whether to prefer the military approach of the military commander to that of the experts of the Council for Peace and Security. The question is whether the route of the separation fence, according to the approach of the military commander, is proportionate. The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury was proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court. I dealt with this issue in *Physicians for Human Rights* (2004), stating:

> Judicial review does not examine the wisdom of the decision to engage in military activity. In exercising judicial review, we examine the legality of the military activity. Therefore, we assume that the military activity that took place in Rafah was necessary from a military standpoint. The question before us is whether this military activity satisfies the national and international standards that determine the legality of that activity. The fact that the activity is necessary on the military plane does not mean that it is lawful on the legal plane. Indeed, we do not substitute our discretion for that of the military commander's, as far as it concerns military considerations. That is his expertise. We examine the results on the plane of the humanitarian law. That is our expertise. . . .

From the General to the Specific

[49] The key question before us is whether the route of the separation fence is proportionate. The question is: is the injury to local inhabitants by the separation fence proportionate, or is it possible to satisfy the main security concerns while establishing a fence route whose injury to the local inhabitants is lesser and, as such, proportionate? The separation fence that is the subject of this petition is approximately forty kilometers long. Its proportionality varies according to local conditions. We shall examine its proportionality according to the various orders that were issued for the construction of different parts of the fence. . . .

[61] These injuries are not proportionate. They can be substantially decreased by an alternate route, either the route presented by the experts of the Council for Peace and Security, or another route set out by the military commander. Such an alternate route exists. It is not a figment of the imagination. It was presented before us. . . .

[85] The task of the military commander is not easy. He must delicately balance security needs with the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

Epilogue

[86] Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently struck by ruthless terror. We are aware of the killing and destruction wrought by terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There

is no security without law. Satisfying the provisions of the law is an aspect of national security. I discussed this point in *The Public Committee against Torture in Israel v. The Government of Israel* (1999):

> We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy—she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.

That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law will lead the state to the security so yearned for.

Alec Stone Sweet & Jud Mathews
Proportionality Balancing and Global Constitutionalism[*]

[Proportional Representation (PA)] is a doctrinal construction: It emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice. For our purposes, it is a decision-making procedure, an "analytical structure," that judges employ to deal with tensions between two pleaded constitutional "values" or "interests." In the paradigmatic situation, PA is triggered once a *prima facie* case has been made to the effect that a right has been infringed by a government measure. In its usual form, the analysis involves three steps, each involving a test. First, in the "legitimacy" or "suitability" stage, the judge confirms that the government is authorized to take a measure, in pursuit of some collective good, and verifies that the means adopted by the government are rationally related to stated policy objectives. The second step, "necessity," has more bite. The core of necessity analysis is the deployment of a "least-restrictive means" [LRM] test: the judge ensures that the measure does not curtail the

[*] *Excerpted from* Yale Law Sch. Faculty Scholarship Series Paper No. 14, *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1013&context=yale/fss. A version of this article is forthcoming in 47 COLUM. J. TRANSNAT'L L. (2008).

right any more than is necessary for the government to achieve its stated goals. PA is a balancing framework: if the government's measure fails either of these first two tests, the act is *per se disproportionate* (it is outweighed by the pleaded right), and is therefore unconstitutional. The last stage, "balancing in the strict sense," is also called "proportionality in the narrow sense." If the measure under review passes the first two tests, the judge proceeds to balancing *stricto senso*. In the balancing phase, the judge weighs the benefits of the act—which has already been determined to have been "narrowly tailored," in American parlance—against the costs incurred by infringement of the right, and then determines which "constitutional value" shall prevail, in light of the facts.

In many polities today, proportionality is treated as a taken-for-granted feature of constitutionalism, or a criterion for the perfection of the "rule of law." For us, this "taken-for-granted" quality is an outcome of a social process that, like any social process, can and should be examined empirically. Treating PA as a natural, inherent principle of the legal system disguises the open-ended process through which it emerged, and downplays the controversies that PA routinely occasions among judges, elected officials, and scholars. The source of the anxiety is clear: however inherently "judicial" one takes the procedure to be, the LRM and balancing stages of PA fully expose judges as lawmakers. Indeed, the framework is typically debated from two opposed standpoints. Some see it as dangerous: judges may defer too much to legislators and executives; they may even "balance rights away." Others see PA as being too restrictive of policy discretion, inevitably casting judges as masters of the policy processes under review. Proponents defend proportionality against attacks from both sides. Although we will join this debate, it is important to emphasize that PA is an *analytical procedure*—it does not, in itself, produce substantive outcomes. That point made, judges also use proportionality as a foundation on which to build doctrine, the "argumentation frameworks" that govern rights litigation. . . .

D. Balancing, Argumentation, Proportionality

One of our claims is that PA has provided an important *doctrinal* underpinning for the rights-based expansion of judicial authority across the globe. In the rest of this paper, we will portray it as a type of operating system that constitutional judges employ in pursuit of two overlapping, general goals:

- to manage potentially explosive environments, given the politically sensitive nature of rights review.

- to establish, and then reinforce, the salience of constitutional deliberation and adjudication within the greater political system.

PA provides basic materials for achieving both objectives, in a relatively standardized, easy-to-use form. Under conditions of supremacy and a steady case load, a trustee court has powerful reasons to seek to draw the major actors in the polity into the processes it governs, and to induce them to use the modes of deliberation that it curates. In so far as they do, political elites will help to legitimize the court and its doctrines, despite or because of controversy about supremacy.

1. Balancing

A basic task of constitutional judges is to resolve intra-constitutional conflict: legal disputes in which each party pleads a constitutional norm or value against the other. Where the tension between two interests of constitutional rank cannot be interpreted away, a court could develop a conflict rule that would determine which interest prevails. In fact, most judges are loath to build *intra*-constitutional hierarchies of norms. Instead, they typically announce that no right is absolute, which thrusts them into a balancing mode.

When it comes to constitutional adjudication, balancing can never be dissociated from lawmaking: it requires judges to behave as legislators do, or to sit in judgment of a prior act of balancing performed by elected officials. We nonetheless argue that the move to balancing offers important advantages. Consider the alternatives. A court could declare that rights are absolute, or that one right must always prevail over other constitutional values, including other rights provisions. Creating such hierarchies would, in effect, *constitutionalize* winners and losers. Further, we know of no defensible procedure for doing so other than freezing in place a prior act of balancing: in so far as judges gave reasons for conferring a higher status on one value relative to another, they have in fact balanced. A court could also generate precedent-based covering rules for determining when a right is or is not in play, or under what circumstances one interest prevails against another. The procedure cannot save the court from charges that it legislates or balances. On the contrary, such a court dons the mantle of the supreme legislator whose self-appointed task is to elaborate what is, in effect, a

constitutional code.

A court that explicitly acknowledges that balancing inheres in rights adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law. It also makes itself better off strategically, relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally legitimate norm or value; (b) that, *a priori*, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts. . . .

3. Proportionality

PA is an argumentation framework, seemingly tailor-made for dealing with intraconstitutional tensions (the indeterminacy of rights adjudication). The framework clearly indicates to litigating parties the type and sequence of arguments that can and must be made, and the path through which the judges will reason to their decision. Along this path, PA provides ample occasion for the balancing court to express its respect, even reverence, for the relative positions of each of the parties. This latter point is crucial. In situations where the judges can not avoid declaring a winner, they can at least make a series of ritual bows to the losing party. Indeed, the court that moves to balancing *stricto senso* is stating, in effect, that each side has some significant constitutional right on its side, but that the court must, nevertheless, take a decision. The court can then credibly claim that it shares some of the loser's distress in the outcome.

E. The Structure of Constitutional Rights

In contemporary rights adjudication, balancing holds sway for three basic reasons. First, rights provisions are relatively open-ended norms, that is, they are both indeterminate and in danger of being construed in an inflexible and partisan manner. As discussed, judges have good reasons to formalize a balancing procedure, and to impose this on litigating parties. PA is such a formalization.

Second, most post-World War II constitutions state unambiguously that most rights provisions are not absolute but, rather, are capable of being limited by another value of constitutional rank. In fact, limitation clauses

are the norm. Take the following examples:

- In Germany (1949), article 2.1 of the Basic Law (GG) states that "everyone shall have the right to the free development of her personality in so far as she does not violate the rights of others or offend the constitutional order or moral code."

- In the Spanish Constitution of 1978, article 20.1.a proclaims the right to free expression, which article 20.4 then "delimits" with reference to "other rights, including personal honor and privacy." Article 33.1 declares the right to private property, while article 33.3 provides for the restriction of property rights for "public benefit," as determined by statute.

- Section 1 of the Canadian Constitution Act (1982) declares that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[I]n each of these settings, constitutional judges have adopted PA to manage the intra-constitutional conflicts associated with rights. Put differently, judges do not develop doctrines that enable them to "enforce" limitation clauses; a law is struck down when it fails the test of proportionality. In Canada, judges apply a least-restrictive means test when they are asked to enforce the "reasonable limits" prescription of Art. 1 of the Constitution Act. In South Africa, LRM testing is required by the Bill of Rights itself, but the founders based this provision on a prior ruling of the Constitutional Court to adopt proportionality as an overarching principle of rights adjudication. Across post-1989 Central Europe, PA is automatically activated whenever the "necessity," or "essential" nature, or "reasonableness," of governmental measures is challenged under a rights provision.

A third reason: many modern constitutions (or constitutional theory or doctrine) require state organs, including the legislature and the executive, to work to protect or enhance the enjoyment of rights. It is a core function of constitutional and supreme courts to supervise this activity. In such situations, governments will develop arguments to the effect that their measures are not opposed to rights, but in fact stand-in for a specific right. The classic conflict—between right X and the will of the "majority" as

expressed in a statute—is recast, as one between right X and a government action designed to facilitate the development or enjoyment of right Y. Courts can, and often do, interpret these disputes as tensions between two rights. Apart from adopting a formal balancing framework such as PA, we do not see how a court could position itself better to deal with such cases. . . .

F. Balancing as Optimization

Robert Alexy's book, *A Theory of Constitutional Rights*, is arguably the most important and influential work of constitutional theory written in the last fifty years. Alexy develops a "structural theory" of rights and proportionality balancing in light of the case law of the German Federal Constitutional Court (GFCC). But the theory has far wider application, since it speaks directly to major issues raised by the new constitutionalism, and in this paper. At this point in time, Alexy's ideas constitute the basic conceptual foundations of PA. In this brief section, we briefly highlight some of the claims Alexy makes, focusing on concepts to be used further along in the paper.

For our purposes, Alexy makes two original contributions. First, he distinguishes between *rules* and *principles* and then conceptualizes principles as "optimization requirements." Rules "contain fixed points in the field of the factually and legally possible," that is, a rule is a norm that is either "fulfilled or not." For Alexy, principles, such as those contained in rights provisions, are norms that "require that something be realized to the greatest extent possible given the legal and factual possibilities." The distinction makes a difference in adjudication. Whereas a conflict between two rules can be resolved through invalidating, or establishing an "appropriate exception" to, one of the rules, a conflict between two principles can only be managed through balancing. One principle outweighs the other, but only in a particular set of circumstances. The "scope of the legally possible" is thus determined by the opposition between principles, which is itself a product of the contextual basis of the conflict. "Conflicts of rules are played out at the level of validity," Alexy argues, whereas "competitions between principles are played out in the dimension of weight," given a specific context.

If rights are "optimization requirements," binding on all public (and in some cases, private) authorities, then rights adjudication (and therefore lawmaking more generally) reduces to balancing. Further, the purpose of balancing must be both to resolve alleged conflicts between principles, and

to aid *all of the organs of the state* in their task of optimizing rights and other countervailing principles properly.

Alexy's second major contribution follows from his construction of balancing as a kind of *meta-constitutional rule* (Alexy does not use that phrase; in our view, he presupposes PA and balancing as a Grundnorm). A conflict between principles places judges under a duty to balance and to optimize. Although we now skip a number of steps in the argument, Alexy theorizes the necessity prong of PA—the LRM test—in terms of Pareto-optimality. Accordingly, there can be no defensible justification for allowing a public authority to infringe more on a right than is necessary for it to realize any second principle, given that the right could be optimized: the bearer of the right could be made better off if the government were to choose less onerous means. Optimization is also built into Alexy's "law of balancing," which governs the "proportionality in the narrow sense" phase of PA: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other."

