

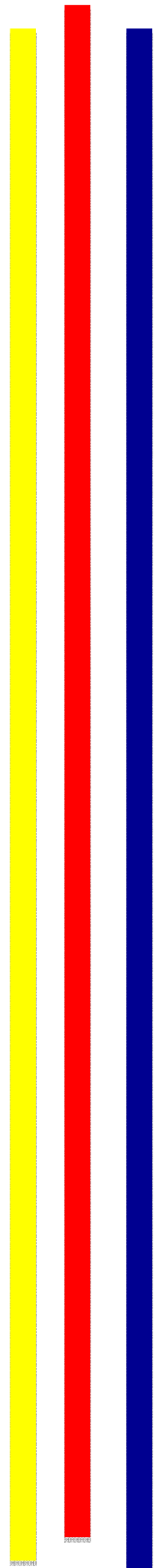
**SPECIAL SERIES ON  
THE FEDERAL DIMENSIONS OF  
REFORMING THE SUPREME  
COURT OF CANADA**

**Reforming the Supreme Court: The One-Court  
Problem and the Two-Court Solution**

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Canada has a national court of final appeal, the Supreme Court of Canada, which carries out the standard and obvious functions of all such courts: first, it is the ultimate resolver of legal disputes, the authority beyond which there is no further (legal or judicial) appeal as to which of the two parties prevails in the immediate case; and second, it is the mechanism for promoting the uniformity of law within the country, either by taking the lead proactively on the precise meaning of new legislation (e.g. *Proulx*<sup>1</sup>) or by deciding which of two or more reasonable and “not simply wrong” formulations of doctrine by provincial, federal or territorial courts of appeal is the one that is to apply to all Canadian jurisdictions. It is the final arbiter for all types of disputes, including (*inter alia*) civil law, criminal law, public law and administrative law issues. Theoretically, there is no question of law presented to any court in Canada that could not under certain circumstances come before the Supreme Court, although practical issues such as the expense to litigants and the constrained case-load of a single collegial court make some issues unlikely ever to rise so high. (While speeding tickets, for example, might be a perennial headache for all drivers, they seldom appear on the Supreme Court docket – but note that I say “seldom”, not “never”, because they have in fact been the occasion of at least one Supreme Court decision.<sup>2</sup>) Indeed, the Supreme Court of Canada has an unusually extensive general appeal jurisdiction as compared with its counterparts; the United States Supreme Court, for example, does not hear appeals on issues of state law or even of state constitutional provisions (unless they trigger constitutional issues under the United States Constitution as well).

Canada also has a constitutional court, the Supreme Court of Canada, which resolves questions about the validity of legislation within the framework of the constitution, including the power of judicial review – that is, the power to declare legislation null and void in whole or in part, on the grounds that it is “inconsistent” with the constitution (to use the wording of s.52 of the *Constitution Act 1982*). Because Canada is a federal nation, this function was long deployed almost exclusively to uphold the terms of the federal/provincial division of legislation authority (Sections 91 through 95 of the *Constitution Act 1867*), with provincial legislation being struck or trimmed back when it infringed on exclusive federal jurisdiction and (less frequently) *vice versa*. More recently, in Canada as in a growing number of other nations, the review function has extended to the protection of constitutionally entrenched individual rights,<sup>3</sup> which has not only extended the scope of the traditional remedies of striking or trimming offending legislation to include a wider range of issues, but has also generated a wider variety of remedial measures.<sup>4</sup>

It will have escaped no reader’s notice that these two are in fact the same court. Those of a certain vintage may remember a television commercial where twins argued about whether something was a candy mint or a breath mint, only to have the announcer interrupt to say “Stop! You’re both right! New *Certs* is two, two, two mints in one!” Similarly, the Supreme Court of Canada is two courts in one – a “general court of appeal” (as Section 101 of the *Constitution Act 1867* has it), and a constitutional court.

