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The 20th Annual McDonald Lecture in Constitutional Studies

What Canadian Federalism Means in Québec

Guy Laforest*

1. Introduction

Georges-Henri Lévesque, the founder of the Faculté des Sciences Sociales at Université Laval where I teach, deeply believed that universities are at the heart of a pluralistic and open society, and that they require both the liberty of culture and a culture of liberty. The McDonald Constitutional Lecture at the Centre for Constitutional Studies, Faculty of Law, University of Alberta, belongs to this great humanistic heritage. I am grateful for the privilege of having delivered the lecture in 2008 and very pleased to honour the memory of the late David C. McDonald.

As a teacher, in my instructions to students as they prepare their term papers, I often remind them that they should never abdicate their judgment to the authority of one single source. Even in the worst of circumstances, it is much better to articulate one's own ideas and convictions than to surrender to a single book or article. In the same spirit, I would urge readers not to rely solely on my pronouncements about the meaning of federalism in Québec. In truth, the title of this lecture should include a question mark, and its content will illustrate, I hope, the richness and diversity of current Québec thinking on the subject. There are many ways to approach the topic at hand. The path I have chosen reflects my academic identity: I am a political theorist and an intellectual historian, hidden in a political science department, who is keenly interested in the relationship between philosophy and constitutional law in Canada.

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As a reader of Gadamer and a former student of Charles Taylor, I shall start with some interpretive or hermeneutical precautions. Beyond the undeniable relevance of current reflections about the theory of federalism in its most general aspects, the real question of this lecture deals with the contemporary meaning of Canadian federalism in Québec. This question arises following the celebrations surrounding the 400th anniversary of the founding of Québec City—an anniversary which can be interpreted as marking the founding of Canada. Constitutional experts are all too aware that after decades of wide-ranging discussions and reform projects about the fundamental law of the land, Canada now suffers from a broad constitutional fatigue.[1] The idea of constitutional reform appears dated, passé, rendered almost unattainable through the legal and political rigidities surrounding the amending formula. Other issues now dominate the political agenda: the war in Afghanistan, the global environment, the security of rights in a multicultural society, economic challenges.

In Québec, something else must be added. The dream of full political sovereignty, which has occupied so many people and mobilized so much energy in the past four decades, appears more and more improbable as time goes on. The idea of holding a referendum on sovereignty has even disappeared from the platform of the Parti Québécois. Two of our most prominent public intellectuals, Daniel Jacques and Alain Dubuc, a philosopher and a journalist respectively, have recently written about the consequences of granting continued prominence to the ideal of sovereignty while its realization appears ever more unlikely. They argue that it encourages a spirit of bad faith in Canadian politics—for instance, witness the contradictions of the Bloc Québécois and how this party is perceived elsewhere. This ideal also fosters an attitude of self-contempt in younger generations—why be proud of a self-proclaimed nation that just cannot realize the highest goal it seems to value? Finally, it inculcates a quasi-surreal aspect to public debates, yielding to arcane idealism rather than lucidly and responsibly facing the challenges of current times.[2]

So, in addition to the constitutional fatigue shared with the rest of Canada, Québec now seems to be characterized by a kind of political exhaustion. Full

1 Roger Gibbins, "Constitutional Politics," in James Bickerton and Alain-G. Gagnon, eds., *Canadian Politics*, 5th ed. (Peterborough, ON: Broadview Press, 2009) 97 at 113.

2 Alain Dubuc, *À mes amis souverainistes* (Montréal: Éditions Voix Parallèles, 2008) [Dubuc]; Daniel Jacques, *La fatigue politique du Québec français* (Montréal: Boréal, 2007); Guy Laforest, "The Internal Exile of Quebecers in the Canada of the Charter," in James B. Kelly and Christopher P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: University of British Columbia Press, 2009) 251 [Laforest].

nation-state status eludes sovereigntists, while federalists remain unable to get the kind of meaningful reform that would allow Québec to be a fully consenting partner in the Canadian constitutional order. Québec is staying in Canada but its situation is akin to that of an internal political and constitutional exile. And people are, indeed, moving to other, more pressing issues: reasonable accommodation and challenges of diversity; the role of the state in a society that is aging fast and burdened by soaring health costs and a huge provincial public debt; the crumbling road infrastructures; the social consequences of religious disaffection centrally (but not exclusively) in the French-speaking majority; the hardships of a public education system ill-equipped to promote the virtues that lead to academic excellence in a post-modern, cultural, social, and global environment that is hedonistic and relativistic.

Having provided in this first section of the lecture some context, I can outline the structure of the remainder of the discussion. In the second section, I will specify how I understand the topic, thereby providing an interpretive context. In the third, I will survey contemporary trends and current scholarship regarding federalism in Québec. This last section will incorporate critical reflections going beyond the description of this current literature, touching on topics such as multinationalism and plural identities, trust and loyalty, and the whole matter concerning the rebalancing of our federal regime.

2. Interpretive Context

The task of interpreting the meaning of Canadian federalism in Québec is manifold. In academia, it certainly involves integrating the methods and approaches of various disciplines such as history, constitutional law, philosophy and political science. Interest in this topic, not surprisingly, goes much beyond academia, reaching a wider public through the media ever since the Confederation Debates of 1864–1866.[3] At least up until the 1995 referendum in Québec and its immediate aftermath, the meaning and fate of federalism in Québec commanded the attention of numerous scholars and intellectuals from English-speaking Canada.[4] Ronald L. Watts, the "dean" of scholars on this broad topic, has just proceeded with the reprinting of the third edition

3 Marcel Bellavance, *Le Québec et la Confédération, un choix libre? Le clergé et la constitution de 1867*, (Sillery, QC: Septentrion, 1992); Arthur Silver, *The French Canadian Idea of Confederation, 1864–1900*, 2nd ed. (Toronto: University of Toronto Press, 1997).

4 Edwin R. Black, *Divided Loyalties: Canadian Concepts of Federalism* (Montreal: McGill-Queen's University Press, 1975); Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997); Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997); Donald Smiley, *Canada in Question: Federalism in the Eighties* (Toronto: McGraw-Hill Ryerson, 1980).

of his book *Comparing Federal Systems*.[5] In 2000, Richard Simeon delivered the Kenneth R. MacGregor Lecture at Queen's University, reflecting on the relationship between political science and federalism that encompassed seven decades of scholarly engagement.[6] In 2004, the Institute of Intergovernmental Relations at Queen's University published a major collection, part of the *Canada: State of the Federation* series, devoted to the topic of the institutions of Canadian federalism.[7] Working out of Montréal and Ottawa, Dimitrios Karmis and Wayne Norman have published a major collection, in which they provide an overview of current theories of federalism in the world.[8] Interestingly, three Canadians have chapters in this book: Pierre Elliott Trudeau, Ronald Watts, and Will Kymlicka.[9] Obviously, the meaning of federalism in Québec is deeply related to the meaning of federalism throughout Canada, and so beyond this lecture it would be foolhardy to ignore the multiple contributions of Canadian scholars on federalism. Incidentally, this Canadian proficiency has now reached a global stage through the immense erudition provided in the last decade by the Forum of Federations. It would be an impoverishment of the topic to ignore this literature here, and I therefore intend to avoid that by focusing on selected works at a greater depth.

The meaning of federalism in Québec has evolved through time and the various travails of our common history. The classical compact theory, in its pact-of-provinces, pact-of-peoples or combination-of-both formulae, is, of course, an interpretive construction that has undergone various reformulations.[10] I will only provide here a few glimpses into this immensely rich literature. In 1967 at the time of Canada's centennial anniversary, Jean-Charles Bonenfant, an important Université Laval constitutional law scholar, reflected about the meaning of Confederation. He concluded that often in history

5 Ronald L. Watts, *Comparing Federal Systems*, 3rd ed. (Montréal: McGill-Queen's University Press, 2008).

6 Richard Simeon, *Political Science and Canadian Federalism: Seven Decades of Scholarly Engagement* (Kingston, ON: Institute of Intergovernmental Relations, Queen's University, 2002).

7 Peter J. Meekison, Hamish Telford and Harvey Lazar, eds., *Canada: the State of the Federation 2002: Reconsidering the Institutions of Canadian Federalism* (Kingston, ON: Institute for Intergovernmental Relations, Queen's University, 2002).

8 Dimitrios Karmis and Wayne Norman, eds., *Theories of Federalism: A Reader* (New York: Palgrave Macmillan, 2005) [Karmis & Norman].

9 Pierre-Elliott Trudeau, "Nationalism and Federalism" 221, Ronald Watts, "Comparing Forms of Federal Partnership" 233, and Will Kymlicka, "Federalism, Nationalism and Multiculturalism" 269 in Karmis & Norman, *ibid*.

10 Stéphane Kelly and Guy Laforest, "Aux sources d'une tradition politique" in Stéphane Kelly and Guy Laforest, eds., *Débats sur la fondation du Canada*, French ed. (Québec City: Presses de l'Université Laval, 2004) 527. The authors provide a broad overview of the evolution of interpretive perspectives about Canadian federalism in Québec from the times of Confederation to the late twentieth century.

peoples or nations live together less out of reciprocal affection than because of their inability to live separately.[11] In 1990, in the aftermath of the demise of the Meech Lake Accord, Léon Dion, co-founder of the Department of Political Science at Université Laval, and father of Stéphane Dion, former leader of the Liberal Party of Canada, had this to say in his testimony to the Bélanger-Campeau Commission:

> Quebec must at long last obtain an absolute right of veto over any amendment to the Canadian Constitution. I had not hitherto seen one of the consequences that flows from these Quebec demands. In the final analysis what I am rejecting is the 1982 revision of the Constitution in its entirety. English Canada ascribes great importance to the Charter of Rights enshrined by that revision. The Charter suits it well. We should not propose to amend it in various ways; we should reject it root and branch. We have had our own Charter of Rights for years. It suits us. We should strengthen its legal validity. Each person and group would thus appeal to a single Charter of Rights. Everybody would be better off for it.[12]

Throughout his entire life, Léon Dion was a passionate promoter of the Canadian "dream of duality." Twenty years ago, at the height of our debate over the ratification of the Meech Lake Accord, I gave a lecture about his thought at the department of Political Science at the University of Alberta. In the passage I have just quoted, one can sense the immensity of Dion's disappointment over the demise of Meech Lake and the constitutional stalemate it provoked. In a way, as I will elaborate in my conclusion, this stalemate is still with us. In another way, the profound ambivalences of Québec vis-à-vis Canadian constitutionalism and federalism have very deep roots. Consider this last excerpt, written in the mid-1950s by one more Université Laval scholar, the economist Maurice Lamontagne:

> Québec's actual position is hybrid and ambiguous and cannot last. One member of a federation cannot cling indefinitely to a bygone phase of federalism while all other members desire to evolve to new forms. The way in which Québec currently participates in the life of the Canadian federation is that of a province submitting to the drawbacks of the federation without benefiting from all its advantages, while the rest of Canada is in a hurry to attain new objectives . . . The province of Québec must therefore become conscious of this reality and make a choice. She is currently in a dilemma: either she accepts the new Canadian federation and integrates, or she refuses it and disassociates. What should she do? By and large, this is the question the population poses.[13]

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11 Jean-Charles Bonenfant, "Le Canada et les hommes politiques de 1867" (1967) 21:3 Revue d'histoire de l'Amérique française 571.

12 Léon Dion, cited in Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montréal: McGill-Queen's University Press, 1995) at 105.

13 Maurice Lamontagne, *Le fédéralisme canadien: Évolution et problèmes* (Québec City: Presses de

The meaning of federalism in Québec and throughout Canada is of course the business of constitutional law scholars, and many would hasten to add that it primarily preoccupies the scholars in Québec. This lecture will stay outside of technical discussions about federalism as a constitutional principle in our fundamental law, particularly in the era of Charter dialogue.[14] Constitutional jurisprudence, from the lofty statements of the Judiciary Committee of the Privy Council, to the Laskin Supreme Court in the era of Patriation, to the Lamer Supreme Court's historical reconstruction in *Reference Re Secession of Quebec*,[15] will be only discussed indirectly. Historians, for their part, would be quick to invite us to consider the interpretation of Canadian federalism in a number of key Commissions of Enquiry over the last century, some of them in Québec, all of them involving Québec thinkers, judges or politicians: Rowell-Sirois, Tremblay, Laurendeau-Dunton, Pépin-Robarts, MacDonald, Bélanger-Campeau, and Erasmus-Dussault. Each and every one of these Commissions had something important to say about the meaning of federalism in Québec and in Canada.

In interpreting the meaning of Canadian federalism in Québec, one must consider how much the country has changed since Confederation. This is one of the arguments put forward by André Pratte, the chief editorialist of the Montréal newspaper *La Presse*, and one of the key contributors to the Québec debate over the meaning of federalism, as I will illustrate at greater length in the next section of this lecture. For now, I will limit myself to a few major facts mentioned by Pratte.[16] There are 47 times more people in Alberta today than at the time of Confederation, and in British Columbia the figure is 120 times. In 1901, the population of Québec was seven times the population of these two provinces combined. As matters currently stand, there are now more people in Alberta and British Columbia combined than in Québec. Within my lifetime, roughly speaking, Québec's share of Canada's total population will have declined from about 30% to 20%. In comparative terms, it is accurate to speak of Québec's steady demographic and economic decline in modern-day Canada. However, for as long as I can see in the future, Québec will continue to play an important role in the political and constitutional make-up of Canada. This much can be expected of a distinct national society of close to eight million people operating predominantly in French, being culturally

l'Université Laval, 1954) at 284, 286 [translated by author].

14 See Laforest, *supra* note 2.

15 [1998] 2 S.C.R. 217, 1998 CanLII 793.

16 André Pratte, "Voir notre passé autrement pour mieux bâtir notre avenir," in André Pratte, ed., *Reconquérir le Canada: Un nouveau projet pour la nation québécoise* (Montréal: Éditions Voix Parallèles, 2007) 231 at 243 [Pratte, "Faire Table"].

and economically dynamic on the world stage, and integrating immigrants in an autonomous educational, institutional and communication network—in a bilingual federal country called Canada. The reality of the English-French duality, anchored foremost but not exclusively in Québec, is a major part of the past, present, and future of Canada. To say that the Canadian state operates in two official languages does not tell the whole story: in Canada we find two legal systems, two networks of civil society associations, two scholarly communities, two media networks, two host societies for immigrants, two apparatuses of popular culture, two literatures. A substantial share of this dualistic configuration, which distinguishes Canada in the Americas and in the world, is owed to the fact that Québec is a distinct, predominantly French, society and an autonomous political community. Therefore, the meaning of federalism in Québec does matter for all of Canada. This is as true now as it was in the times of our nineteenth-century Confederation Debates or during the various stages of our constitutional tugs-of-war of the last decades.

From the mid-1990s onwards, when I was working on the Beyond the Impasse Project for the Institute for Research on Public Policy with Roger Gibbins, now president of the Canada West Foundation, I coined an expression that owed a lot to my experience in Calgary: "I'd much prefer to be governed in a federal way by a unilingual Albertan, than in a quasi-imperial way by a fellow Quebecker." Like many in my province, I was disenchanted by the way in which, at least in my eyes, the Canadian government led by Jean Chrétien showed little respect for the institutions and principles of federalism in its fiscal policies, higher-education initiatives, and, more generally, in its rather arbitrary and unilateral way of providing co-ordination for our political regime. As many Quebeckers were gradually moving away from the idea of seriously considering the sovereignty option, they had some reason to believe that Canadians beyond their province were gradually moving away from the idea of federalism as an ethical, institutional, and constitutional pillar of our system. Consider the following passages from essays by Will Kymlicka and Sujit Choudhry:

> English-speaking Canadians have a deep desire to act as a nation, which they can do only through the federal government; they also have come to define their national identity in terms of certain values, standards, and entitlements that can be upheld from sea to sea only through federal intervention in areas of provincial jurisdiction. In short, the only way for English-speaking Canadians to express their national identity is to undermine the provincial autonomy that has made it possible for Quebecers to express their national identity. The problem in Québec-Canada relations, therefore, is not simply that Quebecers have developed a strong sense of political identity that is straining the bounds of federalism. It is also that Canadians outside Quebec

> have developed a strong sense of Pan-Canadian identity that strains the bounds of federalism.[17]

And from Choudry:

> The impact on federalism of Canada's increasing ethnic diversity and the concentration of that diversity in Canada's urban centres is a question that has largely remained unexplored. My sense is that federalism is in for a bit of a shock, because many recent immigrants do not identify with Canada's self-description as a federal political community. They have not taken to federalism in the same way that they have embraced other aspects of our constitutional identity, such as rights and the rule of law. The difficulty here is that federalism offers up a conception of the Canadian political community with which immigrants find it difficult to identify.[18]

There is a short, simple answer to the question about the meaning of federalism in Québec, and it has been reformulated in recent years by political scientists of my generation, such as Alain-G. Gagnon, Alain Noël, François Rocher, and myself, as liberty, identity, autonomy, and recognition. Canadian federalism, at its best, provides Québec with a substantial degree of political freedom while preserving and promoting its distinct identity. It fosters autonomy and offers an authentic form of recognition. This, in other words, is the dominant paradigm, and I will consider some of its limitations further in this lecture. The current Prime Minister of Canada, Stephen Harper, has undeniably struck a chord in Québec by developing a doctrine of open federalism (fédéralisme d'ouverture in French). In two key speeches made in Québec City in December 2005 and in Montreal in April 2006, Harper elaborated a vision that contained the following elements:

1. move beyond domineering and paternalistic federalism and show greater respect for constitutional provincial jurisdiction and division of powers;

2. foster better collaboration and co-ordination with provinces and circumscribe Ottawa's spending power;

3. recognize the existence of a vertical fiscal imbalance between Ottawa and the provinces and show willingness to act on this problem;

4. recognize the special cultural and institutional responsibilities of Québec's government role in the UNESCO;

17 Will Kymlicka, *Finding our Way: Rethinking Ethnocultural Relations in Canada* (New York: Oxford University Press, 1998) at 166.

18 Sujit Choudhry [no title] in Irvin Studin, ed., *What is a Canadian? Forty-Three Thought-Provoking Answers* (Toronto: McClelland & Stewart, A Douglas Gibson Book, 2006) 117 at 122–123.

5. in Canada-Québec relations, offer a noticeable change of tone: "We shall change the debate, change the programme and change the federation."[19]

Although the Harper-led Conservative minority government has failed to deliver on its promise to elaborate a so-called "Charte du fédéralisme d'ouverture," I believe there is a general consensus in Québec that Harper has made significant progress on most items of this agenda. Moreover, considering that Harper moved a resolution through the House of Commons recognizing the Québécois as a nation in a united Canada, that he has shown tremendous respect for the French language, and that he has highlighted here and abroad the role of Québec and of Québec City in the founding of Canada, it is somewhat surprising that he did not make substantial gains in Québec in the 2008 federal election.

Any analysis of these matters must be done carefully; in truth, the engine of open federalism has been losing energy on a variety of issues. Statements about the need to circumscribe the spending power have been timid at best. Some ambiguities remain concerning what Harper really meant in the above-noted resolution. Senate reform projects and the idea of an Ottawa-based securities regulator have met strong resistance in the federalist Québec City. The Prime Minister has shown no enthusiasm for streamlining co-ordination through regular and more rational First Ministers Conferences, and he has generally stayed away from the idea of re-opening the constitutional file to formally recognize Québec's national identity. Add to this the rift between Harper and Québec Premier Jean Charest dating back to the latter's decision to reduce income taxes in the aftermath of the 2007 federal budget addressing fiscal imbalance, and one sees a more realistic portrait of the relationship between Harper's government and Québec.

Harper's views need to be examined in parallel with the strong federalist perspectives of Stéphane Dion, first and foremost a Quebecker, a respected academic, and a politician. I will consider some of Dion's pronouncements about the meaning of federalism in Québec. First, I wish to say that Dion and Prime Minister Stephen Harper have a lot in common. Political theory and comparative institutional studies tell us that federalism is always a balancing

19 Stephen Harper, "Finie la polarisation!," *La Presse* (21 April, 2006), A-15; Stephen Harper, "Un fédéralisme d'ouverture," *La Presse* (20 December, 2005), A-27 [translated by author]. Additionally, Harper's federalism of openness is discussed in Réjean Pelletier, *Le Québec et le fédéralisme canadien: un regard critique* (Québec City: Presses de l'Université Laval, 2008) [Pelletier]; as well in Jean-François Caron and Guy Laforest, "Canada and Multinational Federalism: From the Spirit of 1982 to Stephen Harper's Open Federalism" (2009) 15:1 Nationalism and Ethnic Politics 27.

act between unity and diversity, self-government and shared rule, autonomy and solidarity/participation. So, I think that Dion, like Harper, understands very well the need to balance integrative strategies bringing all citizens into the fabric of the Canadian national and federal political community with strategies of empowerment aimed at satisfying the aspirations of a minority national community such as Québec. In his days as a political scientist, Dion wrote about the need to balance "stratégies d'endiguement" with "stratégies de contentement," which I find very close to the vocabulary of experts such as Richard Simeon who wrote on behalf of the Forum of Federations on combining strategies of integration with strategies of empowerment.[20]

Modern-day Canada is about striking a balance between the constitutional laws of 1867 and of 1982: the first one provides a strong anchor for federalism and provincial powers enabling Québec to be free and distinct, while the second one integrates the whole country with a nationalizing Charter of Rights and Freedoms. As a former leader and still a major figure of Pierre Trudeau's party, Dion may lean toward 1982 and the Charter, whereas Harper may lean towards 1867 and a more historical and federalist understanding of Canada, but both men do reconcile these two pillars of our constitutional identity. Dion is a bona fide federalist. As the Minister of Intergovernmental Affairs in Chrétien's governments, he made numerous speeches developing a rich federalist discourse emphasizing the necessity of cohabitation of cultures in our world, the value of multiple national identities, and the principles of tolerance, solidarity, and flexibility.[21] In addition to this normative orientation, Dion has reflected upon his own praxis of federalism as a minister, emphasizing the following elements:

1. the Constitution must be respected;
2. close co-operation must be established where it is needed;
3. the capacity and liberty of governments towards action must be preserved;
4. the federation must be flexible;
5. the federation must be fair;
6. we must exchange information;

20 Richard Simeon, "Federalism and the Management of Diversity" (Fourth International Congress of the Forum of Federations, New Delhi, India, 5–7 November 2007) [unpublished] at 7–8.

21 Stéphane Dion, *Straight Talk: Speeches and Writings on Canadian Unity* (Montréal: McGill-Queen's University Press, 1999) at 29–30.

7. the public must be aware of the respective contributions of the different governments.[22]

Prior to and in the aftermath of the 1995 Québec referendum, Dion and Harper were in the same camp on a number of issues. Both were, and remain, coherent anti-separatists forcefully defending the value of the Canadian political experience in the world and strongly advocating for the rule of law and Canada's territorial integrity. In English-speaking Canada, Dion is seen as "Mr. Unity" and known as the co-sponsor, with then Prime Minister Jean Chrétien, of the *Clarity Act*.[23] As is well established, the whole idea of the necessity for greater legal clarifications of such endeavours owes a lot to the mind of Harper. But it was Dion who fought this struggle in the trenches in Québec, and he remains to this day hindered as a political actor by the perception that in order to strengthen the legitimacy of the *Clarity Act*, he aided and abetted a partitionist movement in Greater Montréal and elsewhere. In light of the fact that the *Clarity Act* would allow the federal government to establish the nature of a clear majority in a secessionist referendum, observers should not be surprised to note that it is still Dion, rather than Harper, whom Québec sees as the real sponsor or defender of the tougher Canadian line. Dion, while he was the Liberal leader and still to this day, stands for the rough language of an uncompromising Canadian national integration, as the embodiment of a strong "stratégie d'endiguement," whereas Harper, who was elected after the turmoil of the Chrétien decade and the malaise surrounding the sponsorship scandal, offered himself to Québec as the embodiment of the balancing act in his doctrine of open federalism. In the fall of 2006, Dion was a candidate for the leadership of the Liberal Party of Canada. Neither during the leadership race, nor at any time following his victory, has Dion thought it necessary or useful to propose his own rebalancing act on federalism and Canada-Québec relations in the twenty-first century. All in all, a similar remark applies to the current Liberal leader Michael Ignatieff who in his own right is offering strong intellectual leadership to the party forty years after Pierre Trudeau replaced Lester Pearson. On these matters, the current website of the Liberal Party and Dion's platform in 2008 share the same silence.[24] To be fair, both Dion and Ignatieff have supported a number of measures associated with Harper's open federalism, including the recognition of the Québécois as a nation within Canada.

22 *Ibid*. at 117–118.

23 S.C. 2000, c. 26.

24 E.g., no reference is made to federalism on the "Ideas and Issues" page of the current website, accessed on 3 August, 2010: "What we stand for" online: Liberal Party of Canada http://www.liberal.ca/issues/.

In June 1877 in Québec City, Wilfrid Laurier made a landmark speech about the meaning of political liberalism that strongly contributed to his election as Prime Minister of Canada two decades later. Laurier redefined liberalism for his times. It remains to be seen whether or not, at the dawn of a new decade, any leader of the Liberal Party will attempt to re-define himself or herself as a new Laurier for the twenty-first century, offering a coherent understanding of what federalism means in Québec and in Canada, and rebalancing on the side of the empowerment of Québec's liberty and identity (strategy of contentment) against the mainstream majoritarian approach characterized by the legal integration of Québec in the unity of the Canadian nation (strategy of containment).

A quarter of a century after Lord Durham's *Report*[25] and after the *Act of Union*, *1840*, [26] the emergence of a federal Dominion in Canada in 1867 meant, in the eyes of George-Etienne Cartier and those who sided with him, nothing less than the political renaissance of Québec, and its resurfacing as an autonomous, distinct, and self-governing political community. The following two passages coherently illustrate this line of interpretation. The first is taken from a parliamentary speech made by John A. Macdonald:

> I have again and again stated in the house that, if practicable, I thought a legislative union would be preferable . . . But on looking at the subject in the conference . . . we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada because they felt that in their peculiar position—being in a minority, with a different language, nationality and religion from the majority—in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced. It was found that any proposition which involved the absorption of the individuality of Lower Canada . . . would not be received with favour by her people.[27]

The second excerpt summarizes Arthur Silver's views about the French-Canadian idea of Confederation:

> Here was the very heart and essence of the pro-Confederation argument in French Lower Canada: the Union of the Canadas was to be broken up, and the French Canadians were to take possession of a province of their own—a province with an enormous degree of autonomy. In fact, *separation* (from Upper Canada) and *inde-*

25 Lord Durham, *Report on the Affairs of British North America* (1839). See Janet Ajzenstat, ed., *Lord Durham's Report: New Edition* (Montréal: McGill-Queen's University Press, 2006).

26 3&4 Vict., c. 35.

27 John A. Macdonald, Address (presented at the Legislative Assembly of United Canada, 6 February, 1865), cited in Janet Ajzenstat *et al*., *Canada's Founding Debates* (Toronto: Stoddart, 1999) at 279.

> *pendence* (of Quebec within its own jurisdictions) were the main themes of Bleu propaganda. "As a distinct and separate nationality," said *La Minerve*, "we form a state within the state. We enjoy the full exercise of our rights and the formal recognition of our national independence."[28]

These two passages remind us of what Canadian federalism meant in Québec in 1867. The length of this section shows that many hermeneutical precautions need to be taken before attacking head-on the heart of the matter: what federalism may mean for us in the contemporary era.

3. Contemporary Trends and Scholarship: Critical Reflections

In political, intellectual and academic circles, a federalist revival is currently occurring in Québec. I believe it is useful to start with a collection of essays put together by André Pratte, the lead editorialist of *La Presse* in his book, *Reconquering Canada*.[29] Reading this work, many came to the view that Canadian federalism had finally found its voice anew in Québec. Pratte and the other contributors share four premises:

1. It is in Québec's long-term interests to remain within Canada;
2. Quebeckers must change their approach towards Canada, moving beyond the language of grievances and constitutional demands;
3. Quebeckers should be more active participants in the political life of the country;
4. Québec already possesses all the required tools to meet its contemporary challenges.[30]

In short, they argue that Québec must move beyond isolationism; Quebeckers must be more enthusiastic Canadians; and federalists must abandon their dogmas and vanquish their fear to act and to speak out forcefully on behalf of their option.

In his own contribution to the book, "Faire table rase: Voir notre passé autrement pour mieux bâtir notre avenir," Pratte proposes a lucid reassessment

28 Arthur Silver, *The French Canadian Idea of Confederation, 1864–1900*, 2nd ed. (Toronto: University of Toronto Press, 1997) at 41.