Although Alexy provides a rationalization of balancing as a procedure, he acknowledges that the question of what relative weight judges should give to opposed principles, in any given dispute, falls completely outside the theory. In our view, any proponent of PA must admit that the move to proportionality balancing reveals, rather than disguises, Kelsen's positive legislator, the rights-protecting, trustee court. Alexy can nonetheless claim, as we have, that PA generates a particular form of argumentation, and places the judge under an obligation to justify her decisions in terms of certain constraints. Thus, to the extent that judges actually search for Pareto-optimal solutions (the necessity phase) and actually seek to comply with the law of balancing (the final balancing phase), PA is less vulnerable to the charge that it proceeds in the absence of rational criteria, and is no more than a means to package a court's (unconstrained) policy choices.

****

Beit Sourik intervenes in national security decisions of the political branches that emerged out of decades of conflict, insisting on the compatibility of democracy and human rights by employing proportionality analysis to negotiate and abate tension between them. Compare the technique for mediating this tension used by the Australian High Court in the 1992 *Mabo* case, in which the Court was asked to vindicate the land

claims of Australia's indigenous peoples. These claims raised questions about Australia's history and identity that were, in their way, as fundamental and contested as were the security questions in *Beit Sourik*.

British settlement of Australia took place under the common law doctrine that Australia was *terra nullius*, or land belonging to no one. Thus, the New South Wales Supreme Court in 1833 described the indigenous inhabitants of Australia as "wandering tribes . . . milling without certain habitation and without laws [who] were never in the situation of a concrete people" (*McDonald v. Levy*). It was held as a matter of law that such people could not hold title to land and thus that the Australian continent was essentially open for appropriation.

Terra nullius became much more than a legal doctrine in Australia. As Peter Russell has written, "*terra nullius* became a state of mind:" It played into a national mythology of Australia having been settled as "a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominion."[*] That mythology was necessarily accompanied by a corollary, which the eminent Australian anthropologist W.E.H. Stanner in the 1960s called the "Great Australian Silence" and a national "cult of disremembering:" a willed collective amnesia about white treatment of indigenous Australians.

Mabo was a test case brought to determine the legal rights of the Meriam people to lands on the islands of Mer (Murray Island), Dauar and Waier in the Torres Strait (between mainland Australia and Papua New Guinea). These islands were annexed to the then Colony of Queensland in 1879 (now the State of Queensland). The lead plaintiff, Eddie Mabo, believed that he and other indigenous islanders owned land on Mer, land which according to the doctrine of *terra nullius* was Crown land. The plaintiffs sought declarations, *inter alia*, that the Meriam people were entitled to the Murray Islands "as owners; as possessors; as occupiers; or as persons entitled to use and enjoy the said islands."

[*] *Cooper v. Stuart* [1889] 14 App Cas 286 (PC) at 291.

Mabo v. Queensland (No. 2)
High Court of Australia
107 A.L.R. 1 (1992)

MASON C.J. and McHUGH J. We agree with the reasons for judgment of Brennan J. and with the declaration which he proposes.

In the result, six members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The main difference between those members of the Court who constitute the majority is that, subject to the operation of the *Racial Discrimination Act* 1975 (Cth), neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J. supports the conclusion of Brennan J. and ourselves on that aspect of the case since his honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.

We are authorised to say that the other members of the Courts agree with what is said in the preceding paragraph about the outcome of the case. . . .

BRENNAN J. [T]he proposition that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein, invites critical examination. If the conclusion at which Stephen C.J. arrived in *Attorney-General v. Brown* (1847) be right, the interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest. According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to

compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned. This Court must now determine whether, by the common law of this country, the rights and interests of the Meriam people of today are to be determined on the footing that their ancestors lost their traditional rights and interests in the land of the Murray Islands on 1 August 1879.

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. . . .

The plaintiffs accept [that the Imperial Crown acquired sovereignty over the Murray Islands and that the Crown thereby acquired a radical or ultimate title to the Murray Islands] but [they] challenge the final link in the chain, namely, that the Crown also acquired absolute beneficial ownership of the land in the Murray Islands when the Crown acquired sovereignty over them.

Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law. . . .

The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands. Yet the supposedly barbarian nature of indigenous people provided the common law of England with the justification for denying them their traditional rights and interests in land. . . .

As the indigenous inhabitants of a settled colony were regarded as "low in the scale of social organization," they and their occupancy of colonial land were ignored in considering the title to land in a settled colony. Ignoring those rights and interests, the Crown's sovereignty over a territory which had been acquired under the enlarged notion of *terra nullius* was equated with Crown ownership of the lands therein, because, as Stephen C.J. said, there was "no other proprietor of such lands." Thus, a Select Committee on Aborigines reported in 1837 to the House of Commons that the state of Australian Aborigines was "barbarous" and "so entirely destitute . . . of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded." The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organization" than the Australian Aborigines whose claims were "utterly disregarded" by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not. . . .

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. . . .

The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land. (The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants). The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land. . . .

It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate

injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land. . . .

Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position of the Meriam people. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown. . . .

Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation. But, if this be the consequence in law of colonial settlement, is there any occasion now to overturn the cases which held the Crown to have become the absolute beneficial owner of land when British colonists first settled here? Does it make any difference whether native title failed to survive British colonization or was subsequently extinguished by government action? In this case, the difference is critical: except for certain transactions next to be mentioned, nothing has been done to extinguish native title in the Murray Islands. There, the Crown has alienated only part of the land and has not acquired for itself the beneficial ownership of any substantial area. And there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining

their identity and their customs, are entitled to enjoy their native title. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.

After this lengthy examination of the problem, it is desirable to state in summary form what I hold to be the common law of Australia with reference to land titles:

> 1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
>
> 2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
>
> 3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
>
> 4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).
>
> 5. Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent

with the continuing concurrent enjoyment of native title over the land (e.g., land set aside as a national park).

6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

7. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.

8. Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.

9. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner. . . .

DEANE J. and GAUDRON J. [European settlement of Australia brought with it] a conflagration of oppression and conflict which . . . spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame. . . .

If this were any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a

basis of the real property law of the country for more than one hundred and fifty years. . . . Far from being ordinary, however, the circumstances of the present case make it unique. . . . The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. . . . The lands of this continent were not *terra nullius* or "practically unoccupied" in 1788. The Crown's property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes. . . .

ORDER:

In lieu of answering the questions reserved for the consideration of the Full Court:

> (1) declare that the land in the Murray Islands is not Crown land . . . .;
>
> (2) putting to one side [those parcels of land that have] validly been appropriated for use for administrative purposes . . . declare that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands;
>
> (3) declare that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.

****

As he was being sworn in as the High Court's Chief Justice, a few years after writing the lead judgment in *Mabo*, Justice Brennan insisted that the High Court "is not a parliament of policy; it is a court of law. Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes, sometimes engendered by those with power, and when it protects the unpopular against the clamour of the multitude."

Mabo (and its progeny) unquestionably provoked the "clamour of the multitude." It in fact ignited a firestorm. Views such as those of Hugh Morgan, an executive and vocal spokesman for the mining industries, were typical of those conveyed in media reports: Morgan claimed that "*Mabo* is a challenge to the legitimacy of Australia" and that "the free, prosperous nation that our forebears built . . . is irremediably tainted." Entirely unfounded fears circulated of what came to be known as "ambit claims"—claims to valuable urban real estate by indigenous Australians—including even rumors of a claim to the land on which Sydney's Opera House stands.

In an address to the nation, Prime Minister Paul Keating criticized "the outbreaks of hysteria and hostility" and called on the nation to recognize *Mabo* as an "historic decision" that should start a national dialogue of reconciliation. Such a dialogue, he said, would need to begin with the "[r]ecognition that it was we [non-Aboriginal Australians] who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion." Both Aboriginal groups supportive of *Mabo* and mining and pastoralist interests hostile to it called for a legislative response to the High Court's ruling, which Keating promised.

Keating's Labor Party won the elections in March of 1993, as the opposition avoided indigenous rights as a campaign issue. But the political storm began in full immediately thereafter, as Parliament took up consideration of the Native Title Act, Keating's promised legislative response. On one side stood a coalition of indigenous groups, which called for the establishment of a process to facilitate awards of native title. On the other were *Mabo*'s chief antagonists: the state and territory governments with the largest exposure to native title claims, as well as pastoralists and the mining industries, who hoped that the Native Title Act would allay their fears about the loss of grazing and mineral rights. A substantial segment of the Australian urban and suburban public sympathized with these latter groups. They embraced the image of the stoical and hardy white settler in the outback as an essential element of their Australian identity, an element they felt recognition of native title threatened. In the meantime, a grassroots movement for reconciliation began to gain strength; groups such as Australians for Native Title and Reconciliation (ANTaR), along with many religious leaders, rallied support for Aboriginal interests.

"The principle product of the great political storm of 1993," Peter Russell has written, "was a legal fog." The resulting Native Title Act

legitimated most of the dispossession of native title that had occurred to date while creating a complex process for those who had not been dispossessed to validate their claims. Soon, Russell writes, "the legal fog of NTA was enveloping much of the field of indigenous action concerned with defending and securing rights to water and land. This activity was highly localized and hardly visible politically."

Keating's government was handed a resounding defeat in 1996 and the new prime minister, John Howard, promised in his victory speech "to focus on those things that bind us together." But later that year the High Court handed down its decision in *Wik v. Queensland*. The case concerned whether the issuance of a pastoral lease extinguished all incidents of native title, a question which was left unresolved by both *Mabo* and the Native Title Act. By a 4-3 majority, the High Court concluded, but again only cautiously, that a pastoral lease did not necessarily extinguish all incidents of native title.

Although the subject of such a ruling might seem obscurely technical, pastoral leaseholds covered nearly half of the Australian land mass, and so *Wik* was destined to reignite the controversy over native title. This time the attacks on the High Court were even fiercer. The judges were lambasted as a "pathetic . . . self-appointed [group of] Kings and Queens," a group of "basket-weavers" "gripped . . . in a mania for progressivism" while they purveyed their "intellectual dishonesty." The mayor of Burke Shire in Queensland expressed his view that "[i]f the High Court is going to write legislation, then we have to be given the opportunity to vote for the High Court. Otherwise we'll have to shoot them all or hang them." The Howard government did little to defend the Court from the attacks and, in fact, launched some of its own, with then-serving Chief Justice Brennan and retired Chief Justice Mason entering a public row with Deputy Prime Minister Tim Fischer. Fischer, in response, stated his intention to find "a capital C conservative law person" to appoint to the place of the soon-retiring Brennan. The Howard government introduced legislation to Parliament which would have rolled back much of *Wik* and indeed, even *Mabo*. It eventually passed in a weakened form, but only after nearly causing the dissolution of the government.

A study conducted by D.P. Pollack found that by the end of June of 2000 only ten indigenous communities had gained some recognition of their native title to land or water as a result of *Mabo* (and its successor cases and legislation). Although at that time nearly 18 percent of the Australian land mass was under indigenous ownership or control, the vast majority of this

land had been granted by statutes or other schemes that predated *Mabo*. There have, of course, been awards of native title since 2000 and there are claims that are still pending but, nonetheless, Peter Russell maintains "the value of native title [introduced to Australian law by *Mabo*] . . . has been so diminished by [legislation] and by the post-*Wik* High Court that alternative ways of securing Indigenous land ownership have been and are likely to remain more accessible and more fruitful."

Peter H. Russell

The End of the High Court's Leadership[*]

Eddie Mabo's and the Meriam people's resort to the courts in 1981 was an attempt to do politics by other means. By going to court and winning two cases[**] in the country's highest court, they gained a good deal. . . . But in the aftermath of these court victories, it quickly became clear that their value to Indigenous people would very much depend on what happened in the regular avenues of politics. The High Court continued to be involved in adjudicating disputes about native title but was no longer the site of the main developments in Indigenous relations. That moment passed with the High Court's decision in *Mabo (No.2).* In *Wik*, the majority held that native title and pastoral leases could coexist on the same land, but that the native title holders must not interfere with the conduct of the pastoralists' business. That even this very moderate support for native title carried a bare majority of the court, and raised a huge political storm, was a sign that judicial leadership in the recovery of *terra nullius* was on the wane. Contrary to what the mainstream of Australia's legal profession would have you believe, courts are not immune to changes in the political climate. . . .

