MARBURY v. MADISON AND CANADIAN CONSTITUTIONALISM: RHETORIC AND PRACTICE

LUC B. TREMBLAY*

Marbury v. Madison[1] established important constitutional principles that have legitimate claim to universality. Indeed, Chief Justice John Marshall's reasoning is partly responsible for the worldwide spread of judicial review.[2] Since the entrenchment of the Canadian Charter of Rights and Freedoms[3] in the Constitution in 1982, *Marbury* has become an explicit part of Canadian constitutional rhetoric. The main issue addressed here is the extent to which the constitutional principles recognized in *Marbury* underlie and can make sense in Canadian constitutional discourse and practice.

Marbury is a complex case; it deals with many difficult issues and suggests various levels of understanding. For Canadian constitutional lawyers, for example, the case is generally understood as supplying the basic legal and logical justification of two principles: the supremacy of the written Constitution and the legitimacy of judicial review of the constitutionality of legislative and executive acts.[4] But *Marbury* can also be understood as expressing the dominant characteristics of what I shall call the "American model of constitutionalism." Now Canadian constitutionalism also recognizes the supremacy of the written Constitution and the legitimate authority of the judiciary to review the constitutionality of legislative and executive acts. Moreover, it has become almost natural to hear in Canada that the Canadian Constitution has been "Americanized,"

---

* Professor of law, University of Montreal. LL.B. (1981), University of Sherbrooke; LL.M. (1983), University of British Columbia; Ph.D. (1993), Oxford. Professor Tremblay is a member of the Barreau du Québec. A previous version of this text has been presented at a seminar on *Marbury v. Madison* held at the University of Montreal in 2002. Professor Tremblay wishes to thank his colleagues David Gruning and Jean Leclair for having read a previous draft of this text and for their comments. He also thanks the Social Sciences and Humanities Research Council of Canada for its financial support.

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

2. *See, e.g.*, WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 104-13 (2000).

3. Canada Act, 1982, c. 11, sched. B, pt. I (Eng.) [hereinafter the Charter].

4. *See, e.g.*, Peter W. Hogg, *The Charter of Rights and American Theories of Interpretation*, 25 OSGOODE HALL L.J. 87, 92 (1987).

at least to a certain extent. Given the British legal heritage of Canada and the preamble of the British North America Act, now the Constitution Act, 1867, which provides that the Constitution is "similar in Principle to that of the United Kingdom,"[5] it is interesting to verify whether, or the extent to which, the U.S. model of constitutionalism underlies and can make sense of Canadian constitutional discourse and practice.

The question as to whether the Canadian Constitution is similar in principle to that of the United States, as opposed to that of the United Kingdom, has always been a contested issue within Anglo-Canadian constitutional theory. For example, Albert V. Dicey, the most important British constitutional theorist in modern times, argued in 1885 that the preamble of the British North America Act was a "diplomatic inaccuracy." The truth required one to substitute the word "States" for the word "Kingdom." In Dicey's mind, it was clear that "the Constitution of the Dominion [was] in its essential features modelled on that of the Union [that is, the United States]."[6] Many Canadian constitutional lawyers disagreed. For example, in 1892, in his treatise on constitutional law, William Henry Pope Clement argued that Dicey's view was "quite erroneous [and] founded upon a very superficial observation of the structure of government in this Dominion."[7] In 1889, in his own treatise, J.E.C. Munro asserted that Dicey's view was "very far from the truth."[8] Of course, the value of these positions might depend on what elements are taken as "essential" characteristics of the Canadian, U.S., and British constitutions. For example, Dicey emphasized the federal nature of the Canadian system whereas Clement and Munro emphasized the parliamentary nature of the Canadian system of governance. Moreover, the value of the contested positions might depend on what essential characteristics are taken as similarities and differences in "principle."

The first Section of this Article describes the meaning of the U.S. model of constitutionalism. The second Section contends that this model of constitutionalism played no significant role in Canadian constitutional law and theory from the creation of Canada in 1867 up until 1982. The third Section shows that since 1982, however, the U.S. model of constitutionalism has become part of Canadian

5. British North America Act, 1867, now the Constitution Act, 30 & 31 Vict., c. 3 (Eng.), *reprinted in* R.S.C. 1985, App. II, No. 5 (Can.).

6. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 165-66 (10th ed. 1959).

7. W.H.P. CLEMENT, THE LAW OF THE CANADIAN CONSTITUTION 3 (1892).

8. J.E.C. MUNRO, THE CONSTITUTION OF CANADA 2 (1889).

constitutional rhetoric. Chief Justice Marshall's reasoning in *Marbury* has actually been conceived as offering the theoretical premises that can justify the supremacy of the Canadian Constitution and the legitimacy of judicial review in Canada. The fourth Section proffers that Canadian constitutional practice, namely constitutional adjudication and interpretation, is radically inconsistent with the U.S. constitutional rhetoric. When one looks at what the courts do, instead of looking at what they claim they do, one should conclude that Canada has not adopted the U.S. model of constitutionalism. Finally, this Article concludes by suggesting that Canadian constitutionalism peculiarly resembles, not entirely facetiously, that of the first planet visited by the little prince in Antoine de Saint Exupery's tale.

