Henry VIII Clauses and the Constitution

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I. Introduction

Sections 91 and 92 of the *Constitution Act, 1867* are commonly thought of as providing the textual basis for the division of legislative power between the federal and provincial orders of government.[1] But, when considered in their proper philosophic and historical contexts, sections 91 and 92 also reveal a formula for a governmental structure that protects individual liberty. "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons," says section 91, "to make Laws for the Peace, Order, and good Government of Canada . . .".[2] Section 92 provides that "[i]n each Province the Legislature may exclusively make Laws . . .".[3] These sections assign the authority to "make Laws" exclusively to legislatures.[4] These legislatures comprise distinct elements: the Crown, an appointed upper house and a democratically elected lower house.[5] These distinct elements are a feature unique to the legislative branch and facilitate the representation of diverse societal interests within the legislature.[6] The separation of legislative power from executive power and the vestiture of legislative power in a representative institution comprising distinct societal elements serve as "structural limitations on the capacity of the state to violate individual rights".[7]

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1 *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34, at para. 53 [hereinafter "*City of Toronto*"].

2 *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91.

3 *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92.

4 In this paper, "legislature" refers to the legislative branch and includes provincial legislative assemblies as well as the Parliament of Canada.

5 *Constitution Act, 1867*, 30 & 31 Vict., c. 3, ss. 17, 69, 71, 88.

6 Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 61-62; Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 141-42.

7 Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press,

Henry VIII clauses are disruptive of the structural limitations in sections 91 and 92, because they authorize the executive to wield primary legislative powers without involving the constituent elements of the legislature. Henry VIII clauses are provisions in primary legislation that authorize the executive to amend or repeal primary legislation.[8] They are named derogatively after Henry VIII, an English monarch known, *inter alia*, for his use of a statute which gave his proclamations the force of primary legislation.[9] The thesis of this paper is that Henry VIII clauses are contrary to the *Constitution Act, 1867* and are, therefore, unconstitutional.

The thesis runs against the conventional view on Henry VIII clauses, at least as expressed by the Supreme Court of Canada.[10] Section II of this article briefly considers the jurisprudence on delegations of subordinate and primary law-making authority. Although there is ample historical precedent for the delegation of subordinate law-making authority before 1867,[11] Henry VIII clauses are a post-Confederation invention.[12] Their validity was not tested in Canada until the conscription crisis brought on by the Great War and, even then, the Supreme Court split four votes to two in favour of upholding the validity of Henry VIII clauses.[13] The issue was not raised again in the Supreme Court until *References re Greenhouse Gas Pollution Pricing Act* ("*Re GGPPA*"). Justice Côté, writing in dissent, offered an interpretation of the *Constitution Act, 1867* that challenged the conventional view

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2014), at 141. See also Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 154.

[8] Lord Rippon, "Henry VIII Clauses" (1989) 10:3 Stat. L. Rev. 205, at 205; House of Lords Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers*, *16th Report of Session 2017-19* (House of Lords, 2018), at para. 59, online: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/225.pdf>.

[9] Lord Judge, Mansion House Speech, July 12, 2010, at 4-5, online: <https://webarchive.nationalarchives.gov.uk/ukgwa/20131203071727mp_/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-for-lm-dinner-13072010.pdf>; Lord Rippon, "Henry VIII Clauses" (1989) 10:3 Stat. L. Rev. 205, at 205

[10] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150 (S.C.C.); *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11 [hereinafter "*Re GGPPA*"].

[11] *Hodge v. The Queen*, [1883] J.C.J. No. 2, at para. 37, 9 App. Cas. 117 (J.C.P.C.); *R. v. Hodge*, [1882] O.J. No. 354, at paras. 21-23, 7 O.A.R. 246 (Ont. C.A.), *per* Spragge C.J., at paras. 77, 93, *per* Burton J.A.; Sir John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), at 225-26; Paul Craig, "The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight" (Oxford Legal Stud. Rsch. Paper, Paper No. 44, 2016), permalink: <https://ssrn.com/abstract=2802784>.

[12] Lord Rippon, "Henry VIII Clauses" (1989) 10:3 Stat. L. Rev. 205, at 205; Sir John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), at 226, fn 147.

[13] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150 (S.C.C.).

on the legislature's authority to enact Henry VIII clauses.[14] However, her reasons did not include a discussion of the purpose of the constitutional provisions she relied upon and did not attempt to situate them within their proper philosophic and historical contexts.

Section III advances the thesis of this article — that Henry VIII clauses are unconstitutional — by building on Côté J.'s reasons with a broad and purposive interpretation of the *Constitution Act, 1867*. In particular, section III incorporates recent developments in the historiography of the intellectual history of pre-Confederation British North America to provide the philosophic and historical context needed to understand the constitutional text.[15] A consideration of the text of the *Constitution Act, 1867* in its proper philosophic and historical contexts reveals that the purpose of the Constitution, including sections 17, 69, 71, 88, 91 and 92, is the protection of individual liberty through a scheme of mixed government and a balanced separation of powers. Section III concludes that Henry VIII clauses are contrary to the text of the Constitution, and the purpose and structure of government enacted in the *Constitution Act, 1867*. The Constitution permits delegations of subordinate law-making authority, but does not permit a delegation of primary law-making authority in the form of a Henry VIII clause. Section IV concludes the paper.

II. BACKGROUND: DOCTRINE ON DELEGATION AND CONSTITUTIONAL INTERPRETATION

As the thesis of this paper is advanced by a ground-up interpretation of the constitutional text, what follows is a brief review of the relevant jurisprudence in order to provide a reference point, but not a comprehensive review, on the present state of the doctrine. The principles of constitutional interpretation are also considered as they form the primary methodology for the article.