It is not that the current High Court repudiates the court's 1992 decision recognizing native title but that it follows the more limiting potentialities of that decision and seems anxious to pass on to the legislature the primary responsibility for defining its meaning. Claimants of native title

[*] *Excerpted from* PETER H. RUSSELL, RECOGNIZING ABORIGINAL TITLE: THE *MABO* CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM (2005).

[**] Editor's Note: The High Court issued a decision in *Mabo (No. 1)* in 1988 after the State of Queensland tried to moot out the *Mabo* litigation by enacting legislation that extinguished all native title to the contested lands, if such title ever existed. In *Mabo (No. 1)* the High Court held such legislation invalid, finding it inconsistent with the Racial Discrimination Act of 1975. This latter statute is the enactment of the International Convention on the Elimination of All Forms of Racial Discrimination into Australian municipal law.

rights have had some success in the High Court, but the rights upheld by the court's majority have been limited to carrying on some very specific traditional activities. For example, in *Yanner v. Eaton*, decided in October 1999, the court's majority upheld the right of Murrandod Yanner (a prominent Aboriginal leader) to hunt crocodiles with a traditional harpoon on his clan's traditional country even though he lacked the licence required by Queensland law.

A much more significant decision came in 2001, when the court dealt with sea rights, an important dimension of native title that it had not been required to consider in *Mabo (No.2)*. . . . [A group of] Aboriginal islanders now claimed, as Eddie Mabo had done, that their traditional country embraced the sea and parts of the seabed around their islands. The court's majority, in a five-to-two decision, overturned the lower courts and upheld the claimants' right to traditional use of the seas and the seabed in the waters surrounding their island homes—but not on an exclusive basis. In effect, the court's majority allowed for a regime of coexistence in coastal waters similar what it endorsed in *Wik*. From the perspective of most non-Indigenous Australians, this win was very significant for Indigenous peoples. But from the Indigenous perspective, except for Justice Kirby's decision, it was a total repudiation of the continuity of land and water in traditional understandings in favour of the relatively modern common law doctrine that the seas must be a commons.

Though these High Court decisions yielded some positive results for native title holders, there is no echo in them of the majority's declaration at the end of *Mabo (No.2)* "that the Meriam people are entitled as against the whole world to possession, occupation use and enjoyment of the island of Mer." The Australian judges seem to be whittling native title down to "a bundle of rights"—rights to carry on specific traditional activities rather than a controlling interest in their traditional country. A majority of judges in the Federal Court in *Western Australia v. Ward* (2002) took this approach. . . . [A]s [this] case moved on appeal to the High Court, it was seen as a test of whether the court would subscribe to the "bundle of rights approach" developing in Australia's lower courts, rather than the understanding of native title as full and exclusive ownership of land which the Canadian Supreme Court had articulated in *Delgamuukw* (1997).

The High Court's decision in the *Ward* case, rendered on 8 August 2002, reached new heights (or depths) of prolixity and opaqueness. Its four hundred pages of opinions contained some good news for the claimants: five of the seven justices held that their native title had not been entirely

extinguished by all the projects and leases authorized on their lands by settler governments. In effect, the majority, as in *Wik*, endorsed a regime of coexistence between native title holders and others granted rights by the state. But all the justices took a very limited view of native title. They showed no interest in the Supreme Court of Canada's approach in *Delgamuukw* which recognized native title as a full right of property ownership, including the right to develop the land in non-traditional ways. Their guide to fleshing out the meaning of native title was not to be their own decisions or those of other common law courts but section 223(1) of the *Native Title Act*, which makes the rights and interests possessed under traditional laws and custom the touchstone of native title. This 'frozen rights' approach, among other things, led to the conclusion that the claimants' native title does not include minerals or petroleum—because there is no evidence of any Aboriginal law, custom, or use relating to these substances. . . .

[T]o Justice McHugh, who had supported Brennan's opinion in *Mabo (No.2)*, it was becoming increasingly clear that redress for the dispossession of the Aboriginal peoples, which "was a great wrong . . . cannot be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the native-title whose fragile rights must give way to the superior rights of the landholders." McHugh suggested it might be better to move to "an arbitral system that declares what the rights of the parties ought to be according to the justice and circumstances of the case." These concluding words of McHugh's opinion were virtually a letter of judicial resignation from the "administration of justice" for Australia's Indigenous peoples.

In December 2002 the High Court rendered a decision that was the toughest blow yet to common law native title. The case involved the Yorta Yorta, the very first Aboriginal community to apply to the National Native Title Tribunal for a determination of native title, in 1994. . . .

Two points stand out in the judgment. The first is the vigorous way in which the majority nails down the frozen rights approach and denies any continuing life for Aboriginal sovereignty. The majority rejected the Yorta Yorta's argument that though they had changed and adapted the laws and customs governing their relation to their lands, that did not sever their connection with those lands. Chief Justice Gleeson and Justices Gummow and Hayne, writing the main majority judgment, said that the Yorta Yorta could not adapt their traditional laws and customs to their changing circumstances because, after the white man moved in, they lost any

independent law-making power: "what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty." According to this view of Australian constitutionalism, while it is possible under Australia's federal system for the Commonwealth and the states to share sovereign law-making power, there is no room in this sovereign federal house for a share of aboriginal sovereignty. These judges added that "one of the uncontestable consequences of the change in sovereignty was that the only native title rights or interests in relation to lands or waters which the new sovereign recognized were those that existed at the time of change in sovereignty." Native title remains as a bridge to recognizing an aboriginal regime of law and custom, but a regime which, according to these judges, atrophied in 1788.

The second point that was hammered home in this decision was killing the common law foundation of native title. . . . Gleeson, Gummow, and Hayne leave no doubt that, in their view, native title is now entirely a creature of statutes passed by a majority in the Commonwealth: "To speak of the 'common law requirements' of native title is to invite fundamental error. Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today."

[T]he High Court's retreat on native title is only partly explained by changes in its personnel. . . . More important than personnel changes has been the judges' sense of a change in the political climate. The political row over *Mabo (No.2)* and the row over *Wik*—in which the court's activism was even more heavily targeted—have given most members of the court a sense that their political mandate to be pace-makers on the rights of Indigenous people has run out. In a constitutional democracy, we should not be shocked or surprised that judges' assessment of the boundaries of their political legitimacy should be a factor in their decision-making. But a judicial retreat, however explicable in terms of the pressures of majoritarian democracy, can never be good news for the minority, whose rights judicial activism was protecting. This is certainly true of the Aborigines and Torres Strait Islanders in Australia. But though these peoples constitute a minority of Australians in a statistical sense, they are a minority in no other sense. They are members of historical societies that have never given up their own laws and their continuing and sovereign responsibility for their lives and their lands. In the resort to the white man's courts that Eddie Mabo inspired, they hoped to improve their chances for establishing a just relationship with the much more powerful society that has colonized them. In that case, they did

achieve a measure of justice. That is about all Indigenous peoples can expect from these courts. As I have written elsewhere, as a person whose ancestral ties are with the colonizing English-speaking people: "At their best, my people's courts can prod, provoke, and, yes, on their *very* best days, inspire my people and our political leaders to work for a just relationship with the peoples we have colonized. But justice will only come through the political agreements my people and Indigenous peoples in freedom construct together."

Jennifer Wellington

History, Memory, and the Law: Representing the High Court of Australia's Mabo *Decision*[*]

3. Institutional representations: history, memory, and politics in the portrayal of indigenous people and Mabo *in the National Museum and National Archives of Australia*

The *Mabo* judgment and the 'new' Australian history it authorized and was used as a symbol for has entered into popular culture and been represented in a number of media. Writers on cinema, for example, argue that the decision generated a paradigm shift in depictions of Aboriginality, forcing a re-examination of colonization, the past, and race relations as "integral" to a "morally illegitimate national identity." This section, however, will focus more narrowly on the representation of the decision, Native title and dispossession in government-funded national institutions: the National Museum of Australia and the museum at the National Archives.

Opened in 2001, the National Museum of Australia as a whole has, according to conservative commentators, a 'postmodern' approach to representing the past. That is, it emphasizes the multiplicity of Australian stories, rather than a 'grand narrative' of the past, and focuses on interactivity over didacticism. The representation of indigenous Australians in the museum is scattered through five permanent galleries: "Eternity: Stories from the Emotional Heart of Australia," "First Australians: The Gallery of Aboriginal and Torres Strait Islanders," "Horizons: The Peopling of Australia Since 1788," "Nation: Symbols of Australia." and "Old New Land: Australia's People and Environment" (before recent redevelopment,

[*] Unpublished manuscript.

this last gallery was somewhat more poetically known as "Tangled Destinies"). Although materials relating to indigenous people are present in all galleries, they are obviously concentrated in the "First Australians" gallery. Much of the gallery is devoted to trying to explain indigenous cultural practices, community life and art, positing them as sources of strength both disrupted by and assisting indigenous peoples to resist colonialism.

Placards and timelines emphasize that "since time immemorial Aboriginal people have been born with cultural rights and responsibilities to protect their land, people and culture." The visitor walks through curving galleries which emphasize this, with artifacts interspersed with individual accounts of the past—and, often, of dispossession—before reaching the more contemporary gallery that focuses on more recent political history, including the issues of litigation and native title. The "prologue" to the political and legal events of the later twentieth century is thus established in a manner that fuses 'anthropological' approaches (a focus on pre-contact cultural practice and ritual artifacts) with the recuperation of the indigenous past as history (testimonies of dispossession, timelines). It is only in the displays depicting the indigenous political movements and legal tussles of the later twentieth century that the galleries move fully into the generic realm of 'history' and the 'history museum.'

A display on Native title is found in a room entered by walking past a large wall filled with the faces of prominent indigenous Australians. Foot-high lettering proclaims: "Facing our Futures." This approach connects the indigenous (primarily political/legal) narratives and artifacts displayed in the room beyond with the future: the "everything to gain," the "extension of social justice" and the "recognition of historical truth" of Keating's rhetoric on *Mabo*. "Futures" as a plural also reflects the museum's overall focus on the past as multivalent, and diversely authored. In the words of the Museum's first director Dawn Casey, speaking in the year the Museum opened, "[w]e intend the museum to speak with many voices, listen and respond to all, and promote debate and discussion about questions of diversity and identity." In the display case containing a range of artifacts related to Native title this approach is evident: no one voice dominates, but all the elements join together to create an overall impression of a struggle to overcome the effects of dispossession, the importance attached to recognition of indigenous prior ownership of country, and legal victory as a combination of 'recognition' and 'overcoming.'

The Native title display, which is arrayed in segments around a crescent-shaped viewing space, contains a photograph of the judges of the High Court, indigenous (often protest) art, quotes from a range of participants, and items from political campaigns. Beside a photograph of a serious-faced Aboriginal elder, and beneath a photograph of the High Court filled with the barristers and solicitors for the *Wik* case (1996)—to that date the largest number of legal counsel representing the parties in a matter before the Court—is one of the 'participant' quotes on a yellow card. Headed "We took it to the High Court," Denny Bowenda of the Aurukun people explains: "We talk about it and we explain what the law stick [means]. . . . We got nothing in papers. . . . But we still have a law that says we have a right to everything. We have a right to a law to protect ourselves and to protect our country." His words (edited by curatorial staff) are placed in a context of rights, land and the framework established by *Mabo*.

On another, larger card, set against a photographic backdrop of the Murray Islands, text beneath the heading "Our land, our culture, our heritage" explain the 'native' laws of the Murray Islands—the Malo laws. "Malo laws," the display states, "—philosophies, history and learning—govern relations between the people and the land. It is with these laws that the Meriam have demonstrated their land ownership." The history presented to visitors wishing to learn something about Australia is the history described in the majority *Mabo* judgments. The past is, the exhibits collectively say, native title. The old 'white' history is not mentioned, although the court's recognition of the non-existence of *terra nullius* is. *Mabo*, although described in multiple voices, is the new orthodoxy. *Mabo* plaintiff Father Dave Passi's words are displayed, emphasizing this: "Because our laws that governed our land were there. We still practising them. They were very strong laws. And so, Mer could do it. Mer alone could do it. Now, it's easier for other Islands now and for the rest of the world to follow that. They're using *Mabo* Case."