I. The United States Model of Consitutionalism

The U.S. model of constitutionalism derives from Chief Justice John Marshall's reasoning in *Marbury*. The model provides that the written Constitution is a founding legal text made morally legitimate by virtue of an original act of consent by the people. The legal supremacy of the Constitution and the legitimate authority of the judiciary to review the constitutionality of legislative and executive acts flow directly from and are justified in terms of this basic idea. This model can be described in four theses.[9]

The first thesis, the "Sovereign People" thesis, claims that the people have an original right to establish their own Constitution. The specific form in which the people can exercise this basic right does not really matter, but it should amount to a form of popular consent to a set of principles, rules, or standards. For example, this could be a form of ratification, such as in the United States, or an *a posteriori* referendum. What is significant in this thesis is the claim that the people have supreme, indeed ultimate, moral and political authority to establish the legal Constitution of their country. It follows from this thesis that the exercise of this basic right by the people gives the principles of the Constitution their supreme normative legal and political force, that is, their supremacy. Chief Justice Marshall stated this thesis in *Marbury*:

> That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this

9. These theses are not meant to review the various questions and arguments analyzed in *Marbury v. Madison*.

> original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . . .[10]

The second thesis, the "Agency of the People" thesis, follows from the first. This thesis claims that all legitimate governmental powers in the State owe their existence, scope, and normative force to the sovereign will of the people as expressed in the written Constitution. Accordingly, the authority of the coordinate branches of government—judicial, legislative, and executive—is derivative. It is delegated by and subordinated to the original will of the people. The powers delegated to the government can be limited or unlimited and, where they are limited, the Constitution should contain written limits. In all cases, the various branches of government should be conceived as agents or trustees of the people. It follows from this thesis that any governmental action or decision that goes beyond the sphere of powers originally delegated by the people is of no force and effect, that is, such actions are void. This thesis is supported by the following assertions of Chief Justice Marshall:

> This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.
>
> The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken, or forgotten, the constitution is written. . . .
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.[11]

The Court's opinion in *McCulloch v. Maryland*[12] clearly articulates the "Agency of the People" thesis:

> The government proceeds directly from the people; is 'ordained and established' in the name of the people. . . .
>
> The Government of the Union then (whatever may be the influence of this fact on the case) is, emphatically and truly, a Gov-

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).
11. *Id.*
12. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

> ernment of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. . . .
>
> . . . [T]he Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all.[13]

The third thesis, the "Judicial Duty" thesis, follows from the first two. The "Judicial Duty" thesis claims that the specific province of the courts is to say what the law is, including the explanation and interpretation of particular rules, in order to act in accordance with it. Thus, if two laws appear to conflict in particular cases, the judges must determine which one should govern the cases. In other words, the judges decide which law is superior in validity, obligation, and authority. Because the Constitution is the supreme law of the land, the courts must uphold it against inconsistent governmental actions. This judicial duty follows from the fact that the original authority of the sovereign people (Sovereign People thesis) is superior to the delegated or derivative authority of its agents (Agency of the People thesis). Thus, judicial review of the constitutionality of governmental actions is legitimate. The original will of the sovereign people, as expressed in the Constitution, has legally and morally authorized such review. In a well-known passage, Chief Justice Marshall wrote:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply.[14]

13. *Id.* at 403-05.

14. *Marbury*, 5 U.S. (1 Cranch) at 177-78.

Now, in Marshall's view, "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation."[15]

The fourth thesis, the "Original Intention" thesis, builds from the first three theses. Because the people's original right to establish the constitution of their choice legitimizes all constitutional and legislative laws (Sovereign People thesis and Agency of the People thesis), and because the original will of the sovereign people, as expressed in the written Constitution, legitimizes judicial review of the constitutionality of government acts (Judicial Duty thesis), the constitutional norms on the basis of which the courts may legitimately determine the validity of governmental actions must have been declared or intended by or must derive from or be justified in terms of this original will. This "Original Intention" thesis presupposes that there are original constitutional norms, that is, that the written Constitution possesses some objective and determinate original meaning. Moreover, it assumes that there exists a rational methodology that makes it possible for the courts to ascertain these original norms. Thus, the original constitutional norms and the rational interpretive methodology must be determined and understood in accordance with a version of what U.S. constitutional scholars now call "originalism." The true nature of the original constitutional norms and the nature of true originalist methodology is a matter of debate among specialists. The significant point is the formalist claim that no judicial interpretation and application of the written Constitution is legitimate unless it is made in accordance with the principles (rules, purposes, values, standards) intended or understood by the original people.

Chief Justice Marshall's theory of constitutional interpretation comes within some version of originalism, although his theory is not one of strict constructionism. The assertions that the principles established by the original people are fundamental and "designed to be permanent" and that it was the province and duty of the judicial department "to say what the law is," came in all probability within some version of what has been called the "declaratory theory."[16] In *Marbury*, with respect to another issue, Chief Justice Marshall asserted that even if it may be difficult for the

15. *Id.* at 177.

16. The declaratory theory of judging holds that judges do not make or create the law, but "declare" the rules or norms that already exist in the body of case law, statutes and constitutional texts in order to apply them to relevant cases. The theory was particularly influential in the nineteenth century.

courts to apply a given rule of law to particular cases, "there cannot, it is believed, be much difficulty in laying down the rule."[17] He examined the obvious meaning of the words[18] and the formal logic of the constitutional text so as to ascertain the original intention.[19] Yet, Marshall's legal formalism was best stated in *Osborn v. Bank of the United States*[20] and in *McCulloch v. Maryland.*[21] In the *Osborn* decision, he professed his commitment to formalism:

> Judicial power, as contradistinguished from the powers of the laws, has no existence. Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is mere legal discretion, a discretion to be exercised in discerning the course described by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.[22]

In *McCulloch,* he applied it to constitutional interpretation:

> A Constitution, to contain an accurate detail of all subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. [W]e must never forget, that it is a Constitution we are expounding.[23]

These four theses are constitutive of the U.S. model of constitutionalism. They provide the basic justifications of the principles most closely associated with *Marbury,* namely, the supremacy of the written Constitution and the legitimacy of judicial review of legislation.