1. Delegation and the *Constitution Act, 1867* before *Re GGPPA*

As a general proposition, the legislature's authority to delegate subordinate law-making powers to the executive branch is uncontroversial. In *Hodge v. The Queen*, the Privy Council held that legislatures have the authority to delegate the power to make subordinate legislation. As Their Lordships noted, there is ample pre-Confederation historical precedent for this power, both in the United Kingdom and in Canada.[16] The subordinate nature of the rules enacted under such a delegation

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[14] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 242 (S.C.C.), per Côté J. (dissenting).

[15] This article adopts the historical framework proposed in Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 1-36.

[16] *Hodge v. The Queen*, [1883] J.C.J. No. 2, at para. 37, 9 App. Cas. 117 (J.C.P.C.); *R. v. Hodge*, [1882] O.J. No. 354, at paras. 21-23, 7 O.A.R. 246 (Ont. C.A.), *per* Spragge C.J., at paras. 77, 93, *per* Burton J.A.; Sir John Baker, *An Introduction to English Legal History*,

has not traditionally been understood as usurping the sovereignty of the legislature, as subordinate legislation is constrained by the legislature's primary enactments.[17]

Henry VIII clauses, however, are a post-Confederation phenomenon. The U.K. Parliament first used a Henry VIII clause in the *Local Government Act, 1888*.[18] By 1929, the U.K. Parliament had used Henry VIII clauses on just nine separate occasions, and these were usually accompanied with a temporal limitation on the power to amend primary statutes.[19] As late as 1968, the Legislative Assembly of Ontario had never enacted a Henry VIII clause.[20] In the U.K., there is, of course, no constitutional constraint on the U.K. Parliament's use of Henry VIII clauses, although the use of such clauses has not gone without criticism.[21] In Canada, the constitutional validity of Henry VIII clauses was not tested until the cataclysm brought on by the Great War.

By 1917, after years of bitter and bloody total war in Europe, the ranks of Canada's armed forces were decimated and could no longer be replenished with volunteers. In response, the federal government introduced conscription with the *Military Service Act, 1917*,[22] but the statute provided for several classes of exemptions from service. The need for more troops at the front became particularly acute in the Spring of 1918 when the Germans launched a ferocious all-out offensive along the Western Front. In April 1918, by order-in-council passed under the *War*

5th ed. (Oxford: Oxford University Press, 2019), at 225-226; Paul Craig, "The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight" (Oxford Legal Stud. Rsch. Paper, Paper No. 44, 2016), at 14-17, permalink: <https://ssrn.com/abstract=2802784>.

[17] Paul Craig, "The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight" (Oxford Legal Stud. Rsch. Paper, Paper No. 44, 2016), at 14-17, permalink: <https://ssrn.com/abstract=2802784>.

[18] Lord Rippon, "Henry VIII Clauses" (1989) 10:3 Stat. L. Rev. 205, at 205; Sir John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), at 226, fn 147.

[19] Lord Rippon, "Henry VIII Clauses" (1989) 10:3 Stat. L. Rev. 205, at 205.

[20] *Waddell v. Canada (Governor in Council)*, [1983] B.C.J. No. 2017, at para. 25 (B.C.S.C.), quoting Ontario Royal Commission Inquiry into Civil Rights (The McRuer Commission) (1968), Report No. 1, Vol. 1, at 345.

[21] See Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929); Committee on Ministers' Powers, *Report Presented by the Lord High Chancellor to Parliament by Command of His Majesty* (London: H.M. Stationary Office, 1932), online: <https://archive.org/details/1936ReportOfTheCommitteeOnBritishParliamentMinistersPowersCmdPaperNo4060/page/n1/mode/2up>; House of Lords Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers*, *16th Report of Session 2017-19* (House of Lords, 2018), at para. 67, online: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/225.pdf>.

[22] *Military Service Act, 1917*, S.C. 1917, c. 19.

Measures Act, 1914,[23] the federal government amended the *Military Service Act, 1917*, cancelling the exemptions from service. The *vires* of the order-in-council was challenged and, in *Re Gray*, a narrow four to two majority at the Supreme Court held that the order-in-council was *intra vires* the Governor-in-Council.[24]

The Court accepted that Parliament could not "abdicate its functions" and that its authority to delegate was subject to "reasonable limits".[25] However, the Court also concluded that the *Constitution Act, 1867* did not "impose any limitation on the authority of the Parliament of Canada to which the Imperial Parliament is not subject".[26] The Court added that Parliament had not parted with its "perfect control over the Governor" — an allusion to the political reality that the Governor General's ministers remained responsible to the House of Commons for their tenure in office.[27]

Justice Idington authored a powerful dissenting opinion in which he decried the threat to liberty and democracy posed by what he saw as "a wholesale surrender of the will of the people" contrary to "all past history of our ancestors".[28] He concluded that the Parliament of Canada did not have the authority to delegate the power to amend primary legislation. In his view, the measures needed for Canada's war effort "must be enacted by the Parliament of Canada in a due and lawful method according to our constitution", and the authority of that body could not "by a single stroke of the pen" be "surrendered or transferred to anybody".[29]

Taken at face value, *Re Gray* should have all but closed the door on the question of the validity of Henry VIII clauses in Canada. However, subsequent developments in the jurisprudence have eroded some of the majority's assumptions about the legislature's authority to delegate.

In *In Re The Initiative and Referendum Act*, the Privy Council held that a legislature could not set up a parallel scheme for enacting or repealing primary legislation based on ballot initiatives, because the scheme disregarded the legislative role assigned to the Lieutenant Governor by the *Constitution Act, 1867*.[30] Their

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[23] *War Measures Act, 1914*, S.C. 1914, c. 2.

[24] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150 (S.C.C.).

[25] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150, at 157 (S.C.C.), *per* Fitzpatrick C.J.C., at 170, *per* Duff J. (as he then was).