This duality will probably not strike many as being unusual, or as calling for any real explanation, but in fact this is not the standard way for countries in the modern world to deal with the two functions. The standard way – in the double sense of being adopted by more countries, and being accepted by a larger

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<sup>1</sup> *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, where the Supreme Court set down guidelines for lower courts regarding the new “conditional sentence” measures that Parliament had passed into law only two and a half years before the Court heard oral arguments on this appeal.

<sup>2</sup> *Bilodeau v. A.G. (Man.)*, [1986] 1 S.C.R. 449

<sup>3</sup> Martin Shapiro, “The Success of Judicial Review” in Sally Kenny, William Reisinger & John Reitz (eds.), *Constitutional Dialogues in Comparative Perspective* (Macmillan, 1999).

<sup>4</sup> Most specifically spelled out in *Schachter v. Canada*, [1992] 2 S.C.R. 679, and even more expansively in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62, [2003] 3 S.C.R. 3.

share of the planet's total population – is to assign the two functions to two different courts, with different personnel and different procedures.<sup>5</sup> In global terms, it is not the separation of the two functions, but their agglomeration in a single institution, that is something out of the ordinary, and that calls for an explanation.

Let me explain from two different angles why the two functions might be different enough, might raise different enough questions and challenges and problems, to call for two different mechanisms; and then let me go on to suggest what the implications and the possible benefits might be were Canada to follow through on my advice by replacing the single dual-function Supreme Court with two single-function institutions.

For one thing: the “court of general appeal” concept fits nicely within the concept of the political system (the foundation of contemporary political science), which sees government output in terms of a three-stage process: legislatures make rules, executives (working through public officials, including the police) apply rules, and courts “interpret” rules by dealing with disputes over the application of rules to specific actions or situations. There is no inherent conflict between the three different elements of this process; although a particular government may from time to time be inconvenienced or even embarrassed by particular judicial decisions, on balance there are many ways in which governments in general benefit from interacting with an independent judiciary. But the “constitutional court” concept on the very face of it calls for a different language. Although Jim Kelly has eloquently and effectively warned us from assuming a “court vs. government” logic as the central or complete operational reality of the Charter,<sup>6</sup> nonetheless the notion of judicial review necessarily involves courts that are willing at least some of the time to enforce binding restrictions of government activity that may be highly inconvenient to the government of the day, and that cannot be easily gotten around, if indeed they can be gotten around at all.

For another thing: the “court of general appeal” approach suggests the capstone to a set of institutions that basically deals with secondary and derivative (albeit still important) matters – clarifications of rules, resolutions of ambiguities, accommodation of apparent contradictions or inconsistencies, enforcement of appropriate procedures and presumptions, application of prescribed penalties or consequences. But constitutional courts deal with much grander issues, and they do so in ways that often pre-empt any serious prospect of meaningful response. Ran Hirschl and others have used the term “mega-politics”<sup>7</sup> (or, alternatively, “pure politics”<sup>8</sup>) to describe the way that courts are increasingly taking the responsible of dealing with the issues that in the past we would have expected (and democrats would still prefer) to be addressed by the citizenry itself through its elected representatives. As one example: on one reading, the Supreme Court of Canada in its *Quebec Secession Reference*<sup>9</sup> effectively decided that there is a “right to secession” (not easily invoked, and with significant procedural difficulties) contained within the Canadian

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<sup>5</sup> In saying that the “two-court” solution is the “standard” way of dealing with it, I do not mean to understate the considerable variety that exists in the ways that various countries have provided for the two functions to be carried out. The German Constitutional Court is quite different from the French Constitutional Council, but both are distinct and separate from the “ordinary” court system, and both play an important and prominent role within the governmental process. See Alec Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000). Nor, of course, to these two examples exhaust the full range of possibilities; for a tabular presentation of the diversity of provisions for constitutional judicial review, see Mavcic’s impressive website at [Concourts.net](http://Concourts.net).

<sup>6</sup> James Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (UBC Press, 2005)

<sup>7</sup> Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts” *2008 Annual Review of Political Science*, 93.