Within the U.S. model of constitutionalism, judicial review is plainly designed to be a "counter-majoritarian force" in the system of government.[24] This understanding raises no problem of legiti-

17. *Marbury,* 5 U.S. (1 Cranch) at 165.
18. *See id.* at 175.
19. *See, e.g., id.* at 174, 177.
20. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).
21. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
22. *Osborn,* 22 U.S. (9 Wheat.) at 866.
23. *McCulloch,* 17 U.S. (4 Wheat.) at 407.
24. A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

macy; majoritarianism, as a normative theory of democracy, is not conceived as the ultimate ground of political legitimacy. The ultimate ground of legitimacy is the original will of the people. Accordingly, even if the members of the legislatures are elected and collectively represent the electorate, as political bodies, they act as subordinate "agents" of the original people. Their collective will, even supported by the electorate, cannot be conceived as a source of legitimate laws beyond the scope of legislative powers authorized by the original people. The relevant question, then, is not whether judicial review is consistent with majoritarianism, but whether the original people intended to authorize the legislatures to take certain actions; it is thus a question of constitutional interpretation.[25]

II. CANADIAN CONSTITUTIONALISM 1867-1982

In *Marbury*, Chief Justice Marshall expressed very powerful and coherent constitutional ideas. Yet, at least until 1982, these ideas had not been recognized and incorporated into Canadian constitutional law. Before 1982, Canadian cases rarely referred explicitly to *Marbury*. Yet, the Judicial Committee of the Privy Council and the Canadian courts recognized the supremacy of the British North America Act and the legitimacy of judicial review on the basis of arguments quite similar to those of Chief Justice Marshall. In 1869, for example, two years after the creation of Canada, Chief Justice William Johnstone Ritchie of New Brunswick stated in *The Queen v. Chandler*[26] that "[If legislatures] do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other authorized body."[27] Ten years later, in 1879, Chief Justice William Collis Meredith of the Quebec Superior Court explicitly referred to Chief Justice Marshall's reasoning in *Marbury*, "to whom a higher authority can not be cited," in order to justify the supremacy of the Canadian constitution, the non-legal character of legislative acts taken beyond the limits of the authority conferred upon them by the Canadian constitution, and the judicial duty to

25. From this point of view, Bickel's counter-majoritarian objection to judicial review hits directly not only judicial review, but also the normative force of the American model of constitutionalism. It is made intelligible through a set of normative assumptions that postulate the validity of majoritarianism.

26. The Queen v. Chandler, 12 N.B.R. 556 (1869) (Can.).

27. *Id.* at 566-67. *See generally* BARRY L. STRAYER, THE CANADIAN CONSTITUTION AND THE COURTS 19-22, 38-50 (3d ed. 1988).

disregard laws that do not respect these limits.[28] In *Langlois v. Valin,*[29] he said:

> To me it seems plain that a statute, emanating from a legislature not having power to pass it, is not law; and that it is as much the duty of a judge to disregard the provisions of such a statute, as it is his duty to obey the law of the land.[30]

One might think, therefore, that Canadian constitutionalism had originally been conceived as coming within the U.S. model of constitutionalism. Such a characterization is flawed for a number of reasons. First, the supremacy of the Canadian Constitution did not derive from the fact that the British North America Act was the expression of a sovereign people having an original right to establish or consent to their own principles of government. Rather, the supremacy of the Canadian Constitution derived from the fact that it was an act of the British Parliament recognized by judges as having sovereign legal authority. The Canadian Constitution was an ordinary statute enacted by the Imperial Parliament. Accordingly, the supremacy of the Constitution was not based upon the Sovereign People thesis. It was a mere corollary of the doctrine of sovereignty of Parliament, as understood within orthodox British constitutional theory, and applied to colonial context—it was based upon imperialism.[31]

Second, although the Canadian legislatures and Parliament were regarded as non-sovereign law-making bodies, having a form of delegated authority, as in the U.S. model, they were not conceived as subordinated to the original authority of the people. They were subordinated to the sovereign authority of the British Parliament. Their laws were similar in principle to municipal by-laws or English railway company by-laws. Thus, if Canadian legislative institutions could be characterized as agents, then they were agents of the sovereign British Parliament. Their agency could not be conceived as coming within the Agency of the People thesis.[32]

---

28. STRAYER, *supra* note 27, at 41.

29. Langolis v. Valin, [1879] 5 Q.L.R. 1 (Can.), *aff'd*, 3 S.C.R. 1, *aff'd*, 5 App. Cas. 115 (P.C.) (Eng.).

30. *Id.* at 17. See also the reference to Alexander Hamilton asserting that "no legislative acts, therefore, contrary to the constitution can be valid." *Id.* at 16.

31. *See* P. RUSSELL, THE JUDICIARY IN CANADA: THE THIRD BRANCH OF GOVERNMENT 93 (1987).

32. In *Langlois v. Valin*, Chief Justice Meredith explicitly referred to a passage written by Hamilton for the purposes of asserting that "[t]here is no position which depends upon clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void." *Langlois*, 5 Q.L.R. at 16. This position, found in *Federalist 78*, was plainly consistent with British constitutional theory. THE FEDERALIST NO. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Third, the duty of the Canadian courts to give effect to the Canadian constitution in the event of an inconsistent law did not derive from the superior authority of the will of the sovereign Canadian people as expressed in the Constitution. Rather, this duty derived from the tradition of British constitutionalism, associated with the sovereignty of Parliament. This judicial duty required invalidation of subordinate laws that are not within the powers conferred by act of Parliament, that is, laws that were inconsistent with the will of the British Parliament as expressed in its acts. Formally, the Judicial Duty Thesis is not unique to the United States. One might even argue that the duty of U.S. judges to invalidate legislative acts inconsistent with the U.S. Constitution derived its formal logic from British constitutional practice and tradition. Indeed, in both traditions, the courts must obey the law.[33]

In light of these considerations, the recognition of the sovereignty of the Imperial Parliament entailed the judicial duty to uphold the Act of the Imperial Parliament recognized as the Canadian constitution against inconsistent Canadian legislation. As Dicey argued:

> The courts . . . may be called upon to adjudicate upon the validity or constitutionality of any Act of the Dominion Parliament. For if a [colonial] law really contradicts the provisions of an Act of Parliament extending to [the colony], no court throughout the British dominions could legally, it is clear, give effect to the enactment of the Dominion Parliament. *This is an inevitable result of the legislative sovereignty exercised by the Imperial Parliament.* In the supposed case the Dominion Parliament commands the judges to act in a particular manner, and the Imperial Parliament commands them to act in another manner. Of these two commands *the order of the Imperial Parliament is the one which must be obeyed. This is the very meaning of Parliamentary sovereignty.*[34]

Moreover, judicial power to review the constitutionality of colonial laws was recognized and somewhat circumscribed by another Imperial Statute, the Colonial Laws Validity Act, 1865.[35] Section 2 of this Act provided that "[a]ny colonial law . . . repugnant to the provisions of any Act of Parliament extending to the colony . . . shall . . . be and remain absolutely void and inoperative."[36] Judicial review was thus limited to colonial laws inconsistent with any act of Parliament, intended by the Imperial Parliament to extend to the

33. *See, e.g.*, DICEY, *supra* note 6, at 159.