29 André Pratte, ed., *Reconquérir le Canada: un nouveau projet pour la nation québécoise* (Montréal: Editions Voix Parallèles, 2007) [Pratte]. It was released in English under the title *Reconquering Canada: Quebec Federalists Speak Up for Change*, trans. by Patrick Watson (Vancouver: Douglas & McIntyre, 2008).

30 Pratte, *ibid*. at 10.

of Québec's situation and fate within Canada.[31] With words echoing those of André Laurendeau at the time of the Royal Commission on Bilingualism and Biculturalism forty years ago, Pratte invites his fellow Quebeckers to become more involved and to take more risks in the human and social experiment called Canada. Quebeckers should learn more about other provinces and other Canadians; they should learn anew the language and the spirit of compromise; they should extend a generous hand to their allies and partners in the business of this country. Quebeckers have constructed a distinct society; they have every reason to be proud of this; and they control their own destiny. They should act responsibly, and affirm themselves through their economic prowess, their dynamism, and their creativity.[32] Canada has changed a lot since 1867, its governance is now extraordinarily complex, and in this context Quebeckers must abandon their past-oriented approach and the rhetoric of victimhood.[33] Invoking in his writings a historical tabula rasa as a strategic orientation for a more rewarding future, Pratte joins the contemporary historians and philosophers who have systematically criticized the rather nostalgic and melancholic brand of nationalism that has occupied so much place in Québec letters since the Quiet Revolution.[34]

Three more contributions are relevant for this lecture, respectively written by Marie Bernard-Meunier, formerly Canada's ambassador to Germany, by Pierre-Gerlier Forest, the current President of the Trudeau Foundation in Montréal, and by Jean Leclair, a professor of law at Université de Montréal.

In her chapter, Marie Bernard-Meunier puts forward an appeal to the politics of reason.[35] The complexity of federal governance is such, according to her, that such regimes can only be the choice of necessity (recall the reference to Bonenfant and the spirit of 1867 in the previous section). She sees four principles at work in the logic and nature of federalism:

1. the locus of equilibrium in a federation will always be unstable;

31 Pratte, "Faire table," *supra* note 16.

32 *Ibid*. at 252–253; see also see also Dubuc, *supra* note 2 at 229 and André Pratte, *Aux pays des merveilles: essai sur les mythes politiques québécois* (Montréal: VLB éditeur, 2006) at 132.

33 Pratte, "Faire table," *supra* note 29 at 232.

34 Jocelyn Létourneau, *A History for the Future: Rewriting Memory and Identity in Quebec* (Montréal: McGill-Queen's University Press, 2004); Jocelyn Maclure, *Quebec Identity: the Challenge of Pluralism* (Montréal: McGill-Queen's University Press, 2003); Daniel Marc Weinstock, "The Moral Psychology of Federalism" in Jean-François Gaudreault-Desbiens and Fabien Gélinas, eds., *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Cowansville, QC: Yvon Blais, Brussels: Bruylant, 2005) 209.

35 Marie Bernard-Meunier, "Apprendre à jouer le jeu: le défi du Québec au sein du Canada" in Pratte, *supra* note 29, 115.

2. the cohesion of a federal regime rests on its ability to reconcile two fundamental needs: the wish of the partners to preserve their identity ("rester soi-même") and their desire to pull together ("s'unir");

3. such regimes are "marriages of reason," and thus in Canada Quebeckers should restrain their crippling desire to be recognized and loved;

4. finally, and perhaps at least partly in contradiction with the preceding principle, federations require dual loyalties and senses of belonging.[36]

In her careful comparison of Canadian and German federal institutions and practices, she notes that in both countries a certain natural logic towards centralization needs to be counterbalanced, and that Germany is better equipped than Canada to do this. However, in German federalism all partners play the game with an authentic, bona fide desire to share and co-operate with the others. In Canada, she concludes, Québec has broken the equilibrium between autonomy and solidarity-participation, pursuing its sole interests in an instrumental/utilitarian approach.[37]

Drawing on his vast knowledge of the politics of health in Canada, Pierre-Gerlier Forest, in his chapter of Pratte's book, invites Quebeckers and their political leaders to imagine more boldly the institutions and practices of interdependence which must be adapted to the twenty-first century.[38] In health as in other matters, he argues, Québec must move beyond the blind and mechanical repetition of its traditional demands and grievances. He proposes a graphic typology of current understandings of federalism in Québec and elsewhere in Canada, with one axis representing centralization/decentralization and the other symmetry-asymmetry. In Québec, the hegemonic approach towards federalism has traditionally privileged strong asymmetry with substantial decentralization. Although the interpretive panorama is somewhat more complex in Canada-beyond-Québec, Forest believes that since the advent of the 1982 *Charter of Rights and Freedoms*, greater centralization and greater symmetry have been put forward through a redefinition of Canadian nationalism. Forest makes an insightful point about the logic of change in a federal regime. He concurs with most experts that the burden of proof belongs to those who wish to secede from a federation, adding that it should also belong to those who want to consolidate centralizing and symmetrical dimensions.[39] He further maintains that this burden should also belong to those

36 *Ibid*. at 133–134.
37 *Ibid*. at 140.
38 Pierre-Gerlier Forest, "Santé: en finir avec la chaise vide" in Pratte, *supra* note 29, 261.
39 *Ibid*. at 272.

who want to restrain our ability to innovate and to experiment with different approaches, particularly in an era characterized by the primacy of science and knowledge where the presence of our provincial and federal governments in the field of health is justified on pragmatic grounds.

Much of the public interest surrounding Pratte's edited volume at the time of the publication was centred on Jean Leclair's brilliant, thought-provoking, polemical, and at times inflammatory chapter, "Vers une pensée politique fédérale: la répudiation du mythe de la difference québécoise radicale."[40] Never since Pierre-Elliott Trudeau penned the chapters and articles that found their way in his own collection of essays in the 1960s, *Federalism and the French Canadians*, [41] has any Québec intellectual written so eloquently about the theoretical and practical merits of federalism. In truth, some parallels could be established between Leclair and his former Université de Montréal colleague, Stéphane Dion. Both march in the footsteps of Alexis de Tocqueville and of Pierre Trudeau, crafting a philosophical defence of federalism for the benefit of individual freedom and multiple identities. Both see federal governance as an exercise in counterbalancing forces and in promoting a political culture marked by a spirit of compromise and moderation. Beyond theory, however, Dion's "Straight Talk" for contemporary Canada is dominated by his own brand of coherent anti-separatism. His ethics and praxis of federalism look like overtures in this greater symphony. Leclair's essay, in contrast, is first and foremost an essay in the praise of Canadian federalism in Québec. According to him, the understanding of Canada propounded by Québec nationalists and sovereigntists has been deterministic and totalizing, vastly exaggerating the strength of centralizing elements in the political and legal systems. He believes that these writings have also been premised on a monistic approach towards "nation" and "culture," disregarding the authentic possibility of multiple identities and developing a culturalizing pathos which over-simplifies social reality. Leclair criticizes the contemporary thinking about Canadian federalism in Québec: in particular, the views that one can only belong to a single nation; that all social life is reduced to culture alone; and that Québec is fundamentally and radically different from the rest of Canada. In order to elaborate a serious theory and practice of federalism in Canada, Leclair believes that it is necessary to accept a series of premises and spiritual preconditions:

1. There are differences between human beings, but, in addition, each human being is traversed by a plurality of forms and modes of belonging;

40 Jean Leclair, "Vers une pensée politique fédérale: la répudiation du mythe de la difference québécoise radicale" in Pratte, *supra* note 27, 39 [Leclair].

41 Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968).

2. cultural dimensions do not exhaust the whole of reality;

3. the function of federalism is to limit the power of the state as well as to structure relations between various communities peacefully;

4. federalism requires a combination of autonomy and solidarity;

5. a climate of tension is inescapable in any federal regime—in politics in general and in democratic politics in particular;

6. federalism is not a zero-sum game: Canada and the central government do not win whenever Québec and its government lose, and vice versa;

7. a majority of Quebeckers remain substantially attached to the Canadian state.[42]

Constitutional law professors and their students would no doubt appreciate Leclair's efforts to provide a balanced perspective of the current Supreme Court of Canada's jurisprudence on the meaning and the importance of federalism in Canadian constitutionalism. He discusses such issues as the legal anchoring of the spending power of the central government, the "national dimensions" and "national emergencies" theories of interpretation, and the federal jurisdiction over the regulation of trade and commerce, communications, and the implementation of treaties. On these matters, his main academic interlocutor in Québec is my young colleague Eugénie Brouillet, who is fast becoming one of Québec's pre-eminent authorities on federalism and the Constitution. Her views will be discussed further in this lecture.

Leclair concludes his contribution with a series of reflections on what needs to be done in order to foster a greater federal spirit or a political culture of federalism in Québec and in the whole of Canada. I will limit myself here to what he has to say about Québec. In Québec, this would require relinquishing the essentialistic and totalizing view of culture and identity. It would require finding a better equilibrium between autonomy and solidarity.[43] Finally, it would be greatly beneficial to abandon an overly narcissistic approach to the public-policy dialogue. This, by the way, was one of the ideas I developed ten years ago in the Beyond the Impasse project, advocating that federal associates place themselves in the shoes of the other partners.[44]

42 Leclair, *supra* note 40 at 63 [translated by author].

43 *Ibid*. at 65–66.

44 Guy Laforest, "Standing in the Shoes of Other Partners in the Canadian Union," in Roger Gibbins and Guy Laforest, eds., *Beyond the Impasse: Toward Reconciliation* (Montréal: Institute for Research on Public Policy, 1998) 60 at 51–52.

Ever since Confederation, as I have begun to argue earlier in this lecture, the dominant paradigm about Canadian federalism in Québec has been about the identity of Québec and its liberty within Canada, and about its autonomy from Canada and recognition by Canada and other partners within Canada. One of the most enlightening recent pieces about Canadian federalism has been penned by University of Ottawa's political scientist François Rocher.[45] He considers that in both Québec and English-speaking Canada, interpretive developments to this day remain heavily dependent, respectively, on the reports of two mid-twentieth century commissions of enquiry: the Tremblay Commission in Québec and the Rowell-Sirois Commission across Canada. I will quote at length from Rocher's chapter:

> In Quebec the dominant understanding of federalism and federal institutions has its origins in the Tremblay Report, named for the chairman of the Quebec Government's Royal Commission on Constitutional Problems, published in 1956. Since then, while evidently being adapted for particular political conjunctures, the Quebec-Canada debate has taken place almost exclusively within the argumentative framework set out in that report. Similarly, the literature in English on Canadian federalism, as well as the practice of federalism by the general government, follows the argumentation advanced by the Rowell-Sirois Commission, informally so named for its co-chairmen, in the Report of the Royal Commission on Dominion-Provincial Relations, published in 1940. To summarize my central argument in a few words: the dominant understanding of the English-language literature on Canadian federalism pays no heed to the notion of autonomy but emphasizes the notion of efficiency, while Quebec francophone scholars and the practices of the Quebec government have not adequately taken into account the notion of interdependence.[46]

A healthy practice of federalism requires a form of equilibrium between the requirements of autonomy on one side and those of solidarity-interdependence on the other. This idea, oft repeated in the scholarship, has been recently reasserted both in a polemical fashion by Leclair, in a book quite critical of Québec sovereigntists and ultra-autonomists, and by Rocher, in the first textbook about Canadian federalism published in the past two decades in Québec.[47] Rocher's essential point is that ever since the Report of the Tremblay Commission, there has been no such equilibrium in the work of Québec francophone scholars; the vast majority of them privilege the securing and the enhancement of autonomy for Québec while neglecting the matters

45 François Rocher, "The Quebec-Canada Dynamic or the Negation of the Ideal of Federalism," in Alain-G. Gagnon, ed., *Contemporary Canadian Federalism: Foundations, Traditions, Institutions*, (Toronto: University of Toronto Press, 2009) 81 [Rocher].

46 *Ibid*. at 98.

47 Leclair, *supra* note 40 at 263; Rocher, *supra* note 45.

of solidarity and interdependence. I will not dwell here on the fact that the topic of Québec's autonomy was the first and foremost focus of the Tremblay Commission, considering that this subject has been competently addressed elsewhere.[48] I will rather illustrate the perseverance and strength of the same perspective in the current works of Québec francophone scholars representing a variety of academic disciplines and methodological approaches.

In a work of synthesis published in 2008, summarizing three decades of teachings on Canadian federalism, my Université Laval colleague Réjean Pelletier squarely espouses the autonomist approach of the Tremblay Commission as depicted by Rocher. His book *Le Québec et le fédéralisme canadien: un regard critique* starts with the classical interpretation highlighting the centralizing aspects of the 1867 Constitution and placing the provinces in general and Québec in particular in a subordinate position.[49] All constitutional and institutional developments coming in the aftermath of the founding moment are essentially examined from the perspective of their consequences for the preservation and promotion of Québec's autonomy.[50] Pelletier's book has high pedagogical value: the chapters on intergovernmental relations, bilingualism, Senate reform, the Council of the Federation, and Harper's open federalism are thorough and insightful. The chapter on asymmetrical federalism is an excellent example of the contemporary relevance of the Tremblay Commission's hegemonic autonomist paradigm. Relating his views on institutional development to the work done by Alain-G. Gagnon on the normative foundations of asymmetry,[51] Pelletier laments the fact that Québec has never been adequately recognized as a minority nation or as a distinct society within Canada.[52] The book ends on a rather pessimistic note, with the observation that the demographic and economic centres of gravity in Canada are moving further and further away from Québec. As minorities get weaker, Pelletier observes, they will get less and less attention.

The study of Canadian federalism in Québec is attracting a new generation of scholars. This is nowhere more evident than in the field of constitutional law, with the recent contributions of figures such as Jean Leclair, Jean-François Gaudreault-Desbiens, and Eugénie Brouillet. A co-author of

48 Alain Noël, "L'héritage de la Commission Tremblay: penser l'autonomie dans un cadre fédéral rigide"(2007) 16:1 Bulletin d'histoire politique 105; Rocher, *supra* note 45.

49 Pelletier, *supra* note 19 at 14.

50 *Ibid*. at 54.

51 Alain-G. Gagnon, ed., *Contemporary Canadian Federalism: Foundations, Traditions, Institutions*, (Toronto: University of Toronto Press, 2009) [Gagnon].

52 Pelletier, *supra* note 19 at 150.

the most important French-language Canadian constitutional law textbook,[53] Brouillet had also published a decade earlier a key work about the legal dimensions of Canadian federalism focusing on the autonomy and cultural identity of Québec.[54] This latter work modified at least in part the traditional Québec interpretation focused on the centralizing trends as illustrated in this essay by Pelletier and still very much present in Brouillet's constitutional law textbook.[55] While not denying the institutional thrust of this analysis, Brouillet suggests that the nineteenth-century federal constitution had much to offer for the defence and development of Québec's cultural identity. I cannot do justice here to the richness of the book's sections on the founding debates, the analysis of the principles of the division of powers, and the ways in which Québec's autonomy and cultural identity were originally secured and later enhanced by the constitutional jurisprudence for many decades after 1867. Nor can I consider Brouillet's rigorous treatment of the jurisprudential evolution between the periods 1949–1982 and 1982–2005, characterized according to her by a steady dilution of the importance of the federative principle in cases and matters pertaining to the cultural identity of Québec. What I find particularly striking is the fact that, similar to Pelletier, she examines Canada and its federal traditions, laws and institutions quite exhaustively, but solely with respect to the two higher objectives of Québec's autonomy and distinctiveness. In a key section of her book, Brouillet approvingly quotes the Report of the Tremblay Commission in support of the idea that critical matters dealing with culture and societal identity were left to the provinces and thus to Québec in 1867. She acknowledges this approval before synthesizing the argument about the autonomy of spheres of jurisdiction and the relationships between orders of government.[56] In these pages, she thoroughly vindicates the point made by Rocher about the contemporary relevance of the Tremblay Commission paradigm in Québec's francophone scholarship.

What Pelletier and Brouillet represent and have accomplished respectively within the spheres of political science and constitutional law is brilliantly complemented in the universe of political philosophy by my Université de Montréal colleague, Michel Seymour. In a remarkable synthesis published in 2008, Seymour builds on the work of Charles Taylor, Will Kymlicka, and

53 Henri Brun, Guy Tremblay and Eugénie Brouillet, eds., *Droit constitutionnel*, 5th ed. (Cowansville, QC: Yvon Blais, 2008).

54 Eugénie Brouillet, *La négation de la nation: l'identité culturelle québécoise et le fédéralisme canadien,* preface by Guy Laforest (Sillery, QC: Septentrion, 2005).

55 *Ibid*. at 434.

56 *Ibid*. at 154–156.

John Rawls in an attempt to justify philosophically and legitimize politically the existence of collective self-governing rights for non-sovereign peoples.[57] Kymlicka's approach remains insufficient for Seymour because it cannot go beyond moral individualism in its defence of minority rights within the liberal theory. Seymour's argumentative strategy consists in extending to non-sovereign peoples the collective rights that Rawls is willing to grant to independent nation-states. All in all, Seymour has produced the most sophisticated philosophical argument of the decade in support of the defence and enlargement of the autonomy and self-government of non-sovereign peoples in general, and of Québec in particular. In 1999, at the height of a particularly acrimonious period in Canada-Québec political and intellectual debates, Seymour published a book that clearly replicated the traditional Québec perspective on Canadian federalism: an existential approach towards Québec, its autonomy and recognition, coupled with an instrumental/utilitarian stance towards Canada.[58] In a key passage of this publication, Seymour reflects on the meaning and consequences for Canada of the recognition of the existence of the Québec people. He summarizes these consequences in ten points:

1. Official recognition of the existence of the Québec people in the Constitution;
2. Acceptance that the principle of provincial equality does not apply to Québec;
3. Acceptance of the general principle of asymmetry in the distribution of powers and spheres of jurisdiction;
4. Formal acceptance of the responsibilities of the Québec government in the promotion of the French language;
5. Acceptance that the Québec government is solely in charge of culture, communications and the Internet in the province;
6. Limitation of the spending power of the federal government;
7. The grant to Québec of a veto right on constitutional modifications;
8. Recognition that Québec has special responsibilities for its national economy;
9. The grant to Québec of a right to participate in the nomination of three of the nine judges on the Supreme Court of Canada;
10. Acceptance that Québec should have an enhanced presence on the international stage.[59]

57 Michel Seymour, *De la tolérance à la reconnaissance* (Montréal: Boréal, 2008) [Seymour].
58 Michel Seymour, *La nation en question* (Montréal: Hexagone, 1999).
59 *Ibid*. at 95–96 [translated by author].

Recall Rocher's point about the lack of equilibrium in Québec's francophone federalist scholarship between the value of autonomy on one side, and the value of solidarity/interdependence on the other. It seems to me that the above list and the relevant passage from Seymour's 1999 book are perfectly illustrative of this break in equilibrium. For, supposing that the federal government considered accepting the various points on Seymour's list, all connected to the enhancement of Québec's perennial objectives of increased autonomy and meaningful recognition, how would this transform the way Québec and its citizens understand Canada? What would be the specific consequences with regards to obtaining more authentic forms of solidarity and interdependence within the Canadian political community? Seymour remained silent about these matters in the bitter political context of 1999. His more recent *De la tolérance à la reconnaissance* deals mostly with strictly philosophical matters, only incidentally referring to Canada-Québec issues to reinforce the thrust of the argument. Quite unequivocally, however, it is still a philosophical work devoted to issues of autonomy, recognition and self-government, rather than to co-operation and interdependence, as the following central passage clearly establishes:

> Peoples without state possess in my understanding a general, unilateral and primary right to internal self-determination, i.e. they have the right to develop themselves, economically, socially, culturally within the larger state ["état englobant" in French], and the right to determine their political status within this larger state. A secession right should be admitted only as a right for reparation. If the larger state refuses the representation of the minority people within its institutions, if it quashes the rights and freedoms of the citizens of the minority people, if it annexes the territory of the minority people, the latter has the right to secede. More importantly, the minority people is endowed with a right to secede seen as a right for reparation if the larger state violates the principle of internal self-determination of the minority people.[60]

Whether the emphasis is placed on the approaches of political science, constitutional law, or political philosophy, the same conclusion appears to be warranted: francophone Québec scholarship studies Canadian federalism with an existential and Québec-centred ultra-autonomist focus, adopting an instrumental/utilitarian stance towards Canada. This orientation carries with it a number of consequences which are lucidly discussed by Rocher:

> Following from the recognition of the need for the general government to respect provincial jurisdiction, the Quebec government during the Quiet Revolution demanded the recasting of Canada's Constitution in order to obtain powers that it judged to be indispensable to the affirmation of the Quebec identity in all spheres of

60 Seymour, *supra* note 58 at 624 [translated by author].

> activities—economic, social, political and cultural . . . For the Quebec governments, the Quebec-Canada dynamic is illustrated through several concepts: attachment to the principle of autonomy, respect for and expansion of provincial jurisdictions, achieving a distinct status, and asymmetrical federalism. . . . It is remarkable to note that this construction has taken place, both at the discursive level and concerning the Quebec-Canada state relations, on the basis of the non-participation of Quebec in the building of the Canadian political community.[61]
>
> . . .
>
> From the point of view of political institutions and the normative project of federalism, the dominant approach in Quebec is problematic in many ways. First, the emphasis on notions of pluralism, autonomy and non-subordination is clearly disproportionate to the scant attention paid to the notion of interdependence. This imbalance was present in the work of the Tremblay Commission and has since been consistently reproduced. The desire to construct a "complete" Quebec society has privileged the expansion of the spheres of sovereignty of the Quebec state and sought disassociation from the Canadian political space. In this context, the necessity of a double loyalty within the federal state proves impossible to articulate.[62]

In all these affairs pertaining to trust, loyalty and equilibrium, it is of course wrong to put exclusive focus on one of the partners. Considering, as I do in this lecture, the evolution of the meaning of Canadian federalism in Québec, I could give my readers the impression that the dilution of the federative principle in the institutions and political culture of Canada, accompanied by a certain abandonment of what Rocher has called the ideal of federalism, are only the responsibility of Québec—its political leaders and its intellectuals. As the quotes from Kymlicka and Choudhry above show, English-speaking Canadians and their political leaders and intellectuals also partake in this responsibility. Rocher himself, in his seminal analysis, recalls that the ideal of federalism has also been abandoned by English-speaking Canada ever since the Rowell-Sirois Commission, and the contemporary behaviour of political elites and corresponding scholarly studies have emphasized the instrumental logic of performance and effectiveness, at the expense of the autonomy which characterized the work of this Commission.[63]

Nonetheless, my subject matter remains the evolution of ideas about Canadian federalism in Québec. Reflecting on the work of the past decade, I would suggest that although Rocher remains correct in his assertion about the hegemony of the interpretive paradigm associated with the Tremblay

61 Rocher, *supra* note 45 at 106.
62 *Ibid*. at 109.
63 *Ibid*. at 110.

Commission, a number of cracks have emerged in this model, indicating that a paradigm shift could occur in the foreseeable future. The work of Pratte and his colleagues may not be merely an anomaly in the quiet air of still interpretive times.

In 2005, one of Prime Minister Trudeau's former speech-writers and advisers, and a philosopher in his own right, André Burelle, published a major book in which he offered a critical re-assessment of Trudeau's intellectual and political trajectories.[64] Marching in the footsteps of Emmanuel Mounier and Jacques Maritain, Burelle recalled the four principles of a political philosophy of federalism steeped in the categories of "communitarian personalism," the term coined by Denis de Rougemont and others at the dawn of the construction of a new Europe in the aftermath of the second World War. These principles are summarized as follows:

1. In a liberal-democratic federal regime, the ethical anchor of just relations between citizens and federated communities should be the principle of equivalent treatment rather than identical (uniform, symmetrical) treatment, because whenever we treat beings and agents who are not identical in an identical way, we negate their difference and frustrate the federal goal of union without fusion.

2. Subsidiarity should be entrenched as a founding principle to establish the sharing of jurisdictions between federal governmental partners. In order to maintain the exercise of power as close as possible to the human beings and communities involved, authority should be centralized only for matters which cannot be justly and efficiently managed at the local level.

3. Non-subordination should be entrenched as a founding principle with regards to the sharing of sovereignty. The establishment of peaceful and creative cohabitation between federal partners requires that none of the orders of government be subordinated in law or in practice to the others in the exercise of their respective constitutional powers.

4. Joint decision-making should be established as the founding principle for the management of interdependence between partners in the federation. Consistent with the above principle of non-subordination, federal partners should jointly decide the nature and scope of the constraints to their sovereign powers that each is prepared to accept when their respective jurisdictions overlap.[65]

Interestingly, Burelle shares many of the critical judgments concerning the evolution of the Canadian federation found in the contemporary studies

64 André Burelle, *Pierre-Elliott Trudeau: l'intellectuel et le politique* (Montréal: Fides, 2005).
65 *Ibid*. at 44 [translated by author].

faithful to the traditional Québec autonomist interpretive canon by such authors as Pelletier, Brouillet, and Seymour. Like most analysts, Burelle believes that there was greater respect for these principles in 1867 than when Canada was constitutionally re-founded in 1982. However, he is much more vocal and lucid than anybody else about the need for a new equilibrium between autonomy and solidarity/interdependence. Throughout the last decade, Burelle has urged Québec governments (without concrete results, much to his chagrin) to open talks addressing this need, demanding the constitutional recognition of Québec's right to national difference (a difference that comes with symbolic as well as with legal and political consequences), but also with an acceptance of the aforementioned principle of joint decision-making in the management of economic and social interdependence.[66]

In many ways, Burelle remains an idealist about federalism as a doctrine and also in his understanding of Canada's 1867 federal constitution. Thus, I find it useful to read his prose alongside that of Christian Dufour, who has been intelligently studying the histories and collective identities of Canada and Québec for twenty years. While Rocher and Burelle talk about an equilibrium between autonomy and solidarity/interdependence, Dufour, without relinquishing the need of such balance, prefers to talk about the twin projects of sharing and separation.[67] Federal partners indeed need to share, no doubt about this, but they also need to have separate rooms in their joint political home; they require enough space to conduct their own affairs. Because the language of separation is stronger than the vocabulary associated with autonomy, Dufour remains suspicious about Burelle's principle of subsidiarity, considering that it may yield too much to the target of greater efficiency. Dufour, however, becomes a nice companion to Burelle's reflections when he notes that Québec's lack of participation in the Canadian state over the last 25 years has contributed to the weakening of the federal principle across the country, and that Québec's approach to the Canadian federal project is partly outdated.[68]

Dufour also brings a welcome touch of historical realism to the whole discussion when he recalls the intertwining of the Canadian and Québécois collective national identities, and the key role of Quebeckers in the founding and development of both of these identities. Ever since the eighteenth century, the contemporary Canadian national identity has been created and transformed through historical events that took place largely, if not exclusive-

66 *Ibid*. at 467.

67 Christian Dufour, *Lettre aux souverainistes québécois et aux fédéralistes canadiens restés fidèles au Québec* (Montréal: Stanké, 2000) at 105.

68 *Ibid*. at 106–108.

ly, on Québec territory. Particularly following the Quiet Revolution, Québec's national identity came to substantially dissociate itself from the Canadian national identity, but the latter has kept much greater relevance in the hearts and minds of Quebeckers than many among the sovereigntist intellectual elite have been willing to recognize. In the words of Dufour, most contemporary Quebeckers are also the deepest-rooted Canadians, and this explains why it has remained extremely difficult to make them renounce their Canadian allegiance. If this is the source of a profound misunderstanding in Québec, the equivalent elsewhere in Canada is immensely difficult to find—particularly in light of Québec's role in the transforming of Canada while embracing its right to difference, and given the idea that this right should have meaningful political and legal consequences.

Both Dufour and Burelle are advocates and admirers of the ill-fated Meech Lake Accord. They believe that the Accord was the best attempt to modernize the Canadian federal project in agreement with the principled ideals of federalism and the realities of our historical context. Taken together, Burelle and Dufour provide a suitable starting point for those who would attempt, at the dawn of a new decade, to modernize the paradigm of the Tremblay Commission.