<sup>8</sup> See e.g. Russell E. Miller “Lords of Democracy: The Judicialization of ‘Pure Politics’ in the United States and Germany” *Washington & Lee Law Review*, Vol. 61 (2004) 587; Ran Hirschl “The New Constitutionalism and the Judicialization of Pure Politics World-Wide” *Fordham Law Review* Vol. 75 (2006) 721.

<sup>9</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

constitution, something that I would have thought was at least contestable and perhaps simply false until the moment they delivered their decision. This is hardly a small matter, since our neighbor to the south fought a major civil war to establish the opposite position.

To be sure, neither of these considerations remotely supports the idea that courts should not deal with constitutional issues just because they involve meta-political issues and/or the very real potential to come into serious confrontations with specific governments; but they do suggest, at least to me, that we should consider whether the dual purposes are best served by a single set of procedures and personnel, let alone by a single body.

To be specific: I am suggesting that we should do away with the existing Supreme Court of Canada with its personnel, procedures and powers, and replace it with two distinct and separate institutions. The first – we could still call it the Supreme Court of Canada<sup>10</sup> – would be a general court of appeal, dealing with all matters except constitutional issues and enjoying its full set of remedial powers save for the power of judicial review (i.e., the capacity to find legislation or other official acts null and void by reason of inconsistency with the constitution). The second – we could call it the Constitutional Court of Canada – would deal exclusively with constitutional issues, in which matters its findings would be binding on all other courts including the Supreme Court. There are a variety of procedural choices about the relationship between the two<sup>11</sup> that I will leave to one side in order to focus on the basic issue: why would we want two courts where we now have one?

#### *What is the problem?*

The oldest caution in the arsenal is: if it ain't broke, don't fix it – so what is it that I am saying is broken, and why does it need to be fixed, and why is this the best way to fix it? Let me take a step back: what is it that a “normal” appeal court does, and what is it that a “normal” appeal court must look like, that makes me wonder if it is optimally suited to perform double duty as a constitutional court?

In general terms, what an appeal does is to re-open the decision in the immediate case – generally not the entire decision, to be sure, but always the most critical elements of the decision. These issues are once again “live” and all the options for outcome and consequences enjoyed by the initial trial court are at least theoretically back on the table for the appeal court panel, which can “re-decide” them as they feel appropriate. But this necessarily and inevitably means that appeal court judges have to be precisely the same kind of people as the trial court judges were in the first place – that is to say, trained professional lawyers of established competence and reputation, preferably with directly relevant experience. Thus it is hardly surprising that a significant and apparently growing proportion of the appeal court bench consists of judges elevated from the lower courts. Given our tradition of general jurisdiction courts and judges, we can ramp this up a notch: they need to be something approaching encyclopedic legal experts, able to deal authoritatively with criminal law cases on Tuesday and insurance law cases on Thursday and tax law cases the following week. This requirement further constrains the choices.

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<sup>10</sup> Purists might suggest that without the power of judicial review, the name would no longer be appropriate because the Court would no longer be truly supreme, but such a criticism is overdrawn; we called our court “the Supreme Court” for decades, from 1875 to 1949, even though any and all of its decisions could be appealed to a quasi-court in London, the Judicial Committee of the Privy Council.

<sup>11</sup> Perhaps most importantly: would it be possible to mount full appeals from provincial, federal and territorial courts of appeal lie to either or both the Supreme Court and the Constitutional Court for full resolution, depending (of course) on the subject matter? Or would other courts address specific questions on constitutional issues to the Constitutional Court, waiting for its answer on that part of the case before dealing with its other aspects (something like the old practice of “appeal by way of stated question”). Or – between the two – would we follow a practice like the French “cassation” where a successful appeal to the Constitutional Court settles only the constitutional question but returns all other aspects of the matter to the originating court for final resolution?

The general appeal process means that all levels of court have to be staffed by the same kind of legal professionals, differing from each other only in detail or degree and not in kind. And this necessarily aggravates the democratic problems implied by the very notion of judicial review itself – it is not just that the decisions of elected accountable politicians are subject to review and possible overruling, but that the people who do the review are unaccountable, appointed experts drawn from an elite profession which has its own standards and methods for reaching decisions and explaining those decisions. They are not just an appointed elite, but a “triple-distilled” elite.