34. *Id.* at 109 (emphasis added).

35. Colonial Laws Validity Act, 28 & 29 Vict., c. 63 (1865) (Eng.).

36. *Id.* § 2.

colony. Nevertheless, the normative force of this Imperial Act also derived from the sovereign authority of the British Parliament.

Fourth, the "Original Intention" thesis was not in place. The constitutional norms on the basis of which the courts could legitimately determine the validity of governmental actions did not have to be declared by, intended by, derived from, or be justified in terms of the will of the original people. Being an Act of the British Parliament, the Canadian Constitution should be interpreted as any other British statute.[37] Accordingly, the paramount interpretive constraint within the process of constitutional interpretation was to enforce a norm that could fit the "words" used in the Canadian Constitution.[38] This constraint has been understood in various ways and has given rise to competing interpretive methodologies.[39] The central idea was that judicial interpretation should be based on the words of the Act of Parliament. Any legislative intent, to the extent it played a role in the normative process, was inferred from the words of the Act taken as a whole. As Dicey said, "[t]he courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament."[40]

> [T]he English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House, of anything which may have passed in debate (a matter of which officially he has no cognisance), or even of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent.[41]

But the words of the Canadian Constitution are weak constraints. Judges could determine the meaning of words in accordance with a whole range of competing interpretive approaches. In practice, they have had no hesitation in using almost all of them. They have

---

37. *See* Bank of Toronto v. Lambe, [1887] 12 App. Cas. 575, 579 (Eng.). It is true that the Judicial Committee of the Privy Council has stated later that the words of the Canadian Constitution should be given a broad, generous and progressive interpretation. But that was justified by the specific purpose of the Imperial Act, namely the creation of a new country (as opposed to the purposes of other statutes), and not by a distinct theory of legal interpretation. *See, e.g.*, Edwards v. Canada (Attorney General), [1930] A.C. 124, 136-37 (P.C.) (Eng.).

38. *See* DICEY, *supra* note 6, at 407.

39. Dicey himself, for example, thought that judges who interpret the words of enactments are "influenced by the feelings of magistrates no less than by the general spirit of the common law." *Id.* at 413.

40. DICEY, *supra* note 6, at 73-74.

41. *Id.* at 407-08.

elaborated the content of certain words or provisions in accordance with some version of formalism that have favoured either strict or liberal constructionism, formal deductive reasoning or abstract conceptualism, with some version of the purposive approach and have even departed from past interpretations by using a progressive interpretive approach, and so on. Indeed, the words of the Canadian constitution, conceived as formal signs, can often support many competing meanings. As long as judges interpreted the text, instead of changing, ignoring or amending it by referring to values not associated with the words (such as defining the word "bank" in the light of the "right to education," for example), lawyers generally conceived the constitutional norms arising from the process of interpretation as legitimate. As Peter Hogg observed, "the principle of progressive interpretation is as firmly established in Canada as is the principle of minimal reliance on legislative history"[42] and both progressive and purposive interpretation constitute "orthodox Canadian constitutional law."[43] Words were therefore paramount while original intention was almost irrelevant. Canadian constitutionalism did not incorporate the "Original Intention" thesis.

Before 1982 Canadian constitutionalism did not come within the U.S. model of constitutionalism rooted in *Marbury* and explained in terms of the four theses described in the previous Section. The references to the original Canadian people were absent from the premises of the arguments supporting the supremacy of the Canadian constitution and the legitimacy of judicial review. Yet, things have changed in the last twenty years.

III. Canadian Constitutional Rhetoric 1982-Present

In 1982, the United Kingdom Parliament enacted the Canada Act.[44] This Act included the Constitution Act[45] that contained, among other things, a procedure for the amendment of the written Constitution and the Charter of Rights and Freedoms. Canadian constitutional rhetoric consequently changed and the vocabulary came to be conceived in terms similar to those of American constitutional law and theory.[46]

---

42. *See* Hogg, *supra* note 4, at 97.

43. *Id.* at 103.

44. *See* Canada Act, 1982.

45. *See* Constitution Act, 1982.

46. Indeed, it has become a daily experience to hear lawyers, politicians, public figures, or journalists speaking about the "Americanization" of the Canadian Constitution.

One of the main purposes of the Canada Act 1982 was to terminate the authority of the Imperial Parliament over Canada, notably through the adoption of a process of constitutional amendment that would be entirely local. This meant that the Canadian Constitution would become, truly, a "Canadian" Constitution. Because Canada would now have the absolute legal control over its structure and content, the Constitution would "really" become the Constitution of all Canadians; it would become "their" Constitution; the Constitution of their nation. For this purpose, the original name of the Constitution, the British North America Act, was even changed into "Constitution Act, 1867," suggesting that the text should not be referred to as an old Imperial Act, but as the Constitution of an independent and sovereign country. Perhaps Peter Hogg went a bit far when he claimed that this modification was an attempt to "re-write history,"[47] but it was certainly an attempt to change for the future the deep meaning the constitutional text has for the Canadian people.