[26] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150, at 157 (S.C.C.), *per* Fitzpatrick C.J.C., at 177, *per* Anglin J. (as he then was).

[27] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150, at 176 (S.C.C.), *per* Anglin J., quoting *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282, at 291 (J.C.P.C.).

[28] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150, at 165 (S.C.C.), *per* Idington J.

[29] *Gray (Re)*, [1918] S.C.J. No. 35, 57 S.C.R. 150, at 165 (S.C.C.); Brodeur J. concurred with the dissent of Idington J. Justice Davies concurred with Anglin J., making the majority four to two.

[30] *Initiative and Referendum Act (In Re)*, [1919] J.C.J. No. 5, at paras. 12-13, 48 D.L.R. 18 (J.C.P.C.).

Lordships also expressed an opinion, in *obiter*, that the *Constitution Act, 1867* "entrusts the legislative power in a Province to its Legislature, and to that Legislature only" and, by implication, a legislature cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."[31] In another line of jurisprudence, the Supreme Court has held that the Parliament of Canada cannot delegate its "primary" legislative powers to a provincial legislature, and *vice versa*.[32] A legislature's "primary authority to legislate", according to the Supreme Court, is the authority to enact, amend and repeal statutes.[33] A legislature may delegate subordinate law-making powers to a person or administrative body, but a legislature of one level of government may not delegate to a legislature of the other level its authority to enact, amend or repeal statutes.[34]

In sum, although *Re Gray* upheld the validity of Henry VIII clauses, subsequent doctrinal developments on the permissible scope of delegation have eroded some of the underlying assumptions on which the Court based its decision. At the very least, these decisions are at odds with the proposition that the legislature's authority to delegate is as wide as that of the U.K. Parliament. In this regard, the Constitutional text apparently imposes some constraints on delegation after all. It is unsurprising, then, that Henry VIII clauses continued to be viewed as open to question.[35]

2. Delegation and the *Constitution Act, 1867* in *Re GGPPA*

After *Re Gray* was decided in 1918, the constitutional validity of Henry VIII clauses was not again considered by the Supreme Court until *Re GGPPA*. Several provinces challenged the *vires* of the federal *Greenhouse Gas Pollution Pricing Act* (the "GGPPA"), which provided for a national scheme of carbon pricing in the form a fuel levy and pricing mechanism for heavy emitters.[36] The primary challenge to the *vires* of the GGPPA was made on federalism grounds. However, Wagner C.J.C.,

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[31] *Initiative and Referendum Act (In Re)*, [1919] J.C.J. No. 5, at para. 14, 48 D.L.R. 18 (J.C.P.C.); The Supreme Court described this statement as a "deliberate and important *obiter*" in *Ontario (Attorney General) v. O.P.S.E.U.*, [1987] S.C.J. No. 48, at para. 103, [1987] 2 S.C.R. 2 (S.C.C.).

[32] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48, at para. 75 (S.C.C.); *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1950] S.C.J. No. 32, [1951] S.C.R. 31 (S.C.C.).

[33] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48, at para. 75 (S.C.C.).

[34] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48, at para. 76 (S.C.C.).

[35] See *Ontario Public School Boards' Assn. v. Ontario (Attorney General)*, [1997] O.J. No. 3184, at para. 47, 151 D.L.R. (4th) 346 (Ont. Gen. Div.), revd [1999] O.J. No. 2473, 175 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal refused [1999] S.C.C.A. No. 425 (S.C.C.).

[36] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186.

writing for the majority, and Côté J., writing in dissent, exchanged differing views on the validity of the Henry VIII clauses in sections 166, 168 and 192 of the GGPPA.[37]

Justice Côté's reasons offered an original interpretation of the *Constitution Act, 1867* that challenged the conventional view, as expressed in *Re Gray*, on the legislature's authority to enact Henry VIII clauses. Reading sections 17 and 91 of the *Constitution Act, 1867* in light of the "architecture" of the Constitution and the constitutional principles of parliamentary sovereignty, the rule of law and the separation of powers,[38] she concluded that clauses that purport to empower a body other than the legislature to amend primary legislation are unconstitutional.[39]

In response, Wagner C.J.C. reiterated that *Re Gray* had established the constitutional validity of Henry VIII clauses and he declined to revisit the issue.[40] He added, however, that Parliament had not abdicated its role in this instance because the GGPPA "instituted a policy for combatting climate change by establishing minimum national standards of GHG price stringency".[41] For Wagner C.J.C., sections 166, 168, and 192 of the GGPPA simply delegate the power to implement this policy, which makes the delegation constitutionally acceptable.[42]

Justice Brown, writing in dissent, observed that the Chief Justice's response "largely misses the point" because it ignored "potentially significant separation of powers concerns" that raise "serious questions" to consider.[43] Indeed, the exchange between Côté J. and Wagner C.J.C. provides an occasion to revisit the constitutional validity of Henry VIII clauses. This is particularly so in light of the doctrinal

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[37] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, ss. 166(2), 166(4), 168(4), 192(a).

[38] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 263 (S.C.C.), *per* Côté J. (dissenting).

[39] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 242 (S.C.C.), *per* Côté J. (dissenting).

[40] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at paras. 85-87 (S.C.C.), *per* Wagner C.J.C.

[41] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 88 (S.C.C.), *per* Wagner C.J.C.

[42] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 88 (S.C.C.), *per* Wagner C.J.C. For an analysis of the significance of Wagner C.J.C.'s reasons on the permissible scope of delegation, see James Johnson, "The GHG Reference and the Delegation of Legislative Power: A New Direction?", online (blog): *TheCourt.ca* <https://www.thecourt.ca/the-ghg-reference-and-the-delegation-of-legislative-power-a-new-direction/>.