For decisions involving the meaning and the application of statutes, this is as it should be; legislation (and the shrinking but still important back-stop provided by the common law) is a very complex business that through a combination of evolution and conscious design has created the framework within which millions of people make their calculations and decisions. As Rod Macdonald has put it, “Today, many regulatory statutes are cast in highly recondite language...directed to a highly specialized audience, and meant to be interpreted by a highly sophisticated judge...Even statutes ostensibly directed to the public at large – marriage, divorce, and family legislation; home warranty acts; occupier's liability laws; landlord and tenant enactments – are beyond the ken of most citizens.”<sup>12</sup> Devising and refining the appropriate framework for statutory interpretation is an ongoing preoccupation of the Supreme Court, continually addressed and re-addressed. A second staple issue involves “standards of review” (crudely: how big a mistake of what kind did the initial decision maker have to make before appellate intervention is appropriate, this having different answers depending whether the initial decision maker was a judge or an administrative board).<sup>13</sup> I am not suggesting for a moment that matters of this sort should be turned over to some less formally and narrowly professional body.

As the Supreme Court itself keeps telling us, however, interpreting a constitution is quite a different exercise from interpreting a statute.<sup>14</sup> Unlike statutes, constitutions tend to be couched in rather general terms, because to do otherwise risks a rigidity that would quickly and unacceptably “date” the constitution rather than allowing it to adjust appropriately to changing circumstances.<sup>15</sup> But the practical effect of this laudable intention is that interpreting a constitution is less like following the detailed instructions of a statute than it is like unraveling the meaning of a piece of poetry. If the instructions are calculatedly imprecise, then the responses necessarily allow for a range of discretion and flexibility.

And the flexibility can be considerable indeed, to the extent that what was unthinkable yesterday can become constitutionally entrenched tomorrow. Nobody who followed the debates in the early 1980s can doubt for a moment that the parliamentarians, provincial and federal alike, had no intention whatever of entrenching gay rights in the constitution; when the argument was made in legislative debate, it was derisively dismissed as simply ridiculous. The same was true of any suggestion that the entrenchment of the Charter would settle the abortion issue in a way that completely bypassed Parliament. But today, sexual orientation has unquestioned status as a prime example of the “analogous categories” under s.15;

<sup>12</sup> R. A. Macdonald, “The Fridge-Door Statute” *McGill Law Journal*, Vol. 47 (2001) 11 at 15.

<sup>13</sup> The current “last word” on statutory interpretation is probably *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; the major modern decision for “standards of review” was *Housen v. Nikolaisen* 2002 SCC 33, [2002] 2 S.C.R. 235 until the Supreme Court explicitly rewrote the guidelines in *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 S.C.R. 190. Based both on the Court’s own headnotes, and my own studies of citation patterns, I would suggest that these are the most recurrent pair of issues on the Supreme Court docket.

<sup>14</sup> The “classic” and most frequently cited statement of this is Dickson’s reasons in *Hunter et al. v. Southam Inc.* [1984] 2 S.C.R. 145 at 155: “The task of expounding a constitution is crucially different from that of construing a statute” such that meanings “cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction.”

<sup>15</sup> Hence the argument in the American law journals about whether the United States Air Force is unconstitutional, given that the US Constitution only contemplates a Congressional power to establish an army and a navy. See e.g. Samuel Issacharoff, “The Elusive Search for Constitutional Integrity” *57 Stanford L. Rev.* Vol. 57 (2004) 727. (The point of the argument is usually to critique the originalist style of constitutional interpretation.)

and the right to abortion is widely believed to enjoy constitutional status.<sup>16</sup> Whether this is a good thing or a bad thing depends on whose ox is being gored, or whose lottery ticket turned out to be a winner; but whether it happens at all is almost entirely up to the judges, whose reasons are sometimes surprisingly candid about the fact that they may simply change their mind in the future about something they are “settling” today.<sup>17</sup> Even Peter Hogg – a supporter rather than a critic of the Charter project and the Supreme Court’s preemptively important role – delicately admits that judges “have a great deal of discretion in ‘interpreting’ the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges.”<sup>18</sup> Precisely.