It would be impossible to revisit the developments of the last decade without attempting to assess the ideas and the contributions of the current Liberal government in Québec, led by Jean Charest. First elected in 2003, reduced to a minority status in 2007, but restored to a modest but real majority position in 2008, the Charest government inherited the traditional autonomist position in the Canadian federal dialogue. Benoît Pelletier, a constitutional law scholar who was the Minister of Intergovernmental Affairs between 2003 and 2008, claims that the Charest government has attempted to respect the federalist tradition of the Québec Liberal Party through upholding three principles:

1. Affirmation—because Québec has every reason to be proud of its identity and to want to reinforce it and have it resonate both in Canada and around the world.

2. Autonomy—because being a federalist means believing in autonomy. Indeed, federalism postulates that the provinces' autonomy is just as important as that of the federal order of government. Québec is an autonomous entity within the Canadian federation. The Government of Québec is committed to defending this autonomy, and even extending it, in part through non-constitutional means, such as the signing of administrative agreements. The current Québec government defines the term: "autonomy" from a resolutely federalist perspective.

3. Leadership—because Québec must resume the leadership position that it held historically within Canada, both in its relations with other provinces (namely interprovincialism) and in its dealings with Ottawa.[69]

According to Rocher, Charest and his government have been nothing short of implacable in their assessment of the current state of the federal political system while embracing normatively the ideals of federalism and maintaining steadfastly that Québec should remain a dynamic partner in the Canadian federation.[70] Premier Charest delivered this message subtly in a conference speech he gave in Charlottetown in November 2004, inviting Canadians and their leaders to reunite with the spirit of federalism and to distance themselves from centralizing temptations. Entitled "Rediscovering the Federal Spirit," this conference gave Premier Charest the opportunity to identify five principles which should inhabit the spirit of federalism in Canada:

1. the respect of the choices, the jurisdictions and the intelligence of each partner;

2. flexibility, i.e. adaptability, and the respect of differences and asymmetry;

3. the rule of law but also the capacity to change rules if they do not correspond anymore to the will of the partners;

4. political as well as fiscal equilibrium, for there can be no long-term equilibrium if one member finds itself in a situation which transforms detrimentally the nature of the relationship between levels of government;

5. co-operation that becomes ever more inevitable due to the requirement of interdependence in contemporary politics.[71]

Whereas Premier Charest's key speech in Charlottetown mostly focused on political culture, insisting firmly but respectfully that the central government is not the sole guardian of the common good in a federal regime, most of former Minister Pelletier's addresses between 2003 and 2008 were devoted to the structural characteristics of our federal regime. The crucial piece from this perspective is from a lecture he gave on a few occasions in the spring of 2004, while travelling in Western Canadian cities. He suggested that a federal regime should respect four requirements:

69 Benoît Pelletier, "Appendix: The Future of Québec within the Canadian Federation" in Gagnon, *supra* note 51, 469 at 471.

70 Rocher, *supra* note 45 at 107.

71 Jean Charest, "Pour redécouvrir l'esprit fédéral," *La Presse* (9 November 2004) A-19 [translated by author].

1. the establishing of an equilibrium in the sharing and interpretation of legislative powers between the two levels of government;

2. the ability of participants to obtain sufficient fiscal resources to fully assume their responsibilities;

3. the capacity of provinces to express their views in common central institutions;

4. the establishing of efficient mechanisms to facilitate intergovernmental co-operation in fields where co-ordination is warranted.[72]

Pelletier arrived at the conclusion that the Canadian system of government does not measure up to any of these structural requirements. However, rather than lamenting the existence of a federative deficit (as I and my co-authors did in a different chapter of the same book, for instance),[73] he chose to call for the urgent revitalizing of Canadian federalism.

Almost a decade after their first electoral victory, how can we assess the performance of Jean Charest's Liberals in the revitalization of Canadian federalism? The accomplishments are far from insignificant:

1. the creation in 2003 of a new body aimed at streamlining horizontal interprovincial intergovernmental relations: the Council of the Federation;

2. a major agreement towards the financing of the health system with the central government, and a formal recognition of the principle of asymmetrical federalism in a parallel deal in 2004;

3. a Canada-Québec agreement paving the way towards the participation of Québec in the forums of the UNESCO in 2006;

4. the motion adopted by the Canadian Parliament in 2006 recognizing that the Québécois form a nation within a united Canada;

5. the partial overhauling of fiscal relations between the central government and its partners in 2007.

Experts have analysed in depth most aspects of this performance,[74] and I have

72 Benoît Pelletier, "L'État de notre fédération: la perspective du Québec" (Speech presented to the Canada West Foundation, Calgary, 24 March 2004), online: Secrétariat aux affaires intergouvernementales canadiennes http://www.saic.gouv.qc.ca/centre_de_presse/discours/2004/saic_dis20040324.htm [translated by author].

73 Jean-François Caron, Guy Laforest and Catherine Vallières-Roland, "Canada's Federative Deficit" in Gagnon, supra note 51, 132.

74 Pelletier, *supra* note 19; Guy Laforest and Eric Montigny, "Le fédéralisme exécutif: problèmes et actualité," in Réjean Pelletier and Manon Tremblay, eds., *Le parlementarisme canadien*, 4th ed.

discussed some of these results in this lecture while commenting on Prime Minister Harper's federalism of openness.

Beyond these segmented evaluations, it is worth noting that the Charest government has adapted its federalist rhetoric in the past couple of years. In a major speech entitled "Reinventing Canada: the Challenges of our Country for the 21st century" and delivered in Toronto during the October 2008 federal election campaign, former Minister Pelletier clearly modified the structure of Québec's traditional federalist discourse which has been "existential" about Québec, emphasizing the twin mottos of autonomy and recognition while maintaining an instrumental/utilitarian stance towards Canada. [75] In his speech, Pelletier started with a reference to Canada as a country that "we build and share all together." He did not, of course, ignore the objectives of autonomy and recognition, but he started by talking about interdependence and co-operation. With regard to the national identities of Canada and Québec, Pelletier insisted that they did not need to conflict with one another; rather, that they could enrich each other, inasmuch as the "affirmation of Québec's distinct national character could be reconciled with the pursuit of a Canadian common project."[76] In the years that have elapsed since the speech, this recalibrated federalist discourse has not been followed or consolidated by any major new development. Intergovernmental relations between Canada and Québec appear to be dominated by problem-solving and the search towards administrative arrangements. It remains to be seen whether or not the governments of Stephen Harper in Ottawa and Jean Charest in Québec will be capable of proposing and structuring new orientations towards a new equilibrium between autonomy and solidarity/interdependence.

About a decade ago, Alain-G. Gagnon and James Tully published a major collection on multinational democracies.[77] At the crossroads between comparative political science and political philosophy, this research endeavour explored political and constitutional developments mostly in advanced democracies such as Belgium, Canada, Spain and the United Kingdom. Under Gagnon's leadership, major inter-university collaborative efforts out of

(Québec City: Presses de l'Université Laval, 2009) 129.

75 Benoît Pelletier, "Réinventer le Canada: les défis de notre pays au XXIe siècle" (Speech delivered to the Canadian Club, Toronto, 3 October 2008) at 2, online: Secrétariat aux affaires intergouvernementales canadiennes <http://www.saic.gouv.qc.ca/centre_de_presse/discours/2008/pdf/saic_dis20081003.pdf>.

76 *Ibid*. at 5 [translated by author].

77 Alain-G. Gagnon and James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001).

Montréal have produced significant academic contributions.[78] In the deliberative public spheres of complex democracies, the flagship of multinational federalism is often carried with greater enthusiasm by the academic leaders of minority nations. Witness, for instance, the cases of Gagnon in the Québec-Canada debates and Ferran Requejo in the Catalunya-Spain debates, and one would logically expect that when they discuss multinational federalism in general, these academic leaders would reproduce the hegemonic categories of the internal debates in their respective national communities.[79] Keeping in mind what Rocher had to say about Québec's interpretive federalist traditions, let us consider the following excerpts from a recent book by Gagnon and Iacovino:

> As this overview of Canadian constitutionalism will show, Quebec's position with regards to its place in Canada has survived generational shifts, international political transformations, and mostly, domestic social currents both in the larger Canadian context and in Quebec, demonstrating remarkable consistency with regards to its existential standing. From both socio-historical and historical-institutional perspectives, Quebec's place in Canada has rarely shifted, and when it has, it has been a matter of degree as opposed to a wholesale reconceptualization.[80]
>
> . . .
>
> It is time for both parties to take the high road . . . Canada must understand that Quebec's affirmation is not inimical to the preservation of the country. It is not a zero-sum game. The extent of association, however, must be negotiated before the level of mutual confidence and trust that bind the political communities together are severed beyond repair. This is a key step, since the will to live together may not be sufficient once that symbolic threshold is crossed. The high road is a two-way street. Quebec must make additional efforts to assure that its minorities are represented in the process of formally constituting itself. Its relationship to the rest of the country ought to be deliberated in a more legitimate procedure than a mere referendum question would imply. And its solid record in respecting liberal democracy ought to remain unblemished. The formal constitution process puts all of this on the table. With regards to Canada, whatever negotiating partner emerges, whatever procedure is adopted, one clear principle must take precedence; it must internalize the notion that it is not ratifying and subsequently negotiating a new deal as a majority. It must begin to see itself as a partner, in the spirit of dualism to which Quebec has always

78 Such as *Groupe de Recherches sur les Sociétés Plurinationales* and *Centre de Recherche Interdisciplinaire sur la Diversité au Québec*.

79 Alain-G. Gagnon, *Au-delà de la nation unificatrice: plaidoyer pour le fédéralisme multinational* (Barcelona: Institut d'Estudis Autonomics, 2007) [Gagnon, *Au-delà*]; Alain-G. Gagnon and Raffaele Iacovino, eds., *Federalism, Citizenship and Quebec: Debating Multinationalism* (Toronto: University of Toronto Press, 2007) [Gagnon & Iacovino]; Ferran Requejo, *Multinational Federalism and Value Pluralism: The Spanish Case* (London: Routledge, 2005).

80 Gagnon & Iacovino, *supra* note 79 at 24.

> adhered. They may not ratify the document, or reject the process altogether, but in the scenario outlined here, this would only hasten the rupture.[81]

I believe that the tensions and contradictions in these passages reinforce the idea that the ground is slowly but effectively moving in Québec, and that the current decade could indeed witness an important paradigm shift. The first passage is all about continuity, pretty much in the spirit of the Tremblay Commission, and of its legacy critically analyzed by Rocher. The second passage does not totally depart from this view—consider, for instance, that the Canadian partner is expected to accept the dominant Québec view of dualism—but it also insists on reciprocity, that all players in this democratic deliberation should take the high road, and that the whole matter is a two-way street, with everything on the table, thus calling all partners to display imagination and courage. These latter elements were more consistently present in the introduction and conclusion of the book that Gagnon published under the auspices of the Institut d'Estudis Autonomics in 2007, for which he obtained the first Josep Maria Vilaseca I Marcet prize.[82] Our political and intellectual communities will be hard-pressed to display that kind of imaginative boldness in the 2010s.

4. Conclusion

I have argued in this lecture that the meaning of Canadian federalism in Québec has been at a crossroads since 2009. While the traditional, strictly autonomist paradigm of the Tremblay Commission is still dominant in the key disciplines of political science, constitutional law, and political philosophy, rich internal debates within these disciplines give indications that a major paradigm shift could be looming.[83] Quite naturally, as often happens in the human and social sciences, not everything will change simultaneously. In both francophone Québec and anglophone Canada, the dominant interpretive traditions are deeply-rooted and will not be easily displaced. If it were possible to muster sufficient space and intellectual resources, it would be interesting to see if Rocher's argument about federalist traditions in Canada could be applied as well to the political and intellectual spheres of other multinational societies such as Belgium, Spain, and the United Kingdom. My hunch is that it could, allowing us to see that in the dialogue between minority and majority national political communities, most authors (scholars, intellectuals, politicians) have

81 *Ibid*. at 174–175.

82 Gagnon, *Au-delà, supra* note 79 at 15, 179.

83 Peter Graefe, "Renouveau d'intérêt pour l'étude du fédéralisme au Québec et chantiers à ouvrir" (2009) 50:3 Recherches sociographiques, 604.

formulated their interpretation of the shared tradition of federalism or partnership, broadly speaking, with an instrumental "thin" perspective characteristic of the majority and with an ontological identity-defining, "thick" perspective common to the minority. This explains some of the major misunderstandings between interpretive communities. Focusing mostly on the Québec francophone interpretive community and following the path-breaking work of Rocher, I have examined here some of the intellectual shortcomings of this tradition. Of course, as Gagnon and Iacovino have indicated, this whole affair is a two-way street, and the English-speaking interpretive tradition is not without its own shortcomings. Moreover, as Alain Noël has argued in his own assessment of current scholarly debates about multinational federalism in Canada, these debates are always complex affairs, combining normative considerations and power politics between governments on one hand, and between majorities and minorities on the other. Such debates always associate the power of arguments with the arguments of power.[84] Considering all the constraints that limited their capacity for action and innovation, Noël suggests that nineteenth-century politicians from Canada and Québec did a reasonable job in their own deliberations, one that could possibly inspire us in our own times:

> For all its democratic limitations, the constitutional politics of the late nineteenth century followed a path that was neither "analgesic" nor "agonistic." Anchored in the immediate preoccupations of politicians and informed by the need to find workable accommodations, the process nevertheless displayed a tension between the principled search for uniformity typical of modern constitutions and the equally principled demands for recognition and for the preservation of diversity that were anchored in the country's ancient constitution. This tension pitted the idea of a new nation against the protection of established ways of life, and confronted the elites of the new state with the complex requirements of popular consent in a multinational federation . . . Like all deliberative processes of significance, the Canadian constitutional debate never was a nice and polite conversation, carried by well-meaning participants who had previously checked their interests and their advantages at the door. It often involved tough bargaining or verged on plain domination, was always less than perfectly democratic, and incorporated many restrictions and constraints that disadvantaged some or many constituents. This debate, however, was also anchored in principles about democracy, continuity and consent, and it contributed to the establishment of important rights and relatively satisfying institutions and practices. This deliberative process was, in other words, a real political process. And it mattered very much.[85]

84 Alain Noël, "Democratic Deliberation in a Multinational Federation" (2006) 9:3 Critical Review of International Social and Political Philosophy, 419 at 422.

85 *Ibid*. at 438.

This deliberative process is still going on and it still matters very much for us in 2010, with all kinds of new constraints in a transformed Canada, a transformed Québec, and a globalized world. Be they majorities or minorities, national communities are always structured around an equilibrium between the pull of the past, with its heritage and memory, and the pull of their projected futures. Will these futures be characterized by the mechanical repetition of the dialectic of conquest and reconquest, premised on the idea of domination, or a by a more edifying politics of concord and reconciliation? We can never be completely certain about these matters in human affairs. However, I am convinced that if the politics of concord and reconciliation is to prevail in Canada-Québec debates, it will require political leaders and academics to agree, referring back to Burelle's principle of joint decision-making, about the appropriate disentangling between utilitarian issues that can be governed by the categories of thin, instrumentalist rationality, and existential matters that will demand the ability to speak the thick language of authentic allegiance to their shared and intertwined collective national identities. It will not be a simple process. As Noël reminds us, it was far from being simple at the time of our federal founding in 1867.

The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?

Luc B. Tremblay*

Quebec's Consultation Commission on Accommodation Practices Related to Cultural Differences (the Bouchard-Taylor Commission) was created amid public controversies over the extent to which certain religious or cultural practices should be "accommodated" within Quebec. While multiculturalism has become an important value in the rest of Canada, that value does not comport easily with Quebec nationalism and Quebec conception of sociocultural integration elaborated in the last thirty years. With this background, the Bouchard-Taylor Commission's 2008 Report adopts a concept of "interculturalism." The Report argues that interculturalism is preferable to multiculturalism because it offers a better model of cultural integration; collective identity; and church-state relations. Interculturalism also suggests a better framework for handling cultural and religious requests for reasonable accommodation. The author argues that, instead of proposing a true, novel alternative to multiculturalism, the Report uses a concept of interculturalism that does not fundamentally differ from multiculturalism. Both terms promote or emphasize ethnocultural diversity and equal respect for cultural differences. Multiculturalism can also contribute to formation of collective identity. In addition, the author argues that multiculturalism, as much as interculturalism, can include a commitment to the principle of "open secularism" in church-state relations. Finally, the "citizen route" of accommodation proposed by the Report is not exclusive to interculturalism, but also plays an important role in theories of multiculturalism.

La Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles (la Commission Bouchard-Taylor) a été créée par le gouvernement du Québec suite aux expressions de mécontentement de la population québécoise relativement au bien-fondé de certains accommodements des pratiques religieuses et culturelles. Alors que le multiculturalisme est devenu une valeur importante au Canada en dehors du Québec, cette valeur est difficilement compatible avec le nationalisme québécois et la conception de l'intégration socio-culturelle qui s'est affirmée au Québec depuis plus d'une trentaine d'années. Dans ce contexte, le rapport de la Commission Bouchard-Taylor (2008) a adopté le concept d' « interculturalisme ». Selon les commissaires, l'interculturalisme est préférable au multiculturalisme, notamment pour le motif qu'il offrirait un meilleur modèle de l'intégration culturelle, de l'identité collective (« identité inclusive ») et de la relation entre les Églises et l'État (la « laïcité ouverte ») que le ferait le multiculturalisme. De plus, l'interculturalisme proposerait un meilleur cadre de traitement des demandes d'accommodement religieux ou culturel (la « voie citoyenne »). Dans ce texte, l'auteur soutient que loin de constituer une véritable alternative au multiculturalisme, le concept d'interculturalisme, tel qu'élaboré dans le rapport, ne diffère pas fondamentalement du multiculturalisme. Les deux termes promeuvent et mettent l'accent sur la diversité ethnoculturelle et l'importance de respecter également les différences culturelles. De plus, le multiculturalisme peut contribuer à la formation du même type d'identité collective que celle que conçoit l'interculturalisme et promouvoir le même type de laïcité ouverte aux fins des relations entre les Églises et l'État. Finalement, le cadre de traitement des demandes d'accommodement religieux ou culturel proposé dans le rapport, la « voie citoyenne », n'est pas exclusive à l'interculturalisme, mais joue un rôle important dans les théories du multiculturalisme.

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Introduction

On May 22, 2008, the sociologist and historian Gérard Bouchard and the philosopher Charles Taylor released their final report as co-chairs of the Consultation Commission on Accommodation Practices Related to Cultural Differences.[1] The Bouchard-Taylor Commission, as it came to be called, was created in February 2007 by the Quebec government in response to public discontent concerning "reasonable accommodation" of religious and cultural practices. Although their mandate was relatively specific, the co-chairs exami ned some of the most fundamental and difficult issues all contemporary liberal democracies must face with respect to cultural integration, collective identity, church-state relations and procedures for handling cultural and religious harmonization requests.[2] The result is impressive. On each issue, the Bouchard-Taylor Report proposes to move beyond the dominant positions that tend to frame the terms of the debates. Although it claims to pursue the path Quebec has followed in matters of sociocultural integration in recent decades, its positions possess a normative and conceptual dimension that gives them universal scope. Altogether, they arguably propound an original conception of integration in a pluralist and culturally diverse society. I will call it "interculturalism."

In the Report, interculturalism is conceived as an alternative to multiculturalism.[3] The co-chairs acknowledge that multiculturalism is often simplified, distorted or caricatured. However, they explicitly state that "Canadian multiculturalism, inasmuch as it emphasizes diversity at the expense of continuity, is not properly adapted to Québec's situation."[4] More generally, they reject the abstract view of the social bonds uniting a multicultural society, namely, a respect for universal values codified by law, such as human rights.[5] In the Canadian context, these assertions are tremendously important. While

1 Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future: A Time for Reconciliation* by Gérard Bouchard and Charles Taylor (Quebec: Gouvernement de Quebec, 2008), online: Consultation Commission on Accommodation Practices Related to Cultural Differences < http://www.accommodements.qc.ca/> [the Report].

2 The Bouchard-Taylor Commission had the mandate to: take stock of accommodation practices in Quebec; analyze the attendant issues bearing in mind the experience of other societies; conduct an extensive consultation on the topic; and formulate recommendations to ensure that accommodation practices conform to Quebec's fundamental values. See *Order in Council Concerning the Establishment of the Consultation Commission on Accommodation Practices Related to Cultural Differences*, O.C. 95–2007, G.O.Q. 2007.II.1372.

3 *Supra* note 1 at 118–119.

4 *Ibid.* at 121.

5 *Ibid.* at 122–123.

multiculturalism has become an official policy of the Canadian government, a constitutional principle and a marker of the Canadian national identity, all Quebec governments since 1981, as well as the Quebec population in general, have rejected it.[6] To the extent to which the co-chairs intended to construct their views on the path Quebec has followed in matters of sociocultural integration, leaving aside the issue of social acceptability, multiculturalism could hardly be seen as a legitimate option.

In this paper, I examine whether interculturalism, as propounded in the Report, is anything but a version of multiculturalism. My contention is that it is "a rose by any other name."[7] For this purpose, interculturalism and multiculturalism will be understood in a broad sense. They will represent two general conceptions of sociocultural integration that provide competing answers to the four issues referred to above: cultural integration, collective identity, church-state relations and the manner in which cultural and religious requests must be handled in a pluralist and culturally diverse society. Although the Report may seem to use interculturalism and multiculturalism in a stricter sense (these conceptions are mostly discussed in the specific chapter on cultural integration), it actually uses them in a broad sense.[8] Interculturalism is generally defined as "a way of promoting ethnocultural relations characterized by interaction in a spirit of respect for differences,"[9] and multiculturalism is understood as taking into account both "recognition and affirmation of difference" and certain "integrating elements such as teaching national languages and intercultural exchange programs."[10]

Part I of this paper briefly recalls the socio-political context in which the Commission was created. It explains why multiculturalism has been an irritant for the Quebec governments and the general population and why this factor makes the Report's analysis highly relevant to most democratic, pluralist and culturally diverse societies. Part II describes what may be seen as the Report's main contribution to the normative and conceptual debates on sociocultural integration. This contribution lies in the fact that the Report moves beyond the dominant positions that tend to frame the terms of the debates and adopts

6 *Ibid.* at 121.

7 Of course, this phrase comes from William Shakespeare's *Romeo and Juliet* (Cambridge: Cambridge University Press, 2005) at II, ii: "JULIET: 'Tis but thy name that is my enemy / ... / What's in a name? That which we call a rose / By any other name would smell as sweet. / So Romeo would, were he not Romeo call'd, / Retain that dear perfection which he owes / Without that title. Romeo, doff thy name; / And for that name, which is no part of thee, / Take all myself."

8 *Supra* note 1 at 120–121.

9 *Ibid.* at 118.

10 *Ibid.* at 192.

what may be conceived as "middle terms" between them. Insofar as the dominant positions have reached a deadlock, the Report might propose a way out. In Part III, I will substantiate the general contention that interculturalism constitutes a form of multiculturalism. Nothing in this paper should be read as a criticism of multiculturalism *per se* or of the way it is interpreted by the co-chairs, or of its appropriateness in Quebec society or elsewhere in the world. There is much to be said in favour of the co-chairs' recommendations. More importantly, I am in total agreement with the general outlook: the Report constitutes one of the most powerful pleas ever written in Quebec in favour of toleration, openness, reciprocity and dialogue in a context of growing cultural and religious diversity. The chapter on the reception of immigrants, notably the section concerning the Muslim community and Islamophobia, deserves to be widely read, especially by those who favour the status quo.[11] Whatever the fate of the Report's specific recommendations, I hope that this plea will be heard for generations to come.

I. Quebec nationalism and Canadian multiculturalism

The Bouchard-Taylor Commission was created by the Quebec government in reaction to the public discontent generated by the legal duty of reasonable accommodation of religious practices and beliefs.[12] The legal duty of reasonable accommodation was established in 1985 by the Supreme Court of Canada, without explicit legal mandate, in *Ontario (Human Rights Commission) v. Simpsons-Sears*,[13] a human rights case dealing with religious discrimination in employment. In this case, an employee who recently converted to a religion that celebrated its sabbath on Saturday had asked her employers to be exempted from work on this day. The Supreme Court decided that a practice or norm that is neutral on its face, such as an employment norm requiring all employees to work on Saturday, but that has an adverse effect on religiously-minded individuals, constituted indirect discrimination—for which the employers are liable unless they can show that no "accommodation" was "reasonable" in the circumstances. A defense of reasonable accommodation thus entails that the employers have a legal obligation to adjust their practices and norms—even if honestly made for sound economic or business reasons—to the specific religious beliefs, practices or needs of the employees, unless the accommodation imposes an "undue hardship" on the employers.[14]

11 *Ibid.,* c. XI.

12 An accommodation of religious practices can be imposed by law or negotiated by the parties. Negotiated accommodations have probably always existed. In the Report, they are called "concerted adjustments": see *ibid*. at 64.

13 [1985] 2 S.C.R. 536., 23 D.L.R. (4th) 321 [cited to S.C.R.].

14 *Ibid*. at para. 23.

Today, the legal duty of reasonable accommodation applies to all forms of legally prohibited discrimination, be it direct or indirect, on the basis of all discriminatory grounds (race, colour, age, sex or disability, for example), in employment, services and goods, and everywhere in Canada, even if the relevant human rights legislation does not stipulate it explicitly.[15] Moreover, the accommodations should not be conceived as exceptions to general discriminatory standards: those who are governed by human rights legislation must incorporate all accommodations into their own standards, practices or decisions.[16] Finally, the Supreme Court has held that more "than mere negligible effort is required to satisfy the duty to accommodate."[17] So the concept of "undue hardship" is much more demanding than the American *de minimis* test.[18] Similarly, the actual interference with the rights of others that would result from the accommodating measures must not be trivial. Such measures must be substantial before being considered as undue hardship: "more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated." According to the Court, "[m]inor interference or inconvenience is the price to be paid for religious freedom in a multicultural society."[19]

By 2006, when the Supreme Court decided the kirpan affair in *Multani v. Commission scolaire Marguerite-Bourgeoys*, the legal duty of reasonable accommodation of religious practices was already quite controversial in Quebec.[20] Nevertheless, this decision is generally regarded as the main source of the crisis. In *Multani*, a twelve-year-old child who sincerely believed that the Sikh religion required him to wear a kirpan at all times had accidentally dropped it in the yard of the public school he was attending. Although the school board accepted to accommodate the child, the governing board of the school refused the accommodation on the basis that wearing a kirpan at school violated the school's *Code de vie* (code of conduct), which prohibited the carrying of weapons. The school board's council of commissioners upheld this decision. In the Supreme Court, a majority of judges held that the council of commissioners' decision infringed Multani's freedom of religion guaranteed under s. 2 of the *Canadian Charter of Rights and Freedoms*,[21] and that this infringement could

15 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at paras. 19–68, 176 D.L.R. (4th) 1 [*Meiorin*].

16 *Ibid*.

17 *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 19, 95 D.L.R. (4th) 577 [*Central Okanagan*].

18 *Ibid*. The leading American case on the *de minimis* test is *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

19 *Central Okanagan, supra* note 17 at para. 20.

20 2006 SCC 6, [2006] 1 S.C.R. 256 [*Multani*].

21 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11

not be justified under s. 1 of the *Charter* (the limitation clause), as understood in the light of the "Oakes test."[22] The judges accepted that the council's decision was motivated by a pressing and substantial objective, safety, and that the decision had a rational connection with the objective. However, it held that the prohibition did not satisfy the "minimal impairment test." The majority of the Court decided that the minimal impairment test used for the purposes of s. 1 of the *Charter* imposed on the State a burden similar in principle to that deriving from the duty of reasonable accommodation elaborated in anti-discrimination law. Consequently, for all practical purposes, the State now had a constitutional duty to accommodate the religious practices and beliefs of each particular individual in society, unless it could show that the accommodating measures would create an "undue hardship." This decision created a shock in Quebec. As said in the Report, "this decision tinged the entire debate on accommodation in addition to discrediting the courts."[23] According to some polls, up to 91% of Quebeckers of all origins disagreed with the Supreme Court's decision in *Multani*, which allowed the boy to wear a kirpan at school.[24] In the following months, the very concept of reasonable accommodation turned a public debate into a social crisis. The Quebec models of integration, the nature of Quebec national identity, secularism, the means to handle religious and cultural harmonization requests, even the value of immigration, were all called into question.

The Bouchard-Taylor Report is historically and socially situated. It deals with a crisis that had no counterpart in the rest of Canada. In the co-chairs' view, the "most important factor" underlying the crisis was the fact that Quebeckers of French-Canadian ancestry constitute a minority in Canada and North America: their members experience a "keen sense of insecurity concerning the survival of their culture"[25] and this insecurity constitutes "an invariant in the history of French-speaking Québec."[26] However, it does not follow that the Report is not exportable. The Report explicitly acknowledges that the "identity-related anxiety" voiced in Quebec during the crisis reflected the concerns "now apparent in all Western countries,"[27] especially in tradi-

[the *Charter*].