[43] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 414 (S.C.C.), *per* Brown J. (dissenting). As Brown J. decided the GGPPA was *ultra vires* the Parliament of Canada, he found it unnecessary to consider the validity of Henry VIII clauses on this occasion.

developments following *Re Gray* discussed above,[44] as well as recent scholarly interest in revisiting the constitutional foundation for delegated legislation in Canada.[45] Before considering the proper interpretation of the constitutional text, however, some preliminary points on methodology are in order.

3. Methodology of Constitutional Interpretation

This is not a paper about how to interpret constitutional texts. This paper relies on received doctrine on the proper approach to constitutional interpretation.

It is well settled that constitutional text must be interpreted in a broad and purposive manner, and must be understood in its proper linguistic, philosophic and historical contexts.[46] A constitutional provision must also be understood in light of the other provisions in the Constitution[47] and the "structure of government" that the Constitution seeks to implement.[48] To that end, the "assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another" must inform a jurist's "interpretation, understanding, and application of the text".[49] Nonetheless, the text itself remains the "most primal constraint" forming the "outer bounds" of the inquiry.[50]

This is the methodology employed in the paper, the balance of which is devoted

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[44] *Initiative and Referendum Act (In Re)*, [1919] J.C.J. No. 5, 48 D.L.R. 18 (J.C.P.C.); *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1950] S.C.J. No. 32, [1951] S.C.R. 31 (S.C.C.); *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.).

[45] See Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dalhousie L.J. 519; (Alyn) James Johnson, "The Case for a Canadian Nondelegation Doctrine" (2019) 52 U.B.C. L. Rev. 817; Mark Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020) 83:1 Sask. L. Rev. 45.

[46] *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, at para. 25 (S.C.C.); *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155-56 (S.C.C.); *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 344 (S.C.C.); *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, at para. 19 (S.C.C.); *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34, at para. 14 (S.C.C.).

[47] *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, at para. 26 (S.C.C.); *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at para. 18 (S.C.C.), *per* Brown and Rowe JJ., and para. 126, *per* Abella J.

[48] *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, at para. 26 (S.C.C.); *Ontario (Attorney General) v. O.P.S.E.U.*, [1987] S.C.J. No. 48, at para. 57, [1987] 2 S.C.R. 2 (S.C.C.).

[49] *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, at para. 26 (S.C.C.).

[50] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 at para. 9 (S.C.C.), *per* Brown and Rowe JJ., quoting B.J. Oliphant, "Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian Charter of Rights and Freedoms" (2015) 65 U.T.L.J. 239, at 243.

to advancing the thesis that Henry VIII clauses are unconstitutional.[51]

III. HENRY VIII CLAUSES ARE UNCONSTITUTIONAL

This section advances the thesis of this paper — that Henry VIII clauses are contrary to the *Constitution Act, 1867*. The textual linchpin of the argument is the formulae for the exercise of legislative powers in sections 91 and 92 of the *Constitution Act, 1867*, which, it is submitted, do not permit delegations of authority to amend or repeal statutes. Although there is ample historical precedent for the delegation of subordinate law-making authority before 1867,[52] Henry VIII clauses are a post-Confederation invention.[53] Interpretative sources that bear directly on the question are therefore unlikely to be forthcoming. As such, the true meaning of the Constitution can only be ascertained by a broad consideration of the sources and applicable constitutional principles. The analysis below begins with a preliminary consideration of the text, followed by a purposive inquiry which considers relevant philosophic and historical contexts, all of which, it is submitted, lead to the conclusion that Henry VIII clauses are unconstitutional.

1. The Text

As discussed above, the text is the primary constraint and jumping-off point in constitutional interpretation. The *Constitution Act, 1867* identifies and defines three distinct branches of the state: the executive, legislative and judicial. Part III of the *Constitution Act, 1867* defines the "Executive Power". Executive power is "vested in the Queen",[54] who is represented in Canada by the Governor General.[55] The Governor General does not exercise the Queen's executive authority alone, however,

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[51] One interpretative device that was omitted from this summary is the metaphor of the "living tree" constitution. The "living tree" metaphor is not *per se* inconsistent with the methodology expressed above: see Bradley W. Miller, "Beguiled By Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Can J. L. & Jurisprudence 331. For a "living tree" analysis of delegations of subordinate law-making authority, see Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dalhousie L.J. 519.

[52] *Hodge v. The Queen*, [1883] J.C.J. No. 2, at para. 37, 9 App. Cas. 117 (J.C.P.C.); *R. v. Hodge*, [1882] O.J. No. 354, at paras. 21-23, 7 O.A.R. 246 (Ont. C.A.), *per* Spragge C.J., at paras. 77, 93, *per* Burton J.A.; Paul Craig, "The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight" (Oxford Legal Stud. Rsch. Paper, Paper No. 44, 2016), at 14-17, permalink: <https://ssrn.com/abstract=2802784>; Sir John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), at 225-26.

[53] Lord Rippon, "Henry VIII Clauses" (1989) 10:3 Statute L. Rev. 205, at 205; Sir John Baker, *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), at 226, fn 147.

[54] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91, s. 9.

[55] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91, ss. 11-14.

as section 11 provides for a "Queen's Privy Council for Canada" to "aid and advise in the Government of Canada".[56]

Part IV defines the "Legislative Power". The key feature is that the "Queen", "Senate" and "House of Commons" are identified as the constituent elements of the Parliament of Canada:

> 17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Although Part IV defines the "Legislative Power", Part VI, which provides for the distribution of legislative power among the federal and provincial orders of government, also provides a formula for how legislation must be enacted:

> 91. *It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws* for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) *the exclusive Legislative Authority of the Parliament of Canada* extends to all Matters coming within the Classes of Subjects next hereinafter enumerated. . .
>
> 92. In each *Province the Legislature may exclusively make Laws* in relation to Matters coming within the Classes of Subjects next hereinafter enumerated. . .