Mabo is a story of triumph, is proof of transcending historical wrongs through recognition of the indigenous past. "We are," the displays proclaim, "the first people who lived here." The *Mabo* litigation and judgment is integrated into a broader context of national 'significant events' in a 'timeline' display in a long, hallway-shaped gallery that connects the "Nation" and "First Australians" galleries. The gallery is titled "Snapshots of History: Australia since 1788." Along one side of this gallery are placed, in chronological order, a series of display cases containing artifacts pertaining to, and descriptions of, sixteen events of national significance in the twentieth century, and seven "snapshots," or

significant events occurring between 1788 and 1900. The display is intended to trace "making Australia what it is today." The 1990s are represented by three events: the *Mabo* decision of 1992, Australian peace monitoring in Bougainville (in the Pacific) in 1998, and Australian peacekeeping/intervention in neighbouring East Timor after the UN-sponsored vote for independence from Indonesia in 1999. . . .

The sign below the display case describes the *Mabo* decision as 'making history' and negating the 'traditional European notion' of *terra nullius.* Native title can be seen in this construction as the now recognized 'Australian' notion of the past. Another sign describes the Torres Strait Islander flag in the case as a symbol of pride and shared identity. The accompanying information on East Timor couches the intervention in terms of another group's pride—the Timorese desire for self-determination—and desire for the recognition of shared identity. The *Mabo* judgement is, in this context, taken to stand not just for the recognition of the indigenous past, but is put into the context of a national narrative which focuses more heavily on non-indigenous Australians, and moves decisively from a British, colonial identity to one which is increasingly confident, self-aware, and engaged with the Asia-Pacific region. *Mabo* becomes, especially as it is presented with East Timor and Bougainville, emblematic of national maturity and this movement from colonial outpost to regional engagement.

The presentation of the *Mabo* decision in the museum exhibition "Memory of a Nation" contained within the National Archives of Australia in Canberra places the case within a narrative of the role of the High Court and constitutional development. The *Mabo* decision is one of a handful of major constitutional cases featured in a display on the High Court entitled "The changing character of the High Court." These decisions, the reader is told, "demonstrate how the justices, and the judgments they hand down, balance powers, rights and interests in their interpretation of the Constitution." *Mabo* is the representative case of the Mason Court (1987-1995), a period the exhibition describes by the tag line "The living force of law." The text surrounding the display depicts the Mason Court as presiding over a time of change, and modernization. The replacement of traditional judicial wigs and gowns in this period with "simpler robes" is noted as an indication of this modernization, and linked with similar political and legal 'modernization.' Further display text states:

> Mabo and other decisions acknowledged the law as a 'living force' interpreted with what Alfred Deakin called 'the full intelligence of the time.' At the time of the Mason Court

> there was a new sense of the Constitution as the 'will of the people.' This was symbolised by the passage of the *Australia Act* 1986. These Acts severed the last legal ties between Britain and Australia, and confirmed the High Court as Australia's ultimate court of appeal.

Like the National Museum's display, the overall positioning of *Mabo* is as emblematic of the realignment of the law with contemporary forces. In this display, the realignment is concerned with 'the will of the people' and the increased legal independence of Australia, and in the National Museum it is interpreted as part of the contemporary acknowledgement that indigenous people 'were here first,' as well as indicative of a similarly more independent Australian identity. In the National Archives' account, this realignment is presented as primarily an intellectual one, whereas the National Museum's depiction puts the decision within the current of indigenous political agitation. The nature of the artifacts displayed emphasizes this: the National Museum shows items like the Torres Strait Islander flag, Aboriginal art painted with slogans like "Give Back What You Stole," and the excerpted voices of participants constructing the court cases as part of active people's movements, such as "We Took it to the High Court" and "The decision was handed down and I danced with victory." The National Archives display, by contrast, displays the last, signed page of Justice Brennan's judgment alongside other constitutional decisions (such as the *Communist Party Case*). [The] 'indigenous' voice displayed is mute, nonverbal: a pen-and ink sketch by Eddie Mabo, "Bay Scene" (1984), depicting a palm-lined bay that is presumably Murray Island. The main actor in the Archives' story is the Court, and the story of change that *Mabo* is a central emblem of is, at its core, a legal and institutional one.

B. The Right/Remedy Distinction

Sometimes courts negotiate the constraints of severe social conflict by defining the nature of the rights that judges will enforce. Sometimes, by contrast, judges will pronounce rights of great consequence, but limit the remedies they are willing to use to enforce those rights. The classic example of this approach is the distinction between *Brown I*, which pronounced segregated education inconsistent with the Equal Protection Clause of the Fourteenth Amendment, and *Brown II*, which announced that violations of this Fourteenth Amendment right would be remedied only "with all

deliberate speed," a formulation that delayed southern desegregation for almost a decade. Consider, in this regard, this pair of state-court cases that address prohibitions on same-sex marriage.

Baker v. Vermont
Vermont Supreme Court
170 Vt. 194 (1999)

AMESTOY, C.J. May the State of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples? That is the fundamental question we address in this appeal, a question that the Court well knows arouses deeply-felt religious, moral, and political beliefs. Our constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case. The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.

We conclude that under the Common Benefits Clause [Article 7] of the Vermont Constitution, which, in pertinent part, reads,

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community. . . .

[P]laintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law. . . .

The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws

challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7. As noted, Article 7 is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons "who are a part only of that community." When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection. . . . We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. . . .

Viewed in the light of history, logic, and experience, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law. Accordingly, in the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples. It remains only to determine the appropriate means and scope of relief compelled by this constitutional mandate.

F. Remedy

It is important to state clearly the parameters of today's ruling. Although plaintiffs sought injunctive and declaratory relief designed to secure a marriage license, their claims and arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections, and security incident to marriage under Vermont law. While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates *per se* to deny constitutionally-protected rights, that is not the claim we address today.

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to

note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners. . . .

Further, while the State's prediction of "destabilization" cannot be a ground for denying relief, it is not altogether irrelevant. A sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences. Absent legislative guidelines defining the status and rights of same-sex couples, consistent with constitutional requirements, uncertainty and confusion could result. Therefore, we hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion. In the event that the benefits and protections in question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought.

Our colleague asserts that granting the relief requested by plaintiffs—an injunction prohibiting defendants from withholding a marriage license—is our "constitutional duty." We believe the argument is predicated upon a fundamental misinterpretation of our opinion. It appears to assume that we hold plaintiffs are entitled to a marriage license. We do not. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so, and the mandate proposed by our colleague is inconsistent with the Court's holding.

The dissenting and concurring opinion also invokes the United States Supreme Court's desegregation decision in *Watson v. City of Memphis* (1963), suggesting that the circumstances here are comparable, and demand a comparable judicial response. The analogy is flawed. We do not confront in this case the evil that was institutionalized racism, an evil that was widely recognized well before the Court's decision in *Watson* and its more famous predecessor, *Brown v. Board of Education* (1954). Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the

pernicious doctrine of white supremacy. The concurring and dissenting opinion also overlooks the fact that the Supreme Court's urgency in *Watson* was impelled by the city's *eight year delay* in implementing its decision extending *Brown* to public recreational facilities, and "the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." Unlike *Watson*, our decision declares decidedly new doctrine.

The concurring and dissenting opinion further claims that our mandate represents an "abdicat[ion]" of the constitutional duty to decide, and an inexplicable failure to implement "the most straightforward and effective remedy." Our colleague greatly underestimates what we decide today and greatly overestimates the simplicity and effectiveness of her proposed mandate. First, our opinion provides greater recognition of—and protection for—same sex relationships than has been recognized by any court of final jurisdiction in this country with the instructive exception of the Hawaii Supreme Court in *Baehr*, See Hawaii Const., art. I, § 23 (state constitutional amendment overturned same-sex marriage decision in *Baehr* by returning power to legislature "to reserve marriage to opposite-sex couples"). Second, the dissent's suggestion that her mandate would avoid the "political caldron" of public debate is—even allowing for the welcome lack of political sophistication of the judiciary—significantly insulated from reality. See Hawaii Const., art. I, § 23; see also Alaska Const., art. I, § 25 (state constitutional amendment reversed trial court decision in favor of same-sex marriage, *Brause v. Bureau of Vital Statistics*, (1998), by providing that "a marriage may exist only between one man and one woman").

The concurring and dissenting opinion confuses decisiveness with wisdom and judicial authority with finality. Our mandate is predicated upon a fundamental respect for the ultimate source of constitutional authority, not a fear of decisiveness. No court was ever more decisive than the United States Supreme Court in *Dred Scott v. Sandford* (1857). Nor more wrong. Ironically it was a Vermonter, Stephen Douglas, who in defending the decision said—as the dissent in essence does here—"I never heard before of an appeal being taken from the Supreme Court." But it was a profound understanding of the law and the "unruliness of the human condition," that prompted Abraham Lincoln to respond that the Court does not issue Holy Writ. Our colleague may be correct that a mandate intended to provide the Legislature with the opportunity to implement the holding of this Court in an orderly and expeditious fashion will have precisely the opposite effect. Yet it cannot be doubted that judicial authority is not ultimate authority. It is

certainly not the only repository of wisdom.

> When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation.

C. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 101 (1996).

The implementation by the Vermont Legislature of a constitutional right expounded by this Court pursuant to the Vermont Constitution for the common benefit and protection of the Vermont community is not an abdication of judicial duty, it is the fulfillment of constitutional responsibility. . . .

The judgment of the superior court upholding the constitutionality of the Vermont marriage statutes under Chapter I, Article 7 of the Vermont Constitution *is reversed. The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein. . . .*

JOHNSON, J., concurring in part and dissenting in part. Forty years ago, in reversing a decision that had denied injunctive relief for the immediate desegregation of publicly owned parks and recreational facilities in Memphis, Tennessee, a unanimous United States Supreme Court stated:

> The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. *Watson v. City of Memphis* (1963).

Plaintiffs come before this Court claiming that the State has unconstitutionally deprived them of the benefits of marriage based solely upon a discriminatory classification that violates their civil rights. They ask the Court to remedy the unlawful discrimination by enjoining the State and its municipalities from denying them the license that serves to identify the persons entitled to those benefits. The majority agrees that the Common

Benefits Clause of the Vermont Constitution entitles plaintiffs to obtain the same benefits and protections as those bestowed upon married opposite-sex couples, yet it declines to give them any relief other than an exhortation to the Legislature to deal with the problem. I concur with the majority's holding, but I respectfully dissent from its novel and truncated remedy, which in my view abdicates this Court's constitutional duty to redress violations of constitutional rights. I would grant the requested relief and enjoin defendants from denying plaintiffs a marriage license based solely on the sex of the applicants.

The majority declares that the issue before this Court does not turn on the heated moral debate over intimate same-sex relationships, and further, that this Court has a constitutional responsibility to consider the legal merits of even controversial cases. Yet, notwithstanding these pronouncements, the majority elects to send plaintiffs to an uncertain fate in the political caldron of that very same moral debate. And to what end? Passing this case on to the Legislature will not alleviate the instability and uncertainty that the majority seeks to avoid, and will unnecessarily entangle this Court in the Legislature's efforts to accommodate the majority's mandate within a "reasonable period of time."

In 1948, when the California Supreme Court struck down a state law prohibiting the issuance of a license authorizing interracial marriages, the court did not suspend its judgment to allow the legislature an opportunity to enact a separate licensing scheme for interracial marriages. See *Perez v. Lippold* (1948) (granting writ of mandamus compelling county clerk to issue certificate of registry). Indeed, such a mandate in that context would be unfathomable to us today. Here, as in *Perez*, we have held that the State has unconstitutionally discriminated against plaintiffs, thereby depriving them of civil rights to which they are entitled. Like the Hawaii Circuit Court in *Baehr v. Miike*, (1996), which rejected the State's reasons for excluding same-sex couples from marriage, we should simply enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation. That remedy would provide prompt and complete relief to plaintiffs and create reliable expectations that would stabilize the legal rights and duties of all couples.