The judges often say their decisions are strictly contained by the written text, but this is trying to turn poetry back into detailed directions and, with respect, it does not convince. On the face of it, the words protecting freedom of expression in the American Bill of Rights and the Canadian Charter are similar enough that one could not predict from the words alone which of the two countries would make free speech preemptively important and which would be much readier to accept policy-driven reasons for restricting it.<sup>19</sup> Similarly, compare the German Basic Law and the Canadian Charter, and you would be hard-pressed to explain *simply from the words* why one country has found that the unborn has a right to life that sharply limited legally permitted abortions while the other has found a “security of the person” guarantee that makes it all but impossible to limit abortion at all. This is not to say that the judges are making the whole thing up out of whole cloth<sup>20</sup> – such a suggestion insults the conscientious members of an honourable profession – but it does strongly suggest that there is something more complicated and discretionary involved than (in former SCC justice W.Z. Estey’s homey tailoring metaphor) simply putting the cut cloth of a statute up against the printed pattern of the entrenched constitution and saying whether or not it fits.

There is a further problem, namely, that we want judges to settle legal issues for us, while the constitution (and decisions about its meaning) is necessarily and unavoidably saturated in politics. It is no longer fashionable (and rightly so) to assume a sharp dichotomy with “law” over there and “politics” over here, but we can nonetheless identify a continuum running from “mostly law, partly politics” through to “mostly politics, partly law” and constitutional decisions are usually the latter. Indeed, as Hirschl points out,<sup>21</sup> they typically include the most fundamentally political issues imaginable, the ones that define the very political community and its purposes. Judges handle these issues by saying (on the one hand) that the answers are to be found in the very words of the constitution even though (on the other hand) they completely dismiss out of hand the most direct and unambiguous indications as to what the drafters of those words intended them to mean.<sup>22</sup> The situation is aggravated by the fact that different courts can draw dramatically different meaning from apparently similar words, and even the same court can change its mind over time about what the words actually mean.

<sup>16</sup> The actual wording of the badly fragmented reasons in *Morgentaler* [1988] 1 S.C.R. 30 actually suggests a more nuanced position, but good luck to any politician who tries to explore these apparent openings.

<sup>17</sup> See e.g. *Gosselin v. Quebec* 2002 SCC 84, [2002] 4 S.C.R. 289, esp. McLachlin’s reasons at para 82 & 83: “One day, s.7 may be interpreted to include positive obligations.” And again “I leave open the possibility that a positive obligation to sustain life, liberty and security of the person may be made out in special circumstances.”

<sup>18</sup> Peter W. Hogg & Allison A. Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)” *Osgoode Hall Law Journal* Vol. 35 (1997) 75 at 77.

<sup>19</sup> See Grant Huscroft, “The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada” *University of Queensland Law Journal*, Vol. 25 (2006) 181.

<sup>20</sup> Although even before the entrenchment of the Charter, Paul Weiler was complaining about the fact that sometimes it seemed as if the Supreme Court was just making the law up as they went along – see Paul C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto; Carswell, 1974).

<sup>21</sup> Hirschl, “Rise of Political Courts” *op.cit.*

<sup>22</sup> The “pure” case is *Reference re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, and the decision not to consider the intentions of the drafters is explicit at paragraphs 51 to 53.