Taking the text at face value, the authority in sections 91 and 92 to "make Laws" refers to the power to enact, amend or repeal primary legislation.[57] The specific statement in section 91 that it is "lawful" for the Queen to "make Laws" through Parliament implies that it is unlawful for the Queen to "make Laws" by any other means.[58] This reading is further reinforced by the use of the word "exclusive" as an adjective to describe the "Legislative Authority of the Parliament of Canada". Similarly, it is the "Legislature" in each province that is empowered by section 92 "exclusively" to "make Laws".[59] The Privy Council and Supreme Court have interpreted this language as imposing a limit on the legislature's ability to

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[56] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91, ss. 11.

[57] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48, at paras. 54, 75 (S.C.C.).

[58] See *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 247 (S.C.C.), *per* Côté J. (dissenting).

[59] "Legislature" is defined in ss. 69 and 71 on similar terms to those in s. 17 for each of Ontario and Quebec, although the Legislative Assembly of Ontario did not have an upper house. Section 88 provides that the "Legislature" in each of New Brunswick and Nova Scotia should continue as it then existed until altered. At that time, New Brunswick and Nova Scotia had bicameral legislatures which resembled the formula in ss. 17 and 71: W.P.M. Kennedy, *The Constitution of Canada* (London: Oxford University Press, 1922), at 390-91.

delegate.[60]

On a plain reading of the text, where the Constitution assigns a specific power to one body, that body itself having been defined as one of the three branches of the state, the natural implication is that the function expressly assigned must not be performed by any other branch or body.[61] That it is "lawful" for the Queen to "make Laws" by and with the "Advice and Consent of the Senate and the House of Commons", implies that it is unlawful for the Queen to "make Laws" with the advice and consent only of the "Queen's Privy Council for Canada". Thus, sections 91 and 92 do not, on a plain reading, appear to allow the executive the authority to amend or repeal statutes. This is, of course, only the beginning of the inquiry, as the text must be read purposively and contextually.

Up to this point, the analysis has largely mirrored Côté J.'s opinion.[62] In addition to the text, she placed emphasis on the unwritten principles of the Constitution, which are also considered further below. However, her reasons did not include a discussion of the purpose of the constitutional provisions she relied upon and did not attempt to situate them within their proper philosophic and historical contexts. In the sections that follow, this paper offers a broad and purposive interpretation of the relevant provisions, as discerned from the relevant philosophic and historical contexts in which the *Constitution Act, 1867* was enacted. This interpretation confirms Côté J.'s conclusion that Henry VIII clauses are unconstitutional.

2. A Broad and Purposive Interpretation

A consideration of the text of the *Constitution Act, 1867* in its proper philosophic and historical contexts reveals that the purpose of the Constitution, including sections 17, 69, 71, 88, 91 and 92, is the protection of individual liberty. This purpose is reflected in the structure of government, as the text provides for a scheme of mixed government in the legislature and a separation of executive and legislative powers. An interpretation of sections 91 and 92 which constrains the legislature's ability to delegate its primary law-making authority to the executive advances this purpose, because delegations of primary law-making authority are contrary to the separation of powers and depart from the mixed government principle.

(a) The Philosophic Context: Two Conceptions of Liberty

The *Constitution Act, 1867* was enacted at the tail end of what historians have

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[60] *Initiative and Referendum Act (In Re)*, [1919] J.C.J. No. 5, at para. 14, 48 D.L.R. 18 (J.C.P.C.); *Reference re the Authority of Parliament in relation to the Upper House*, [1979] S.C.J. No. 94, [1980] 1 S.C.R. 54, at 72 (S.C.C.).

[61] See Brian Bird, "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity" (2019) 42:1 M.L.J. 24, at 43.

[62] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at paras. 243-251 (S.C.C.), *per* Côté J. (dissenting).

styled the "Age of Atlantic Revolutions".[63] From 1776 to 1848, the Atlantic World was awash with revolutionary movements, including the American Revolution, the French Revolution, the Spanish American independence movements, the Haitian Revolution and the convulsions throughout Europe in 1848. This Age of Revolution was preceded by the age of intellectual fermentation known as the Enlightenment. One of the most important ideas developed by Enlightenment intellectuals, which served as a popular rallying cry for the period's revolutionaries, reformers and counterrevolutionaries alike, was the idea of "liberty".[64] Enlightenment intellectuals, and their followers, developed different ideas about the meaning of liberty. As it was understood by the mid-19th century, the idea of liberty can be divided into two distinct conceptions. The first conception will be referred to as "ancient liberty" and the second conception "modern liberty".[65]

Proponents of ancient liberty focused on the rights of "the people" to participate in, and to control, the political process.[66] Ancient liberty was the philosophy of Thomas Paine, Thomas Jefferson, Jean-Jacques Rousseau and Maximilien Robespierre.[67] Proponents of modern liberty centred themselves on protecting the rights and freedoms of the individual, including civil liberties and property rights.[68] Modern liberty was the philosophy of John Locke, Baron Montesquieu, William Blackstone, Edmund Burke and Alexander Hamilton.[69]

These two duelling conceptions of liberty led to significant disagreements on the

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[63] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 1-36.

[64] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 1-36.

[65] Ducharme refers to "ancient liberty" as "republican liberty". Where this paper refers to "ancient liberty", it has the same meaning as "republican liberty" in Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014).

[66] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 28-29.

[67] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 23-24, 34.

[68] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 22, 24-26, 34.