22 The test was originally expounded in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200. Section 1 of the *Charter* provides that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

23 *Supra* note 1 at 179.

24 SOM Poll, *La Presse* (9 October 2007) A2.

25 *Supra* note 1 at 208.

26 *Ibid.* at 185.

27 *Ibid.* at 192.

tionally homogeneous countries with strong national identities.[28] To a certain extent, thus, the deep causes of the crisis transcend the minority status of Quebeckers of French-Canadian ancestry. Moreover, as the sociologist Guy Rocher argued, the identity-related anxiety of French-speaking Quebeckers may well be understood as the anxiety of a majority group.[29] Finally, most of the co-chairs' analysis does not depend on the minority or majority status of French-speaking Quebeckers. This collectivity is treated as a dominant cultural group in Quebec and this postulate is sufficient for our purposes.

In the last fifty years, the Quebec society has followed socio-political processes similar to those followed by most Western countries over the last two centuries.[30] These processes began early in the twentieth century, but accelerated in the 1960s in what is known as the "Quiet Revolution." Traditionally, Quebeckers of French-Canadian ancestry conceived themselves as a minority in Canada. They called themselves "French-Canadians" to express the ethnocultural differences (language, religion, traditions, history, memory, way of life, and so on) that distinguished them from "English-Canadians," or Canadians of British ancestry. However, from the 1960s, they started conceiving themselves as a majority in Quebec, indeed as a distinct nation, calling themselves "Québécois" in order to express their distinct identity. They aspired to build a nation-state in Quebec, either as one Canadian province or as an independent State. The Quebec State came to be seen as the State of their nation. So they modernized it for the purpose of controlling the main structures of power in Quebec, thus realizing their collective goals and preserving the cultural character of the community. Yet, the "Québécois" had to deal with the presence of Anglophones and of post-war immigrants who generally integrated into the English collectivity. This fact generated deep debates over the boundary of Quebec collective identity (who is included and who is excluded) and a certain degree of cultural anxiety. It was perceived as a possible threat to the nationalist ambition, notably the predominance of the French language and the preservation of the national culture. These debates and this anxiety contributed to the elaboration of many nation-building policies, such as imposing French as the official language of the Quebec State and public institutions, requiring immigrants to join and integrate into the

28 *Ibid.* at 42, 189.

29 Guy Rocher, "Rapport Bouchard-Taylor. Une majorité trop minoritaire?" *Le Devoir* (12 June, 2008) A7, online: Université du Québec à Chicoutimi, La bibliothèque numérique Les Classiques des sciences sociales <http://classiques.uqac.ca/contemporains/rocher_guy/majorite_trop_minoritaire/majorite_texte.html>.

30 For a very penetrating analysis, see Raymond Breton, "From Ethnic to Civic Nationalism: English Canada and Quebec" (1988) 11 Ethnic and Racial Studies 85.

French-speaking collectivity, notably through schools policies, controlling immigration and establishing certain national holidays (for example, the "fête nationale des Québécois") and national symbols (for example, renaming of the "Legislative Assembly" into "Assemblée nationale"). From the mid-1970s, many Quebeckers of French-Canadian ancestry came to conceive their nation in broad, pluralist terms that included all French-speaking Quebeckers.

The nationalist ambition of the "Québécois" has been challenged since the beginning.[31] One important challenge came from the federal policy of multiculturalism.[32] In the 1960s, British- or English-Canadians' nationalist ambition was itself called into question by the nationalism of the French-Canadians. In 1963, in order to examine the fate of Canadian national unity, the Canadian Liberal government created the Royal Commission on Bilingualism and Biculturalism (the "B.B. Commission"). Its mandate was to help Canada to favour bilingualism, to understand better its fundamental bicultural character based on the principle of equality between its two founding peoples, and to examine the contribution of non-British, non-French and non-aboriginal Canadians to the culture in Canada and the measures to be taken to preserve it. However, certain members and representatives of ethnocultural groups living in Canada for two or three generations protested against the idea that Canada was a "bicultural" country on the ground that it devaluated their own culture and their own contribution to the country: it made them second-class citizens. In 1969, in its last volume of the report, the B.B. Commission abandoned the idea of biculturalism and favoured the idea of multiculturalism in a bilingual country.[33]

In 1971, the Canadian government led by Pierre Elliot Trudeau followed the B.B. Commission's recommendations and introduced the first official policy of multiculturalism. This policy asserted that "cultural pluralism is the very essence of Canadian identity" and that every ethnic group has "the right to preserve and develop its own culture and values within the Canadian context."[34] In a famous discourse, Prime Minister Trudeau stated that in Canada "there is no official culture, nor does any ethnic group take prece-

31 Influential criticisms came from Pierre Elliot Trudeau when he was a professor of law. See e.g. P.E. Trudeau, "La nouvelle trahison des clercs" in P.E. Trudeau, *Le fédéralisme et la société canadienne-française* (Montréal: Editions HMH, 1967).

32 A very good analysis of the Canadian policy of multiculturalism is found in François Houle, "Citoyenneté, espace public et multiculturalisme: la politique canadienne de multiculturalisme " (1999) 31 Sociologie et sociétés 101.

33 Canada, Royal Commission on Bilingualism and Biculturalism, *The Cultural Contribution of the Other Ethnic Groups,* vol. 4 (Ottawa: Supply and Services Canada, 1969).

34 Canada, *House of Commons Debates* (8 October 1971) at 8545–48.

dence over any other. No citizen or group of citizens is other than Canadian, and all should be treated fairly."[35] The policy's main purposes were to promote individual freedom and national unity. A policy of multiculturalism, said Trudeau, is: "[T]he most suitable means of assuring the cultural freedom of Canadians"; "[it] is basically the conscious support of individual freedom of choice. . . . If freedom of choice is in danger for some ethnic groups . . . [it] is the policy of this government to eliminate any such danger and to 'safeguard' this freedom."

Moreover, he added that if national unity is to mean anything "in the deeply personal sense," it "must be founded on confidence in one's own individual identity. . . . A vigorous policy of multiculturalism will help create this initial confidence." For these purposes, the federal government would support and encourage the various Canadian cultures and ethnic groups in different ways, notably financially, provided that these groups have demonstrated a desire and effort to continue to develop a capacity to grow and contribute to Canada and a clear need for assistance.[36] The policy of multiculturalism was supported by all federal political parties. Moreover, subject to certain criticisms, it has been generally accepted by English-Canadians.[37] In 1982, multiculturalism became a constitutional value by virtue of s. 27 of the *Charter,* which provides that the "*Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[38] Most judges and legal scholars understood s. 27 as having the function of a preamble, purporting to state one fundamental constitutional principle and value and to express the Canadian national identity.

Over the years, cultural pluralism and diversity came to define the Canadian identity and the idea of national unity.[39] The problem, however, is

35 *Ibid.*

36 *Ibid.* These ways of support are: (1) resources permitting, the government will seek to assist all Canadian cultural groups that have demonstrated a desire and effort to continue to develop a capacity to grow and contribute to Canada, and a clear need for assistance, the small and weak groups no less than the strong and highly organized; (2) the government will assist members of all cultural groups to overcome cultural barriers to full participation in Canadian society; (3) the government will promote creative encounters and interchange among all Canadian cultural groups in the interest of national unity; (4) the government will continue to assist immigrants to acquire at least one of Canada's official languages in order to become full participants in Canadian society.

37 In 1988, the Canadian Parliament enacted a law affirming and specifying the purposes of the policy: *Canadian Multiculturalism Act,* R.S.C. 1985 (4th Supp.), c. 24.

38 *Supra* note 21, s. 27.

39 Polls tend to show that diversity and multiculturalism are generally accepted in Canada. See e.g. Centre for Research and Information on Canada (CRIC), *A New Canada: An Identity Shaped by Diversity* by Andrew Parkin and Matthew Mendelsohn*,* CRIC Papers 11 (Montréal, October 2003) at 10: in a survey published by the CRIC, 54% of the respondents said that multiculturalism made them feel very proud to be Canadian.

that multiculturalism has never been accepted in Quebec, neither by its governments nor by the general population. Of course, no Quebec government has ever ratified the *Charter*. Two main objections have been recurrent.[40] First, multiculturalism would be inconsistent with Quebec nationalist ambition—certain persons have even argued that it was one of the policy's purposes to neutralize this ambition.[41] According to multiculturalism, Quebec French-Canadians would constitute only one ethno-cultural group among others; they would have no more significance to Canadian national identity than, say, the Chinese community of Toronto or Montreal. So the political project of creating a nation-state in Quebec appears illegitimate, even if it is founded on a history that traces its roots back to Nouvelle-France and even if the nation's ancestors were settlers instead of immigrants. Similarly, Quebec's various nation-building policies look morally and politically problematical. In Canada, no culture and no ethnic group should in principle legitimately take precedence over any other. Indeed, one reason for the Quebec State not to ratify the *Charter* has been that constitutional multiculturalism denies the equality of the two founding peoples and is inconsistent with the fact that Quebec is a "distinct society."[42] According to the second objection, multiculturalism fosters cultural diversity at the expense of integration, unity and social cohesion. Consequently, by promoting ethnic differences, it favours cultural separation, the "ghettoization" of communities and, ultimately, their marginalization.[43]

Since the 1970s, all Quebec governments have affirmed the legitimacy of promoting French as the common language of public life and a certain idea of the Quebec nation as a pluralist, but integrated democratic political community. They have sought to respect ethno-cultural diversity in accordance with the principle of equal citizenship, but have emphasized the continuity of the French-language culture and the value of social bonds. The integration policies have emphasized intercommunity and intercultural exchange, relations and rapprochements, while prioritizing the enrichment of

40 See e.g. the remarkable study presented to the Bouchard-Taylor Commission: François Rocher et al., *Le concept d'interculturalisme en contexte Québécois: Généalogie d'une néologisme* (Montréal, Université du Québec à Montréal, Centre de recherche sur l'immigration, l'ethnicité et la citoyenneté: 21 December, 2007), online: <Centre de recherche sur l'immigration, l'ethnicité et la citoyenneté http://www.accommodements.qc.ca/documentation/rapports/rapport-3-rocher-francois.pdf>.

41 A policy of "biculturalism" would have been consistent with the Quebec nationalist ambition, for it would have maintained the idea of two founding peoples.

42 See e.g. Michel Lévesque, *René Lévesque textes et entrevues 1960–87* (Sillery, Qc.: Presses de l'Université du Québec, 1991) at 338.

43 See e.g. Neil Bissoondath, *Le marché aux illusions. La méprise du multiculturalisme* (Montréal: Boréal-Liber, 1995).

the French-speaking culture conceived as common public culture.[44] In popular opinion, these policies have come to be known as "interculturalism." In official government documents, it has been described in terms of "convergence" (French-speaking culture as the rallying point of ethnocultural convergence) and "moral contract" (all persons living in Quebec must accept French as the common language of public life, democracy and equal right to participate, reasonable pluralism, and intercommunity exchange). Where these documents referred to Canadian multiculturalism, they mentioned it in order to create a distance from it.[45]

When Quebeckers became aware that the *Charter*, through the Supreme Court, now imposed on the State, notably on public schools, an "unwritten" constitutional duty of reasonable accommodation of religious practices and beliefs, many believed, rightly or wrongly, that this duty had something to do with, derived from, or purported to promote, Canadian multiculturalism. This inference was not unreasonable. Multiculturalism, as entrenched in the *Charter*, had been one reason why the Supreme Court had given what can be seen as the broadest plausible scope and the greatest plausible strength to freedom of religion.[46] It had also been one of the main considerations why a substantial cost or burden must be shown before the complainant's right to accommodation can be defeated.[47] Moreover, one could reasonably think that a long-standing practice of reasonable accommodation of religious practices and beliefs could foster a form of "multi-religious" society.[48] One could also think that certain religiously-minded citizens could use the duty of reasonable accommodation as a reason not to integrate, make compromises with others, or accept certain of the society's fundamental values. Finally, many Quebeckers believed, rightly or wrongly, that the duty of reasonable accom-

44 According to the Report, the reason why interculturalism places a "variable emphasis" on the pole of unity and continuity lies in the cultural insecurity and anxiety of the French speakers who, even if they constitute a majority in Quebec, constitute a minority in Canada and North America (*supra* note 1 at 119). This explanation is significant insofar as the search for unity and continuity would not be justified by a form of assimilationist project, as has been the case where the people aspire to become a nation state, but by the anxiety of a minority cultural group for its own survival. This characteristic has two consequences: on the one hand, the promotion of unity and continuity appears more legitimate than where it is supported by a strong national group and, on the other, it reduces intercultural relationships as a "face-off between minority groups, all anxious about their future" (*ibid.* at 18, 187).

45 *Ibid.* at 116–117.

46 See e.g. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 99–100, 18 D.L.R. (4th) 321 [*Big M Drug Mart*]; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para. 96, 35 D.L.R. (4th) 1 [*Edwards Books*].

47 *Central Okanagan, supra* note 17.

48 See e.g. the dissenting opinion of Justice L'Heureux-Dubé in *Adler v. Ontario*, [1996] 3 S.C.R. 609 at 212, 140 D.L.R. (4th) 385.

modation was inconsistent with the Quebec policy of interculturalism and nationalist ambition.[49] It is significant, in this regard, that the legal duty to reasonably accommodate victims of discrimination on grounds of disability, gender, or race, for example, has never been a controversial issue.

The Report acknowledges that "almost all of the interveners who expressed themselves at our consultations said they were in favour of interculturalism and rejected Canadian multiculturalism."[50] They report that Canadian multiculturalism was often presented in a simplified or distorted manner that did not take into account the important changes this model has undergone over the past thirty years. For example, from the mid-1980s, the fear that the policy of multiculturalism could contribute to maintaining cultural and social separation and fragmentation, instead of promoting sociocultural integration, led the federal government to move the priorities of the policy from the protection and enhancement of the multicultural heritage of Canadians to the promotion of equality of opportunity and of a more integrated society. National identity, integration, social cohesion, the fight against inequality and discrimination, intercultural understanding and promotion of Canadian values of democracy, freedom, human rights, and the rule of law became dominant themes.[51] However, as we saw, the co-chairs ultimately agreed with the interveners: Canadian multiculturalism, "inasmuch as it emphasizes diversity at the expense of continuity, is not properly adapted to Québec's situation."[52] They give four reasons that have no counterpart in English Canada: "language-related anxiety"; "existential anguish of the minority"; "a majority ethnic group"; and "a concern for the continuity or preservation of an old founding culture."[53] More fundamentally, the co-chairs reject multiculturalism, inasmuch as it conceives unity as merely based upon respect for universal values codified by law. In their view, this perspective of the social bond is "very

49 *Supra* note 1 at 67–68. The negative reaction of Quebeckers may have various causes. However, most of the reasons examined in the Report support this general claim.

50 *Ibid.* at 121.

51 See e.g. Citizenship and Immigration Canada, *Annual Report on the Operation of the Canadian Multiculturalism Act 2007–2008* (Ottawa: Her Majesty the Queen in Right of Canada, 2009), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/resources/publications/multi-report2008/part1.asp>.

52 *Supra* note 1 at 121.

53 See *ibid.* at 121–122 for an elaboration on these four reasons: "Language-related anxiety": in English Canada, sooner or later, immigrants will have to learn English, whereas in Quebec language is the field of a perpetual battle; "Existential anguish of the minority": this factor is not found in English Canada; "A majority ethnic group": in 1986, Canadian citizens of British origin accounted for roughly 34%, while in Quebec citizens of French-Canadian origin made up a strong majority of 78%; "A concern for the continuity or preservation of an old founding culture": in English Canada, there is less concern for this than for national unity and cohesion.

abstract": "all communities need a few strong symbols that serve as a bonding agent and a rallying point, sustain solidarity beyond cold reason and underpin its integration."[54] For these reasons, the co-chairs propose to follow the path that Quebec has followed in recent decades on matters of cultural integration, that is, interculturalism.

II. The main contribution

The purpose of this Part of the paper is to describe the main contribution of the Report to the normative and conceptual debates concerning integration. In my view, the main contribution lies in the original positions it takes with respect to four issues: cultural integration; collective identity; church-state relations; and the most appropriate framework to handle cultural harmonization requests. These positions may be conceived as "middle terms" or "just measures" between opposing alternatives. For this reason, one might wish to reduce them to mere "compromises" between conflicting claims, interests and views on sociocultural integration.[55] However, this would be a mistake. The co-chairs' positions are actually grounded on principles, notably the constitutive principles of a democratic, liberal State, and ultimately justified by a basic commitment to the moral equality of persons; that is, the equivalent moral value of each individual.[56]

The basic egalitarian commitment entails that each person must be treated with equal concern and respect. For the purposes of political deliberation and decision making, this means that, as citizens, each individual has the same moral value. In order to honour this principle, the State "must be able, in principle, to justify to each citizen each of the decisions that it makes."[57] It follows that the State of a pluralist and culturally diverse society must remain neutral or impartial when it comes to the competing religious and secular conceptions of the world and of good and to the "fundamental reasons" or "grounds" that stem from them.[58] If the State operated on the basis of specific religious or secular worldviews, or otherwise favoured or burdened any of them, it would not be able to justify to each citizen each of the decisions that it makes. All citizens would not be treated with equal concern and respect: cer-

54 *Ibid.* at 123.

55 *Ibid.* at 39.

56 *Ibid.* at 135–136. The positions are also grounded upon various policies, such as a policy of fighting against socio-economic inequality and discrimination (c. XI).

57 *Ibid.* at 136.

58 *Ibid.* at 134: the fundamental reasons or grounds enable the individuals "to understand the world around them and give meaning and a direction to their lives . . . In the realm of fundamental reasons, the State, in order to be the State of all citizens, must remain neutral."

tain citizens would be made "second-class citizens."[59] However, a democratic, liberal State "cannot remain neutral" toward the political principles that constitute it and provide its foundation, such as human rights and equality before the law: it has "no choice but to assert and defend them."[60] Nevertheless, it can legitimately identify itself with and promote them because they can form the core of an "overlapping consensus": citizens adhering to very diverse religious, spiritual and secular worldviews can agree on and affirm these principles, even if they disagree on the fundamental reasons that justify them.[61] A State operating on the basis of an overlapping consensus is therefore able, in principle, to justify to each citizen each of the decisions that it makes.

In what follows, I shall contrast the co-chairs' positions with their main alternatives. The positions are formulated as ideal types: few political regimes, if any, correspond to these types.

The model of cultural integration

In the co-chairs' view, the integration process concerns all members of a society, including children, marginalized and underprivileged groups, immigrants, and so on. It comprises various interdependent dimensions, such as economic, social, political, cultural, and others. However, given their specific mandate, the co-chairs are particularly concerned with the cultural dimension of the process. Now, all models of cultural integration must find a balance between two conflicting demands: the need to perpetuate the social bond and the symbolic references underlying it (unity and continuity) and the respect for ethnocultural diversity.[62] There are two main models: the "assimilationist" and the "multiculturalist" models. The assimilationist model includes the republican and the melting-pot models. It gives precedence to unity and continuity, fostering assimilation of all citizens into one common culture—the culture of the dominant or largest group.[63] Since the citizens must be united and homogenous, cultural differences are relegated to the background, into the private sphere. The multiculturalist models of integration give precedence

59 *Ibid.* at 134–135.

60 *Ibid.* at 134.

61 *Ibid*. In the co-chairs' view, these principles can be the core of an overlapping consensus because they enable citizens to live peacefully together and to be equally sovereign in matters of conscience and life-planning. The co-chairs explicitly refer to John Rawls's interpretation of the idea of an overlapping consensus in his *Political Liberalism* (Paris: PUF, 2001). The extent to which they intend to follow Rawls' understanding is not altogether clear. There are reasons to believe that they significantly depart from his interpretation. I leave this issue aside.

62 *Supra* note 1 at 118–119.

63 *Ibid.* at 118.

to the preservation and promotion of ethnocultural diversity.[64] They foster recognition and accommodation of the cultural and religious differences that are constitutive of the citizens' identities.

By contrast, the co-chairs propose an interculturalist model of integration. This model fosters ethnocultural interactions in a spirit of respect for differences.[65] It places a "variable" emphasis on unity and continuity, notably through ethnocultural "rapprochement" such as exchanges, communication, interaction, co-operation, establishment of a common culture, intercommunity action, and mutual enrichment.[66] However, it does not promote assimilation into one particular culture. Interculturalism seeks a balance between the demands of unity and continuity and the demands of diversity that fosters both the formation of a common collective identity and respect for ethnocultural diversity. In this way, it affords security both to the dominant cultural group and to ethnocultural minorities and respects the rights of all.[67] Interculturalism may thus appear to be a just measure between the assimilationist and the multiculturalist models.

Interculturalism and multiculturalism constitute two genuinely pluralistic models of integration. Both models broach the economic, social, political, cultural, and other dimensions of the integration process in a comprehensive perspective. Both may be described in terms of "integrative pluralism": "pluralism" indicates respect for diversity and "integrative" emphasizes the interdependence of all dimensions.[68] They both bear a tension between the pole of unity and continuity and the pole of diversity. What distinguishes them is the emphasis interculturalism places on the need to perpetuate the social bond and the symbolic references underlying it, as compared to multiculturalism, which gives priority to the preservation and promotion of ethnocultural diversity.[69]

64 *Ibid.* at 118, 123.

65 *Ibid.* at 118.

66 *Ibid.* at 119.

67 *Ibid.*

68 *Ibid.* at 115. The integration model now present in Quebec is said to be supported by three key notions: (1) an ideal of equality, which underpins the whole process of integration; (2) a general rule of reciprocity, which demands interaction; and (3) an imperative of mobility, whereby the fate of the individual is not confined to the individual's original group or milieu (*ibid.* at 114). As actually applied, the model comprises three components: (1) participation by citizens in public life and institutions; (2) interaction and exchanges that make possible deliberation and democratic life, the search for common values and reference points, and the establishment of consensus and participation; and (3) the protection of rights that guarantee fair treatment to all citizens (*ibid.*).

69 *Ibid.* at 118–119, 123.

The type of collective identity

The discussion about collective identity relates to the bonds that unite a pluralist and culturally diverse political community.[70] This issue is generally conceived as a reflection on national identity and the form of citizenship that defines it. Two conceptions of collective identity, corresponding to the two opposing types of nation, tend to dominate the debates: "ethnic" and "civic" collective identity.[71] An ethnic collective identity is constituted by the particular culture of the dominant or the largest national group, such as its history, its language, its traditions, its values, its literature, its myths, and its religion. A civic collective identity is united by respect for universal values codified in law, such as respect for democratic procedures and human rights.[72] While ethnic collective identity has something to do with the assimilationist models of integration, civic collective identity may be associated with various political models, including a certain version of multiculturalism.[73]

In the co-chairs' view, in a democracy, people living in the same territory and who are submitted to the laws of the same State are equal members of the political community and, accordingly, equal citizens. Membership is not determined by ethnocultural criteria. Thus, all inhabitants of Quebec are Quebeckers: there is no hierarchy, and no Quebec citizen is more of a Quebecker than another. There is no "Quebec Us." These terms are ambiguous: since they do not determine who is included and who is excluded, they may harden ethnocultural differences, contrary to the spirit of interculturalism.[74] However, this raises a difficulty: if all citizens are equal members of the political community and if the citizens have different ethnocultural identities, what features are constitutive of their collective identity? Plainly, these features cannot be the substantive culture of the dominant national group. Since the political community has no ethnocultural unity, it cannot be an "ethnic nation,"[75] nor can the features be comprised of a mere respect for universal values codified by law. The civic conception of collective identity has too abstract a view of the social bond: "all communities need a few strong symbols [meanings, dreams, ideals, achievements, edifying narratives, heroes, and so on] that serve as a bonding agent and a rallying point, sustain solidarity beyond cold reason and underpin its integration."[76]

70 For my purposes, all inhabitants of Quebec form a distinct political community, although the Quebec State is one Canadian province.

71 See e.g. Hans Kohn, *The Idea of Nationalism: A Study in Its Origins and Background* (New York: McMillan Company, 1944) at n. 339.

72 *Supra* note 1 at 123.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.* at 124.

76 *Ibid.* at 123.

The co-chairs therefore reject the polarity that exists between ethnic and civic national identity: all Western nations "offer an alloy of these two types." In their view, the collective identity of a culturally diverse political community must be inclusive. It "opens itself fully to ethnocultural diversity through exchanges and interaction such that all citizens can at once be sustained by and contribute to it."[77] The symbols, values or ideals that serve as cement are less an array of customary or ethnic traits "than an alliance of worldviews, some deep-seated values, hopes and projects to be pursued together."[78] They have taken shape in the past and have continued to change from one generation to the next. Since anyone can adopt these values at any time and has a right to co-determine their future, no one can predict the course of the movement that may result from ethnocultural interactions.[79] Inclusive collective identities are thus "shifting" and "constructed," just like any other identity.[80]

An inclusive collective identity is united by what is called a "citizen culture."[81] The constitutive features of a citizen culture include certain aspects of the dominant national culture and certain common universal values that "all citizens can share within or beyond their specific identities."[82] The aspects of the dominant national culture that are included are its language, its symbols and mechanisms of collective life, and a memory that makes the past of the dominant group significant and accessible to citizens of all origins.[83] The common universal values may include pluralism, equality, solidarity, secularism, non-discrimination, and non-violence, provided that they have been "historicized" by the various ethnocultural traditions found in the society.[84] Historicization is a process by virtue of which an abstract universal value acquires a specific meaning or connotation for a particular ethnocultural group. The value is linked "with a past and . . . striking collective experiences" that have struck the memory and imagination of a particular group. When historicized, a universal value is adopted by the group and becomes a founding value. Accordingly, convergence on historicized values is not a form of "gentle assimilation" into the culture of the dominant group: it appears at the outset and not at the outcome.[85]

77 *Ibid.* at 128.
78 *Ibid.* at 124.
79 *Ibid.* at 125.
80 *Ibid.* at 123.
81 *Ibid.* at 125.
82 *Ibid.* at 124.
83 *Ibid.* at 125, 127.
84 *Ibid.* at 126.
85 *Ibid.*

An inclusive collective identity, thus, may entail a certain degree of substantive cultural homogeneity, but this homogeneity is neither comprehensive nor a copy of the culture of the dominant group. It seems to be situated somewhere between the thick identity of ethnic nations and the thin identity of civic nations. An inclusive collective identity is both respectful of cultural diversity and built upon it. It grows out of cultural interaction and exchange.

The model of church-state relations

The relationship between church and state is generally conceived in the light of two opposing models: the "strict church-state separation" model and the "established church" or "theocratic" models.[86] The strict church-state separation model favours a rigid separation between religion and politics and between the religious and the secular. Religion is entirely left to the realm of personal life and private conscience, choice and action: it is "privatized" and of no concern to the State. For this purpose, religion is strictly excluded from the public sphere and public institutions: there is no public support for religion, no religious symbols in public displays, no exemption from general public laws, no religious teaching, and religious considerations are not used as reasons in the process of political justification. In this sense, the State is neutral on matters of religion, for it neither helps or favours nor hinders or burdens any particular religion. This form of State neutrality on matters of religion entails a strict separation between religion and politics. Religious organizations and institutions are organically separated from the State and the public realm is "free" from religion. Both domains are autonomous and independent in their own field of jurisdiction. In the Report, this model is called "integral" or "rigid secularism."[87]

The "established church" or "theocratic" models are characterized by an organic link between the State and one particular religion. Accordingly, the preferred religion may permeate the public sphere and institutions: it is recognized by the State, it receives public support, its symbols are upheld by the State, its main tenets are taught in schools and reflected in the general public laws, and it may be used as a reason for governmental action.[88] In turn, the dominant church and religious institutions provide the State with some legiti-

86 See e.g. Sophie van Bijsterveld, "Church and State in Western Europe and in the United States: Principles and Perspectives" (2000) 3 B.Y.U.L. Rev. 989. This being said, many scholars in the field have propounded complex typologies or taxonomies purporting to reflect the various church-state relation regimes that exist in the world.

87 *Supra* note 1 at 138.

88 *Ibid.* at 134.

macy. This model may be more or less tolerant of other religions and more or less committed to the principle of equal treatment of religions.