I

My dissent from the majority's mandate is grounded on the government's limited interest in dictating public morals outside the scope of its police power, and the differing roles of the judicial and legislative

branches in our tripartite system of government. I first examine the State's narrow interest in licensing marriages, then contrast that interest with the judiciary's fundamental duty to remedy civil rights violations, and lastly emphasize the majority's failure to adequately explain why it is taking the unusual step of suspending its judgment to allow the Legislature an opportunity to redress the unconstitutional discrimination that we have found.

This case concerns the secular licensing of marriage. The State's interest in licensing marriages is regulatory in nature. In granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships, but only identifying those persons entitled to the benefits of the marital status.

Apart from establishing restrictions on age and consanguinity related to public health and safety, the statutory scheme at issue here makes no qualitative judgment about which persons may obtain a marriage license. Hence, the State's interest concerning the challenged licensing statute is a narrow one, and plaintiffs have prevailed on their constitutional claim because the State has failed to raise any legitimate reasons related to public health or safety for denying marital benefits to same-sex couples. In my view, the State's interest in licensing marriages would be undisturbed by this Court enjoining defendants from denying plaintiffs a license.

While the State's interest in licensing marriages is narrow, the judiciary's obligation to remedy constitutional violations is central to our form of government. Indeed, one of the fundamental principles of our tripartite system of government is that the judiciary interprets and gives effect to the constitution in cases and controversies concerning individual rights.

This power is "not merely to rule on cases, but to *decide* them." As this Court has stated on numerous occasions, when measures enacted pursuant to the State's police powers have no real or substantial relation to any legitimate purpose of those powers and invade individual "rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." This Court emphasized in *Morse* that "in its last analysis, the question of the validity of such measures [enacted under the police powers] is one for the court."

The power of courts to fashion remedies for constitutional violations is well established in both this Court's and the United States Supreme

Court's jurisprudence concerning individual rights and equal protection. Particularly in civil rights cases involving discrimination against a disfavored group, "courts do not need specific [legislative] authorization to employ a remedy, at law or in equity, that is tailored to correct a constitutional wrong."

Accordingly, absent "compelling" reasons that dictate otherwise, it is not only the prerogative but the duty of courts to provide prompt relief for violations of individual civil rights. This basic principle is designed to assure that laws enacted through the will of the majority do not unconstitutionally infringe upon the rights of a disfavored minority.

There may be situations, of course, when legislative action is required before a court-ordered remedy can be fulfilled. For example, in *Brigham v. State* this Court declared that Vermont's system for funding public education unconstitutionally deprived Vermont schoolchildren of a right to an equal educational opportunity, and then retained jurisdiction until the Legislature enacted legislation that satisfied the Court's holding. Plainly, it was not within the province of this Court to create a new funding system to replace the one that we had declared unconstitutional. The Legislature needed to enact legislation that addressed issues such as the level of state funding for public schools, the sources of additional revenue, and the framework for distributing state funds. In finding a funding source, the Legislature had to consider whether to apply a flat or progressive tax on persons, property, entities, activities or income. These considerations, in turn, required the Legislature to consider what state programs would have to be curtailed to make up for the projected additional school funding. All of these complex political decisions entailed core legislative functions that were a necessary predicate to fulfillment of our holding.

A completely different situation exists here. We have held that the Vermont Constitution entitles plaintiffs "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." Given this holding, the most straightforward and effective remedy is simply to enjoin the State from denying plaintiffs a marriage license, which would designate them as persons entitled to those benefits and protections. No legislation is required to redress the constitutional violation that the Court has found. Nor does our paramount interest in vindicating plaintiffs' constitutional rights interfere in any way with the State's interest in licensing marriages. Far from intruding upon the State's narrow interest in its licensing statute, allowing plaintiffs to obtain a license would further the overall goals of marriage, as defined by the majority—to provide stability to

individuals, their families, and the broader community by clarifying and protecting the rights of married persons.

The majority declines to provide plaintiffs with a marriage license, however, because a sudden change in the marriage laws "may have disruptive and unforeseen consequences," and "uncertainty and confusion could result." Thus, within a few pages of rejecting the State's doomsday speculations as a basis for upholding the unconstitutionally discriminatory classification, the majority relies upon those same speculations to deny plaintiffs the relief to which they are entitled as the result of the discrimination.

During the civil rights movement of the 1960s, state and local governments defended segregation or gradual desegregation on the grounds that mixing the races would lead to interracial disturbances. The Supreme Court's "compelling answer" to that contention was "that constitutional rights may not be denied simply because of hostility to their assertion or exercise." Here, too, we should not relinquish our duty to redress the unconstitutional discrimination that we have found merely because of "personal speculations" or "vague disquietudes." While the laudatory goals of preserving institutional credibility and public confidence in our government may require elected bodies to wait for changing attitudes concerning public morals, those same goals require courts to act independently and decisively to protect civil rights guaranteed by our Constitution. . . .

I recognize that the Legislature is, and has been, free to pass legislation that would provide same-sex couples with marital benefits. But the majority does not explain why it is necessary for the Legislature to act before we remedy the constitutional violation that we have found. In our system of government, civil rights violations are remedied by courts, not because we issue "Holy Writ" or because we are "the only repository of wisdom." It is because the courts "must ultimately define and defend individual rights against government in terms independent of consensus or majority will." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15.3, at 896 (1978).[7]

[7] Judicial authority is not, however, the ultimate source of constitutional authority. Within our constitutional framework, the people are the final arbiters of what law governs us; they retain the power to amend our fundamental law. If the people of Vermont wish to overturn a constitutionally based decision, as happened in Alaska and Hawaii, they may do so. The

"[G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time." *Rosenberg v. Canada,* (Ontario Court of Appeals, 1998). Once a court has determined that a discriminatory classification has deprived plaintiffs of a constitutionally ripe entitlement, the court must decide if the classification "is demonstrably justifiable in a free and democratic society, not whether there might be a more propitious time to remedy it."

Today's decision, which is little more than a declaration of rights, abdicates that responsibility. The majority declares that plaintiffs have been unconstitutionally deprived of the benefits of marriage, but does not hold that the marriage laws are unconstitutional, does not hold that plaintiffs are entitled to the license that triggers those benefits, and does not provide plaintiffs with any other specific or direct remedy for the constitutional violation that the Court has found to exist. By suspending its judgment and allowing the Legislature to choose a remedy, the majority, in effect, issues an advisory opinion that leaves plaintiffs without redress and sends the matter to an uncertain fate in the Legislature. Ironically, today's mandate will only increase "the uncertainty and confusion" that the majority states it is designed to avoid.

No decision of this Court will abate the moral and political debate over same-sex marriage. My view as to the appropriateness of granting plaintiffs the license they seek is not based on any overestimate (or *any* estimate) of its effectiveness, nor on a miscalculation (or *any* calculation) as to its likely permanence, were it to have received the support of a majority of this Court. Rather, it is based on what I believe are the commands of our Constitution. . . .

III

This case is undoubtedly one of the most controversial ever to come before this Court. Newspaper, radio and television media have disclosed widespread public interest in its outcome, as well as the full spectrum of opinion as to what that outcome should be and what its ramifications may be for our society as a whole. One line of opinion contends that this is an issue that ought to be decided only by the most broadly democratic of our governmental institutions, the Legislature, and that the small group of men

possibility that they may do so, however, should not, in my view, deprive these plaintiffs of the remedy to which they are entitled.

and women comprising this Court has no business deciding an issue of such enormous moment. For better or for worse, however, this is simply not so. This case came before us because citizens of the state invoked their constitutional right to seek redress through the judicial process of a perceived deprivation under state law. The Vermont Constitution does not permit the courts to decline to adjudicate a matter because its subject is controversial, or because the outcome may be deeply offensive to the strongly held beliefs of many of our citizens. We do not have, as does the Supreme Court of the United States, *certiorari* jurisdiction, which allows that Court, in its sole discretion, to decline to hear almost any case. To the contrary, if a case has been brought before us, and if the established procedures have been followed, as they were here, we *must* hear and decide it.

Moreover, we must decide the case on *legal* grounds. However much history, sociology, religious belief, personal experience or other considerations may inform our individual or collective deliberations, we must decide this case, and all cases, on the basis of our understanding of the law, and the law alone. This must be the true and constant effort of every member of the judiciary. That effort, needless to say, is not a guarantee of infallibility, nor even an assurance of wisdom. It is, however, the fulfillment of our pledge of office.

William N. Eskridge, Jr.

*Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics******

As a matter of formal equal protection doctrine, one can argue that state bars to same-sex marriage constitute unconstitutional discrimination. This is not just technical discrimination against lesbian and gay couples but the denial of hundreds of state benefits and rights and, arguably, a deep denial of equal citizenship. And the discrimination is held in place by antigay prejudice and stereotypes that impede gay people's efforts to achieve state recognition. For these reasons, Ely's representation-reinforcing approach strengthens the formal case for judicial intervention.

Expansively applying a state equal rights amendment for these Elysian reasons, the Hawaii Supreme Court in *Baehr v. Lewin* (1993) ruled that the same-sex marriage bar is sex discrimination that must be strictly

* *Excerpted from* 114 YALE L.J. 1279 (2005).

examined under the Hawaii Constitution. We the People responded immediately and negatively to this exercise in perfecting democracy. *Baehr* generated a constitutional train wreck. Moderates joined outraged traditionalists all over the country in opposing same-sex marriage. Dozens of states adopted laws refusing to recognize same-sex marriages. Congress by huge margins adopted the Defense of Marriage Act (DOMA), which assured those states that the Full Faith and Credit Clause would not require them to recognize same-sex marriages and provided that more than 1000 federal laws and regulations using the terms "spouse" or "marriage" will never be applied to same-sex couples (a degree of linguistic conformism unprecedented in the U.S. Code). After a vitriolic campaign, tolerant Hawaiians voted 70%-29% to amend their state constitution to allow the legislature to bar same-sex marriages. The Hawaii Supreme Court meekly dismissed the same-sex marriage lawsuit, leaving gay people feeling as disenfranchised as traditionalists had felt right after *Baehr*.

The Hawaii experience suggests why a pluralism-facilitating approach would counsel much greater judicial caution on this issue, because primordial loyalties are so deeply implicated on both sides of this still-intense culture war. Many gay people view same-sex marriage as essential to their equal citizenship, while many traditionalists view it as an abrogation of theirs. . . .

[I]n *Baker v. State*, [the Vermont Supreme Court adopted] a pluralism-facilitating approach to judicial review. As in *Baehr*, the *Baker* plaintiffs were lesbian and gay couples using the state constitution's equality guarantee to challenge the state's same-sex marriage bar. The court ruled that the state was acting unconstitutionally in discriminating against lesbian and gay couples. Rather than directing an immediate remedy, however, the court remanded the matter to the legislature. The intended effect of the remand was to reverse the burden of inertia: Same-sex marriage was forced onto the legislative agenda with the burden shifted to traditionalists to justify doing little or nothing to recognize lesbian and gay families. In early 2000, the Vermont legislature agonized over the normative and practical issues and enacted a law reaffirming marriage as between one man and one woman, but also creating civil unions, separate from marriage but accorded all the legal benefits and duties that Vermont conferred on married (different-sex) couples. The stakes of this political debate were high, but the process lowered them somewhat. Through public hearings and one-on-one conversations, the legislators listened attentively to all groups and made a genuine effort to accommodate the deepest normative needs of their different constituents.

If *Baehr* was a disaster and *Baker* a relative success, was the Massachusetts Supreme Judicial Court wrong to require same-sex marriage licenses six months after announcing its decision in *Goodridge v. Department of Public Health*?

Goodridge v. Department of Public Health [Goodridge I]
Massachusetts Supreme Judicial Court
798 N.E.2d 941 (Mass. 2003)

MARSHALL, C.J. Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code."

[T]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage

and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution. . . .

IV

We consider next the plaintiffs' request for relief. We preserve as much of the statute as may be preserved in the face of the successful constitutional challenge.