This is especially and most transparently true for the type of Charter decisions that have dominated the jurisprudence for the last decade or so. It is clearly not the case that Canadian governments today wake up some morning determined to arrest all the red-heads, outlaw the Presbyterian church, or ban all books on astrology, such that the Supreme Court's Charter mission is to ring the fire alarm to deal with the transparently offensive legislation that emanates from these unacceptable intentions. Rather, Charter decisions are typically of two types: first, it is a question of balancing two different rights (for example *Seaboyer*<sup>23</sup>, one of the Supreme Court's most controversial and immediately unpopular decisions, balancing the rights of victims against the right of the accused to a fair trial); or second, it is a question of some limited and secondary side effect of legislation that on the face of it has a defensible, even a laudable, purpose (for example *Multani*<sup>24</sup> where a school policy of "zero tolerance" on weapons collided with a young Sikh's religious obligation to carry a *kirpan*). I do not mean to trivialize the issues in either case, simply to point out that we are not looking at an uncaring government deliberately riding roughshod over minority rights,<sup>25</sup> but rather of balancing issues at the margins of the central stakes – and balancing is quintessentially a political, not a judicial, function.<sup>26</sup>

But under the imperatives of legal professionalism, the Court must act as if it were a straightforward and purely legal issue, not a political one; and this even though it is becoming more common for politicians of various stripes to seek intervener status and press their issues there – in appropriately veiled language, of course, given that in this context politics is the temptation that dare not speak its name.<sup>27</sup> Not only are the credentials and qualifications of the judges built on legal rather than political matters, not only are they chosen specifically for that particular ability, but when they deal with matters that are saturated with politics, they are obliged to find a language and a logic that tries to keep the politics invisible.

*What would we gain?*

**First:** we could look at different personnel, with a wider variety of expertise and experience. If it is only judges – the elite, appointed members of an elite profession – who can enjoy the final and exclusive authority to determine constitutional meaning, then the circle has been drawn very narrowly indeed.<sup>28</sup>

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<sup>23</sup> *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577

<sup>24</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256

<sup>25</sup> Although of course this is the way it tends to be portrayed in the media, for the double reason that headlines must oversimplify and qualified statements are much less attention-grabbing. If we once worried about the fact that the constitution means what the judges say it means – as USSC Chief Justice Hughes once said – we now have to worry whether ultimately the constitution really means what the public understood the media to say the judges had said. For an excellent discussion of this, see Florain Sauvageau, David Schneiderman and David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (UBC Press, 2005).

<sup>26</sup> And if we wanted an example of someone "riding roughshod" over a minority, it would be hard to improve on McLachlin's decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, concluding that if Alberta's requirement for photographs on drivers' licenses causes a hardship for the Hutterites, it is not something imposed on them "simply because they do not share such religious belief", but rather because they meet the statutory requirements for issuance of a licence – which include having a photo taken." [at para. 107]. *Memories of Bliss?*

<sup>27</sup> The case that I have in mind is *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791, 2005 SCC 35, where no fewer than ten politicians filed briefs as interveners – not, I stress, a group of ten politicians who jointly filed a single brief, but ten different politicians who were listed as individual interveners.

<sup>28</sup> Actually, we can make the point even more strongly: it is increasingly taken for granted, in this country as in the United States, that the only experience which is relevant to service on the Supreme Court, such that its absence is virtual disqualification, is prior experience as a judge in a (state, provincial or federal) court of appeal – eight of the Canadian nine, and all nine of the American nine, share this background. For a discussion of the concerns resulting from the lack of diversity on the highest court, see Lee Epstein, Jack Knight & Andrew D. Martin, "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court" *California Law*

The suggestion that the judges are in some mystic way responsive to broader public opinion in this process not only belies the absence of an institutional mechanism or resources for accomplishing this but also sits strangely with the notion that the real virtue of an independent judiciary is its capacity to generate principled outcomes that are indifferent to public pressure or shifting moods. But once we separate the constitutional court from the court of general appeal, then we can consider a broader range of credentials and experiences as suggesting potentially useful contributions, all the more so if we take advantage of the opportunity to create a body that is larger than the Supreme Court's nine. Judges would continue to be present, perhaps even to dominate the membership, but we could also consider statesmen<sup>29</sup> and academics and respected senior bureaucrats and distinguished lawyers who had never served on the bench. I would prefer to draw the line at current members of provincial or federal parliaments, and would also want to insist that they all be Canadian citizens, but there is in principle no reason why an even broader pool of candidates could not be considered as well. Bell notes the firm expectation that the membership of the French Constitutional Council will include individuals with legal experience, legislative experience, and government or administrative experience, again with some kind of balance between the three.<sup>30</sup> The normal practice in many countries is for fixed non-renewable terms, and I find this idea attractive as well.