By contrast, the co-chairs propose a "flexible" or "open" model of secularism.[89] Open secularism favours both separation between religion and state and greater access of religious beliefs, practices and convictions to the public sphere and institutions. The State must be neutral on matters of religion, but this neutrality is not a matter of freeing the public realm from religion. It is a matter of treating all citizens on an equal footing. So the State must not favour any particular religion nor identify itself with a given religion.[90] However, this does not entail a strict church-state separation. Open secularism acknowledges the "importance for some people of the spiritual dimension of existence."[91] For this reason, it allows them to express in private and in public their religious convictions "inasmuch as this expression does not infringe other people's rights and freedoms."[92] Therefore, while the teaching of one religion in public schools and the religious justification of laws, policies and judicial decisions must not be allowed, public support for religion, religious symbols in public displays, the use of religious language in citizen and legislature deliberation, exemptions from general public laws, and reasonable accommodations on religious grounds are legitimate.

In the co-chairs' view, the separation between religion and state and the neutrality of the State on matters of religion are not ends in themselves: they are two principles expressing the institutional structures that are "essential to achieve" the "final purposes" of secularism.[93] There are two final purposes: the "moral equality of persons" and "freedom of conscience and religion."[94] These purposes come within the broader framework of a democratic, liberal political system. The moral equality of persons requires the State to treat all citizens equally. Freedom of conscience and religion requires the State to ensure that "each individual can live his life in light of his convictions of conscience."[95] It follows that the State and the religious organizations must be separate, each one being autonomous, independent and sovereign within its own fields of jurisdiction. Moreover, the State must be neutral in its relations with the different religions: it must treat all of them equally. Finally, it must be neutral

89 *Ibid.* at 137.
90 *Ibid.* at 134, 136.
91 *Ibid.* at 140.
92 *Ibid.* at 141.
93 *Ibid.* at 135.
94 *Ibid.*
95 *Ibid.* at 136.

towards religious and secular thinking: it must not give special recognition to certain religious, nonreligious, or secular worldviews. In particular, it must not identify itself with religion as a whole or with a secular system of belief as a whole.[96] It must also be neutral in respect of the competing deep-seated beliefs, values and life plans chosen by the citizens, be they religious or secular.[97]

Open secularism is defended as the institutional structure that best allows us to achieve the two final purposes of secularism: it "better serves the equality of persons" and "offers the broadest protection to freedom of conscience and religion."[98] The "basic reason" why the co-chairs opt for this model is that it "best fulfils . . . the four principles of secularism, that is, respect for the moral equality of persons, freedom of conscience and religion, the reciprocal autonomy of Church and State, and State neutrality."[99] It achieves the most appropriate balance between these principles.

The framework for handling harmonization requests

There are two dominant frameworks to handle cultural and religious harmonization requests: a "legal route" and a "laisser-faire" approach.[100] The legal route is based on strict government regulation and codification. It promotes what might be called "regulation from above."[101] Legislation and public norms impose a general frame of reference and the courts interpret the general norms in the light of the requirements and imperatives of a specific context. This framework fosters the "judicialization" of questions related to harmonization requests and, consequently, of interpersonal relations.[102] For example, the State fixes a general standard, say "the duty of reasonable accommodation," and the courts decide what accommodation is reasonable and unreasonable, declaring a winner and a loser in an authoritarian fashion. The laisser-faire position is based upon the responsibility and autonomy of interveners and actors who are directly concerned by the harmonization requests. The determination of the frame of reference and the interpretation of the relevant norms in the light of the requirements and imperatives of a specific context are left to those who are most familiar with the context.[103] The framework does not foster

96 *Ibid.* at 134, 136.
97 *Ibid.* at 134.
98 *Ibid* at 149.
99 *Ibid.* at 149.
100 *Ibid.* at 19, 167.
101 *Ibid.* at 167.
102 *Ibid.* at 167, 173.
103 *Ibid.*

judicialization, but may allow the most powerful group to impose its own cultural norms, values and views on others, risking marginalizing, and indeed eliminating, them through assimilation.

By contrast, the co-chairs propose a "citizen route" leading to solutions corresponding to what they call a "concerted adjustment."[104] A citizen route for handling harmonization requests is less formal than the legal route, but more formal than the laisser-faire position. The framework is a case-by-case approach structured by a contextual, deliberative and reflexive procedure. It relies on negotiation and the search for a compromise that satisfies both parties through a specific procedure fostering dialogue and self-criticism. This framework allows for a smoother transition from abstract and general principles, such as the abstract and general duty to reasonable accommodation, to a more specific solution in an often unique situation than any authoritarian and controversial judicial decision.[105] It empowers those who know best the conditions in the relevant context, but imposes on all actors and interveners certain procedural constraints.[106] Therefore, the citizen route favours both the likelihood of sensible, enlightened and reasoned decisions based upon abstract and general principles and the accountability, responsibility and autonomy of the interveners and actors.[107]

The general model: interculturalism

The main contribution of the Report to the normative and conceptual debate on integration thus lies in the original positions it propounds with respect to cultural integration, collective identity, church-state relations, and the framework for handling cultural and religious requests. These positions are: interculturalism (in a strict sense), inclusive collective identity, open secularism and the citizen route. Altogether, they constitute an original model of integration in a pluralist and culturally diverse society that may be called, for the sake of simplicity, interculturalism.

III. Interculturalism: a rose by any other name?

In the Report, interculturalism and multiculturalism constitute two genuine but competing pluralistic models of sociocultural integration. Both bear a tension between two poles: a concern for ethnocultural diversity and the need to perpetuate both the social bond and the symbolic references underlying it

104 *Ibid.* at 19.
105 *Ibid.* at 19, 40, 64, 167, 168, 172.
106 *Ibid.* at 171–173.
107 *Ibid.* at 168.

(e.g., the founding traditions and values that have been forged through history and collective imagination).[108] They are distinguished by the emphasis each gives to one of the two poles. Multiculturalism emphasizes diversity, whereas interculturalism places a "variable emphasis" on the preservation of the social bond and on the continuity of symbolic references.[109] As we saw, the co-chairs believe that multiculturalism, notably its Canadian version, is not properly adapted to Quebec's situation, and propose to follow, extend and advance the model of integration Quebec has adopted in recent decades. This model, which may be called interculturalism, would achieve a better balance between the two poles than multiculturalism.

In this Part of the paper, I maintain that the co-chairs' model of interculturalism constitutes a version of multiculturalism. I do not claim that it corresponds to the caricature they denounce or to its most radical version.[110] I do not claim either that their model is not desirable or that it is not well adapted to Quebec's situation. My point is that their version of interculturalism emphasizes ethnocultural diversity in ways that are very similar in principle to those of multiculturalism. I acknowledge that the question whether the co-chairs' positions proceed from or, on the contrary, constitute a break with the path that Quebec has followed in the last thirty years, is largely a matter of interpretation.[111] However, if the hypothesis is true, then the co-chairs' model probably departs from what all Quebec governments and many Quebeckers understood, and still understand, by interculturalism. Of course, it would help to understand why so many people in Quebec are ill at ease with the Report.

For this purpose, multiculturalism should be understood as a general model of sociocultural integration. Although there are profound disagreements, even among multiculturalists, as to what constitutes its basic philosophical or moral commitments and its main political principles and policies, all versions of multiculturalism seek the public recognition and political accommodation

108 *Ibid.* at 118.

109 *Ibid.* at 119.

110 *Ibid.* at 121, 123, 192.

111 One must establish the facts that may be accepted as constitutive of the path Quebec has followed in recent decades and give them a coherent meaning. Then, one must determine what the contemporary requirements and priorities are and give them a coherent meaning. Finally, one must identify the directions the society must take in order to best adapt the "path" to contemporary conditions. None of these tasks can be purely descriptive: they all require normative judgments. For the same reason, the methodological approach of the co-chairs is generally interpretive or hermeneutical. It has both descriptive and normative components. This is explicitly stated in the Report: *ibid*. at 113, 133–152.

of group difference, be it cultural or religious. According to Will Kymlicka, three general principles are common to all different struggles for a multicultural state.[112] The first is the repudiation of the nation-state, that is, of the idea that the State belongs to one dominant national group. According to multiculturalism, the State belongs equally to all citizens. The second principle is the repudiation of all nation-building policies that assimilate or exclude members of non-dominant ethnocultural groups. Multiculturalism considers that each citizen must have equal access to all institutions and equal right to act as full citizen in political life, "without having to hide or deny their ethnocultural identity."[113] Accordingly, the State must recognize and accommodate the history, language, and culture of all ethnocultural non-dominant groups as it does for the dominant group.[114] The third principle provides that historic injustice that was done to non-dominant ethnocultural groups by policies of assimilation and exclusion must be acknowledged by the State and, where possible, rectified and remedied.

I agree with Kymlicka that these principles are common to most, if not all, versions of multiculturalism. If we use them to assess the model of integration propounded in the Bouchard-Taylor Report, then interculturalism constitutes a form of multiculturalism. It clearly repudiates the idea of nation-state, that is, that the Quebec State belongs to the dominant national group. It also clearly repudiates the idea that nation-building policies that tend to assimilate or exclude members of non-dominant ethnocultural groups might be legitimate. It is significant that the co-chairs avoid the expression "Québec nation," except occasionally to describe the fact that a distinct political community exists in Quebec.[115] The difficult issue of historic injustice that was done to aboriginal people is voluntarily left aside, notably for the reason that it must be discussed "nation to nation."[116] Nevertheless, the Report's underlying guidelines express the idea that the State belongs equally to all citizens, that all

112 Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007) at 65–66 [Kymlicka]. In this book, Kymlicka uses multiculturalism as an umbrella term to cover a wide range of policies "designed to provide some level of public recognition, support or accommodation to non-dominant ethnocultural groups" (at 16). These policies are mostly concerned with immigrants, racial and ethnic groups, religious or ethnoreligious groups, national minorities and indigenous peoples. They only indirectly deal with other kinds of non-dominant groups, such as women, gays and lesbians, disabled, and others. See also Will Kymlicka, "The New Debate on Minority Rights (and Postscript)," in Anthony Simon Laden and David Owen, eds., *Multiculturalism and Political Theory* (Cambridge: Cambridge University Press, 2007) 25.

113 Kymlicka, *supra* note 112 at 65–66.

114 *Ibid*. at 66.

115 *Supra* note 1 at 119.

116 *Ibid.* at 34.

citizens must have equal access to all institutions and equal right to act as full citizens in political life, without having to hide or deny their ethnocultural identity, and that the State must recognize and accommodate the history, language, and culture of all ethnocultural non-dominant groups as it does for the dominant group. In essence, it emphasizes public recognition and political accommodation of group difference, be it cultural or religious.

Of course, one may legitimately characterize the co-chairs' model of integration in terms of "interculturalism" rather than "multiculturalism." However, it is important to determine whether the intercultural model is substantially distinct from multiculturalism because these labels are politically loaded and the co-chairs claim that they bear distinct meanings. Moreover, one may wish to use the term "multiculturalism" only to name its most radical versions. However, the co-chairs argue that the most radical versions are caricatures or "truncated" versions of multiculturalism.[117] In reality, most versions of multiculturalism promote at least a minimal set of integrating elements in order to foster a sense of unity, common belonging, and social bond.[118]

In what follows, I substantiate these claims with respect to four positions: interculturalism (in a strict sense), inclusive collective identity, open secularism, and the citizen route.

The model of cultural integration: interculturalism

As we saw, interculturalism is conceived as a model of cultural integration that promotes ethnocultural interactions in a spirit of respect for differences. It places a variable emphasis on unity and continuity, notably through ethnocultural interaction, but does not promote assimilation into one particular culture. By fostering both the formation of a common collective identity and respect for ethnocultural diversity, it affords security both to the dominant cultural group and to ethnocultural minorities, and respects the rights of all. Stated as such, interculturalism may appear as a middle term to cover the ground between assimilationist and multiculturalist models of cultural integration.

However, interculturalism, as interpreted by the co-chairs, emphasizes

117 *Ibid.* at 192–193.

118 See e.g. Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory,* 2d ed. (New York: Palgrave MacMillan, 2006), c. 7; Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge: Polity Press, 2007), c. 6; Kymlicka, *supra* note 112, c. 9; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

ethnocultural diversity in terms that are very similar to those of multiculturalism. Where it actually emphasizes unity and continuity, it still fosters ethnocultural diversity. The reason is that public recognition and political accommodation of cultural and religious diversity are seen as facilitating integration into wider society and, consequently, as adequate—indeed the best—means to promote unity and continuity. To this extent, interculturalism promotes ethnocultural diversity, not only for the purposes of promoting diversity, but also for the purposes of unity and continuity. Thus conceived, a policy promoting cultural and religious diversity is a policy of unity and continuity. However, two points must be made. First, this consideration expresses a multiculturalist thesis. In Canada, for example, it has been one strong reason put forward by the federal government to justify the policy of multiculturalism[119] and by the Supreme Court to support the constitutional principle of multiculturalism.[120] It is a central theme within political philosophy and social theory, as exemplified by the works of Will Kymlicka, Bhikhu Parekh, James Tully and Tariq Modood.[121] Secondly, it is an empirical thesis that may be true or false. Although it might be premature to conclude either way, it should be admitted, meanwhile, that multiculturalism emphasizes ethnocultural diversity.[122]

Let me give four illustrations drawn from what the co-chairs regard as the objectives of interculturalism.[123] First, interculturalism assumes that it is beneficial "for initial affiliations, those rooted in the ethnic group of origin, to survive"—for those citizens who so desire.[124] Similarly, it postulates that it is useful, for immigrants and their children, "to make available . . . at least for a certain time, the means to preserve their mother tongue." There are two underlying justifications. The first concerns diversity: these means contribute to preserve "the enrichment cultural diversity affords."[125] The other justification

119 See e.g. *House of Commons Debates*, *supra* note 34.

120 See e.g. the dissenting opinion in *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202, in which two judges introduced the first systematic judicial statement about constitutional multiculturalism.

121 See e.g. Kymlicka, *supra* note 112, c. 9, especially at 189 ff; Parekh, *supra* note 118 at 196, 211, 248; Tully, *supra* note 118 at 196–198; Modood, *supra* note 118 at 150 ff.

122 It is not easy to verify the truth of this multiculturalist thesis because most countries tend to foster homogeneity. Except for Switzerland, perhaps, the countries that have promoted some form of multiculturalism, such as Canada and Spain, tend to show that unity, the sense of belonging to society as a whole, and the sense of sharing a common fate with all citizens are rather weak—indeed, we even encounter various secessionist movements. However, it might be premature to conclude that the thesis is false. Therefore, it might be well advised to get more empirical evidence before making a probable judgment, provided that it is frankly acknowledged that there might be a cost if the thesis ever appears to be false.

123 *Supra* note 1 at 119–121.

124 *Ibid.* at 120.

125 *Ibid.*

concerns unity and continuity, social cohesion and integration: the survival of initial affiliations and the preservation of mother tongue would allow cultural groups to mediate between their members and society overall and would mitigate the migratory shock of immigrants.

Secondly, according to the co-chairs, interculturalism entails that cultural and religious differences do not have to be confined to the private domain: they "must be freely displayed in public life" in accordance with what is called "open secularism."[126] The same two justifications are given. Open secularism is an appropriate way to "benefit fully from cultural diversity," and it enhances social cohesion and facilitates integration: "to display one's differences and become familiar with those of the Other" will prevent marginalization that "can lead to fragmentation favourable to the formation of stereotypes and fundamentalisms."[127]

Thirdly, interculturalism recognizes the principle of multiple identities. Each person has a "right to preserve if he so desires his affiliation with his ethnic group."[128] Accordingly, the mode of integration must be plural: citizens may decide, "according to their choice," to achieve their own integration into society either by means of their culture of origin or by distancing themselves from it. The co-chairs' adaptation of the moving-train metaphor used to describe the integration process is significant. They say that "it also happens that not just passengers but railway cars also join the train."[129] Fourthly, interculturalism encourages both plurilingualism and the language of the majority as the common public language. Each individual has a right to define "as he sees fit his relationship to the common or any other language and to adopt it in his own way."[130] It follows that the debate on the language of the majority group as an identity-related language or as a vehicular language is futile. What counts is to disseminate the language of the majority. However, these claims entail that the function of the language of the majority as a common public language is vehicular only: the common public language is instituted for the purposes of communication, collective deliberation, cultural exchanges and interaction.[131] It seems to follow that the distinction between multiculturalism and interculturalism is reduced to a formal distinction: where the language of the majority is in fact dominant, the force of the market is sufficient to impose it (sooner

126 *Ibid.* at 133.
127 *Ibid.* at 120.
128 *Ibid.*
129 *Ibid.*
130 *Ibid.*
131 *Ibid.* at 119.

or later, immigrants will have to learn it) and the State has no need to institute a common public language; where the language of the majority is not dominant, the force of the market may not be sufficient to produce a common public language and the State may have to use the law to institute it.

As these examples show, the co-chairs' interpretation of interculturalism is difficult to distinguish from multiculturalism. It places a certain emphasis on diversity, even where the proposed policies are justified in terms of integration. Both models recognize the principle of multiple identities and reduce the function of the common public language to a vehicular role. Of course, the co-chairs also claim that interculturalism encourages numerous forms of cultural interaction in a spirit of reciprocity[132] and that Quebec as a nation is "the operational framework for interculturalism."[133] However, since interculturalism is faithful to the "ideal of equality," it confers equal status on all cultural groups. Therefore, the various forms of cultural interaction purport to transform the culture of all ethnocultural groups, and each ethnocultural group has an equal right to survive and develop.[134] This is what the co-chairs mean when they claim that interculturalism affords security both to the dominant cultural group and to ethnocultural minorities and protects the rights of all.[135]

The type of collective identity: inclusive

We saw that the co-chairs' conception of the collective identity of the political community is inclusive: it "opens itself fully to ethnocultural diversity through exchanges and interaction such that all citizens can at once be sustained by and contribute to it."[136] It is "constructed" by everyone and may "shift" at any time.[137] An inclusive collective identity is united by what they call a "citizen culture." The constitutive features of this culture contain both certain symbols, values or ideals of the dominant national culture and certain common values historicized by each ethnocultural tradition. Its basic common reference points, thus, are based on the combination of different cultures and traditions.[138] They can be shared by all citizens within or beyond their specific identities.[139] Stated as such, an inclusive conception of collective identity might be conceived as a middle term the middle ground between ethnic and civic conceptions.

132 *Ibid.* at 120–121.
133 *Ibid.* at 119.
134 *Ibid.* at 120–121.
135 *Ibid.* at 119.
136 *Ibid.* at 128.
137 *Ibid.* at 123.
138 *Ibid.*
139 *Ibid.* at 124.

I have no doubt that a collective identity of this type has been developing in Quebec for several decades. However, it is difficult to conceive how it can be distinct from the type of collective identity that may emerge in a multicultural society such as Canada. The types of collective identity that characterize a society are a matter of social fact and interpretation. Collective identities are not essences and their characters are not immutable: they are social constructs "forged in history from the experience of communities."[140] It is, therefore, a question of fact and interpretation whether the collective identity of the political community of a multicultural society is inclusive.

Two reasons tend to show that the type of collective identity that may emerge in a society committed to interculturalism need not be distinct from the one that may emerge in multicultural society. The first reason derives from the co-chairs' objection to the view that a multicultural society could be united only by respect for universal values codified by law.[141] According to them, this view of the social bond is too abstract: "all communities need a few strong symbols that serve as a bonding agent and a rallying point, sustain solidarity beyond cold reason and underpin its integration."[142] They agree with Toqueville that "no society can prosper without similar beliefs or rather that none subsists thus . . . without common ideas. . . . [I]t is therefore necessary that the minds of all citizens always be assembled and held together by a few main ideas."[143] However, if the co-chairs' objection is true as a matter of fact, then the view that the identity of a political community can be united merely by the respect for universal values codified by law has no anchor in the real world. All collective identity would actually be thicker and its social bond would be more concrete. And if this is true, then it might be difficult to distinguish interculturalism from multiculturalism on the basis of the type of collective identity and social bond they allow to produce.[144]

The second reason derives from what the co-chairs identify as the avenues or spheres within which an inclusive collective identity can be formed and developed as a citizen culture.[145] Let me give a few examples. First, they maintain that the formation of an inclusive collective identity requires the recognition of one common public language, certain symbols and mechanisms of collec-

140 *Ibid.* at 123.

141 This view has often pointed to Canada as an example of such a society. It has some affinity with certain versions of civic nationalism, constitutional patriotism and cosmopolitanism.

142 *Ibid*.

143 *Ibid*.

144 See e.g. Modood, *supra* note 118, c. 6, especially at 146 ff; and Parekh, *supra* note 118, c. 6, especially at 219 ff.

145 *Supra* note 1 at 125–128.

tive life, such as institutional rituals, symbols, codes and holidays, and the edification of a genuine national memory.[146] However, as we saw, the integrative function of a common public language is vehicular only. Moreover, the symbols and mechanisms of collective life must accommodate cultural and religious diversity. For example, the crucifix in legislatures must be removed, prayers must not be part of any institutional rituals, and national holidays must be inclusive, that is, not be conceived as celebrating the dominant cultural group.[147] Finally, the edification of a genuine national memory must not only make the history of the dominant group significant and accessible to citizens of all origins. It must also take into account the growing ethnocultural diversity, notably because the members of the ethnic minorities can substantially enrich Quebec's collective memory "by contributing to it their own stories."[148] Unless one supposes that multicultural societies have no common public language, no symbols, no mechanism of collective life and no national memory, it is hard to see why any of these avenues or spheres cannot also contribute to the development of an inclusive collective identity in a society committed to multiculturalism.

A second example can be drawn from what we may call the "historicization thesis." As we saw, the co-chairs maintain that a citizen culture is constituted by common values that have been historicized by the various ethnocultural groups and traditions found in the society, such as certain universal values.[149] These values are not conceived as mere abstract ideals or empty conventions.[150] Being historicized, each common value has a specific meaning or connotation for the groups that have adopted it by virtue of some collective experiences that made it part of their "founding" values.[151] In my view, the historicization thesis is plausible. However, two difficulties arise. The first is that it gives us no reason to assume that a society committed to multiculturalism cannot have such common values. Since they depend on historicization processes, their existence and specific content are matters of fact.[152] So, it is an empirical question whether such common values actually exist in a multicultural society. The second difficulty is that the historicization thesis gives

146 *Ibid.* at 125, 127.
147 *Ibid.* at 152.
148 *Ibid.* at 127.
149 *Ibid.* at 126.
150 *Ibid.* at 127.
151 *Ibid.* at 126.
152 As far as Quebec is concerned, the co-chairs suggest that the existence and content of a significant core of common value has still to be confirmed: *ibid.* at 126–127. However, they believe that the value of equality would qualify because it is deeply rooted in the collective memory of many ethnocultural groups and inherent in several historicization processes: *ibid*. at 126.

us no reason to assume that the collective identity of a society committed to interculturalism is substantively any thicker than the one we may find in a society committed to multiculturalism. The thesis claims that a value becomes a common value of a society committed to interculturalism when it is inherent in the historicization processes of the various ethnocultural groups and traditions found in this society. It does not claim that it is necessary for the value to be historicized by the wider society as a whole, conceived as a distinct group or community, or indeed as a distinct ethnocultural group or community. If this were a necessary condition, then the fact that it would also be inherent in the historicization processes of the various ethnocultural groups and traditions found in this society would add nothing to the status of the value as a common value of the wider society. Now, since the foundation of the common values of an intercultural society may be totally independent from any historicization process of this society, *qua* distinct group or community, these values may have quite distinct meanings and connotations according to the particular collective experiences of the various ethnocultural groups and traditions.[153] So, the common values, conceived as the value of the wider society, may express nothing more than abstract ideals or empty conventions. This being the case, the bonding agent of the collective identity of a society committed to interculturalism may not be thicker than the one found in a society committed to multiculturalism.

The other avenues and spheres within which an inclusive collective identity can be edified give no more reason to distinguish it from the type of collective identity that may be formed in a multicultural society. For example, the co-chairs favour the development of a sense of belonging through the schools, civic life, intercultural exchanges, knowledge of the territory, and so on.[154] But they immediately add that such a development must not be exclusive: it must leave room "for other parallel ethnocultural or other affiliations."[155] Similarly, artistic and literary creation fosters the formation of a common imagination. However, such creation is pluricultural: it enriches and transforms the imagination of the dominant group.[156]

153 In my view, the example drawn from the value of equality is striking: *ibid.* at 126. Each particular ethnocultural group may give a different meaning to the value of equality, given their own specific collective experience of oppression and domination. Moreover, it might be the case that the meaning of equality is controversial and contested, indeed plural, within the same ethnocultural group found in a society.

154 *Ibid.* at 125.

155 *Ibid.*

156 *Ibid.* at 127.

As these examples show, the type of collective identity that may emerge in a society committed to interculturalism gives us no good reason to distinguish the co-chairs' model of integration from multiculturalism. In particular, in both cases, the conception of collective identity fostered by the idea of nation-state is rejected.[157]

The model of church-state relations: open secularism

Open secularism, as we saw, is a model of church-state relations that simultaneously favours the separation between religion and state and the greatest possible access of religious beliefs, practices and convictions to the public sphere and institutions. The State must be neutral on matters of religion. It must neither favour nor identify itself with any particular religion. However, this does not entail a strict church-state separation that frees the public realm from religion. People must be allowed to express in private and in public their religious convictions "inasmuch as this expression does not infringe other people's rights and freedoms."[158] State neutrality in matters of religion and the separation between religion and state are two principles expressing the institutional structures that are essential to achieve the two purposes of secularism. These purposes are conceived as falling within the framework of a democratic, liberal political system. They are the "moral equality of persons" and "freedom of conscience and religion."[159] Since the moral equality of persons requires the State to treat all citizens equally, the State must be separated from the religious and secular organizations and remain neutral in its relations with the different religious and secular perspectives and worldviews. Freedom of conscience and religion requires the State to ensure that each individual can live his or her life in light of his convictions of conscience, be they religious or secular.[160] Open secularism, then, establishes a balance that best achieves the two purposes of secularism and best fulfils the four principles of secularism.[161]

157 See e.g. Modood, *supra* note 118 at 48 and c. 6; Parekh, *supra* note 118, c. 6, especially at 219 ff, 230 ff.

158 *Supra* note 1 at 141.

159 *Ibid.* at 135.

160 *Ibid.* at 136.

161 *Ibid.* at 148.

The co-chairs' approach to secularism is basically normative.[162] Although they claim that this model has "gradually established itself" in Quebec,[163] they acknowledge that the governments have remained "remarkably silent on the Québec secularism model": no elected government has ever adopted a text in which "the key directions of the Québec secularism model are defined."[164] Although they also claim that there is "a fairly broad consensus" on open secularism among "the organizations that have reflected on Québec secularism over the past decade,"[165] this consensus has been quite limited in scope (it concerns less than ten organizations), quite recent (no more than fifteen years),[166] and it tends to ignore various organizations that have taken a stance in favour of a more rigid form of secularism.[167] In fact, the co-chairs acknowledge that no social consensus actually prevails among Quebeckers on this question: "there is profound disagreement on the policy directions that the Québec State should now adopt in respect of secularism."[168] Most people who took a stance on this issue before and during the public debate in 2007 rejected the open secularism model and favoured a more rigid form of secularism, something pointing towards the strict church-state separation model.[169] As reported, a number of Quebeckers "expressed their reservations about this model. In fact, the accommodation cases that have aroused the greatest discontent were based on religious reasons and implicitly related to this open secularism."[170] Furthermore, although the co-chairs argue that there is no pure secularism model that one could apply properly and, accordingly, that each society must define its own model in light of its own context, values, outcomes and balances,[171] they ultimately propound the "one" model that "best allow[s] us to respect the equality of persons and their freedom of conscience

162 *Ibid.* at 124–138; 142–148. The approach taken in the other chapters is both descriptive and normative. From a normative point of view, the chapter on secularism is the most important of the Report. First, it directly deals with the main issue that had led to the crisis on reasonable accommodation, that is, the place of religion in society. Second, and more fundamentally, it explicitly provides the normative foundation of the whole Report. It explains and articulates its fundamental principles and values which are conceived as liberal and democratic.

163 *Ibid.* at 141.

164 *Ibid.* at 153.

165 *Ibid.* at 140.

166 *Ibid.* at 140–141.

167 For example, Mouvement laïque québécois.

168 *Supra* note 1 at 141.