What would be the normative foundation of the supreme authority of the Constitution and of the legitimacy of judicial review in this post-1982 context in which Canadians could not, in principle, legitimately appeal to the supreme authority of the Imperial Parliament? This remained one of the most pressing questions within Canadian constitutional law and theory after 1982. The Supreme Court of Canada found part of the answer in Chief Justice Marshall's reasoning in *Marbury*. For example, in the very first case on the Charter of Rights and Freedoms decided by the Court in 1984, *Law Society of Upper Canada v. Skapinker*,[48] the Court denied that the fact that the Constitution Act, 1982 had been enacted by the United Kingdom Parliament could have special legitimating force. This fact, the Court held, should be conceived as having a "mere historical curiosity value."[49] In other words, it was a mere formal process of constitutional amendment that has lost relevancy "on the ultimate adoption of the instrument as the Constitution."[50] The right position, then, is to conceive the Constitution Act, 1982 as "a part of the constitution of a nation."[51] The Court thus quoted many important passages of *Marbury*.

47. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 8 (3d ed. 1992).

48. The Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 (Can.).

49. *Id.* at 365.

50. *Id.*

51. *Id.*

This Court's reasoning in *Skapinker* was highly significant; from now on, the Court's rhetoric would generally follow the U.S. model of constitutionalism. First, the Court has since argued for the supremacy of the Constitution in accordance with the Sovereign People thesis. For example, in an important decision dealing with the supremacy of the Constitution and the legitimacy of judicial review, *Motor Vehicle Act (B.C.) Reference,* the Court stated that: "It ought not be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada."[52] Indeed, the expression "elected representatives of the people of Canada," as opposed to the "Imperial Parliament," emphasized the legitimating source of the Charter, as opposed to its legal source. More recently, in a case calling into question the legitimacy of the Constitution, the *Québec Secession Reference,* the Court stated that the proclamation of the Constitution Act, 1982 was legitimate, although formally enacted by the Parliament of the United Kingdom: "[T]he legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the Patriation Reference, had ruled was in accordance with our Constitution."[53] As for the legitimacy of the Constitution Act, 1867, the Court asserted that this Act, although legally instituted by the Imperial Parliament, resulted from "an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat."[54] Not only did local delegates approve the resolutions that subsequently became the British North America Act, but they were confirmed by local parliaments before being translated into law by the Imperial Parliament.

These assertions constituted an important shift within Canadian constitutional rhetoric. The Constitution would now derive its normative force from the fact that the people living in the colonies in 1867 and the Canadian people living in 1982, or perhaps the "elected representatives of the people then living in the colonies" and the "elected representatives of the people of Canada" living in 1982, had an original right to establish for their future the political institutions of their choices. At the very least, the Constitution is

52. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 497 (Can.).

53. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 47 (Can.) [hereinafter *Quebec Secession Reference*].

54. *Id.* para. 35.

made morally legitimate by some act of consent by an original people, at least through their elected representatives. The Canadian people is now regarded as having supreme, indeed ultimate, moral and political authority to establish, amend or replace the Constitution of their country.

Second, the kind of agency thesis that supported the Court's understanding of Canadian constitutionalism before 1982 should henceforth be read as a version of the "Agency of the People" thesis. In the *Quebec Secession Reference,* for example, the Court asserted that Canadian laws and political institutions have no other source, authority and legitimacy than what is provided for in the Constitution and that the legitimacy of the Constitution derived from the people.

> Simply put, the constitutionalism principle requires that all government action comply with 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.[55]

> 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.[56]

It follows that the authority of the various branches of government is derivative and that any governmental action or decision that goes beyond the sphere of powers determined by the people or their elected representatives in the Constitution is of no force and effect.

---

55. *Id.* para. 72.
56. *Id.* para. 75.

Third, the Supreme Court of Canada has explicitly accepted the "Judicial Duty" thesis as expounded by Chief Justice Marshall. In *Skapinker,* the Court approved and quoted at length the relevant passages written in *Marbury.* Judicial review of the constitutionality of governmental actions and decisions is accepted as legitimate because the elected representatives of the Canadian people, who consented to the enactment of the Constitution, have morally authorized such review. The Court stated: "It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy."[57] The same argument has been repeated many times since. For example, it has been said that:

> The ability to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution. This foundational document (in Canada, a series of documents) expresses the desire of the people to limit the power of legislatures in certain specified ways. Because our Constitution is entrenched, those limitations cannot be changed by recourse to the usual democratic process. They are not cast in stone, however, and can be modified in accordance with a further expression of democratic will: constitutional amendment.[58]

So far, the Canadian Supreme Court's rhetoric seems to imply that Canadian constitutionalism has become similar in principle to the U.S. model of constitutionalism. The Canadian people have become the apex of the moral and political reasoning supporting both the legitimacy of the supreme authority of the Constitution and the legitimacy of judicial review.

The "Original Intention" thesis, however, must be addressed. Given the Canadian Supreme Court's acceptance of the three foregoing theses, it should be committed, at least in principle, to the fourth "Original Intention" thesis. Insofar as the supreme authority of the Constitution, the limited powers of the various branches of government, and judicial review of governmental actions are made legitimate by virtue of some original and supreme decision or consent of the Canadian people or of their elected representa-

57. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R at 497.

58. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3, para. 314 (Can.). This passage is drawn from the dissent of Mr. Justice La Forest. It should be said that the majority did not disagree with this point of principle. *See id.* para. 93; *see also Quebec Secession Reference,* para. 53 ("A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.").

tives, the constitutional norms on the basis of which the courts can determine the validity of governmental actions should be declared or intended by or must derive from or be justified in terms of this original and supreme decision or act of consent.

IV. Canadian Constitutional Practice 1982-Present

The practice of constitutional adjudication and interpretation in Canada is radically inconsistent with the "Original Intention" thesis. As such, Canadian constitutionalism is actually incoherent: the Canadian practice of constitutional adjudication and interpretation is radically inconsistent with the Canadian rhetoric based upon the U.S. model of constitutionalism.