Here, no one argues that striking down the marriage laws is an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society. We face a problem similar to one that recently confronted the Court of Appeals for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under the Canadian Charter of Rights and Freedoms (Charter), part of Canada's Federal Constitution. See *Halpern v. Toronto (City)* (2003). Canada, like the United States, adopted the common law of England that civil marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." In holding that the limitation of civil marriage to opposite-sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards.

We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources. It leaves intact the Legislature's broad discretion to regulate marriage.

In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.

So ordered.

******

On February 3, 2004, the Justices submitted the following answer to a question propounded to them by the Senate.

Opinions of the Justices to the Senate [Goodridge II]
Massachusetts Supreme Judicial Court
802 N.E.2d 565 (Mass. 2004)

To the Honorable the Senate of the Commonwealth of Massachusetts:

The order indicates that there is pending before the General Court a bill, Senate No. 2175, entitled "An Act relative to civil unions." [A]s we describe more fully below, the bill adds G.L. c. 207A to the General Laws, which provides for the establishment of "civil unions" for same-sex "spouses," provided the individuals meet certain qualifications described in the bill.

The order indicates that grave doubt exists as to the constitutionality of the bill if enacted into law and requests the opinions of the Justices on the following "important question of law":

> Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all "benefits, protections, rights and responsibilities" of marriage, comply with the equal protection and due process requirements of the Constitution

> of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?

Provisions of the bill. The order of the Senate plainly reflects that Senate No. 2175 is proposed action in response to the *Goodridge* opinion. The bill states that the "purpose" of the act is to provide "eligible same-sex couples the opportunity to obtain the benefits, protections, rights and responsibilities afforded to opposite sex couples by the marriage laws of the commonwealth, without entering into a marriage," declares that it is the "public policy" of the Commonwealth that "spouses in a civil union" "shall have all the benefits, protections, rights and responsibilities afforded by the marriage laws," and recites "that the Commonwealth's laws should be revised to give same-sex couples the opportunity to obtain the legal protections, benefits, rights and responsibilities associated with civil marriage, while preserving the traditional, historic nature and meaning of the institution of civil marriage." To that end, the bill proposes G.L. c. 207A, which establishes the institution of "civil union," eligibility for which is limited to "[t]wo persons . . . [who] are of the same sex. . . ."

The proposed law states that "spouses" in a civil union shall be "joined in it with a legal status equivalent to marriage." The bill expressly maintains that "marriage" is reserved exclusively for opposite-sex couples by providing that "[p]ersons eligible to form a civil union with each other under this chapter shall not be eligible to enter into a marriage with each other under chapter 207." Notwithstanding, the proposed law purports to make the institution of a "civil union" parallel to the institution of civil "marriage." For example, the bill provides that "spouses in a civil union shall have all the same benefits, protections, rights and responsibilities under law as are granted to spouses in a marriage." In addition, terms that denote spousal relationships, such as "husband," "wife," "family," and "next of kin," are to be interpreted to include spouses in a civil union "as those terms are used in any law." The bill goes on to enumerate a nonexclusive list of the legal benefits that will adhere to spouses in a civil union, including property rights, joint State income tax filing, evidentiary rights, rights to veteran benefits and group insurance, and the right to the issuance of a "civil union" license, identical to a marriage license under G.L. c. 207, "as if a civil union was a marriage."

3. *Analysis.* As we stated above, in *Goodridge* the court was asked to consider the constitutional question "whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage." The court has answered the question. We have now been asked

to render an advisory opinion on Senate No. 2175, which creates a new legal status, "civil union," that is purportedly equal to "marriage," yet separate from it. The constitutional difficulty of the proposed civil union bill is evident in its stated purpose to "preserv[e] the traditional, historic nature and meaning of the institution of civil marriage." Preserving the institution of civil marriage is of course a legislative priority of the highest order, and one to which the Justices accord the General Court the greatest deference. We recognize the efforts of the Senate to draft a bill in conformity with the *Goodridge* opinion. Yet the bill, as we read it, does nothing to "preserve" the civil marriage law, only its constitutional infirmity. This is not a matter of social policy but of constitutional interpretation. As the court concluded in *Goodridge,* the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children. The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, *as* same-sex couples, from entering into civil marriage.

The same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by, Senate No. 2175. Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or "preserve" what we stated in *Goodridge* were the Commonwealth's legitimate interests in procreation, child rearing, and the conservation of resources. Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in *Goodridge,* by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal. . . .

We recognize that the pending bill palliates some of the financial and other concrete manifestations of the discrimination at issue in *Goodridge.* But the question the court considered in *Goodridge* was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities. Maintaining a second-class citizen status for same-sex couples by excluding

them from the institution of civil marriage *is* the constitutional infirmity at issue.

4. *Conclusion.* We are of the opinion that Senate No. 2175 violates the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights. Further, the particular provisions that render the pending bill unconstitutional, §§ 2 and 3 of proposed G.L. c. 207A, are not severable from the remainder. The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples, and the bill's remaining provisions are too entwined with this purpose to stand independently.

The answer to the question is "No."

Frank Phillips & Andrea Estes
Right of Gays to Marry Set for Years to Come—Vote Keeps Proposed Ban off 2008 State Ballot[*]

The Legislature, in a vote as swift as it was historic, reaffirmed the state's first-in-the-nation same-sex marriage ruling yesterday, unequivocally protecting the rights of gays and lesbians to wed in Massachusetts until at least 2012. The vote followed three and one half years of fierce arguments, emotional testimonies, and controversial legal decisions. It came on a day filled with cheering and jeering in the streets of Beacon Hill. But when the hour arrived, there was neither debate nor delay. In a packed chamber, first senators and then House members cast their votes to reject a constitutional amendment that would have defined marriage in Massachusetts as only a union between a man and a woman.

In the end, the proposed ban garnered only 45 votes, five short of what it needed to qualify for the 2008 statewide ballot and 17 fewer than it won during its first trip through the Legislature less than six months ago. "In Massachusetts today, the freedom to marry is secure," Governor Deval Patrick told a cheering crowd of gay-marriage advocates after the results of the Constitutional Convention were announced. "Today's vote is not just a vote for marriage equality. It was a vote for equality itself." Opponents of same-sex marriage, who had been optimistic they could hold their votes, vowed to continue the fight, possibly through a new petition drive. That

[*] THE BOSTON GLOBE, June 15, 2007.

process would require, once again, the collection of hundreds of thousands of signatures and the approval of at least 50 lawmakers in two consecutive legislative sessions. Secretary of State William F. Galvin said last night that the question could not be placed before voters until at least 2012.

"We're not going away," said Kris Mineau, president of the Massachusetts Family Institute, which led the voter signature drive to get the proposed constitutional ban before the Legislature. "But it's certainly a setback." The defeat of the proposed amendment ends, at least for now, a series of fierce and often emotional debates at the State House that began when the Supreme Judicial Court issued a four to three ruling legalizing same-sex marriage. Lawmakers opposed to gay marriage immediately attempted to pass an amendment overturning the ruling, and when that failed, citizens launched their own petition, which garnered more than 100,000 signatures.

Over the past three years, lawmakers wrestled with the issue during a series of heated and tumultuous constitutional conventions, which saw the support for a gay marriage ban steadily slip. . . . Less than six months ago, the amendment's chances appeared strong, after it won the support of 62 lawmakers at a Constitutional Convention in January. . . . Arline Isaacson, co-chairwoman of the Massachusetts Gay and Lesbian Political Caucus and its chief legislative lobbyist, said the amendment's defeat is a "monumental and historic moment" that not only marks a crushing setback to gay-marriage opponents in Massachusetts but also to conservative forces across the nation.

Charles F. Sabel & William H. Simon

Destabilization Rights: How Public Law Litigation Succeeds[*]

Scorned when not forgotten, yet transformed by its travails, public law litigation is becoming—again—an influential and promising instrument of democratic accountability.

In 1976 Abram Chayes argued that efforts to apply rule-of-law principles to the institutions of the modern welfare state had produced a new kind of litigation. The "traditional" lawsuit involved two private parties and focused on allegations of a discrete past wrong implying a particular

[*] *Excerpted from* 117 HARV. L. REV. 1015 (2004).

remedy, most often a one-time money payment from the defendant to the plaintiff. Chayes showed that an important category of civil rights litigation departed radically from this model. These "public law" cases involved amorphous, sprawling party structures; allegations broadly implicating the operations of large public institutions such as school systems, prisons, mental health facilities, police departments, and public housing authorities; and remedies requiring long-term restructuring and monitoring of these institutions.

Chayes argued that the new litigation enriched the institutional repertory of our democracy. In his view, the independence, flexibility, and accessibility of the courts equipped them for the task of holding chronically underperforming institutions accountable to governing legal standards. Public law courts were less susceptible to capture by selfish interests and better able to induce fruitful discussion among the relevant parties than the administrative agencies that might otherwise have oversight responsibility.

Although Chayes's analytic description of public law litigation became canonical, his defense of it remained controversial. Early critics doubted that courts had the necessary information to supervise institutional restructuring effectively. Even if the courts were sufficiently informed, these critics argued, their power seemed too narrow and too shallow for the new task: Too narrow because the problems of public agencies were linked to myriad other institutions and social practices, while a court's power extended only to the parties before it. Too shallow because the operations of the agencies depended on the street-level conduct of subordinates far below the court's view, while a court's direct remedial authority operated mainly against senior officials (and even then, only with severe limitations).

From the outset, the legitimacy of public law litigation was as suspect as its efficacy. For Chayes, such litigation would legitimate itself by solving public problems that other institutions of the administrative state could not. But many critics argued that even effective judicial intervention of this kind was often illegitimate. They emphasized, as Chayes had conceded, that these cases did not fit easily into traditional notions of the judicial role or the separation of powers. They doubted that conventional legal sources of authority and modes of analysis could be made to speak in any direct or determinate fashion to the task of devising remedies that restructured entire organizations. They argued that the courts could not undertake the restructuring of administrative agencies without trenching on the authority of the executive and legislative branches, and that federal courts could not superintend the restructuring of state and local agencies

without compromising principles of federalism and local autonomy. . . .

Yet despite decades of criticism and restrictive doctrines, the lower courts continue to play a crucial role in a still-growing movement of institutional reform in the core areas of public law practice Chayes identified: schools, prisons, mental health, police, and housing. And while they have opposed some judicial interventions, legislatures have acquiesced in and even encouraged others. There is no indication of a reduction in the volume or importance of Chayesian judicial activity. The particular forms of this activity, however, have evolved. The remedies of recent years are different in important respects from those that Chayes and his critics focused on.

The evolution of structural remedies in recent decades can be usefully stylized as a shift away from command-and-control injunctive regulation toward experimentalist intervention. Command-and-control regulation is the stereotypical activity of bureaucracies. It takes the form of comprehensive regimes of fixed and specific rules set by a central authority. These rules prescribe the inputs and operating procedures of the institutions they regulate.

By contrast, experimentalist regulation combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability. In the most distinctive cases, the governing norms are general standards that express the goals the parties are expected to achieve–that is, outputs rather than inputs. Typically, the regime leaves the parties with a substantial range of discretion as to how to achieve these goals. At the same time, it specifies both standards and procedures for the measurement of the institution's performance. Performance is measured both in relation to parties' initial commitments and in relation to the performance of comparable institutions.

This process of disciplined comparison is designed to facilitate learning by directing attention to the practices of the most successful peer institutions. Both declarations of goals and performance norms are treated as provisional and subject to continuous revision with stakeholder participation. In effect, the remedy institutionalizes a process of ongoing learning and reconstruction. Experimentalist regulation is characteristic of the "networked" and "multilevel" governance proliferating in the United States and the European Union–decisionmaking processes that are neither hierarchical nor closed and that permit persons of different ranks, units, and even organizations to collaborate as circumstances demand. . . .

In this Article, we offer an interpretation of the evolving approach to public law intervention as a species of what we call "destabilization rights." Destabilization rights are claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability. The term focuses attention on a crucial common element of the claims in the various areas of public law litigation and on a dimension of the remedy that is critical to explaining the prospect of successful intervention. The effect of the court's initial intervention is to destabilize the parties' pre-litigation expectations through political, cognitive, and psychological effects that widen the possibilities of experimentalist collaboration. The regimes of standards and monitoring that commonly emerge from remedial negotiation allow this destabilization, and the learning it generates, to continue within narrower channels. . . .