169 *Ibid.* at 133, 141, 142. The co-chairs state at 141: "our debate that preceded the establishment of our Commission and our public hearings revealed that there is profound disagreement on the policy directions that the Québec State should now adopt in respect of secularism. Some people believe that the current context demands a radical modification of the secularism model centered on the protection of rights and freedoms that we have known until now."

170 *Ibid.* at 140–141.

171 *Ibid.* at 133.

and religion."[172] In their view, the choice of open secularism is "the right one" for the "basic reason" that it best fulfils the four principles of secularism.[173] Finally, the co-chairs take many pages to refute the arguments of the critics in a manner typical of normative political philosophy. Open secularism, therefore, is a normative model and, for this reason, may have a claim to universality, at least within democratic, liberal states.

Open secularism is conceived as an aspect of Quebec interculturalism.[174] It is "much more liberal than republican": it is an institutional arrangement that is "aimed at protecting rights and freedoms" and not, as in France, "a constitutional principle and an identity marker to be defended."[175] Basically, it is conceived within the framework of a democratic, liberal state, notably within John Rawls's idea of an overlapping consensus developed in *Political Liberalism*.[176] However, it is not clear how open secularism, as interpreted by the co-chairs, can be distinguished from a model of secularism deriving from multiculturalism. Open secularism takes the fact of pluralism very seriously and seeks to allow a variety of religious and secular perspectives or worldviews to co-exist and flourish. It is meant to offer "the broadest protection to freedom of conscience and religion" possible.[177] It probably constitutes the most accommodationist model of church-state relations conceivable in a democratic State committed to the moral equality of persons.[178] In what follows, I illustrate these claims by six examples.

First, open secularism conceives freedom of religion in broad, probably the broadest plausible, terms.[179] This conception derives from, or is plainly

172 *Ibid.* at 141.

173 *Ibid.* at 148.

174 *Ibid.* at 120. It is significant that the French specialist on secularism Jean Bauberot entitled his book examining the Report as follows: *Une laïcité interculturelle: Le Québec, avenir de la France?* (La Tour d'Aigues, France: Editions de l'Aube, 2008).

175 *Supra* note 1 at 141.

176 *Supra* note 61.

177 *Supra* note 1 at 148.

178 On the accommodationist model in general, see e.g. Cole Durham, "Perspectives on Religious Liberty: A Comparative Framework" in Johan D. van der Vyver and John Witte Jr., eds., *Religious Human Rights in Global Perspective* (The Hague, Netherlands: Kluwe Law International, 1996) at 12. Open secularism is consistent with the conception of "strict secularism" elaborated by the Supreme Court of Canada in *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 [*Chamberlain*]. The majority of the Court argued, at para. 21, that the concept of "strict secularism," as used in a nineteenth-century statute, "reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity. These values are reflected in our Constitution's commitment to equality and minority rights."

179 *Supra* note 1 at 176.

consistent with, the Supreme Court of Canada's definition. According to the Court, the "essence of the concept of freedom of religion" is the right to "entertain such religious beliefs as a person chooses," the right to "declare religious beliefs openly and without fear of hindrance or reprisal," and the right to "manifest religious belief by worship and practice or by teaching and dissemination."[180] Originally, freedom of religion was inherently limited by the rights and interests of others and one could expect the beliefs to have some objective basis in some religious tradition.[181] However, over the years, the Court's conception has become "subjective" and "quasi-unlimited." Freedom of religion includes any act or practice a person "sincerely" believes has a nexus with his religion, even if it injures or threatens the interests of others, such as their life, safety or health,[182] if it is not required by an official religious dogma, if it is not in conformity with the positions of religious officials, and if he is the only member of a religious group to believe it has such a nexus.[183] Individuals are thus allowed to adopt the religious beliefs "of their choices" and "to put them into practice" if they sincerely believe they are bound to conform[184]: "it is incumbent on the individual to define his own position in relation to religion."[185] Moreover, the protection of the sphere of freedom is very strong. Freedom of religion is infringed in *law* as soon as a norm, act or practice imposes a non-trivial or not insubstantial burden or cost to a person's ability to act in accordance with his religious beliefs.[186] Whether the person's ability to act in accordance with his religious beliefs has been impaired in *fact* does not matter.[187]

The co-chairs maintain that the subjective conception of religion marks "the phenomenon of the individualization of belief," deriving from the people's "personal quest for meaning": more and more people "are turning to an array of religious, spiritual and secular traditions to draw from them elements that allow them to structure their worldview."[188] One might thus reasonably believe that open secularism seeks to secure a liberal individual right. However, it should be recalled that the Supreme Court's broad and strong conception of freedom of religion was partly justified on the basis of constitu-

180 *Big M Drug Mart*, *supra* note 46 at para. 94.
181 See *ibid*; *Young v. Young*, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193.
182 See *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 105, 122 D.L.R. (4th) 1; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at paras. 73, 133 D.L.R. (4th).
183 *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at para. 46.
184 *Supra* note 1 at 176.
185 *Ibid.* at 145.
186 See *Edwards Books*, *supra* note 46.
187 *Multani, supra* note 20 at para. 53.
188 *Supra* note 1 at 176.

tional multiculturalism.[189] It also protects the rights of people to act as part of a larger religious community. Moreover, the subjective conception of religion recognizes the normative importance of the religious identities as they matter to particular individuals. The individuals' religious beliefs, as well as their expressions, define who they are and shape their identity.[190] The meaning of such beliefs and expressions must be decided by the individuals themselves. Otherwise, one would use "words that tend to interpret the other person in light of oneself, as though the other person's semantics necessarily reflected the semantics that informs the dominant culture here."[191] A subjective conception of religion also recognizes that the identity of religious cultures may be internally plural. The co-chairs say, for example, that it avoids "the risk of falling back on the majority opinion in a religious community and contributing to the marginalization of minority voices."[192] Given these considerations, it seems difficult not to associate the broad and strong conception of freedom of religion with multiculturalism.

Second, open secularism conceives freedom of religion as an aspect of freedom of conscience[193] and seeks to protect both.[194] Of course, as we saw, it offers the broadest protection to freedom of conscience and religion. Accordingly, "all deep-seated convictions or convictions of conscience that allow individuals to shape their moral integrity" must enjoy the same status, whether they stem from a religion or from a secular moral philosophy.[195] Once again, one may infer that open secularism seeks to secure a liberal right, notably, the right of individuals to adopt the religious, spiritual or secular beliefs of their choice and to act accordingly, provided that they respect the rights of others. However, there is more to be said. Open secularism requires the State to be neutral, not only toward all religious groups or beliefs, but also toward religious and secular worldviews. It should neither favour nor burden any particular religion, religion as a whole, or any secular system of beliefs as a whole. It should not influence its citizens' choices for or against certain secular or religious worldviews with laws or policies that advantage or burden them.[196] It follows that a secular State should not operate on the basis of a secular system of beliefs. It must not presuppose, for example, the superiority of reason and

189 See *Big M Drug Mart*, *supra* note 46, and *Edwards Books*, *supra* note 46.
190 *Supra* note 1 at 144.
191 *Ibid.* at 145, n. 24.
192 *Ibid.* at 176.
193 *Ibid.* at 144.
194 *Ibid.* at 137.
195 *Ibid.* at 144.
196 *Ibid.* at 148.

science over faith. This would be inconsistent with the principle of neutrality based upon the moral equality of persons.[197] Indeed, secular systems of beliefs are conceived as forms of, or the equivalent of, religion.[198] The co-chairs argue that "this characteristic of secularism is of fundamental importance in the context of societies that are constantly diversifying from a cultural and religious standpoint."[199] I think it fair to say that the co-chairs would characterize as "assimilationist" a secular State operating on the basis of a secular system of belief.

Third, open secularism claims that individuals, as private citizens, must be allowed to express their religious beliefs in public spaces and public institutions and, for this purpose, have a right to reasonable accommodations.[200] Cultural and religious differences need not be privatized. The co-chairs give various reasons for this position. A rigid private/public distinction is too general to be functional and too restrictive to be pragmatic.[201] For example, in hospitals, vulnerable persons may wish to be surrounded by religious rites and by their loved who are religious. The distinction is also incoherent. For example, even if a law prohibiting all religious signs in public establishments treats everyone uniformly, it is not neutral between those whose religion requires the wearing of signs and those whose philosophical, religious or spiritual views do not require it.[202] However, as we saw earlier, the main justifications are twofold: "it is healthier to display one's differences and become familiar with those of the Other than to gloss over and marginalize them," and facilitating the expression of religious beliefs in public spaces and institutions allows all of us to "benefit fully from cultural diversity."[203] The extent to which the right to express one's religious beliefs in public spaces and public institutions holds is a matter of context. However, this right is apparent in the wearing of religious symbols by citizens in public institutions and in sports competitions, dietary prohibitions and the granting of temporary or permanent prayer rooms in public institutions, the installation of an eruv on public streets, the students' exemption from certain optional courses at school, and the use of religious language in citizen deliberation.[204] Although the co-chairs do not mention it, open secularism

197 *Ibid.* at 134–136.

198 See e.g. the expressions "secular equivalent of religion," "civil religion," and "secular religions and philosophies" in the Report: *ibid.* at 134–135 and 145.

199 *Ibid.* at 148.

200 *Ibid.* at 178–179.

201 *Ibid.* at 143.

202 *Ibid.* at 148.

203 *Ibid.* at 120.

204 *Ibid.* at 178–79.

seems to allow the use of religious language in legislature deliberation, for the reason stated below.[205]

Fourth, although open secularism requires the State and public institutions to be neutral towards, and separated from, religion, it also provides that the agents of the State must be allowed to express their religious beliefs while they are in function and, for this purpose, they have a right to reasonable accommodation.[206] This position may reduce the "appearance" of neutrality of the public institutions, for the employees might be seen as serving their religion before serving the State. However, the main consideration is that the State employees "display impartiality in the performance of their duties."[207] Their acts must not be dictated by their faith or philosophical beliefs, but by the desire to achieve the purposes inherent in the position they occupy.[208] Partial acts (proselytism, for example) should be sanctioned on merit.[209] But the mere fact that a person is wearing a religious sign is not a reason to believe that he or she is less impartial, professional or loyal than those who do not externalize their religious or philosophical beliefs.[210] The presumption must be that each employee acts with equal impartiality. Yet, the public expression of religious beliefs by an agent of the State may be subject to limits and prohibition if, in context, it imposes an "undue hardship" on the institution, its mission and the rights of others. For example, the wearing of a burka or a niqab in class may be prohibited if it hampers the performance of a female teacher.[211] Similarly, the public expression of religious beliefs may be prohibited where the "appearance of impartiality" is expected from certain public duties, such as the duties of judges, Crown prosecutors, police officers and prison guards who possess a power of punishment and coercion or symbolically embody the State.[212] Otherwise, the employees of the State may express their religious beliefs as they think appropriate, and the public institutions have a duty to accommodate them. This may include the wearing of the headscarf in class and the burka and the niqab for all employees of the State. It follows that no general and uniform prohibition of the public expression of the religious beliefs of the agents of the State is justified. Judgments must be made on a case-by-case basis. This position simultaneously upholds the neutrality of the State and

205 In *Chamberlain*, *supra* note 178, the Supreme Court of Canada's conception of strict secularism goes that far.
206 *Supra* note 1 at 178–179.
207 *Ibid*. at 149.
208 *Ibid*.
209 *Ibid*. at 150.
210 *Ibid*. at 149.
211 *Ibid*. at 150.
212 *Ibid*. at 151.

the freedom of religion and conscience of the agents of the State. Moreover, it guarantees equal access to jobs in the public and parapublic service, independently of religion. Finally, it fosters the integration of all.[213]

Fifth, open secularism claims that the practices and symbols of public institutions and displays that have originated in the religion of the majority may be maintained insofar as they constitute a part of the society's religious heritage. The Croix du Mont-Royal would be an example. However, if in point of fact a given practice or symbol identifies the State with a religion, it should be changed or removed even if it seems to have only heritage value. For example, crucifixes in legislatures and prayers recited on a voluntary basis at the beginning of public meetings identify the State with a specific religion. In these cases, the appearance of neutrality and impartiality should be paramount.[214] Although one may agree with this position, it raises a difficulty. A given practice and symbol conceived as identifying the State may not infringe the freedom of religion or conscience of any citizen and may not require any of them to act against their conscience. Not every case will necessarily entail that those who work in these public institutions, such as elected representatives, are unable to display impartiality in the performance of their duties. Since the agents of the State may, as employees, publicly express their religious beliefs on the ground that their mere appearance of neutrality does not constitute the main consideration, one might wonder why open secularism would not submit all practices and symbols that now have only a heritage value to the same consideration.

Sixth, open secularism entails that the State may maintain the traditional common calendar, even if the holidays coincide with the holidays of the dominant religious group. However, it also provides that it should reasonably accommodate members of other religions by allowing them to take leave on their most important religious holidays. In this way, the principle of equal respect is upheld.[215]

213 *Ibid.* at 150. The proposition that accommodating religious practices and beliefs fosters integration has probably not been proven yet. It might certainly be true with respect to certain religious groups and practices, but not all religious practices and beliefs. One may reasonably believe that the more the practices and beliefs of a religiously-minded person are accommodated, the more the accommodations allow the person to remain in their religious worldview without having to participate in the intercultural exchanges and dialogue processes. One might argue that the religious group is nevertheless integrated, say, because it lives peacefully. However, this form of integration would be very weak.

214 *Ibid.* at 152, 178.

215 *Ibid.* at 153.

Open secularism might rightly be conceived as providing the best balance between equality, freedom of religion, church-state separation and state neutrality. However, as these examples show, it fits the requirements of a society committed to multiculturalism. Open secularism seeks to give to each citizen, religious or not, equal access to all institutions and equal right to act as full citizens without having to hide or deny their religious identity. For these purposes, it interprets freedom of religion in a very broad, quasi-unlimited, sense, conceives it as a part of freedom of conscience, and requires the State to accommodate the practices, beliefs and symbols of non-dominant religious groups as it does for the religious or secular practices, beliefs and symbols of the dominant group. [216]

The framework for handling harmonization requests: the citizen route

For the purposes of handling harmonization requests that arise through the encounter of different cultures, we saw that the co-chairs favour what they call a "citizen route."[217] A citizen route relies on negotiation and the search for compromises that satisfy all parties. It is a case-by-case approach structured by a contextual, deliberative and reflexive procedural framework that fosters dialogue and self-criticism. A citizen route leads to solutions corresponding to what they call "concerted adjustment."[218] This method is said to allow for a smooth transition from abstract and general principles, such as the duty of reasonable accommodation, to a specific solution in an often unique situation.[219] It seeks to empower those who know best the conditions in the relevant context, while imposing at the same time a set of procedural constraints.[220] In the co-chairs' opinion, "a sound harmonization practices policy must reduce as much as possible the judicialization of interpersonal relations" and the citizen route is the "surest way to avoid one of the party's resorting to courts."[221] This position is supported by various reasons: it is good for citizens to learn to manage their differences; the citizen route avoids congesting the courts; and it fosters the values that underpin interculturalism. The co-chairs

216 Open secularism is somewhat similar in principle to the views of Modood, *supra* note 118; Parekh, *supra* note 118; and Kymlicka, *supra* note 112. See also Geoffrey Brahm Levey and Tariq Modood, eds., *Secularism, Religion and Multicultural Citizenship* (Cambridge: Cambridge University Press, 2009), especially c. 7.

217 *Supra* note 1 at 180.

218 *Ibid.* at 19.

219 *Ibid.* at 19, 40, 64, 167–168, 172.

220 *Ibid.* at 171–173.

221 *Ibid.* at 167 and 173.

maintain that the citizen route proceeds from a "new vision" that is "respectful of diversity" and "based on a general ideal of intercultural harmonization." This new orientation essentially promotes pluralism and enables individuals or groups to achieve "fulfillment according to their choices and traits" and to participate in the dynamic of intercultural exchanges and full integration.[222]

This being said, the citizen route is similar in principle to many dialogical theories and has much in common with multiculturalism.[223] Multicultural theories generally stress the importance of institutionalized dialogue, negotiation, compromises, openness, mutual learning and mutual respect between different cultures and their norms and values under conditions of equality. They tend to conceive the alternative approaches of managing ethnocultural diversity, including the legal route, as fostering confrontation and domination. These alternatives are seen as rigid, as using non-negotiable abstract standards and as working out solutions that are embedded in, and structurally biased toward, one particular cultural view. They accordingly cannot do justice to all parties. According to multiculturalism, solutions to ethnocultural conflicts and disagreements cannot be universally valid for all situations. These solutions are highly contextual and should be adjusted to the different kinds of groups involved. In all cases, they may have transformative effect both on the minority and on the majority or dominant practices and values. The citizen route shares these postulates.[224]

Conclusion

In this paper, I had three objectives. First, I recalled the general context in which the Report had been written. For this purpose, I summarized the sociopolitical processes the Quebec society has followed with respect to the French-Canadians' nationalist ambition, the Canadian policy of multiculturalism, and the Quebec policy of interculturalism. Second, I described what, in my view, might constitute the main contribution of the Bouchard-Taylor Report to the normative and conceptual debates over sociocultural integration. This contribution concerns four issues: cultural integration, collective identity, church-state relations, and the best framework to handle cultural and reli-

222 *Ibid.* at 160.

223 Among these theories, we find, for example, deliberative democracy.

224 This argument is central in Parekh's theory, *supra* note 118, in the introduction and c. 10. See also Tully, *supra* note 118 at n. 49. It is also an important aspect of Modood, *supra* note 118 at 65–66 and 79–80. See also Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000); Charles Taylor, "Foreword. What is Secularism?" in Brahm Levey and Modood, *supra* note 216 at xi.

gious harmonization requests. On each issue, the co-chairs take a stand that appears to be in the middle between two opposing alternatives. All together, their positions form an original conception of sociocultural integration, a conception that we may call "interculturalism." Third, I argued that the co-chairs' interpretation of interculturalism constitutes a form of multiculturalism. Interculturalism, as interpreted, clearly seeks public recognition and political accommodation of group difference, be it cultural or religious. It clearly repudiates the idea that the Quebec State belongs to the dominant national groups and that it can legitimately promote nation-building policies that tend to assimilate or exclude members of non-dominant ethnocultural groups. The State must belong equally to all citizens, and each citizen must have equal access to all institutions and equal right to act as a full citizen in political life, without having to hide or deny their ethnocultural identity. For these purposes, the State must equally recognize and accommodate the history, language, and culture of all ethnocultural groups, dominant and non-dominant.

This paper does not entail that interculturalism, as interpreted in the Report, is detrimental. Multiculturalism might be the best political arrangement possible for Quebec society as it exists today or, perhaps, for any other pluralist society. However, the fact that the Report presents interculturalism as an alternative to multiculturalism, indeed as rejecting it and pursuing the path Quebec has followed in recent decades, has created malaise and confusion. It has been perceived as proposing breaks and new directions where it claims continuity. It seems to me, at the moment, that the social and political debate over integration, collective identity, secularism, reasonable accommodation, and so on, will make no genuine advance until it is clearly explained why interculturalism, as expounded in the Report, does not constitute a rose by any other name.

A Strategic Approach to Judicial Legitimacy: Supreme Court of Canada and the *Marshall* Case*

Vuk Radmilovic†

Recent years have seen a worldwide increase in excursions of judicial power into the political sphere. One obvious effect of this judicialization of politics is to highlight legitimacy concerns associated with the exercise of judicial power. Indeed, how do courts attain and retain institutional legitimacy, particularly in the context of their increasing political relevance? The paper provides an answer to this question by presenting a strategic theory of how courts establish and promote institutional legitimacy and by applying it to the 1999 Marshall *case decided by the Supreme Court of Canada. The case provides a unique opportunity to test judicial responsiveness to factors operating in the external, political environment through the application of a controlled before-after case comparison. The theory shows that courts cultivate legitimacy by exhibiting sensitivities to what are political and non-legal factors.*

Au cours des dernières années il y a eu une augmentation, partout dans le monde, des excursions du pouvoir judiciaire dans la sphère politique. Un des effets évidents de cette judiciarisation de la politique est l'accent mis sur les préoccupations liées à la légitimité de l'exercice du pouvoir judiciaire. En effet, comment font les tribunaux pour parvenir à la légitimité institutionnelle (la conserver), notamment dans le contexte de leur pertinence politique grandissante? L'auteur de l'article fournit une réponse à cette question en présentant une théorie stratégique sur la façon dont les tribunaux établissent et encouragent la légitimité institutionnelle et en l'appliquant à l'affaire Marshall de 1999, jugée par la Cour suprême du Canada. L'affaire Marshall offre une occasion plutôt unique de mesurer l'aptitude de la magistrature à réagir aux facteurs jouant dans le milieu politique extérieur à l'aide d'une comparaison contrôlée «avant-après» de l'affaire. La théorie montre que les tribunaux cultivent la légitimité en affichant une sensibilisation aux facteurs politiques extrajudiciaires.

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Introduction

Recent years have seen a worldwide increase in excursions of judicial power into the political sphere. Comparative public law scholars report that we are witnessing a "Global Expansion of Judicial Power,"[1] moving "Towards Juristocracy,"[2] and living in an "Age of Judicial Power."[3] One obvious effect of this growing judicialization of politics is to highlight legitimacy concerns associated with the exercise of judicial power, for it remains "ultimately unclear what makes courts" appropriate bodies for determining questions of a largely political nature.[4] Indeed, how do courts attain and retain their institutional legitimacy, particularly in the context of their increasing political relevance? According to Gibson et al., "[u]nderstanding how institutions acquire and spend legitimacy remains one of the most important unanswered questions for those interested in the power and influence of judicial institutions."[5]

This article provides an answer to the above question by presenting a strategic theory of how courts establish and promote institutional legitimacy. The theory shows that courts cultivate legitimacy by being strategically sensitive to factors operating in the external, political environment. In particular, legitimacy cultivation requires courts to devise decisions that are sensitive to public opinion, that avoid clashes with key political actors, that do not overextend the outreach of judicial activism, and that employ politically sensitive jurisprudence.

The theory is applied and tested in the context of the Supreme Court of Canada's 1999 *Marshall*[6] case on Aboriginal rights. In fact, the *Marshall* case provides a unique opportunity to test judicial responsiveness to factors operating in the external, political environment by employing a controlled before-after case comparison. This method allows for isolating the explanatory power

1 C. Neal Tate & Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

2 Ran Hirschl, Towards *Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).

3 Kate Malleson & Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World* (Toronto: University of Toronto Press, 2006).

4 Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 Annual Rev. of Political Science 93 at 99.

5 James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, "The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?" (2003) 33 British J. of Political Science 535 at 556.

6 The Supreme Court of Canada delivered two decisions in the *Marshall* case: the so-called *Marshall 1* decision (*R. v. Marshall*, [1999] 3 S.C.R. 456) and the so-called *Marshall 2* decision (*R. v. Marshall*, [1999] 3 S.C.R. 533). When the paper refers to the *Marshall* case it refers to the case as a whole including both decisions.

of a key variable and for controlling the effects of other potential explanatory variables.[7] In the space of two months, the Supreme Court of Canada went out of its way to deliver two decisions in the *Marshall* case—the so-called *Marshall 1*[8] and *Marshall 2*[9] decisions. Both were released by the same set of judges, working on the same court, dealing with the same case and with the same factual record. The only difference in the context of the two decisions had to do with the highly divergent political environments surrounding them. In particular, while the *Marshall 1* decision was produced and delivered in relative obscurity and without much media or political attention, the *Marshall 2* decision was produced and delivered in the face of extreme media attention and political interest, as much of the country grappled with the reaction that the first decision had generated.

For these reasons, the *Marshall* case is particularly suitable for testing the theoretical implications of the legitimacy cultivation theory developed in this paper. In fact, a close analysis of the two decisions shows that in its *Marshall 2* decision, the Supreme Court of Canada departed from much of what it decided in *Marshall 1*. Furthermore, given that the changes between the two decisions were produced by the same set of judges dealing with the same case and the same factual record, other potential explanations of differences between the two decisions, such as those associated with legal or attitudinal factors, can be effectively ruled out. In fact, the legitimacy cultivation theory can go a long way in providing an explanation for why the Supreme Court of Canada contradicted itself, in what has been described as a "precipitous" manner,[10] in the space of two months.

In addition, the paper extends the so-called strategic approach to judicial decision making to Canadian judicial scholarship. While there have been considerable examinations of ideological divisions within the Supreme Court of Canada associated with the attitudinal model of judicial decision-making,[11]

7 Alexander L. George & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Mass: MIT Press, 2005) at 25.

8 *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall 1*].

9 *R. v. Marshall,* [1999] 3 S.C.R. 533 [*Marshall 2*].

10 Russel Lawrence Barsh & James (Sa'ke'j) Youngblood Henderson, "*Marshall*ing the Rule of Law in Canada: Of Eels and Honour" (1999) 11 Constitutional Forum 1 at 15.

11 See e.g. Benjamin Alarie & Andrew J. Green, "Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada" (2008) 58 U.N.B.L.J. 73; Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" (1991) 24 Canadian J. Political Science 289; Peter McCormick & Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer & Co., 1990); C.L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007); Donald R. Songer & Susan W. Johnson, "Judicial

the application of the strategic approach has been much less common.[12] In fact, the topic of strategic behaviour within the judicial branch of Canadian government remains a distinctly under-researched area of interest in Canadian judicial scholarship.

The paper advances in three sections. Section 1 considers and critically assesses the principled-reasoning explanation and the dialogue-theory explanation of how courts attain legitimacy. Section 2 outlines a new, strategic legitimacy cultivation theory of judicial decision making. The theory builds on comparative literatures on public support for the courts and strategic judicial decision making to develop a model of judicial behaviour grounded in a set of testable hypotheses. Section 3 applies and tests the theory in the context of the *Marshall* case. It begins with an introduction to the *Marshall* case followed by: analysis of the *Marshall 1* decision (Section 3.1); the reaction that this decision generated (Section 3.2); and the *Marshall 2* decision (Section 3.3) where the hypotheses developed in Section 2 are applied. Overall, the analysis shows that the *Marshall* case amounts to a stark example of strategic legitimacy cultivation by the Canadian Supreme Court.

1. Existing accounts of how courts attain institutional legitimacy

There is more than one way to conceptualize judicial legitimacy. Fallon's recent summary distinguishes between legal legitimacy, sociological or institutional legitimacy, and moral legitimacy.[13] This paper is focused solely on the second variant—institutional legitimacy. A court or a judicial decision possesses institutional legitimacy "insofar as the relevant public regards it as justified,

Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model" (2007) 40 Canadian J. Political Science 911.

12 But see Tom Flanagan, "Canada's Three Constitutions: Protecting, Overturning, and Reversing the Status Quo" in Patrick James, Donald E. Abelson & Michael Lusztig, eds., *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montreal: McGill-Queen's University Press, 2002); Christopher P. Manfredi, "Strategic Behaviour and the Canadian Charter of Rights and Freedoms" in Patrick James, Donald E. Abelson & Michael Lusztig, eds., *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montreal: McGill-Queen's University Press, 2002); Rainer Knopff, Dennis Baker & Sylvia LeRoy, "Courting Controversy: Strategic Judicial Decision Making" in James B. Kelly & Christopher P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009); Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond" 43 Canadian J. Political Science [forthcoming in 2010]; Lori Hausegger & Stacia Haynie, "Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division" 37 Law & Society Review 635; Roy B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: UBC Press, 2004).

13 Richard H. Fallon, "Legitimacy and the Constitution" (2005) 118 Harvard L. Rev. 1789.

appropriate, or otherwise deserving of support."[14] As such, institutional legitimacy is distinguished from a purely legal legitimacy (whether a particular decision is in accordance with the existing body of law and doctrine regardless of its relation to public support) and from a purely moral legitimacy (whether a particular decision is justified on moral grounds).[15] This section will consider two dominant existing theories of how courts attain institutional legitimacy.

1.1. The principled-reasoning theory

A first theory of legitimacy attainment could be termed a principled-reasoning theory because it suggests that it is the judicial disposition of cases in accordance with internal strictures of the law, such as the principle of *stare decisis* for example, that fosters the institutional legitimacy of courts as well as the legitimacy of individual court decisions.[16] According to this argument, principled reasoning augments institutional legitimacy because it lives up to the public's expectation that courts are procedurally fair and neutral decision-making bodies that decide cases according to legal principles.[17] By not living up to these expectations, judges risk that the public might reject their decisions as illegitimate because they depart from the public expectation of what legitimate judicial function involves.[18] In fact, some legal historians in the U.S. context argue that it was a crisis in the legitimacy of the federal judiciary that led to the emergence of the norm of *stare decisis*.[19]

In the Canadian context this theory is espoused by Choudhry and Howse, for example, who argue that the legitimacy of courts is dependent upon legally principled decision making.[20] As they note, the legitimacy of the Canadian Supreme Court importantly depends on the citizens' view of the Court "as a forum of principle and of reason" and the legitimacy of individual decisions is determined by conceptually valid interpretations of relevant constitutional principles and provisions.[21]

14 *Ibid*. at 1795.