The Supreme Court of Canada's first judicial decisions made under the Charter clearly intended to refute the "Original Intention" thesis. In 1985, for example, in an important decision of principle, the Supreme Court stated that the meaning of the Canadian constitution should not derive from the "original intention" of the bodies which adopted the Charter or from the original meaning as understood at the moment of adoption.[59] Various considerations supported this view: the "historical usage of the terms used [was] shrouded in ambiguity";[60] the relevant statements and speeches by prominent figures were "inherently unreliable";[61] and the "intent" of the legislative bodies that adopted the Constitution should be regarded as a fact which was "nearly impossible of proof."[62] But the most important reason was that constitutional meaning should not be "frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs."[63] In the Supreme Court's opinion, constitutional interpretation should be progressive. Constitutional values must grow and develop "over time to meet new social, political and historical realities often unimagined by its framers."[64] The Constitution, in short, should be understood as a "living tree."[65]

This position was quite paradoxical: In the same case referenced above, the written Constitution was conceived as the ground for the legitimacy of judicial review for the specific reason that it had

59. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R at 497.
60. *Id.* at 512.
61. *Id.* at 508.
62. *Id.* at 508.
63. *Id.* at 509.
64. Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 155 (Can.).
65. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. at 509.

resulted from an original act of popular consent through the elected representatives.[66] One would have expected that the norms that may legitimately be used as judicial reason not to enforce or to invalidate legislative acts would have to derive from what has been consented to, that is, the original norms of the Constitution. In principle, judicial review based upon norms that have not been consented to by the Canadian people or their elected representatives cannot be accepted as legitimate. Progressive interpretation nonetheless requires that the norms that are used as judicial reason not to enforce or to invalidate legislation may not have been willed or consented to by the people or their elected representatives. The courts are responsible for the conditions at which constitutional norms must be adjusted to societal needs and thus may be authors of the norms they apply in the process of constitutional review. The idea that original consent is the source of legitimate norms is therefore undermined by these observations.

Moreover, the Supreme Court of Canada held that the interpretation of constitutional provisions must be ascertained by an analysis of their purposes.[67] Such purposes are not understood as corresponding to some "original" purposes, that is, to the subjective purposes the constituent had in mind when the text was written down. The purposes result from a process of reasoning that constructs them in the light of the Canadian constitution's larger objects and "proper linguistic, philosophic and historical contexts."[68] Accordingly, constitutional purposes result from a process of interpretation that produces what philosophers call a "wide reflective equilibrium" between competing historical, linguistic, conceptual, and philosophical considerations. These considerations have something relevant to say about the meaning of the provisions, but may have nothing, or very little, to do with what the elected representatives of the Canadian people consented to as a matter of historical, political, or legal fact.[69] The purposes of constitutional provisions, therefore, constitute various judicial constructions that can be conceptually detached from what is supposed to give the Constitution its normative force.

There is good reason to believe that the main constraint within the process of constitutional interpretation has remained what it

66. *See supra* notes 50-55 and accompanying texts.

67. *See Hunter*, [1984] 2 S.C.R. at 155.

68. The Queen v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 344 (Can.).

69. On an analysis of the process of purposive interpretation, see Luc B. Tremblay, *L'interprétation téléologique des droits constitutionnels*, 29 REVUE JURIDIQUE THÉMIS [R.J.T.] 459 (1995). On the concept of "wide reflective equilibrium" in this context, see *id.* at 489-91.

had always been, that is, to give the Constitution meanings that reasonably fit the "words" of constitutional provisions.[70] This is why Peter Hogg, for example, could describe as "orthodox constitutional law" the propositions that "judicial review of legislation must be based exclusively on the words of the constitution, and that the words of the constitution should receive a progressive interpretation . . . . [and] a 'purposive' interpretation."[71] With respect to progressive interpretation, he argued that:

> [J]udicial review can be derived from the constitution while departing from or ignoring the original understanding. The doctrine of progressive interpretation is no less faithful to the constitutional text than interpretivism. Like interpretivism, it is based on the words of the constitution, read in the context of the document as a whole. It differs from interpretivism only in that the doctrine of progressive interpretation assumes that the words of the constitution need not be frozen in the sense in which they were understood by the framers, but are to be read in a sense that is appropriate to current conditions.[72]

Similarly, he maintained that a purposive approach to constitutional interpretation is "useful in elaborating those words [. . .] that are especially vague or ambiguous",[73] even if the actual purpose is "usually unknown"[74] and if the Constitution pursues "a range of purposes."[75] As long as the interpretation is consistent with the terms of the constitutional provisions, judicial review is acceptable. Indeed, Hogg argued that "judicial review is only legitimate if it is based on the text of the constitution."[76]

Since 1982, however, the Canadian Supreme Court might even have departed from orthodox constitutional law. In various cases, it has recognized that judicial review could legitimately be based upon what it has described as "unwritten constitutional principles." Indeed, judicial appeal to unwritten constitutional principles may serve different purposes. The courts may refer to them merely as aids in the process of interpreting the specific text of constitutional provisions. In these cases, where the resulting interpretations reasonably fit the express terms of the Constitution, judicial review based upon unwritten principles is not different in kind from judicial review based upon progressive and purposive interpretation

70. *See supra* notes 36-41 and accompanying text.
71. *See* Hogg, *supra* note 4, at 103.
72. *Id.* at 101.
73. *Id.* at 103.
74. *Id.* at 101.
75. *Id.* at 113.
76. *Id.*

that reasonably fits the express terms of the Constitution. Both forms of review come within orthodox constitutional law. In contrast, the courts may also refer to unwritten principles as independent grounds for the purposes of directly reviewing the constitutionality of legislative and executive acts. Here, the unwritten constitutional principles are used to fill out the gaps in the express terms of the constitutional scheme.[77] They are referred to as a reason to create new constitutional rules or principles or new exceptions to existing constitutional rules or principles. In these cases, the resulting constitutional norms or exceptions based upon the body of unwritten constitutional principles do not reasonably fit the express terms of the Constitution. Consequently, this aspect of the practice of judicial review in Canada is inconsistent with orthodox constitutional law.