[69] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 24.

ideal structure of government and the proper relationship between the legislature and the executive. Owing to their emphasis on political participation by "the people", theorists of ancient liberty located sovereignty in the legislative branch.[70] In contrast, theorists of modern liberty strove for a balance between the powers of the legislative, executive and judicial branches to prevent a concentration of power.[71] Theorists of modern liberty, nonetheless, located sovereignty within the *institution* of the legislature.[72]

The proponents of modern liberty theorized that sovereignty should be located in the legislature because their ideal legislature was based on internal divisions comprised of the monarchic, aristocratic and democratic elements of society.[73] In the British Parliament, these elements are represented by the Crown, the House of Lords and the House of Commons. Under the modern conception of liberty, therefore, the legislature was sovereign because, unlike the executive and the judiciary, the legislature comprised disparate elements which combined represented the diverse interests of the nation.[74] A state based on modern liberty, therefore, was "organized around a balance of power and forces within the sovereign power: a mixed government".[75]

The proponents of ancient liberty did not countenance any constraints on the exercise of legislative power, because they regarded the general will of the people

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[70] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 28-30, 35, 111.

[71] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 31, 143, 146; Sir William Blackstone, *Commentaries on the Laws of England*, at 142, online: <https://avalon.law.yale.edu/18th_century/blackstone_bk1ch2.asp>.

[72] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 30-32, 35.

[73] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 30-32; Sir William Blackstone, *Commentaries on the Laws of England*, at 150-151, online: <https://avalon.law.yale.edu/18th_century/blackstone_bk1ch2.asp>; Charles-Louis Montesquieu, *The Spirit of the Laws*, at 181, online <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>.

[74] Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 61-62; Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 141-42.

[75] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 31.

— as expressed in legislation — as the font of all authority.[76] In contrast, a state founded on modern liberty required at least some constraints on the legislative power.[77] John Locke posited that the legislature was precluded from transferring its legislative powers:

> *. . . The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others.* The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, *no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them.* The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, *which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.*[78]

Although scholars debate the right way to read Locke,[79] the conventional view is to read this passage as a constraint on the legislature's authority to delegate primary law-making powers to the executive.[80]

The conventional reading of Locke is consistent with Blackstone's and Montesquieu's writings in the 18th century. As Blackstone observed, tyrannical government follows when the same branch is entrusted with the authority to both make and

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[76] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 31.

[77] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 31; see also Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 59.

[78] John Locke, *Second Treatise of Civil Government* (1690), at para. 141 (emphasis added), online: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm>.

[79] For the unconventional view, see Eric A. Posner & Adrian Vermeule, "Interring the Nondelegation Doctrine" (2002) 69 U. Chicago L. Rev. 1721; Julian Davis Mortenson & Nicholas Bagley, "Delegation at the Founding" (2021) 121:2 Colum. L. Rev. 277, at 307-13.

[80] Larry Alexander & Saikrishna Prakash, "Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated" (2003) 70:4 U. Chicago L. Rev. 1297, at 1310-12; David Jenkins, "The Lockean Constitution: Separation of Powers and the Limits of Prerogative" (2011) 56:3 McGill L.J. 543, at 568, 572; Paul Craig, "The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight" (Oxford Legal Stud. Rsch. Paper, Paper No. 44, 2016), at 14-17, permalink: <https://ssrn.com/abstract=2802784>; Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 59.

enforce the law.[81] For Blackstone, it is only when the diverse elements of the country are assembled in Parliament that statutes could properly be enacted and liberty secured.[82] Montesquieu lamented states which did not have a constitutional separation of powers between the executive and legislature, because they lacked adequate protections for individual liberty.[83] He also stated that the executive should be given a power to veto legislation but not to enact it, because if the executive "were to have a part in the legislature by the power of resolving, liberty would be lost".[84] Thus, proponents of modern liberty were wary of the executive exercising primary legislative powers, because they viewed it as disruptive of the balance of powers and the scheme of mixed government by concentrating power in the executive branch and in the monarchic element, to the detriment of individual liberty.[85]

The significance of the two duelling conceptions of liberty for the constitutional validity of Henry VIII clauses is further addressed after the preceding section, which explains why modern, not ancient, liberty provides the appropriate philosophic context in which to understand the *Constitution Act, 1867*.

(b) The Historical Context: The Triumph of Modern Liberty in British North America before 1867

Two critical historical developments loomed large in the living memory of the generation that assented to the union of the colonies of British North America in 1867. The first is the political agitation culminating in the uprisings in Upper and Lower Canada in 1837–1838 and the second is the struggle for responsible government and the upheavals surrounding the adoption of the *Rebellion Losses Bill* in 1849. These two historical episodes marked the unabashed triumph of modern liberty in the public consciousness of British North America. Modern liberty had become the dominant political ideology of the day by 1867 and is therefore an important interpretive context in which to situate the constitutional text.

In *The Idea of Liberty in Canada during the Age of Atlantic Revolutions*,

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[81] Sir William Blackstone, *Commentaries on the Laws of England*, at 142-43, online: <https://avalon.law.yale.edu/18th_century/blackstone_bk1ch2.asp>. Blackstone appears to be paraphrasing a similar passage from Charles-Louis Montesquieu, *The Spirit of the Laws*, at 173, online <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>.

[82] Sir William Blackstone, *Commentaries on the Laws of England*, at 150, 155, online: <https://avalon.law.yale.edu/18th_century/blackstone_bk1ch2.asp>.

[83] Charles-Louis Montesquieu, *The Spirit of the Laws*, at 174, online <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>.

[84] Charles-Louis Montesquieu, *The Spirit of the Laws*, at 181-182, online <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>.

[85] See also Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 59, 62.