15 *Ibid*. at 1794–1797.

16 See Lawrence M. Friedman *et al.*, "State Supreme Courts: A Century of Style and Citation" (1981) 33 *Stanford Law Review* 773; Jack Knight & Lee Epstein, "The Norm of Stare Decisis" (1996) 40 American J. of Political Science 1018; Thomas G. Hansford & James F. Spriggs II, *The Politics of Precedent on the U.S. Supreme Court* (Princeton: Princeton University Press, 2006).

17 Hansford & Spriggs, *ibid.* at 20–21.

18 Knight & Epstein, *supra* note 16 at 1022.

19 Hansford & Spriggs, *supra* note 16 at 19.

20 Sujit Choudhry & Robert Howse, "Constitutional Theory and the *Quebec Secession Reference*" (2000) 13 Can. J.L. & Jur. 143.

21 *Ibid.* at 145, 163.

There are several problems with this explanation, however. Given that citizens tend to be largely unaware of the subtleties of judicial reasoning in almost any given case, it is hard to see how principled reasoning can by itself secure legitimacy among the public. In fact, one of the difficulties with ascertaining that individual decisions exert *any* effects on public attitudes is the relative lack of awareness of specific decisions among the public.[22] It is simply hard to expect the public to have enough information and expertise to be able to assess whether or not a court's reasoning in any given case is in line with the precedent or amounts to a proper interpretation of the relevant text and therefore deserves their respect. One could additionally claim that principled reasoning could secure legitimacy of judicial institutions if there were a sufficient culture of commentary surrounding high-court reasoning. This argument, however, is similarly problematic given that legal commentary surrounding high-court decision making is largely conducted within a relatively secluded community of judges and legal experts, and is not something that the public engages in, or something that the media reports on.[23]

Furthermore, legal scholars and judges themselves are known for often being at odds about what constitutes a proper application of *stare decisis* and a proper interpretation of relevant statutory and constitutional texts. Hence, given this habitual lack of clarity as to what constitutes a proper application of legal principles in the first place, it is hard to see how applying these principles properly can serve to secure public support for courts. In fact, legal commentary surrounding high court decision making is often profusely critical of the extent to which justices succeed in developing principled jurisprudence.[24] None of this is to suggest that judicial reliance on the legal method plays no role in securing the legitimacy of courts. It *is* to suggest, however, that it cannot be the sole determinant of institutional legitimacy. A more complete account of how courts ensure the attainment and retention of their legitimacy has to include a look at other factors.

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22 See e.g. Jeffery J. Mondak & Shannon Ishiyama Smithey, "The Dynamics of Public Support for the Supreme Court" (1997) 59 The J. Politics 1114; Joseph Fletcher & Paul Howe, "Canadian Attitudes Toward the *Charter* and the Courts in Comparative Perspective" (2000) 6 *Choices* 3 at 4.

23 This is not to suggest that legal commentary is irrelevant and exerts no effects on judicial decision making. On the influence of this factor see, for example, Richard A. Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008) at 205–229.

24 As an example of a profusely critical assessment of Supreme Court of Canada's decision making consider Jamie Cameron's analysis of the Court's jurisprudence regarding the section 7 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. According to Cameron, this jurisprudence is "increasingly bizarre with time" and is overall characterized as being in a state of "doctrinal chaos." Jamie Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 Sup. Ct. L. Rev. 105 at 161, 162.

1.2. The dialogue theory

A second theory of how courts attain institutional legitimacy is the so-called dialogue theory put forward by Hogg and Bushell to describe the character of judicial-legislative relations under the *Charter*.[25] According to this theory, specific features of the *Charter* allow legislative actors to reverse, modify or otherwise avoid unfavourable judicial decisions by introducing new legislation. In this manner, the *Charter* is said not to provide courts with a final word on constitutional interpretation but instead to encourage a dialogue between courts and legislatures—a dialogue that serves to augment the democratic legitimacy of judicial review. As Hogg and Bushell note, "[w]here a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished."[26] Specific sections of the *Charter* that facilitate the dialogue between courts and legislatures are: (1) section 33—the so-called notwithstanding clause, which allows federal and provincial legislatures to override specific *Charter* rights for a specific period of time; (2) section 1—the so-called "reasonable limits" clause, which allows reasonable limits to be placed on *Charter* rights; (3) sections 7, 8, 9 and 12—which are framed in qualified terms and therefore allow for the possibility of corrective legislative action following a judicial pronouncement of unconstitutionality; and (4) section 15—the equality clause, which allows legislative flexibility in complying with a judicial decision.[27]

The dialogue theory, therefore, provides a potential answer to the question of how and why the Supreme Court of Canada remains successful in maintaining its legitimacy since the *Charter* was introduced. Given that judicial pronouncements in *Charter* cases "almost always leave room for a legislative response," the dialogue between legislatures and courts ensures that democratic will does not get usurped by a judicial fiat and that Canadians retain relatively high levels of support for the judiciary.[28] This explanation, however, leaves some very important questions unanswered.

25 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)" (1997) 35 Osgoode Hall L.J. 75; Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited—Or "Much Ado About Metaphors" (2007) 45 Osgoode Hall L.J. 1; see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

26 Hogg & Bushell, *ibid*. at 80.

27 *Ibid.* at 82–91.

28 *Ibid.* at 105.

First, the theory is silent on the question of how the Canadian Supreme Court ensures its legitimacy in areas of law that fall beyond the specific *Charter* sections specified above that facilitate the capacity of the legislative branch to reverse, modify or avoid a judicial decision. For example, legitimacy of the judicial function often comes into play in non-*Charter* cases, such as the 1998 *Secession Reference* case,[29] in which dialogue between courts and legislatures, as described above, is simply not possible. To note another example, how does the Supreme Court ensure legitimacy of its judicial review concerning the section 35 Aboriginal rights jurisprudence, which is beyond the purview of the sections 1 and 33 of the *Charter*? As Hogg and Bushell suggest, "where section 1 of the *Charter* does not apply" the dialogue will not occur as "the court will, by necessity, have the last word."[30]

Second, the dialogue theory fails to capture the complexity of legislative-judicial interactions. According to the theory, dialogue between courts and legislatures commences with a judicial decision that leaves open a possibility on the part of the legislative actors to enact a new legislation in response.[31] By assuming that the judicial branch is free from external constraints in how it interprets constitutional provisions, the theory ignores the extent to which justices engage in strategic adjustment of their decision making *in anticipation* of potentially unfavourable legislative reactions. This could be a particularly weighty oversight given that a large and growing comparative literature on judicial decision making shows that judges commonly adjust their decision making so as to avoid unfavourable governmental reactions.[32] While in the Canadian context not much similar research has been conducted,[33] it remains very much an open and empirical question whether or not Canadian justices exhibit such sensitivities.

29 See Choudhry & Howse, *supra* note 20; Radmilovic, *supra* note 12.

30 Hogg & Bushell, *supra* note 25 at 92.

31 *Ibid.,* at 80.

32 See for example Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington D.C.: CQ Press, 1998); Geoffrey Garrett, Daniel R. Kelemen & Heiner Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union" (1998) 52 International Organization 149; Gretchen Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina* (New York: Cambridge University Press, 2005); Georg Vanberg, *The Politics of Constitutional Review in Germany* (New York: Cambridge University Press, 2005); Jeffrey K. Staton, "Constitutional Review and the Selective Promotion of Case Results" (2006) 50 American J. of Political Science 98; Clifford J. Carrubba, Matthew Gabel & Charles Hankla, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice" (2008) 102 American Political Science Review 435.

33 See *supra* note 12.

The dialogue theory, therefore, provides some insights into the question of how judicial review in Canada attains democratic legitimacy. Perhaps its key strength is the realization that judicial decisions can be significantly modified by legislative actors. However, there are important reasons to question the extent to which the dialogue theory provides a comprehensive account of legislative-judicial relations, and a comprehensive explanation of how the Supreme Court of Canada ensures the attainment and retention of its legitimacy.

2. The theory of strategic legitimacy cultivation

Over the last two decades or so, the literature on public support for the courts has identified several factors that exert effects on the levels of legitimacy courts enjoy.[34] At the same time, the literature on strategic judicial decision making has pointed to the extent to which judges are sophisticated, rational actors whose actions are importantly constrained by factors operating in the external, political environment.[35] Building on these two literatures, this section will outline the legitimacy cultivation theory of judicial decision making and ground it in a set of testable propositions.

According to the public support for courts literature, institutional legitimacy is of fundamental importance for the effective functioning of judicial institutions. There are several reasons for this. The first reason has to do with Hamilton's classic formulation in Federalist 78[36] of the judiciary as having influence over neither the sword nor the purse, and having to rely ultimately on other branches of government, and on the public, for the enforcement of its judgments. This institutional limitation renders the courts particularly dependent on the goodwill of their constituents for compliance, and in the absence of "institutional legitimacy, courts find it difficult to serve as effective and consequential partners in governance."[37] Another reason why legitimacy is important for judicial institutions has to do with the fact that in contrast to

34 Gregory A. Caldeira & James L. Gibson, "The Etiology of Public Support for the Supreme Court" (1992) 36 American J. Political Science 635; Fletcher & Howe, *supra* note 22; Anke Grosskopf & Jeffrey J. Mondak, "Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of *Webster* and *Texas* v. *Johnson* on Public Confidence in the Supreme Court" (1998) 51 Political Research Quarterly 633; James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, "On the Legitimacy of National High Courts" (1998) 92 American Political Science Review 343; Gibson, Caldeira & Spence, *supra* note 5; Valerie J. Hoekstra, *Public Reaction to Supreme Court Decisions* (New York: Cambridge University Press, 2003).

35 See Pablo T. Spiller & Rafael Gely, "Strategic Judicial Decision-making" in Keith E. Whittington, R. Daniel Keleman & Gregory A. Caldeira, eds., *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008).

36 See The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37 Gibson, Caldeira & Baird, *supra* note 34 at 343.

political institutions, which can re-establish their legitimacy every few years via electoral processes, high courts are appointed bodies that do not have recourse to such an automatic institutional refreshment. As the plurality opinion of the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* states, "Supreme Court justices, unlike elected politicians, could not gain back legitimacy by winning at the polls. As a result, popular support, or legitimacy, once lost, would be very difficult to recover."[38]

The comparative literature on public support for the courts is also in agreement about what constitutes institutional legitimacy. Legitimacy is defined through the notion of diffuse support, which refers to the presence of durable, general attachments to courts among the public that persist in spite of specific court decisions that may run counter to the preferences of members of the public.[39] Also, much of the preoccupation of the literature on public support for the courts has been with ascertaining what factors are determinative of diffuse support. As the following discussion illustrates, the literature has provided considerable insights into this question.

The first determinant of diffuse support is the so-called specific support for the courts, which is defined as "satisfaction with the immediate policy outputs."[40] In contrast to the diffuse support, which is identified by measuring durable attachments, specific support is associated with levels of public satisfaction with judicial settlements of particular cases and policy dilemmas. A large number of studies have found that specific support has a direct bearing on the levels of diffuse support for a court.[41] What these studies suggest is that a single decision can alter the amount of support a court enjoys among the public.

A second factor that exerts effects on diffuse support has to do with the capacity of courts to differentiate themselves from other political institutions.[42] Courts achieve this feat primarily by relying on "nonpolitical processes of decision making" and by associating "themselves with symbols of impartiality and insulation from ordinary political pressures."[43] The more

38 *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 at 868–69 (1992) [*Planned Parenthood v. Casey*].

39 Gibson, Caldeira & Spence, *supra* note 5 at 537.

40 *Ibid.* at 537.

41 See e.g. *Ibid.*; Fletcher & Howe, *supra* note 22; Grosskopf & Mondak, *supra* note 34; Hoekstra, *supra* note 34.

42 James L. Gibson, "Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns" (2008) 102 American Political Science Review 59 at 61.

43 *Ibid.*

successful the courts are in this regard, the more they are likely to succeed in establishing and maintaining favourable levels of diffuse support.[44] One can generalize, therefore, that institutional legitimacy or diffuse support for judicial institutions is dependent on the public's perception that the courts' work remains above the fray of regular politics and that, compared to legislatures and executives, courts are apolitical institutions whose decision making derives from principled and impartial reasoning that is devoid of ordinary political calculations.

A third factor significantly affecting diffuse support is the level of judicial activism exhibited by the courts. As Caldeira and Gibson note in the U.S. context, open embrace of judicial activism may lead to the politicization of the Supreme Court, which in turn risks undermining the Court's reservoir of public support and makes the Court dependent for institutional support on those who directly profit from its policies.[45] Judicial deference, on the other hand, renders the public less likely to view the Court through the lens of their political preferences, which is, legitimacy-wise, a more prudent position for the institution to adopt.[46] Hausegger and Riddell's application of Caldeira and Gibson's framework to the Supreme Court of Canada confirms these findings.[47] It is important to stress that the argument linking judicial activism with diffuse support is importantly conditioned by public perception. If activist decisions go without notice among the public at large (if they are, so to speak, conducted in "stealth"), no impact on diffuse support is expected. If institutional legitimacy and diffuse support are indeed important for the effectiveness of courts, what implications do these findings have for the actual decision making of high court judges? One important avenue for answering this question is suggested by the recent "strategic revolution in judicial politics."[48] The key premise of the strategic approach to judicial decision making is that judges are sophisticated, rational actors who are aware that their decision-making liberty is importantly constrained by the political context in which they operate, and by the preferences and anticipatory reactions of other important players within that context. The reasons why justices engage in strategic decision making has to do with a variety of costs that judges, and courts as institutions, can incur as a result of adverse reactions to their deci-

44 See *Ibid.*; Caldeira & Gibson, *supra* note 34 at 648.

45 Caldeira & Gibson, *ibid.* at 659.

46 *Ibid.* at 659–660.

47 Lori Hausegger & Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada" (2004) 37 Canadian J. Political Science 23.

48 Lee Epstein & Jack Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead" (2000) 53 Political Research Quarterly 625.

sions, as well as with a variety of benefits that can be acquired through the rendering of strategically tailored decisions. Hence, to note just two examples, judges can engage in strategic decision making for the sake of increasing their policy-making influence[49] or the institutional position of courts vis-à-vis other major decision-making bodies.[50]

If the strategic decision making literature is correct in postulating that much of judicial behaviour can be explained in terms of sophisticated strategic choice making, and if it is true, as argued above, that institutional legitimacy is of fundamental importance for the proper functioning of courts, then one should expect judicial strategic calculations to be importantly informed by legitimacy considerations. As strategic, sophisticated actors with a distinct interest in maintaining or enhancing the institutional legitimacy of their court, justices can be expected to mould their decision making so as to ensure high levels of public support.[51]

2.1. Hypotheses

Several premises regarding institutional legitimacy of high courts are suggested in the above discussion. First, institutional legitimacy is a fundamental resource of high courts and in its absence the courts would find it extremely difficult, if not impossible, to function in an effective and consequential way. Second, institutional legitimacy can be defined through the notion of diffuse support, which itself refers to a relatively durable reservoir of good will and favourable attitudes a court enjoys among the public. Third, the factors which can exert important effects on the level of diffuse support are: (1) specific support; (2) a perception on the part of the public that courts are "different" kinds of institutions whose work remains above the frame of regular politics; and (3) the character of judicial decision making: overt judicial activism risks politicization of the courts and suggests to the public that courts are not different from other political institutions.

Assuming that judges are strategic, sophisticated actors who are concerned about cultivating diffuse support as their crucial institutional resource, the following four hypotheses can be extracted from the above discussion.

49 See Epstein & Knight, *supra* note 32.

50 See Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).

51 See also Jeffrey K. Staton & Georg Vanberg, "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions" (2008) 56 American J. Political Science 504.

Hypothesis 1: Judicial disposition of individual cases will tend to accord with the state of specific support.

According to this hypothesis, judges are expected to exhibit general sensitivity towards the state of specific support from the public. The reason for this, as discussed above, is that public satisfaction with specific court decisions can have a direct bearing on the levels of diffuse support of the court.

Hypothesis 2: Judges will tend to avoid overt clashes and other entanglements with political actors.

Given that institutional legitimacy is, importantly, linked to the capacity of courts to present themselves as "different" kinds of institutions that act in an apolitical and impartial manner, one can anticipate that judges will seek to cultivate that perception among the public at large. The courts will seek to sustain the perception that their work remains above the fray of regular politics, and their success in this regard can be importantly undermined by political actors who are capable of effectively attacking or otherwise undermining the court in the aftermath of a decision. A variety of actors can perform this role, including governments, interest groups, social movements and their representatives, or even prominent individuals associated with a particular cause, organization or viewpoint. Different cases will attract different actors and part of the judicial strategic challenge is to survey the political environment surrounding a case for the presence of the most important political actors, their constellation, and the intensity of their interests.

In general, one can expect two sets of actors to be particularly important in this regard. The first set contains governmental actors, who are important for several reasons, including the fact that they help determine the implementation of judicial decisions which, as noted above, is directly related to the institutional legitimacy of courts.[52] Governments also tend to be highly attentive observers of judicial decisions, hold a variety of powers over the institutional structure of courts, and can directly affect functioning of courts through such measures as court-packing plans or the less drastic option of fiddling with judicial appointment procedures.[53] A variety of so-called separation of powers models build on these assumptions and argue that courts will strategically avoid conflicts with governmental officials, particularly as the salience officials assign to individual policies rises.[54]

52 Gibson, Caldeira & Baird, *supra* note 34.

53 See e.g. Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006) at 72.

54 See e.g. Helmke, *supra* note 32.

The second set of relevant actors is organized groups. As Epp shows, legal cases do not just magically "pop up" at high courts, but tend to be brought forward by social stakeholders who seek realization of their interests through litigation.[55] Organized groups often play a key role in this process by providing financial resources, sponsoring cases, providing publicity, and otherwise co-ordinating legal mobilization.[56] However, just as organized interests can serve as potential allies of courts in the aftermath of a favourable decision,[57] they can also function as potential enemies leading the backlash against the courts in the aftermath of an unfavourable decision.[58] As Persily notes, group mobilization surrounding a case can have important effects on how the public ultimately evaluates and interprets judicial resolution of a case. For this reason, judges are expected to avoid clashes with organized groups.[59]

Hypothesis 3: Judges will tend towards moderation of judicial activism.

The third hypothesis is related to the second and has to do with the judicial activism. In particular, Caldeira and Gibson's research shows that open embrace of activism by the judiciary can lead the citizenry to view the courts "in the same light as other political institutions," with the consequence that the public's policy preferences become determinative of diffuse support.[60] Somewhat ironically, therefore, when courts engage in greater deference to the existing policy regime, they are more likely to be perceived by the public as being less entangled with politics, and will, therefore, be better able to preserve the perception that they are separated, different, apolitical bodies. It is bold exercise of judicial power and activism, not greater deference to the regime, that will tend to risk politicization of the judiciary and the loss of diffuse support for the courts.

Combining insights from the Hypotheses 1–3, one can further hypothesize that judicial tendency towards moderation of judicial activism will tend to be less (more) pronounced when public opinion is supportive of an activist (deferential) outcome, and/or when dominant political actors tend to be supportive of an activist (deferential) outcome.

55 Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

56 *Ibid.* at 19.

57 *Ibid.* at 201.

58 See e.g. Nathaniel Persily, "Introduction" in Nathaniel Persily, Jack Citrin & Patrick J. Egan, eds., *Public Opinion and Constitutional Controversy* (Oxford: Oxford University Press, 2008) at 12; Michael J. Klarman, "*Brown* and *Lawrence* (and *Goodridge)*" (2005) 104 Mich. L. Rev. 431.

59 Persily, *ibid.*

60 Caldeira & Gibson, *supra* note 34 at 652.

At this stage, it is important to define the concept of judicial activism. In common parlance, judicial activism has a pejorative meaning which suggests that judicial decisions are not grounded in faithful interpretations of constitutional texts or result from the undue influence of personal policy preferences of individual judges.[61] The problem with this definition, however, is that it is inherently "slippery" and subjective.[62] It ultimately suggests that "one person's judicial activist is another person's faithful interpreter."[63] In contrast, judicial activism in this paper is defined as *policy activism*, referring to a "judicial vigour in enforcing constitutional limitations" that occurs whenever a court enforces constitutional limitations to change the policy status quo in the form of an existing statute, regulation or conduct of public officials.[64] As such, policy activism is distinguished from instances of judicial *policy restraint* in which a court decides to uphold the policy status quo. Simply put, the more a court is willing change the policy status quo, the more activist is its decision. In light of the slipperiness of the common meaning of the term "judicial activism," the definition posited here is becoming more common in analyses of judicial decision making.[65]

The above insights also carry significant implications for the development of legal doctrine. In particular, if external factors in the form of public support concerns affect judicial disposition of cases, then one might also anticipate that jurisprudence itself will exhibit sensitivities to such concerns. Legitimacy cultivation, in other words, will push judges to seek reconciliation of their treatment of judicial doctrines with the external constellation of political and social forces.

Hypothesis 4: Jurisprudence will tend to be informed by the tenor of the extant political environment.

The opinion of the U.S. Supreme Court in *Planned Parenthood v. Casey* is particularly illustrative of how doctrines can be determined by tensions and values present within the larger political context and by judicial concerns

61 See e.g., Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525 at 531; Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009) at 344–5.

62 Choudhry & Hunter, *ibid*. at 531.

63 Friedman, *supra* note 61 at 345.

64 Peter H. Russell, Rainer Knopff & Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1989) at 19.

65 See e.g. Garrett, Kelemen & Schulz, *supra* note 32; Choudhry & Hunter, *supra* note 60.

about preserving institutional legitimacy. In that case, the U.S. Supreme Court stated that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[66] The clear implication, as Whittington notes, is that "[a]lthough contemporary theory and politics can support a wide range of conflicting constitutional interpretations, there remain limits on what the Court plausibly can claim that the Constitution means before it raises substantial questions about its actions."[67]

Finally, since the above arguments linking the character of judicial decision making to the cultivation of diffuse support depend on the visibility of judicial actions to the public at large, the above hypotheses are expected to be amplified in cases that garner high public visibility. In highly visible cases, the public is particularly attentive to the courts' behaviour and judicial dispositions of such cases are expected to have disproportionate effects on diffuse support and, therefore, on institutional legitimacy. This expectation corresponds with Mondak and Smithey's finding that the key prerequisite for specific support to exert direct effects on diffuse support is the "availability of information" on the part of the public.[68] In the Canadian context, this finding has been confirmed by Fletcher and Howe, who note that "awareness of specific cases can be an important mediating factor [between individual decisions and general attitudes], for the connection between specific and diffuse support is often stronger among those with some awareness of a given ruling."[69] As a result, one can additionally hypothesize that *in highly visible cases the courts will exhibit even greater sensitivities to the state of specific support, be extra keen to avoid clashes with political actors, be less likely to engage in activist decision making than in non-visible cases, and be particularly inclined to utilize and devise doctrines that reflect the tenor of the extant political environment*.

The issue of visibility or transparency of the political environment is emphasized in Vanberg's analysis of legislative-judicial relations in Germany, which explores how public support concerns can induce strategic judicial calculations.[70] Starting from the above-described implementation problem courts

66 *Planned Parenthood v. Casey, supra* note 38 at 865.

67 Keith E. Whittington, "Taking What They Give Us: Explaining the Court's Federalism Offensive" (2001) 51 Duke L.J. 477 at 501.

68 Mondak & Smithey, *supra* note 22 at 1121.

69 Fletcher & Howe, *supra* note 22 at 49.

70 Vanberg, *supra* note 32; see also Staton, *supra* note 32; Jeffrey K. Staton, *Judicial Power and Strategic Communication in Mexico* (Cambridge: Cambridge University Press, 2010) (building on Vanberg's model, Staton shows that judges promote their decisions in specific cases in order to help ensure their implementation and their accurate representation among the public).

everywhere face, Vanberg argues that legislatures' own electoral connections and their fear of a potential public backlash for going against a popular Court or a decision can serve as an effective enforcement mechanism for judicial decisions. For this mechanism to kick in, however, the public needs to be able to monitor legislative reactions to court decisions. Consequently, Vanberg argues that popular courts should be more likely to engage in activism when public awareness is high.[71] In contrast to Vanberg, this paper suggests that visibility has more complex effects on judicial decision making. The Courts' quest for maintaining relatively high levels of diffuse support implies that highly visible cases will heighten judicial sensitivity to all of the strategic considerations described above, including the tendency to moderate (and not increase) the levels of judicial activism.

Vanberg's prediction that judicial activism will tend to be more prevalent when public awareness of individual cases is higher makes sense in light of the problem he is primarily concerned with, which has to do with implementation of judicial decisions. Surely, to the extent that relatively popular courts are primarily concerned with ensuring that governmental actors implement their decisions, they may indeed tend to be more activist when public awareness of governmental reactions to court decisions is likely to be higher. There are reasons to believe, however, that other concerns might play upon the minds of judges that these concerns can interfere with this prediction. As discussed above, according to a body of empirical work associated with the public support for the courts literature, legitimacy of judicial institutions importantly derives from their insulation from ordinary political pressures. An open embrace of activism, on this account, risks politicization of the judiciary and, ultimately, weakening of its institutional legitimacy and power.[72] To the extent that judges are primarily concerned about preserving or augmenting their public support, therefore, they may be less and not more likely to deliver activist decisions in highly visible cases. As the analysis below shows, this is one of the key messages of the Supreme Court of Canada's behaviour in the Marshall case.

It is important to furthermore point out that judges are not invariably expected to follow the hypotheses outlined above. Judicial decision making is a complex phenomenon determined by a variety of factors. The ideological inclinations of individual judges, or judicial concerns about proper interpretations of internal strictures of the law, for example, may overtake legitimacy con-

71 Vanberg, *supra* note 32 at 39.
72 Caldeira & Gibson, *supra* note 34.

siderations in some cases. Also, relevant information from the larger political environment might be unavailable or imperfect, leading even strategic judges to misread the political moment. In light of this, judges can, and occasionally do, deliver very activist decisions in highly visible environments.[73] Nevertheless, assuming that justices are strategic decision-makers, and given the importance of institutional legitimacy for the overall effectiveness of courts, one can expect that over time the evolution of judicial decision making will tend to reflect the aforementioned hypotheses, particularly in cases garnering a high degree of visibility.

Finally, in order to assess their effect on judicial decision making, relevant variables have to be examined in their *pre-decision* political environment. The pre-decision focus is of critical importance because of the assumption that it is judicial awareness of these factors that exerts impacts on the consequent disposition of cases.

3. The *Marshall* case

In the 1999 *Marshall* case, the Supreme Court of Canada faced the question of whether Mi'kmaq Aboriginals had a treaty right to catch and sell fish. At the centre of the case was Donald Marshall Jr., a member of the Membertou Mi'kmaq Aboriginal community, whose previous encounter with the Canadian justice system resulted in an eleven-year prison sentence based on a wrongful conviction. This time around he was facing three separate charges: fishing without a licence, fishing during closed season with prohibited nets, and selling eels without a licence.

Much of the importance of the case had to do with exploring commercial aspects of Aboriginal treaties, which is an issue the Supreme Court has addressed on previous occasions. In 1996 *R. v. Van der Peet*[74] case, the Supreme Court confronted the question of whether members of the Sto:lo Nation had an Aboriginal right to sell or trade fish. In that case, the majority found that while the Sto:lo people did engage in exchange of fish before their contact with Europeans, this practice was incidental and not integral to the Sto:lo culture. For this reason, the Aboriginal defendant in the case was convicted and the right to sell or trade fish was not established. Another relevant precedent was *R. v. Gladstone* (1996)[75] which dealt with the question of whether

73 See, for example, *Bush v. Gore,* 531 U.S. 98 (2000) for a case in which the U.S. Supreme Court decided a highly controversial and visible case in a an activist manner.

74 *R. v. Van der Peet,* [1996] 2 S.C.R. 507 [*Van der Peet*].

75 *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*].

members of the Heiltsuk band had an Aboriginal right to trade herring spawn on kelp on a commercial level. In *Gladstone*, the majority ruled that prior to the contact with Europeans the practice of selling large quantities of herring spawn on kelp to other Aboriginal tribes was an integral part of the culture of the Heiltsuk people, and thereby recognized the commercial rights of the Heiltsuk people with respect to the herring spawn on kelp.