One might think that the unwritten constitutional principles may have been fixed by the original intention or decision of the elected representatives of the Canadian people. Accordingly, judicial review based upon these considerations can at least be consistent with the "Original Intention" thesis and, therefore, with Canadian constitutional rhetoric. The Court does not, however, understand judicial review in this manner. For example, in various cases relating to the independence of provincial courts, the majority of the Supreme Court asked the question whether the constitutional source of the principle of judicial independence lies in the express provisions of the Constitution Acts, 1867 to 1982, or exterior to the sections of those documents. The answer was that it lies outside, in the preamble:

> [T]he express provisions of the *Constitution Act, 1867* and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867.* In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.[78]

Yet, the preamble of the Constitution Act, 1867 need not be understood in accordance with what it meant in 1867. Consequently, the interpretation of the principles it embodies can be progressive.

---

77. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3, para. 104 (Can.).

78. *Id.* para. 109.

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente*, [. . .] that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.[79]

Judicial review based upon the body of unwritten constitutional principles supporting the recognition of constitutional norms or exceptions that do not reasonably fit the express terms of constitutional provisions cannot be conceived as legitimate within the "Original Intention" thesis and Canadian constitutional rhetoric. Moreover, as we saw, this kind of judicial review cannot be conceived as legitimate in accordance with orthodox constitutional law. This explains the Justice Gerard V. La Forest's vigorous dissent in these cases relating to the independence of provincial courts:

> Judicial review, therefore, is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument. In this sense, it is akin to statutory interpretation. In each case, the court's role is to divine the intent or purpose of the text as it has been expressed by the people through the mechanism of the democratic process. Of course, many (but not all) constitutional provisions are cast in broad and abstract language. Courts have the often arduous task of explicating the effect of this language in a myriad of factual circumstances, many of which may not have been contemplated by the framers of the Constitution. While there are inevitable disputes about the manner in which courts should perform this duty, for example by according more or less deference to legislative decisions, there is general agreement that the task itself is legitimate. This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority.[80]

---

79. *Id.* para. 106.

80. *Id.* paras. 315-16. On these cases, see Jean Leclair & Yves-Marie Morissette, *L'Indépendance Judiciaire et la Cour Suprême: Reconstruction Historique Douteuse et Théorie Constitutionnelle de Complaisance*, 36 OSGOODE HALL L.J. 485 (1998); J. Goldsworthy, *The Preamble, Judicial Independence and Judicial Integrity*, 11 CONST. FORUM 60 (2000); Robin Elliot, *References, Structural Argumentation and the Organizing Principles of Canada's Constitution*, 80 CAN. B. REV. 67 (2001).

In these cases, the majority of the Canadian Supreme Court argued from a formalist perspective, contending that the preamble constituted the "written" source of the principles.[81] The preamble does not explicitly mention the principle of judicial independence; hence, its unwritten character persists in Canadian constitutionalism. In any event, less than a year later, the Supreme Court of Canada ruled that unwritten principles of the Constitution could be explained without any reference to the preamble. Unwritten principles could now be conceived as constituting the underlying substantive constitutional values, ideals, and purposes making sense of express constitutional provisions when they are read in accordance with history and precedent. In the *Quebec Secession Reference*, for example, the Court said that:

> 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. [. . .] Our Constitution has an internal architecture, or [. . .]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. [. . .] 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.[82]

According to the Court, the recognition of unwritten constitutional principles should not be taken as an invitation to dispense with the written text of the Canadian Constitution. In other words, these principles should be referred to in ways consistent with orthodox constitutional law. The Canadian Supreme Court added, however, that in "certain circumstances", the unwritten principles may:

> give rise to substantive legal obligations (have "full legal force" [. . .]), which constitute substantive limitations upon government action. These principles may give rise to very abstract and

81. Chief Justice Lamer wrote: "There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is. In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act, 1867*." *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, paras. 93-94.

82. *Quebec Secession Reference*, paras. 49-51.

> general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.[83]

This suggests that the Canadian courts can refer to such principles, not only for the purpose of interpreting express terms of constitutional provisions, but also to fill out the gaps in the express terms of the constitutional scheme.[84] To this extent, the court confirmed that judicial review could proceed beyond what has been accepted within orthodox constitutional law.

There might exist various competing approaches and theories for the determination of the unwritten principles that constitute the best or the true unstated assumptions upon which the constitutional text is based. In all cases, the principles are basically determined by judges themselves, without formal authorization coming from the original intention of the elected representatives of the people or from the terms of constitutional provisions. The practice of judicial review based upon unwritten principles, therefore, appears to be inconsistent with the Original Intention thesis as with orthodox constitutional law.

In Canada, the judicial practice of reviewing the constitutionality of legislation is inconsistent with the Canadian constitutional rhetoric based upon the U.S. model of constitutionalism. Insofar as the U.S. model is correct, valid, or justified in principle, the Canadian practice of judicial review is not legitimate. Indeed, the practice of Canadian judges contradicts the rhetoric that has been conceived as rendering politically legitimate both the supremacy of the written Constitution and the practice of judicial review.

The thesis, then, is the following. Constitutional rhetoric within the Canadian Supreme Court has become similar to that of Chief Justice Marshall in *Marbury*. This rhetoric has been used by the Court to justify the supreme authority of the Constitution and the legitimacy of judicial review where the Imperial Parliament could no longer be referred to as the ultimate source of legitimate authority. Yet, the practice of constitutional interpretation developed for the purposes of applying the Constitution within the process of constitutional review has remained radically inconsistent with one of the constitutive theses of the U.S. model of constitutionalism, the Original Intention thesis. This is incoherent. If the

---

83. *Id.* para. 54.

84. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, para. 104.

original consent of the elected representatives of the Canadian people constitutes the ultimate moral justification for judicial review based upon the supreme authority of constitutional norms, then this consent should play a significant role in determining the nature and content of the practical constitutional norms that have supreme authority for the purposes of judicial review. A substantial theoretical choice must therefore be made: either Canadians accept U.S. rhetoric and turn to some version of originalism, or they abandon U.S. rhetoric and seek new grounds for establishing the legitimacy of judicial review and the supremacy of the Constitution.