**Second:** a different and wider set of actors involved in the appointment process. The current appointment process highlights lightly-constrained government actors working toward a single specific vacancy to be filled by a single individual who can be defended in terms of pre-emptive merit, complicated by the regional allocation of Supreme Court seats. However, this "winner take all" situation is an artifact of the current model and not built into the concept of a constitutional court at all. Since the variations are endless, I will not confuse the issue by suggesting a single appointment model, but instead confine myself to general points. For one thing, we would not be filling single seats on an "as vacated" basis but rather all the seats or some specific portion of them (say, one third) on a regular basis. For another, we need not privilege specific single actors but could instead involve a number of political and official actors in the process. The German Constitutional Court is constituted on the basis of the major political parties being entitled to a share of the appointments based on their current level of representation; this (on the one hand) prevents a single party's monopoly by virtue of holding office for an extended period and (on the other hand) permits parties other than the government to "buy into" the process and therefore into the outcomes. Since Canada is a federal country, and the constitution is about the division of powers as well as about rights, there should be some role for the provinces, too. The clutter of actors that can become paralyzing if only a single individual is to be selected becomes more manageable if we are looking at allocating some larger number. More pragmatically, the stakes are reduced as well: not one-ninth of the ultimate deciding body, but one-fifteenth or possibly some smaller fraction;<sup>31</sup> and not an appointment that could be for a term as long as thirty years,<sup>32</sup> but rather for some shorter and fixed period.

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*Review* Vol. 91 (2003) 903; and Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, "Circuit Effects: How the Norm of Federal Judicial Experiences Biases the Supreme Court" *University of Pennsylvania Law Review*, Vol. 157 (2009) 101.

<sup>29</sup> Which one might cynically define as former politicians who have subsequently been useful enough that we have forgotten how they annoyed us when they were politicians, the point being that not all of them (perhaps even not many) succeed in clouding our memory.

<sup>30</sup> John Bell, *French Legal Cultures* (Cambridge University Press, 2001) at 42.

<sup>31</sup> Tracey E. George & Chris Guthrie make the same observation in connection with their proposal to expand the size of the USSC; see their "Remaking the Supreme Court in the Courts' of Appeals Image" *Duke Law Journal* Vol. 58 (2009) 1439.

<sup>32</sup> Should current Chief Justice McLachlin serve until the mandatory retirement age of 75, she will have served on the Supreme Court for just under twenty-nine and a half years.

**Third:** we could use different processes and procedures for making decisions. For example: the Constitutional Court could solicit public input (as the Ontario Court of Appeal did for the Catholic education reference); it could invite academic and professional briefs; it could consider public opinion polls on relevant issues or even conduct its own. The Supreme Court of Canada has done some comparable things itself – for example, taking the initiative of appointing an *amicus curiae* to argue one side of the matter in the Quebec secession reference when the Quebec government pointedly refused to do so – but this sort of openness to the expression and the direct consideration of overtly political viewpoints and concerns should be the norm, not the exception, for major constitutional issues. And there should certainly not be a close adherence to the doctrine precedent and the notion of *stare decisis* (although this should not be controversial since the Supreme Court itself, both in theory and in practice, has renounced a strict following of precedent).

**Fourth:** we could use different formats for explaining and justifying the outcomes. Specifically, the Constitutional Court could deliver reasons that are less like current judicial opinions (the dull clang of logical inevitability) and more like a reasoned canvas of a range of alternative frames and responses. I acknowledge, and very much appreciate, the way that the Supreme Court over the last few decades has deliberately changed the delivery of its opinions to make them accessible to a wider audience<sup>33</sup>, but there is only so far that a formal professional court can go in this respect, and it seems to me that the Supreme Court is pretty well there.