Professor Michel Ducharme tells the story of a competition between ancient and modern liberty in the public consciousness of Upper and Lower Canada from 1776 to 1838. In short, modern liberty was prominent in the public discourse at first, but waned as colonial reformers chafed under the obstinate rule of the arch-Tory Family Compact and Chateau Clique.[86] The colonial reform movement skewed radical from the 1820s onward, with ancient liberty serving as its rallying cry.[87] But the radical reformers' defeat on the battlefields of 1837 and 1838 was also a resounding defeat for ancient liberty as a political force in British North America.[88] Thereafter, ancient liberty was seen as the gospel of a dangerous and subversive element, and the moderate reformers rallied around the banner of modern liberty.[89]

The moderate reformers still had to contend with Toryism as a political force in the colonies, which had also triumphed in the wake of the failed rebellions. In *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law*, Professor Ryan Alford recounts the rise of the moderate reform movement in the United Province of Canada after 1840 as part of his larger narrative that resituates British constitutional history within Canada's constitutional history.[90] He notes that the moderate reform movement, headed by Robert Baldwin and Louis-Hippolyte Lafontaine, was a political coalition held together by Whig Constitutionalist views.[91] Baldwin and Lafontaine, of course, spearheaded the successful campaign for responsible government, which saw them into executive office in 1848.

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[86] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 53-92.

[87] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 93-127.

[88] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 160-84.

[89] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 181-86. Ducharme's analysis does not consider New Brunswick or Nova Scotia, however; for some evidence of the popularity of modern liberty over ancient liberty in the political culture of Nova Scotia, see Ajzenstat's discussion of the prominent "constitutionalist" reformer Joseph Howe of Nova Scotia: Janet Ajzenstat, "The Constitutionalism of Etienne Parent and Joseph Howe" in Janet Ajzenstat ed., *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1991).

[90] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal-Kingston: McGill-Queen's University Press, 2020), at 138-65.

[91] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal-Kingston: McGill-Queen's University Press, 2020), at 151-52.

In 1849, their so-called "Great Ministry" was put to the test during the turmoil surrounding the passage of the *Rebellion Losses Bill*. In his assessment, Professor Alford finds that the reformers' speeches made in support of the bill revealed that "the Baldwin-Lafontaine government's vision of the constitution was grounded in the seventeenth century consensus on the substantive principles of the rule of law".[92] It should not be controversial to suppose that this vision of the constitution was also grounded in modern liberty, as the Whigs are closely aligned with the modern conception of liberty.[93] The passage of the bill prompted a disturbing episode of Tory-fuelled political violence, which included the stoning of the Governor General's carriage and the burning of the legislative building in Montreal.

In the aftermath of the 1849 riots, the old Toryism of the Family Compact and the Chateau Clique was discredited as a political force. As Professor Alford tells it, "a new consensus" was formed, with the Tories adopting the moderate reformers' view of the constitution.[94] This new political consensus was grounded firmly in the modern conception of liberty, which, in the words of Professor Ducharme, "constitutes the organizing principle of Canada's intellectual and political history" and "forms the basis for the modern Canadian state".[95]

Modern liberty had become the dominant political ideology of the day by 1867. This critical historical context explains why modern liberty is the proper philosophic context within which to situate the text of the *Constitution Act, 1867*.[96]

(c) Modern Liberty and the Constitution

Reading the text of the *Constitution Act, 1867* in its proper philosophic and

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[92] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal-Kingston: McGill-Queen's University Press, 2020), at 158.

[93] The Whigs were a British parliamentary coalition that celebrated the British constitutional settlement arising from the Glorious Revolution of 1688-1689: Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 24-25.

[94] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal-Kingston: McGill-Queen's University Press, 2020), at 163.

[95] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 186; see also Peter H. Russel, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3d ed. (Toronto: University of Toronto Press, 2004), at 12; Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 7.

[96] There is, of course, an even wider historical context that could be considered which stretches back to 1215 with the *Magna Carta* and follows the long and venerable history of the English Constitution to bring executive authority under the law: see Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal-Kingston: McGill-Queen's University Press, 2020); Mark Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020) 83:1 Sask. L. Rev. 45, at 58.

historical context reveals that the "internal architecture" or "basic constitutional structure"[97] of the Constitution is modelled on the structure of government advocated by the proponents of modern liberty. As noted above, the text divides state power between three branches of government.[98] The executive power is treated independently — and separately — from the legislative power, as the proponents of modern liberty advised.[99] Sections 17, 69, 71, 88, 91 and 92 contemplate legislatures of the federal and provincial orders constituted according to the mixed government principle.[100]

In addition, the *Constitution Act, 1867* created legislatures with constrained legislative authority. The *Constitution Act, 1867* was enacted after the *Colonial Laws Validity Act, 1865*.[101] The legislature's exercises of power were, therefore, intended to be constrained by the Constitution and subject to judicial review. Thus, the traditional British conception of parliamentary supremacy was not imported into Canada without qualification.[102]

In sum, situating the text within its proper interpretive contexts reveals that the *Constitution Act, 1867* enacted a constitution of modern liberty for Canada — that is, a constitution structured to protect individual liberty through a balanced separation of powers and a mixed government in the sovereign — but constrained — legislature.[103]

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[97] *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, at para. 26 (S.C.C.).

[98] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91, Parts III, IV, and VII. The Supreme Court has described the separation of powers as one "of the defining features of the Canadian Constitution.": *Cooper v. Canada (Human Rights Commission)*, [1996] S.C.J. No. 115, at para. 10, [1996] 3 S.C.R. 854 (S.C.C.).

[99] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 143, 146.

[100] Although Ontario's legislature deviated from the exact formula because it did not have an upper house, the legislature nonetheless retains the monarchic element and therefore resembles the kind of legislative body envisioned by proponents of modern liberty. In any event, a unicameral legislature is reconcilable with modern liberty: Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 56.

[101] Brian Bird, "The Unbroken Supremacy of the Canadian Constitution" (2018) 55:3 Alta. L. Rev. 755, at 757-61.

[102] Jesse Hartery, "Protecting Parliamentary Sovereignty and Accountability in a Dualist Federation" (2020) 58:1 Alta. L. Rev. 187, at 189.

[103] For a further analysis of how the whole of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 mirrors the Lockean formula for the ideal political constitution, see Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 55-62.