C. Judicial Structuring of Controversy

There are times when courts facing circumstances of severe social conflict are able neither to pronounce definitive social rights nor to issue authoritative judicial remedies. In such situations courts can occasionally author opinions that by sheer persuasive force structure the nature and form of intense political conflict. Although constitutional law typically structures conflict, it sometimes does so by infusing controversy with constitutional values. Consider, in this regard, the monumental decision of the Canadian Supreme Court in response to the efforts of Quebec to secede from Canada.

Reference re Secession of Quebec
Supreme Court of Canada
[1998] 2 S.C.R. 217

REFERENCE by Governor-in-Council concerning certain questions relating to secession of Quebec from Canada.

Per curiam:

I. Introduction

[1] This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. [It] "combines legal and constitutional questions of the utmost subtlety and

complexity with political questions of great sensitivity." In our view, it is not possible to answer the [three] questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge. . . .

C. Justiciability

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

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

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

[26] Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. As we stated in *Reference re Canada Assistance Plan*:

> While there may be many reasons why a question is non-

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

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

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

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

[28] As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal

aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

III. Reference Questions

A. Question 1

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

(1) Introduction

[32] "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in § 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules." Finally, the Constitution of Canada includes

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. . . . In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): Federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us. . . .

(2) Historical Context: The Significance of Confederation

[33] In our constitutional tradition, legality and legitimacy are linked. . . . [O]ur constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order. . . .

[48] We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

[49] What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other. . . .

[50] Our Constitution has an internal architecture, or what the majority of this Court in *O.P.S.E.U. v. Ontario (Attorney General)* called a "basic constitutional structure." The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference*, we held that "the principle is clearly implicit in the very nature of a Constitution." The same may be said of the other three constitutional

principles we underscore today.

[51] Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

[52] The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree," to invoke the famous description in *Edwards v. Canada*. . . . [C]anadians have long recognized the existence and importance of unwritten constitutional principles in our system of government. . . .

[53] Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference*, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference. [W]e determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."

[54] [It] is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

[57] [T]here can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously,

perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

[58] The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the *Constitution Act, 1867*, it was said, was not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. . . .

[59] The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. . . .

(c) Democracy

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

[62] The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. . . .

[63] Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. . . .

[64] Democracy is not simply concerned with the process of government. On the contrary, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the *Charter*, the Court in *R. v. Oakes,* articulated some of the values inherent in the notion of democracy:

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

[65] In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government."

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

[67] The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real

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

[68] Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas." At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

[69] The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

[70] The principles of constitutionalism and the rule of law lie at the root of our system of government. . . . At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable,

predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

[71] In the *Manitoba Language Rights Reference,* this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order." A third aspect of the rule of law is that "the exercise of all public power must find its ultimate source in a legal rule." Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

[72] The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in § 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch. They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source. . . .

[73] An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

[74] First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when

the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

[75] The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

[76] Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

[77] In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

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

(*e) Protection of Minorities*

[79] The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. [T]he protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. Similar concerns animated the provisions protecting minority language rights.

[80] However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. . . .

[82] Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in § 35 explicit protection for existing aboriginal and treaty

rights, and in § 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of § 35 recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

[83] Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "under the Constitution of Canada." This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

[84] The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. . . . It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

[85] The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. . . . By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada *unilaterally*.

[86] The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral." We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. . . . This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

[87] Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

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

[89] What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

[90] The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

[91] For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

[92] However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

[93] Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of

Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

[94] In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of *all* the participants in the negotiation process.

[95] Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

[96] No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians

resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation.

[97] In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated. . . .

[100] The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

[101] If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. . . .

[102] The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

[103] To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would

be evaluated in an indirect manner on the international plane.

[104] Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

B. Question 2

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

(1) Secession at International Law

[111] It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state. . . . Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument. . . (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of "a people" to self-determination. . . .

(*b) The Right of a People to Self-determination*

[113] While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states—such as the right of a *people* to self-determination.

[114] [T]he existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law.

[115] Article 1 of the *Charter of the United Nations* states in part that one of the purposes of the United Nations (U.N.) is:

> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

[116] Article 55 of the U.N. *Charter* further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

[118] [Article 1] of both the U.N.'s *International Covenant on Civil and Political Rights,* and its *International Covenant on Economic, Social and Cultural Rights,* states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[119] Similarly, the U.N. General Assembly's *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,* states:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the

> United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

[120] [T]he U.N. General Assembly's *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

> Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. . . .

(i) Defining "Peoples"

[123] International law grants the right to self-determination to "peoples." Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples," the result has been that the precise meaning of the term "people" remains somewhat uncertain. . . .

[125] While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people," as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. . . . As the following discussion of the scope of the right to self-determination will

make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

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

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

[127] The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states. . . .

[128] The *Declaration on Friendly Relations*, *supra, Vienna Declaration,* and *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are *not* to

> be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government

> representing the whole people belonging to the territory without distinction. . . .

(iii) Colonial and Oppressed Peoples

[131] Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised "externally," which, in the context of this Reference, would potentially mean secession: the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their "territorial integrity," all but destroyed by the colonialist or occupying Power, should be fully restored.

[132] The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

[133] The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. . . .

[134] A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

[135] Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an

established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the *amicus curiae*:

> 15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people.
>
> 16. For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

[136] The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction."

[137] The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

[138] In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples," nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

[139] We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference. . . .

IV. Summary of Conclusions

[148] As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of

constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

[149] The Reference requires us to consider whether Quebec has a right to *unilateral* secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

[150] The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

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

[152] The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

[153] The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution," not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm

precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role. . . .

[155] Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

Peter Leslie

The Supreme Court Sets Rules for the Secession of Quebec[*]

In August 1998, Canada became probably the only contemporary federation to have a constitutionally mandated process for bringing about the secession of one or more of its provinces or states. However, the process entails such intrinsic difficulties and would probably take so long to be brought to conclusion, that it might be of little avail to a province that invoked it. This is the grand paradox, or perhaps the balanced result, that has emerged from a judgment of the Supreme Court of Canada.

The court's decision came thirty years after the founding of the *indépendantiste Parti québécois* (PQ). The PQ held office from 1976 to 1985, won the 1994 election, and was reelected in 1998. Twice, in 1980 and in 1995, it has called a referendum aiming to take Quebec out of Canada; a third referendum is promised, perhaps as early as mid-2000, but evidently it will be held only if the Quebec government expects to win it. In both of the referendums already held, the PQ proposed replacing the federal tie with a bilateral economic association, supported by political arrangements evidently inspired by the European Community/Union. In the 1980 referendum, Premier René Lévesque sought a mandate to enter into

[*] *Excerpted from* 29 PUBLIUS 135 (1999).

negotiations with "Canada" on the basis of a "sovereignty-association" formula, following which the electorate would be consulted again; however, Quebecers rejected this proposal by a 60 percent majority. In the referendum of 30 October 1995, by contrast, Quebec Premier Jacques Parizeau asked the people of Quebec to authorize the National Assembly (provincial legislature) to pass a bill declaring sovereignty. In fact, the bill had already been introduced. Once passed, it would have guided the transition process; in particular, Quebec would provisionally act as a Canadian province while drafting its constitution and conducting negotiations to create a Quebec-Canada "partnership." Regardless of the outcome of those negotiations, Quebec would become independent in one year, unless the National Assembly decided otherwise. The intent was that the transition period might be lengthened if that were needed to resolve outstanding issues, but it could also be shortened if partnership negotiations broke down. However, the bill never came to a vote; it was withdrawn when the federalist forces won by a hair's breadth, with only 50.6 percent of the vote.

The federal government did not challenge the legality of the referendum or the prospect of a unilateral declaration of independence that would have followed a 'Yes' vote. Canadian Prime Minister Jean Chrétien had expected a much more resounding victory for the federalist side, and apparently believed that a decisive 'No' would (as in 1980) severely weaken the separatist movement ("independence" and "sovereignty" are terms avoided by federal politicians). Chastened by the result, and under pressure from an angry public in the rest of Canada, which blamed Chrétien for having nearly "lost the country," the federal government now sought to have the legal situation clarified. Accordingly, it referred to the Supreme Court of Canada three questions about the legality of unilateral secession. The case is generally referred to as the *Quebec Secession Reference.* It was decided on the basis of a single set of reasons subscribed to by all nine Supreme Court justices. . . .

The Case

The Quebec government denounced the federal government for turning to the court in this way, declaring that the matter was inherently political and was thus beyond the purview of any court. It refused to participate, in consequence of which the court enlisted the help of an *amicus curiae* to argue the case for Quebec's right of unilateral secession. When the decision was rendered, however, it was welcomed by virtually everyone, including the Quebec government. Federalists and *indépendantistes* each

found aspects favorable to their side, and each proceeded to put its own spin on the 65-page judgment.

Essentially, the federal government got what it wanted, a ruling that unilateral secession was not legal under either domestic or international law, in consequence of which the question of which would take precedence did not arise. However, the Quebec government, and *indépendantistes* generally, expressed deep satisfaction that the court had not stopped there; it had gone much farther, they said, than Ottawa had wanted it to. Specifically, the court had ruled that if ever a clear majority of Quebecers voted in favor of secession, and the question itself was clear, negotiations on the issue of secession would have to ensue. However, the court did not define the term "clear majority"—the federal government has insisted that a majority greater than "50 percent plus one" would be required—nor did it state what might constitute a "clear question." These, the court declared, are political matters, and cannot be resolved judicially.

Where *indépendantistes* highlighted "Canada's" duty to negotiate, federalists highlighted the fact that negotiations would have to cover a range of issues that the PQ government has so far shown no inclination to open up. Thus, the court stated that in negotiations on secession, the parties would have to address "the interests of the other provinces, the federal government, Quebec, and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities." It even implied that Quebec's boundaries might be challenged. In general, federalists delighted in the uncertainties flowing from the decision, as the potential for chaos stemming from a 'Yes' vote in a future referendum has been presumed (perhaps wrongly) to frighten off "soft nationalists."

The court noted that the outcome of negotiations could not be predicted, and it refused to speculate about what might happen if they collapsed or were never initiated. It did, however, acknowledge that an attempted secession, other than one brought about through constitutional amendment, might succeed or fail. In particular, it suggested that international recognition might depend on whether foreign states considered that Quebec on the one hand, and federalist forces on the other, were acting in accordance with Canadian constitutional principles, after a referendum in which a clear majority unambiguously opted for secession.

Numerous questions are raised by the *Secession* case. Among them, the following are addressed below: constitutional principles, a secession referendum and the duty to negotiate, secession and the 1982 amending

formula, secession and the international community, the Supreme Court and political controversy, and the *realpolitik* of secession.

Constitutional Principles

As jurisprudence, the *Quebec Secession Reference* is remarkable for its enunciation of four basic principles that "inform and sustain the constitutional text [and] are the vital unstated assumptions upon which the text is based." The principles are: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. None of these, the court said, is absolute; none can trump the others. The whole judgment is based on these four principles. They underlie the values of diversity and accommodation among cultural and political (provincial) communities, values that are given prominence in the court's decision. By contrast, the concept of nationhood, except as (in the words of constitutional lawyer John D. Whyte) "an arrangement of market convenience," is virtually absent from the judgment. . . .

[By contrast with the four principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities], the concept of nationhood as an organic entity, or a Lincolnian "perpetual union," does not appear in the court's decision. Mutual obligation, however, does. Thus, the court cites the words of Britain's Colonial Secretary in 1868, rejecting Nova Scotia's efforts to undo the federal union entered into the year before: "vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted . . . the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation." As the court notes, the interdependence resulting from such "vast obligations" has "multiplied immeasurably in the last 130 years." The court also quotes, approvingly, the words of counsel for Saskatchewan, an intervenor in the case:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation.

What the court implicitly suggests is that no party to Confederation may lawfully tear the fabric into pieces, but it is nonetheless possible that the fabric may be unwoven in a way that takes account of past mutual commitments and compromises, as well as contemporary (and future) interests. Contrast Lincoln:

> I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination.