#### *Why tilt at windmills?*

Why make this proposal? Clearly, it is rather unlikely to be picked up by any set of relevant actors, and in any event the experiences with the Martin/Harper experiments on modifications to the current appointment process are less than encouraging. But I intend this to be similar in principle to the current academic proposals in the United States that are suggesting changes such as a dramatic increase in the size of the USSC accompanied by the adoption of three-judge panels and possibly term limits or retirement ages for judges.<sup>34</sup> Like them, I want us to remember that the past is more varied, and the future presents a wider range of alternatives, than the apparent rigidity of the status quo suggests; and I want to use my proposals to highlight particular problems that tend to be overlooked as we take the current format for grants.

For one thing: let me emphasize that the Supreme Court of Canada performs a double function, but the credentials and experiences of its members are based on only one of those functions; when it acts as a constitutional court, and deals with the “hot” controversial public issues of the day, it is reaching beyond that expertise, which means that it is then obliged to misrepresent what is going on – to wrap inherently political issues in pristine judicial wrapping – to make up for this.

Second, it must be stressed that the constitution of Canada does not belong to the Supreme Court but to the people of Canada, and they are the ones who should be involved in some way (if only an indirect one) when decisions are made that change the constitution in ways that could not realistically have been foreseen by the attentive lay observer. I am profoundly uncomfortable with the standard orthodoxy (directly stated by Peter Hogg in his influential textbook) that Supreme Court decisions about the constitution are themselves part of the constitution. I understand the practical issues involved in the

<sup>33</sup> See Peter McCormick, “Patterns of Judgment: How the Modern Supreme Court Organizes Its Reasons” *Dalhousie Law Journal*, forthcoming.

<sup>34</sup> See e.g. Jonathan Turley, “Unpacking the Court: The Case for the Expansion of the United States Supreme Court in the Twenty-First Century” *Perspectives on Political Science* Vol. 33 (2004), 155; Tracey E. George & Chris Guthrie, “‘The Threes’: Re-imagining Supreme Court Decisionmaking” 61 *Vanderbilt Law Review* Vol. 61 (2008) 1825; Tracey E. George & Chris Guthrie, “Remaking the Supreme Court in the Courts’ of Appeals Image” *Duke Law Journal* Vol. 58 (2009) 1439.

assertion, but I think it goes too far; we need to preserve the conceptual space for citizens (even – heaven forbid! – politicians) to be able to suggest that the Court has made a mistake without branding themselves as constitutional apostates.

Third, people need to be alerted to the fact that inherently political issues do not somehow lose their political content to become purely legal/judicial issues simply because the Supreme Court has decided to deal with them. The *Quebec Secession* decision still leaves me profoundly uneasy (although many of my colleagues praise its statesmanlike conclusions); and the inconclusiveness of *Chaoulli* does not assuage my concern about the way the Court let itself be dragged into the Medicare debate. The *Same-Sex Marriage Reference* demonstrates everything that is wrong about the constitutional status quo (not saved by the fact that in the end the Supreme Court simply refused to answer the only question that mattered, the only question that was really in doubt).<sup>35</sup>

Finally and most cogently: recent decades have seen a dramatic expansion in the role of the courts within the processes of democratic governance, a development that we tend to attribute to the Charter but in fact is so globally pervasive as to call for broader and more systemic explanations. But I cannot help feeling that one factor in the rapid expansion of the political role of judges in protecting rights and defining broader constitutional values is a widely shared dissatisfaction with the processes and practices of contemporary democratic politics, a “dissing” of elected officials of all parties in favor of appointed professionals, an attraction to the apparent purity of principle rather than the transparent messiness of pragmatic compromise. I am not saying that we should try to turn the clock back even if we could (which I doubt), just that one day we may feel that the pendulum has swung rather further than is welcome, and that we would be well served by an institution that reaches toward a blended middle ground between judges and politicians where these society-defining matters could be worked out in a way that drew from both worlds. Just as Clemenceau famously said that war is too important to leave to the generals, I am suggesting that the constitution is too important to leave (exclusively) to the judges.

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<sup>35</sup> The *Same-Sex Marriage Reference* has convinced me that we should do away with the reference procedure for both provincial and federal governments, but this is another matter.