One might object, claiming that what makes the Canadian judicial position look incoherent should be explained by the fact that judges have broken up with the kind of formalism underlying Chief Justice Marshall's methodological assumptions on constitutional interpretation. As we have seen, the U.S. model of constitutionalism might be plausible if judges could ascertain the objective original meaning of constitutional provisions. Canadian judges are realist; they cannot share the view that the original meaning of the Constitution can be objectively found and it would be quite unfair to require them adopt that perspective. Judges know, as Justice Antonio Lamer said, that the original intention is a "fact which is nearly impossible of proof."[85] Consequently, Canadian constitutional theory must live with the incoherence. In my view, if it is true that legal formalism constitutes a theoretical position Canadian judges cannot live with, then Canadian constitutional rhetoric based upon the U.S. model of constitutionalism should be radically called into question. What constitutes the moral basis of the supreme authority of constitutional norms and of the authority of the judiciary to review the constitutionality of legislative and executive acts on the basis of these norms should be revisited. Canadians, especially Canadian judges, should construct a theory of Canadian constitutionalism that is both coherent and justified.

V. Conclusion

Canadian constitutional practice is inconsistent with Canadian constitutional rhetoric and, consequently, with the U.S. model of constitutionalism. Moreover, at the moment, Canadian constitutionalism seems no more similar in principle to that of the United Kingdom. In fact, one might believe that Canadian constitutional-

85. *Id.*

ism appears similar in principle to that of the first planet visited by the little prince in Antoine de St-Exupéry's tale.[86]

At some point in his life, in order to add to his knowledge, the Little Prince decided to visit his cosmic neighborhood. The first planet was inhabited by a king covered with a magnificent robe, sitting upon a throne which was at the same time both simple and majestic. The king was an absolute monarch. He tolerated no disobedience. Moreover, he ruled over everything, his planet, the other planets, and all the stars. His rule was universal. When the king saw the Little Prince coming, he proudly announced: "Here is a subject." For him, all men are subjects. Because the Little Prince was tired, he looked everywhere to find a place to sit down, but he could not—the entire planet was crammed and obstructed by the king's magnificent ermine robe. So the little prince remained standing upright and yawned. Then the king said: "I forbid you to yawn in front of the king; this is contrary to the rule of etiquette." The Little Prince replied: "I can't stop myself, I am tired." "Ah", the king said, "then, I order you to yawn. Yawn! Yawn again! It is an order!" Frightened by such order, the Little Prince said: "I cannot, any more . . . ." Thus, the king replied: "All right, then, I order you sometimes to yawn and sometimes not to yawn." When the Little Prince timidly asked if he might then sit down, the king said: "I order you to sit down." When he begged to be excused to ask a question, the king answered: "I order you to ask me a question." And so on.

In this amusing tale, the kind of authority enjoyed by the king looks completely absurd. For what can be the point of claiming supreme and absolute authority over the whole universe if you always command your subjects to do what they wish to do? What is the meaning of such authority?

As funny or absurd as it may sound, it represents fairly well the actual state of Canadian constitutional discourse and law. The authority of the original elected representatives of the Canadian people is similar to the king's authority. The elected representatives of the Canadian people would have supreme and absolute authority with respect to constitutional commands, but their commands would order judges to do what they wish to do anyway. The Canadian courts should thus act in accordance with the constitutional commands of the sovereign people, but the commands

86. ANTOINE DE ST-EXUPÉRY, LE PETIT PRINCE, (1943), *available at* http://www.angelfire.com/hi/littleprince/ (last visited Apr. 8, 2004). Material from LE PETIT PRINCE is translated from French by the author.

would then reflect what judges prefer or think appropriate in particular contexts. It is like if the original people had said to the courts: "You think that freedom of expression includes child pornography? I order you to give freedom of expression a meaning that recognizes child pornography. You think the contrary? I order you not to give freedom of expression a meaning that recognizes child pornography."

What then is the point of legitimating the Constitution on the original consent of the people? Wouldn't it be more coherent and legitimate to favour originalism? Perhaps, but the point of my conclusion is not to promote originalism. Insofar as the actual practice of judicial review in Canada is accepted as desirable, Canadian constitutional theory must find a justified and coherent basis for its legitimacy. Whatever that basis might be, I suggest that it might have something to do with what Saint Exupéry wanted his tale to illustrate. The moral of the story has something to do with the legitimacy of law based upon reason. The king clearly wanted his authority to be respected. According to the author, "because he was a very good man, he made his orders reasonable." So the king said:

> One must require from each one the duty which each one can perform. Accepted authority rests first of all on reason. If you ordered your people to go and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable.

Indeed, what is reasonable depends on the context, but the examples show that the only accepted and respected commands are those that the subjects find reasonable and justifiable from their own point of view and for their own good. For example, there is a beautiful passage on the power of the king to order a sunset to happen precisely at the time it should naturally happen. Indeed, the king said that he will command the sunset, even if, according to his science of government, he must "wait until conditions are favourable," that is, after having "consulted a bulky almanac," until the evening at about twenty minutes to eight o'clock. The king will order the sun to set on the right time and we will see how well he is obeyed and so the king proclaimed: "If I ordered a general to change himself into a sea bird, and if the general did not obey me, that would not be the fault of the general. It would be my fault." Similarly, the king inquires:

> If I ordered a general to fly from one flower to another like a butterfly, or to write a tragic drama, or to change himself into a sea bird, and if the general did not carry out the order that he

> had received, which one of us would be in the wrong? The general, or myself?

The little prince answers: "You."

The authority of the king might not be so absurd after all. The king admitted that the authority of his commands is ultimately a matter of reason, not will. The constitutional lesson of the king's tale is as follows: the authority of constitutional norms should derive from reason, not from original will or consent of the people. To the extent to which Canadian constitutional practice can be understood as guided by some reason-based legitimacy criteria, as opposed to original will, Canadian constitutionalism might be conceived as justifiable and coherent. This conception would require, as a first step, a rhetoric that departs from the U.S. model of constitutionalism as inferred from Chief Justice Marshall in *Marbury*.[87]

87. My main contribution to this project is: Luc B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 OXFORD J. LEGAL STUD. 525 (2003).