(d) Henry VIII Clauses and the Constitution

Having ascertained the purpose and structure of government that the *Constitution Act*, *1867* seeks to implement, it is evident that an interpretation which permits the executive to wield the power to amend or repeal primary legislation undermines that purpose and structure. The advocates of modern liberty located sovereignty in the legislature because they believed that the internal divisions and disparate interests represented within a mixed government would serve as "structural limitations on the capacity of the state to violate individual rights".[104] For them, allowing the executive to exercise primary legislative authority was dangerous to individual liberty, because "to permit the executive to have legislative power was to permit despotic and arbitrary government."[105] Even a cabinet exercising executive power under the principle of responsible government represents only a part of the nation assembled in the legislature.[106] A delegation of primary law-making authority in the form of a Henry VIII clause would disrupt the structural limitations designed to protect individual liberty by concentrating power in the executive branch and in a mere faction of society.

Justice Côté's analysis of how Henry VIII clauses violate the fundamental principles of the Constitution buttresses this interpretation.[107] The principle of parliamentary sovereignty is undermined when another institution is empowered to override the legislature's primary enactments.[108] The rule of law principle is violated when the text of the law is not to be found in the statute book and when the executive is not constrained by primary legislation, placing executive action effectively beyond judicial review.[109]

The separation of powers principle also supports this interpretation and merits further consideration. The separation of powers principle requires that some

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[104] Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 141-42.

[105] R.C.B. Risk, "Blake and Liberty" in Janet Ajzenstat ed., *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1991), at 198.

[106] Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 61.

[107] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at paras. 262-293 (S.C.C.), *per* Côté J. (dissenting). The unwritten principles of the Constitution also inform the meaning of constitutional text: *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34, at para. 55 (S.C.C.).

[108] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at paras. 265-266 (S.C.C.), *per* Côté J. (dissenting).

[109] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at paras. 270-278 (S.C.C.).

functions be exclusively reserved to particular branches.[110] In its interprovincial delegation jurisprudence, the Supreme Court has held that "the legislature has the *exclusive* authority to enact, amend, and repeal any law"[111] and "a legislature of one level of government may not delegate to a legislature of the other level its primary authority to legislate".[112] It would seem a rather minor leap to extend this statement on interprovincial delegation to interbranch delegation under the separation of powers principle.[113]

Against this interpretation, one might consider the hard-won prize of responsible government as having instilled in the public consciousness of British North America an expectation that the exercise of executive and legislative authority would overlap. But the partial fusion of *personnel* occupying executive and legislative office does not imply a fusion of these two distinct *functions*.[114] This conclusion is evident from the text of the *Constitution Act*, *1867*, which provides for a separate "Queen's Privy Council for Canada" to "to aid and advise in the Government of Canada".[115] In contrast, when the Crown enacts legislation, it must do so "by and with the Advice and Consent of the Senate and House of Commons". If the executive and legislative powers were fused, there would have been no need to spell out these different formulae for the exercise of each respective power. An interpretation that disregards the separation of the Crown's executive and legislative functions ascribes no meaning to the text and is difficult to reconcile with the purposive method or the

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[110] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, at para. 139, [1997] 3 S.C.R. 3 (S.C.C.); *Ontario v. Criminal Lawyers' Assn. of Ontario*, [2013] S.C.J. No. 43, at paras. 28-29, [2013] 3 S.C.R. 3 (S.C.C.).

[111] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48, at para. 54 (S.C.C.) (emphasis in original).

[112] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48, at para. 75 (S.C.C.).

[113] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at paras. 290-293 (S.C.C.), *per* Côté J. (dissenting); see also Brian Bird, "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidility" (2019) 42:1 M.L.J. 24, at 43.

[114] Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal-Kingston: McGill-Queen's University Press, 2007), at 61-62; Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, transl. Peter Feldstein (Montreal-Kingston: McGill-Queen's University Press, 2014), at 143-44; *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, 2021 SCC 11, at para. 281 (S.C.C.), *per* Côté J. (dissenting).

[115] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91, s. 11.

philosophic and historical contexts.[116]

In sum, the *Constitution Act, 1867* allows the legislature to delegate subordinate law-making authority, but does not permit a delegation of primary law-making authority in the form of a Henry VIII clause. The power to delegate subordinate law-making authority is properly considered part of the Legislature's authority to enact primary legislation because of the long-standing historical precedent for the power and the subordinate nature of the rules enacted under such a delegation. As a result, delegations of subordinate law-making authority are not *per se* unconstitutional under the interpretation advanced in this article.[117]

IV. CONCLUSION

Returning to *Re Gray*, the Court's willingness to accept a delegation that had "in effect transferred to the executive the whole legislative authority of the Dominion Parliament"[118] was contrary to the purpose and structure of government enacted in the *Constitution Act, 1867*. A consideration of the provisions recorded in the text of the Constitution in their appropriate philosophic and historical context, reveals that the *Constitution Act, 1867* created a constitution of modern liberty for Canada, with institutions structured to protect individual liberty through a balanced separation of powers and a mixed government in the legislature. Henry VIII clauses run contrary to the constitutional text, its purpose and basic structure, by permitting the executive to exercise primary law-making authority. Such clauses are dangerous to individual liberty and unconstitutional. This interpretation does not preclude delegations of subordinate law-making authority.

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[116] See *Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34, 2021 SCC 34, at paras. 14, 53 (S.C.C).

[117] Delegations of subordinate law-making authority may be subject to other constraints: see Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dalhousie L.J. 519; (Alyn) James Johnson, "The Case for a Canadian Nondelegation Doctrine" (2019) 52 U.B.C. L. Rev. 817; Mark Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020) 83:1 Sask. L. Rev. 45.

[118] John Willis, "Administrative Law and the British North America Act" (1939) 53:2 Harv. L. Rev. 251, at 256.