A Secession Referendum and the Duty to Negotiate

Invoking the four principles it enunciated, while denying that any of them was absolute, the court reached several significant conclusions. First, nationhood is not organic or indissoluble, at least not in Canada. Second, secession is a legitimate political objective, and may be accomplished without legal discontinuity by applying the 1982 amending formula. Third, "a clear repudiation by the people of Quebec of the existing constitutional order" would create an obligation upon the federal government and the other nine provincial governments to enter into negotiations, although not necessarily "to accede to . . . secession . . . subject only to negotiation of the logistical details." The Supreme Court noted that a referendum may provide a democratic method of ascertaining the views of the electorate on important political questions. Further, it stated that a referendum that was free of ambiguity in terms of the phrasing of the question, and in terms of the support it achieved, would confer legitimacy on the efforts of a Quebec government to secede.

The Supreme Court and Political Controversy

The *Secession* case has an obvious bearing on the legitimacy of the court itself, and more broadly on the legitimacy of the Canadian constitutional order, both within Quebec and within Canada as a whole. The court has been walking a very fine line in its triad of constitutional judgments. It would strain the imagination to suppose that the justices of Canada's highest court took no notice of the prospective or probable reaction of various publics to their decisions on such politically sensitive matters. Surely, constitutional jurisprudence in Canada is the result of political calculation, as much as it is the austere product of human reason

applied to observable facts.

In the *Secession* case, the Supreme Court struck political gold. Its ruling has been lauded by federalists and *indépendantistes* alike. There has been criticism, of course. Among some federalists, there has been unease about the court's thin sense of nationhood, and its apparent readiness to subordinate written constitutional rules to general principles, which the court itself has formulated in a way that suits the conclusions it apparently felt compelled to draw. Among some *indépendantistes,* there appears to be a desire to prepare the ground for future attacks on the legitimacy of the court in a new phase of constitutional crisis. . . .

It is doubtful that, if negotiations on secession do occur, the Supreme Court would be able to maintain Olympian detachment from politics. The court has disclaimed a supervisory role over the political aspects of such negotiations. However, having declared a constitutional duty to negotiate, could the court escape obligation to decide whether the parties were negotiating in good faith? Could it determine adherence to—or violation of—constitutional principles without itself making the sorts of judgment that it has explicitly declared only "political actors" have the capacity to make? It is hard to see how the court could, in such a situation, convincingly draw a line between the legal and the political. Its recent judgments, not only in the constitutional revision triad, but also in many Charter cases, have blurred that line if not (as some insist) erased it altogether. Perhaps a clear distinction cannot be established or maintained. Be that as it may, it is hard to see how a future court, in a crisis over an intended secession, could avoid being drawn into the political vortex—unless events were to move so rapidly as to make court action irrelevant.

Conclusion: The Realpolitik *of Secession*

I close with a final comment on what may well be a fundamental lack of political realism by the court, and, in this light, a comment on the overall significance of the case. In declaring a duty to negotiate, and in identifying many of the incredibly complex and difficult issues to be resolved in negotiations over a proposed secession, the court implicitly assumes that no significant time constraints apply. How could that be?

Several commentators have suggested that a referendum endorsing secession would precipitate a crisis that would demand almost immediate resolution. Political scientist Robert Young speculated during the lead-up to the 1995 referendum that if there were a strong 'Yes' vote, the prime

minister would be compelled to announce immediately that the verdict would be accepted. Economic pressure, sporadic violence, and pressure from foreign governments (notably the United States) would ensure that negotiations began very soon—in three or four days—and that in the course of a few weeks, "the shape of secession [would] clarify."

[T]he *realpolitik* of secession is that after a 'Yes' vote, principle would recede before the urgency of decision. It is hard to imagine that interested parties—including investors, employers, the employed, the retired, and the indigent, to say nothing of those who quite simply love their country—would sit back and await the outcome of the negotiations mandated by the court. Either the negotiations would suppress issues the Supreme Court has said would need to be resolved, and would ride roughshod over the interests of non-powerful players, or they would be, in Hartt's words, "acrimonious, slow, and unable, before the damage inflicted by uncertainty has actually occurred, to settle the intractable issues including borders, first nation rights, minority protection, asset division, currency, debt, citizenship, trade relations and others." Either way, the Supreme Court's decision would be of little relevance if Quebec ever opts for secession.

The *Secession* case actually resolved almost nothing, in the sense of removing any critical questions from the realm of political controversy. Even the "obligation to negotiate," highlighted by so many commentators (certainly by the *indépendantistes),* left in place almost all the existing ambiguities and uncertainties surrounding the process that could lead to secession. . . .

It is doubtful, to say the least, that the court reduced uncertainty about the negotiation process or its outcome; few if any of the critical questions have been taken off the table. First, the court indicated that, for there to exist a duty to negotiate, there would have to be a clear question and a clear majority in favor of secession, but it also indicated that the meaning of "clear" will have to be decided politically. Second, the court did not specify (and surely could not have specified) the composition of a future negotiating team that might have authority to speak for the rest of Canada. This has been the problem highlighted by those who have said that there would be no one to sit on the other side of the table from Quebec in the negotiations that Quebec envisioned in both referendums. The federal government (representing the whole of Canada, including the 25 percent of the population that lives in Quebec) would lack authority to commit the nine other provinces; the provinces, on the other hand, would lack the

capacity to marginalize the federal government. In its judgment, the court referred to both the federal government and the provinces as being involved in the negotiations it mandated; it also referred to the many and varied interests that would have to be taken into account, but it avoided specifying the roles to be played by each of the parties, and it did not say how such a broad range of interests could all be effectively represented in the negotiations. Third, the court avoided saying what the scope of the negotiations would be, and in particular, it did not say whether they could be expected to lead to the creation of a new form of economic union, or to full independence for Quebec, or indeed to any agreed conclusion. Fourth, it did not say what would happen if negotiations took place, and the parties reached an agreement that legislatures refused to incorporate into a constitutional resolution providing for secession. It is scarcely any wonder, then, that a former Quebec vice-premier under the PQ, Jacques-Yvan Morin, has summarized the court's ruling as follows: "In theory, sovereignty is for Quebec a legitimate goal to pursue, and the right to secede cannot democratically be denied; in practice, however, the federal power is entitled to raise obstacles and difficulties that are important and numerous enough so as to negate any attempt to achieve sovereignty and to throw off track any negotiation on the issue."

The real significance of the *Secession* case is more political than jurisprudential. It may have some bearing on a future referendum outcome, or on a PQ decision to hold a referendum or postpone it indefinitely. After the judgment was handed down, both federalists and *indépendantistes* began to interpret the decision as having palpable advantages for their own side. This may be taken as an indication of the court's political finesse in the short run, and perhaps as forewarning of political controversies that a future court may be unable to avoid if the PQ holds and wins a referendum. No doubt, though, the court's judgment will be significant in another way as well: as a shaper of Canadian political norms, which it surely it will be, if it stimulates reflection on the interrelationship between federalism, democracy, constitutionalism and the rule of law, and the protection of minorities-and on the meaning of nationhood.

Neil S. Siegel

The Virtue of Judicial Statesmanship[*]

Statesmanship charges judges with approaching cases so as to facilitate the capacity of the legal system to legitimate itself by accomplishing two paradoxically related preconditions and purposes of law: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement. I argue that judicial statesmanship is a necessary, although not sufficient, component of judicial role in the American constitutional order. Statesmanship is not sufficient to legitimate the legal system because there are other important purposes of law with which statesmanship can be in tension, particularly those secured by maintaining fidelity to such rule-of-law values as consistency and transparency. But statesmanship is necessary if law is to fulfill all of its functions and to sustain its legitimacy over the long run and with respect to the nation as a whole. I conceive of law as an institution that must accomplish a diversity of purposes and that must account for the conditions of its own legitimation. . . .

One critical facet of the relationship of trust that sustains the rule of law is the confidence of the governed that the fidelity of their governors to what I shall call rule-of-law values—that is, to the values of consistency, stability, predictability, and transparency that were celebrated by legal-process jurisprudence and that are essential to the rule of law—does not result in law that the governed do not recognize as their own. If members of a political community experienced the law as deeply alienating over an extended period of time, they would inevitably feel a diminished sense of obligation to obey the law. They might continue to obey out of fear of punishment if punishment were reasonably likely to follow noncompliance, but less and less would those citizens continue relating to the law from what H.L.A. Hart called "the internal point of view." They would become less inclined to view the requirements of the law as a "*reason*" to behave in a certain way. Alienation, in other words, undermines the "widespread assumption within [a] society that law *matters* and should matter."

Without that tacit understanding, the rule of law will die. Counter-intuitively, therefore, while the rule of law is not primarily concerned with the content of legal rules, a society cannot sustain the rule of law by pursuing rule-of-law values single-mindedly at the expense of all other ideals. Accordingly, and focusing now on the role of courts in sustaining the

[*] *Excerpted from* 86 TEXAS L. REV. 959 (2008).

rule of law, one fails to apprehend the conditions for realizing the rule of law when one conceives of fidelity to rule-of-law values as exhaustively defining judicial role. One fails to register the magnitude of the cultural feat that the rule of law embodies. In a modern, heterogeneous community, a certain kind of democratic politics provides perhaps the best political support for the rule of law. It is a politics of persuasion, coexistence, and imagination that allows citizens within it to negotiate potentially profound disagreements that may endure despite a profound sense of common identity—even though the most significant disagreements may be about the meaning of that very identity. It is a politics that pursues the normative ideal of democracy as collective self governance. That conception of democracy engages the "question of how, in the face of manifest and indissoluble differences, we may be said to govern ourselves through collective self-determination."

B. Sustaining Social Solidarity

[A] basic purpose of law, particularly in a culturally heterogeneous society such as our own, is "to maintain social cohesion as circumstances change." That purpose of law has been characterized as reflecting concern with "the fate of 'a common fate,' that is, in the durability of social relationships across time." That purpose has also been described as "promoting social stability and . . . achieving a form of mutual respect." Some measure of social solidarity—of "political fraternity"—in the face of intense normative disagreement seems constitutive of the very existence of the community for whose benefit the legal order exists. Regarding the role of the Supreme Court in particular, "it is a function of the Court—in the sphere of its competence—to maintain continuity in the midst of change."

Of course, near-collective assent to significant legal interpretations is often lacking at a particular time. But if courts are to "organiz[e] political change so as to facilitate the survival of societies," then they must attend to "the problem of stability." This means, among other things, that courts must "anticipate[] the disputants'—or a community's—reactions to [their] behaviour." This further means that the values authoritatively expressed by governmental actors, including courts, must (over the long haul and to some extent) be those that different segments of a normatively heterogeneous nation can recognize as their own. In certain deeply divisive cases—certain cases that Anthony Kronman has called "identity-defining" conflicts—it may be appropriate for courts to "fashion settlements that avoid the declaration of a clear winner or loser," settlements that allow "each disputant [to] achiev[e] a partial victory." In other identity-defining

controversies, as when a government seeks to dismantle an apartheid social order, it may be appropriate for courts to take decisive action, sacrificing social stability over the short run in order to advance social solidarity and other important values over the long run. How courts ought to respond to situations so as to sustain social solidarity is not a theoretical question; the answer in a given case necessarily turns on the specific values at stake, the context, and the exercise of the faculty of judgment.

Maintaining a significant measure of social solidarity over the long term does not require courts to credit all values regardless of their content. The task of maintaining solidarity amidst heterogeneity is properly performed within the universe of *reasonable*, even if irreconcilable, disagreements that may exist in a community. For example, the values that long supported social subordination based on race or gender in this country are properly regarded by courts as unreasonable and inadmissible. Moreover, validating extreme views, even to only a modest extent, might undermine social solidarity rather than sustain it and would in any event prove impossible to reconcile with the function of law faithfully to express prevailing social values. Of course, what qualifies as "reasonable" disagreement, as opposed to "unreasonable" or "the most extreme," can be controversial when one moves from, say, apartheid to affirmative action. Drawing the necessary lines, particularly when the values in question are determined to be unreasonable but not extreme as measured by the number of present adherents, requires normative judgments that may themselves be based in contestable social values.