According to Bruce Wildsmith, who defended Marshall at the Supreme Court, the *Marshall* case was particularly suitable for exploring treaty-based commercial rights of the Mi'kmaq people. As he notes, there was a clear evidence of commercial activity as the sale of eels was observed by fisheries officers, the Mi'kmaq people have traditionally harvested for eels, and conservation issues did not come into play in the case.[76] In fact, given the notoriety and public personality status of Donald Marshall Jr., some wondered whether the whole case was manufactured as a test case for exploring commercial treaty rights of the Mi'kmaq people. Wildsmith underscores that this is not the case, and that Marshall was fishing for therapeutic reasons having to do with getting back to his roots, as well as to ensure subsistence for himself and his family.[77] At the Supreme Court, Marshall's defence team did not dispute that Marshall was fishing and selling fish contrary to federal regulations, but contended instead that he had a right to catch and sell fish pursuant to the 1760–61 treaties concluded between the British and the Mi'kmaq.

Four interveners appeared at the Supreme Court: The Attorney General of New Brunswick and the West Nova Fishermen's Coalition intervened in support of the federal government, and argued against the establishment of Mi'kmaq treaty rights to catch and sell fish; the Union of New Brunswick Indians and the Native Council of Nova Scotia, on the other hand, intervened in support of Marshall's cause.

3.1. *Marshall 1*

The Supreme Court of Canada delivered its first decision in the *Marshall* case on September 17, 1999. A five-member majority upheld the Marshall's contention and rendered an acquittal. Much of the Court's attention was centred on this critical passage from the treaties involving Mi'kmaq pledges to the British:

76 Bruce H. Wildsmith, Q.C., "Vindicating Mi'kmaq Rights: The Struggle Before, During and After *Marshall*" (2001) 19 Windsor Y.B. Access Just. 203 at 216.

77 *Ibid.*

> And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Acadia.[78]

This clause was interpreted to give the Mi'kmaq a *right to bring* goods to trade at the specified truckhouses, as well as a corresponding or incidental *right to obtain* goods for the purposes of such trading through their traditional hunting, fishing, and gathering activities.[79] These rights were held to have survived the eventual termination of the truckhouse regime.

The Supreme Court of Canada is usually careful of potential distributional implications that recognition of Aboriginal commercial harvesting rights may have on the industry in question, as well as on other economic actors vying for the same resource. In *Gladstone*,[80] for example, the Court ruled that providing Aboriginal people with a preferential and unlimited fishing right could have the potential of absorbing the whole fishery, and completely displacing non-Aboriginal access to resources. In order to avoid such an outcome, the Court in *Gladstone* proclaimed that any right granting Aboriginal fishers preferential access to a resource would have to be internally limited. In light of similar concerns, the majority in *Marshall 1* imposed two limitations on the Mi'kmaq rights.[81] First, an internal limitation was incorporated into the rights so that the rights "do not extend to the open-ended accumulation of wealth," but are limited to securing "necessaries," or "moderate livelihood," for Aboriginal families.[82] Second, the Court specified that rights are also susceptible to governmental regulation, which can be justified under the justificatory test the Court first developed in the *R. v. Sparrow* (1990)[83] decision. It is important to note that the Court ruled that neither of these two types of limitations applied to Marshall. He was pursuing a small-scale commercial activity to support his family that clearly fell within the "moderate livelihood" threshold,[84] while the government did not seek to justify any of the prohibitions on which he was charged. The government's focus has been on disputing

78 *Marshall 1*, *supra* note 8 at para. 5.
79 *Ibid.* at para. 56.
80 *Gladstone, supra* note 75.
81 During the hearing of the *Marshall* case some justices (including Justice Binnie who wrote the majority opinion) expressed particular concern about the extent to which Aboriginal rights in question are and can be limited, both internally (in terms of their definition) and externally (by governmental action).
82 *Marshall 1*, *supra* note 8 at para. 7.
83 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].
84 *Marshall 1*, *supra* note 8 at para. 8.

the existence of rights in the first place.[85]

A two-member minority of the Supreme Court, on the other hand, argued that the so-called truckhouse clause established "neither a freestanding right to truckhouses nor a general underlying right to trade outside of the exclusive trade and truckhouse regime."[86] Rather, the clause obliged the Mi'kmaq to trade only with the British, and in that sense it established a limited "right to bring" trade goods to the truckhouses.[87] Once those truckhouses ceased to exist, the minority held, so did the Mi'kmaq limited right to bring goods to trade.

Marshall 1 amounted to a considerable victory for Aboriginal peoples that was described as a "remarkable example of the generous interpretation of an Indian treaty."[88] It was, in fact, the first time that the Supreme Court affirmed Aboriginal treaty rights to fish for commercial purposes.[89] According to Wildsmith, the Mi'kmaq came away from the Court's decision with "an immediate right to harvest and sell fish and wildlife in sufficient quantities to support a moderate livelihood" that "was not contingent on a new trial or any other event."[90]

It is important to stress that the pre-decision environment surrounding the *Marshall 1* decision was characterized by a very low degree of visibility. In fact, none of the major media organizations (television or newspaper) covered the 1998 hearing, which ensured that the Canadian public remained very much unaware of the case the Supreme Court was confronting.[91] Recalling the briefing that preceded the decision, James O'Reilly, the Court's executive legal officer responsible for media relations, noted the following:

> There were only three or four people in the room for *Marshall*. There was only one person that actually knew what that case was about . . . The other people in the room came over because they saw Donald Marshall's name on something and they wanted to know what it was about. They had no idea what the case was about. And you know, when I said it was a case about catching eels, I think they turned around and left the room.[92]

85 *Ibid.* at para. 4.
86 *Ibid.* at para. 70.
87 *Ibid.* at para. 107.
88 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2007) at 28–38.
89 Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006) at 140.
90 Wildsmith, *supra* note 76 at 226.
91 Sauvageau, Schneiderman & Taras, *supra* note 89 at 145.
92 *Ibid.*

3.2. Reaction to *Marshall 1* (or the pre-decision political environment of *Marshall 2*)

The Mi'kmaqs' reaction to the decision was exuberant. Recognition of fishing rights for the purposes of attaining a moderate livelihood amounted to a prospect of reaching the long-sought-after goal of financial and economic independence for many Aboriginal families whose economic fortunes were tied to the state's welfare system. Across Nova Scotia and New Brunswick, Aboriginal fishers rushed to deliver on that prospect by putting lobster traps into the sea even though in some of the areas lobster season was still officially closed.

Non-Aboriginal fishers, for their part, emphasized that the existing resources could not accommodate the infusion of Aboriginal fishers. Dealing with a vulnerable industry that had already seen the depletion of the profitable cod fishery, they expressed bitter resentment towards Native actions. As one of them proclaimed: "We're regulated to death and not regulating natives on the same basis as we are is complete racism."[93] Non-Aboriginal fishers braced themselves for a fierce protection of their interests, which would soon involve taking it to the streets and to the sea.

The federal government was slow to react to the situation that was fast developing. The eventual crisis became responsibility of fisheries minister Herb Dhaliwal, whose initial response included a call for patience and restraint followed by a seclusion aimed at further analyzing the issue.[94] When he finally spoke out, Dhaliwal said that he could not order the Mi'kmaq off the water because the rights affirmed by the Supreme Court were applicable immediately, though he expressed a "resolve that fishing be conducted in an orderly and regulated manner."[95]

Other options were also considered. In order to evade a "potentially explosive situation," Premier John Hamm of Nova Scotia called on Prime Minister Chrétien to suspend the newly proclaimed Aboriginal rights.[96] Leader of Official Opposition, Preston Manning, joined in the request for an immediate suspension of the Court's ruling, emphasizing that "what you want is one set of laws and one set of regulations that everybody can live with" and not a

93 Ken Coates, *The Marshall Decision and Native Rights* (Montreal: McGill-Queen's University Press, 2000) at 134.

94 *Ibid*. at 131.

95 Sauvageau, Schneiderman & Taras, *supra* note 89 at 153.

96 Coates, *supra* note 93 at 135.

"special status" designation for one set of Canadians.[97] In response, the federal government seriously considered the option of suspending the decision and engaged in "studying the legalities of the issue."[98] In fact, in one of his only public statements on the whole *Marshall* affair, Prime Minister Jean Chrétien stated that "[t]he Justice Department and the minister of fisheries is looking into [the issue of suspension]."[99]

In the meantime, the conflicts escalated. The most dramatic confrontation occurred on October 3 when, in a pre-dawn attack, a 150-boat armada of non-Aboriginal fishers destroyed some 3,000 Aboriginal lobster traps in Miramichi Bay, New Brunswick, vandalizing the fishing gear in the process.[100] Upon the return of non-Aboriginal fishers to the shore, the RCMP had to step in to separate the warring parties amidst Aboriginal pledges of revenge. Violence then spread throughout the local area. The Brunt Church reserve school was broken into and the principal's office was vandalized.[101] "Angry mobs" of unruly non-Aboriginal fishers also attacked local fish processing plants, ransacking the buildings, destroying computers, and overturning vending machines.[102] Aboriginals retaliated by torching trucks of non-Aboriginal owners, which resulted in some of their own vehicles being torched in return.[103] The intensity of the situation is perhaps best illustrated by the following statement of one of non-Aboriginal fishers: "Nobody wants [violence] but we've all got guns."[104]

Dhaliwal responded to the escalation by holding meetings with both Aboriginal and non-Aboriginal groups, which served to ease the tensions somewhat. It was not until mid-October, however, that the federal government set about with a concrete plan to deal with the situation. The plan entailed conducting negotiations with individual Aboriginal bands on separate fishing allocations.[105]

While the media expressed relatively little interest in the case when the *Marshall 1* decision was initially released, the coverage exploded as violence

97 Daniel Leblanc, "Ottawa Gropes for Response to Fish Battle: PM and Fisheries Minister Send Conflicting Signals as Tensions Rise" *The Globe and Mail* (5 October 1999) A1.
98 Rick Mofina, "Pressure Building for Feds to Limit Indian Fishing Rights" *The Gazette* (29 September 1999) A12.
99 *Ibid.*
100 Coates, *supra* note 93 at 139.
101 *Ibid.* at 140.
102 *Ibid.*
103 *Ibid.*
104 *Ibid.* at 136.
105 *Ibid.* at 133.

and conflict intensified. As Figure 1 shows, compared to the week in which the decision was released, media interest in the case grew considerably in the subsequent two weeks. The media placed particular emphasis on portrayals of violence such as that of burned buildings, shoving matches, vandalism, boat confrontations, and Mi'kmaq men dressed in army fatigues.[106] The Court and the decision itself were also placed "under a magnifying glass."[107] Excerpts from the decision were published, while columnists devoted considerable energies to scrutinizing the Court's reasoning. Sauvageau et al.'s analysis of media coverage of the decision shows that "most commentary was critical of the court."[108] In fact, major newspapers published a total of thirty articles that were negative towards the Court and the decision, and only one article that was positive (see Figure 2). Also, a "third of the headlines about the court were negative and tore into the institution with phrases such as 'Supreme Court ignites the fire' . . . 'Supreme anarchy' . . . 'The Supreme Court as battering ram' . . . 'Supreme Blindness' . . . and 'Supreme Court, supreme arrogance.'"[109]

Figure 1
Newspaper and TV Coverage in the Aftermath of *Marshall 1*

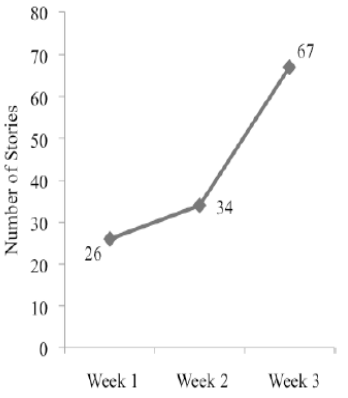
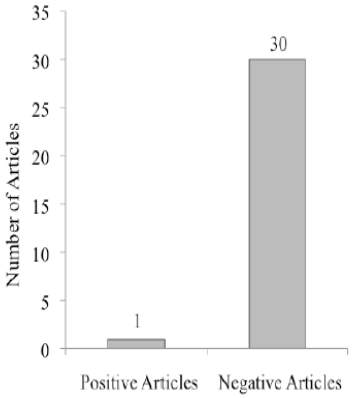


Figure 2
Character of Newspaper Coverage in the Aftermath of *Marshall 1*



106 Sauvageau, Schneiderman & Taras, *supra* note 89 at 155.
107 *Ibid.* at 158.
108 *Ibid.*
109 *Ibid.*

The pressure on the Supreme Court continued to pile up. Even Dr. Patterson, the Crown's principal witness on the history of the treaties during the proceedings, lambasted the Court by accusing it of misconstruing his testimony and engaging in "a selective use of evidence."[110] By October 25, the governments of Alberta and Ontario questioned the Supreme Court appointment process and demanded a greater provincial input for the sake of curbing the Court's tendencies towards judicial activism.[111]

In sum, in three short weeks following the release of *Marshall 1* the political environment surrounding the *Marshall* case had undergone a profound change. From the relative obscurity in which it was litigated and in which the *Marshall 1* decision was delivered, the case advanced into the limelight, garnering an extraordinary amount of public attention and interest. It is in this context of high visibility that the Supreme Court of Canada decided to deliver a "reprise," or a "clarification," to its *Marshall 1* decision.

3.3. *Marshall 2*: Legitimacy Cultivation at Work

One of the interveners in the case, West Nova Fishermen's Coalition, applied to the Supreme Court for a rehearing of the *Marshall* appeal and for a stay of the existing judgment pending such rehearing. Instead of responding to the Coalition's request by writing a one- or two-line decision which is the standard practice on such motions, on November 17, 1999, the Court returned a 32-page, 48-paragraph long decision that came to be known as the *Marshall 2*. Rendering such a long reprise shocked the Canadian legal community, as it amounted to an unprecedented and unusual step for the Court.[112] It is also important to stress that in sharp contrast to *Marshall 1*, the second decision was produced and delivered in the context of the enormous visibility and public interest that ensued *Marshall 1*. Sauvageau et al.'s statement is to the point: "While *Marshall 1* arrived to relatively little fanfare, the same cannot be said of *Marshall 2*."[113]

The Court's reprise dismissed the Coalition's motion, which sought more detail on the power of federal government to regulate the treaty rights recognized in *Marshall 1.* The Court stated that "[t]he Coalition's motion rests

110 Robert Fife, "High Court Accused of 'Distorting' History" *National Post* (28 October 1999) A1.

111 John Ibbitson & Steven Chase, "Ontario Joins Alberta: Rein In Top Court" *The Globe and Mail* (25 October 1999) A1.

112 See e.g. Wildsmith, *supra* note 76 at 228; Sauvageau, Schneiderman & Taras, *supra* note 89 at 138; Leonard I. Rotman, "'My Hovercraft is Full of Eels': Smoking Out the Message in *R. v. Marshall*" (2000) 63 Sask. L.R. 617 at 629.

113 Sauvageau, Schneiderman & Taras, *supra* note 89 at 162.

on a series of misconceptions about what the September 17, 1999 majority judgment decided" and that the responses to all of the Coalition's queries "are already evident in the . . . majority judgment and the prior decisions of this Court therein referred to."[114] What remains unclear, however, is why the Court rendered such a long reprise if answers to all of the Coalition's queries were clearly presented in *Marshall 1.* Furthermore, while the Coalition's motion was focused on the issue of governmental regulation, in its response the Court went much beyond that issue and extensively revisited the issue of the definition of the right itself.

Another interesting aspect of *Marshall 2* is that the two dissenting justices from *Marshall 1* joined the majority so that the *Marshall 2* decision was signed collectively by "The Court." According to Bienvenu, Supreme Court judges have a tendency to come together in this manner when dealing with cases of a "politically sensitive" character[115]—as they, for example, had done a year earlier in the landmark 1998 *Secession Reference* case[116] and as they would do again in the 2004 *Same-Sex Reference*[117] case. Furthermore, this practice could be directly linked to legitimacy concerns given that, as Friedman et al. argue, "[s]eparate opinions tend to sap the legitimacy of a court" because they imply that a single conclusive settlement of an issue does not exist.[118]

This is to suggest that, in rendering *Marshall 2*, the Court was exhibiting apparent sensitivities to the political environment developing outside the courtroom. It is hard to escape the conclusion, in fact, that it was the change in the political environment surrounding the *Marshall* case that compelled the Court to come together and deliver a new, unprecedented, follow-up to the *Marshall 1* decision. As the rest of this section illustrates, a close analysis of the discrepancies between the two decisions provides strong support for the claim that it was legitimacy concerns that weighed heavily on the minds of the justices.

In spite of the Court's claim that the *Marshall 2* decision amounts to nothing but an explication of what was stated in *Marshall 1*, several scholars have pointed out that the second decision covers new ground and departs significantly from

114 *Marshall 2, supra* note 9 at paras. 2, 9.

115 Pierre Bienvenu, "Secession by Constitutional Means: Decision of the Supreme Court of Canada in the *Quebec Secession Reference*" (1999) 21 Hamline J. Pub. L. & Pol'y 1 at 41.

116 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

117 *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

118 Lawrence M. Friedman *et al.*, "State Supreme Courts: A Century of Style and Citation" (1981) 33 Stan. L. R. 773 at 785.

what the Court stated in *Marshall 1*.[119] According to Saunders, the discrepancies between the two decisions could be classified under four categories: (1) *geographic scope of the right*; (2) *beneficiaries of the right*; (3) *resources included under the right*; and (4) *character of the right itself*.[120] Each will be considered below.

With respect to the *geographic scope of the right*, the *Marshall 2* decision specifies a clear restriction. The Court notes that the treaties in question "were local and the reciprocal benefits were local," and that, therefore, "the exercise of the treaty rights will be limited to the area traditionally used by the local community."[121] The onus is on the Aboriginal claimant of the right to demonstrate that he or she was exercising "the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds."[122] Yet, this geographic restriction on the exercise of the right is simply absent from the *Marshall 1* decision. *Marshall 1* decision mentions neither that the right is local, nor that the reciprocal benefits are local, nor that the claimant has to show he was exercising rights in traditional grounds.[123] As discussed above, the only restriction the Court includes in its definition of the right in *Marshall 1* has to do with the attainment of moderate livelihood.

That the Court was not concerned with the geographic restriction in *Marshall 1* is further evidenced by the fact that Marshall himself was fishing well outside of his community's local grounds. Marshall was a member of the Membertou Indian Band, whose territory is located on the north side of Cape Breton Island. He was fishing in Pomquet Harbour, which is located on the mainland of Nova Scotia and Marshall was, therefore, well outside the territory of his band. Yet, these facts did not come to play in the *Marshall 1* decision. The *Marshall 2* decision, in this sense, directly contradicts the Court's acquittal of Marshall in the first decision.[124] As Saunders concludes, "if what the Court said about this issue in *Marshall #2* is true, then what the majority concluded in *Marshall #1* cannot be correct."[125]

119 See for example Rotman, *supra* note 112 at 619; Phillip M. Saunders, "Getting Their Feet Wet: The Supreme Court and Practical Implementation of Treaty Rights in the *Marshall* Case" (2000) 23 Dal. L.J. 48 at 85; Sauvageau, Schneiderman & Taras, *supra* note 89 at 138; Wildsmith, *supra* note 76 at 229; Barsh & Henderson, *supra* note 10 at 16–18.

120 Saunders, *ibid.* at 67.

121 *Marshall 2, supra* note 9 at para. 17.

122 *Ibid.*

123 Saunders, *supra* note 119 at 73.

124 See Wildsmith, *supra* note 76 at 231; Leonard I. Rotman, "Developments in Aboriginal Law: The 1999–2000 Term, Part I: *R. v. Marshall*" (2001) 13 Sup. Ct. L. Rev. (2d) 1 at 26–27; Saunders, *ibid*.

125 Saunders, *ibid.* at 75.

In terms of the *beneficiaries of the right,* the Court again outlines a restriction in *Marshall 2* that is absent from *Marshall 1.* The *Marshall 2* decision specifies that "the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs."[126] This amounts to an important restriction on the rights because it implies that beneficiaries of the rights are not individual members of Aboriginal communities, but the communities themselves. Individual fishers, by implication, can exercise rights only "by authority of the local community." The Court, however, makes no mention of the "collective" right or of the exercise of communal authority over individual members in *Marshall 1*.[127] At one point, the Court's actual formulation in this regard refers to the "*appellant's* treaty right to fish for trading purposes" and to "*his* right to trade."[128] What is more, this restriction again cannot be squared with the facts of the case. As Wildsmith notes, there was no evidence that Marshall possessed a communal permission to exercise rights nor did any of the courts that dealt with the case, including the Supreme Court, considered any evidence or argument in this regard.[129]

On the issue of the *resources included under the right*, there are two ways in which *Marshall 2* is again more restrictive than *Marshall 1.* The first issue deals with the definition of the word "gathering." While in *Marshall 1* the Court uses only the word "traditional" to refer to the type of activities and resources that could be gathered by Aboriginal rights claimants, in *Marshall 2* the definition of the word "gathering" becomes much more elaborate. According to the Court:

> The word "gathering" in the September 17, 1999 majority judgment was used in connection with the types of resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760–61 treaties. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed.
>
> . . .
>
> The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower.[130]

126 *Marshall 2, supra* note 9 at para. 17.
127 Saunders, *supra* note 119 at 70; Rotman, *supra* note 124 at 27; Wildsmith, *supra* note 76 at 231.
128 *Marshall 1, supra* note 8 at para. 66, emphasis added; see Saunders, *supra* note 119 at 70.
129 Wildsmith, *supra* note 76 at 231.
130 *Marshall 2, supra* note 9 at paras. 19–20.

By introducing new components to the definition of the word "gathering"—i.e., inclusion in traditional Aboriginal economies and presence in the contemplative perspective of the parties at the time—the Court significantly reduced the evolutionary potential of the rights in question, and therefore constricted the scope of rights protection.[131] In fact, in subsequent litigation dealing with Mi'kmaq logging rights, the Supreme Court of Canada relied on this formulation, declaring that the Mi'kmaq had no treaty rights to log or sell logs given that "logging was not a traditional Mi'kmaq activity."[132]

The second issue deals with the range of species included under the categories of hunting and fishing. In *Marshall 1*, the Court spoke of fishing and hunting activities "generically," as encompassing the full range of wildlife and fish.[133] Hence, the majority stated that the 1760 treaty affirms "the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed 'necessaries.'"[134] The flavour of the *Marshall 2* decision, however, is of a species-to-species approach, and of a right that is restricted to the particular species (eels) Marshall fished for.[135] According to the Court:

> The *Marshall* appeal . . . related to fishing eel out of season contrary to federal fishery regulations. In its judgment of September 17, 1999, a majority of the Court concluded that Marshall had established the existence and infringement of a local Mi'kmaq treaty right to carry on small scale commercial eel fishery.[136]

While this could be seen as a point of emphasis rather than a manifest inconsistency between the two decisions (Marshall, after all, did fish for eels), it is worth noting that the change in emphasis is again in the direction of further restriction of the right.

Finally, in terms of the *character of the right itself* there are important differences between *Marshall 1* and *Marshall 2.* As noted above, the *Marshall 1* decision defined the right in rather straightforward terms as including the *right to bring* goods to trade and the corresponding *right to obtain* such goods for the purposes of attaining moderate livelihood. In *Marshall 2*, however, the Court goes well beyond this formulation:

131 Saunders, *supra* note 119 at 76–77.
132 *R. v. Marshall*; *R. v. Bernard,* 2005 SCC 43, [2005] 2 S.C.R. 220 at para. 34.
133 Wildsmith, *supra* note 76 at 224.
134 *Marshall 1, supra* note 8 at para. 4.
135 See for example Wildsmith, *supra* note 76 at 224; Barsh & Henderson, *supra* note 10 at 17.
136 *Marshall 2, supra* note 9.

> the Mi'kmaq treaty right to hunt and trade in game is not now, any more than it was in 1760, a commercial hunt that must be satisfied before non-natives have access to the same resources for recreational or commercial purposes. The emphasis in 1999, as it was in 1760, is on assuring the Mi'kmaq *equitable access* to identified resources for the purpose of earning a moderate living.[137]

This addition of the emphasis on assuring "equitable access" amounts to an important redefinition of the right proclaimed in *Marshall 1*.[138] According to Saunders, "[t]he fact that the words 'equitable access' did not appear in the [first] decision, let alone in the paragraphs which defined the treaty right, gives some cause for doubt about the centrality of this concept to the majority's reasoning [in *Marshall 1*]."[139]

So, how helpful is the theory of strategic legitimacy cultivation in explaining the Court's rather unusual step to deliver the *Marshall 2* decision? As the following discussion illustrates, the Court's actions fall very much in line with predictions of the theory.

Hypothesis 1: Judicial disposition of individual cases will tend to accord with the state of specific support

It is evident from the above discussion that the *Marshall 1* decision provoked a rather negative reaction from the Canadian public in general, and from the Eastern Canadian public in particular. According to Coates, there was much "public anger" and "discontent swirling around" *Marshall 1*.[140] This public discontent is particularly evident in media accounts of *Marshall 1* which, as argued above, were largely negative of the Court (see e.g. Figure 1). As Sauvageau et al. note, the implication of much of this coverage "was that justices were emotionally, physically, and intellectually removed from mainstream society."[141]

There is also direct evidence that the *Marshall 1* decision resulted in the loss of public support for the Court. While the Atlantic region generally manifests the highest levels of support for the courts in Canada,[142] an Angus Reid poll conducted on November 4th and 14th of 1999, and therefore right during the interlude between the two *Marshall* decisions, shows Atlantic Canadians (56%) together with Albertans (57%) as being the most unhappy with the

137 *Ibid.* at para. 38, emphasis added.
138 Saunders, *supra* note 119 at 80; Barsh & Henderson, *supra* note 10 at 16.
139 Saunders, *ibid.* at 80.
140 *Coates*, *supra* note 93 at 18.
141 Sauvageau, Schneiderman & Taras, *supra* note 89 at 159.
142 Fletcher & Howe, *supra* note 22 at 14.

power of the Canadian judiciary.[143] According to Fletcher and Howe, this "apparent upswing" in public opposition to courts in Atlantic Canada is most likely due to the general dissatisfaction with the *Marshall 1* decision.[144] This suggests that the outcry from the *Marshall 1* decision might have started to pluck away at the Court's diffuse support, at least in the Atlantic region.

On the basis of these factors, one can speculate that the state of specific support was at least in part responsible for the Court's unprecedented decision to deliver a reprise to *Marshall 1.* As the legitimacy cultivation theory outlined above specifies, high visibility exaggerates judicial sensitivities for producing decisions that accord with the state of specific support. In fact, numerous commentators have concluded that much of the purpose behind the *Marshall 2* decision was to dampen the public anger that resulted from *Marshall 1*, and to redeem the Court in the eyes of the public.[145] The primary method by which the Court sought redemption in the eyes of the public involved blunting the activist edges of the *Marshall 1* decision, and bringing the decision better in line with public preferences.

Hypothesis 2: Judges will tend to avoid overt clashes and other entanglements with political actors.

According to the Hypothesis 2, judges are expected to avoid overt clashes and entanglements with political actors. There were three key political stakeholders involved in the *Marshall* case: Aboriginal fishers and their communities, non-Aboriginal fishers and their communities, and federal and provincial governments. While the *Marshall 1* decision received enthusiastic endorsement from the Aboriginal community, the reaction from the other two actors was quite the opposite. Non-Aboriginal fishers engaged in violent demonstrations, while the federal government, on the advice of the Nova Scotia provincial government, seriously contemplated suspending the decision. In *Marshall 2*, however, the Court took significant steps to placate these two groups of actors, who, as it turned out, had much of the public support behind them.

143 Kirk Makin, "Opinion Mixed on Power of Judges: Regional Differences Reflect Controversial Rulings" *The Globe and Mail* (23 November 1999) A5.

144 Joseph F. Fletcher & Paul Howe, "Public Opinion and Canada's Courts" in Paul Howe & Peter H. Russel, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) at 255.

145 See for example Cameron, *supra* note 24 at 148; *Coates*, *supra* note 93 at 18; Sauvageau, Schneiderman & Taras, *supra* note 89 at 165; Wildsmith, *supra* note 76 at 234–235; Barsh & Henderson, *supra* note 10 at 17.

Non-Aboriginal fishers were troubled by the *Marshall 1* decision for two reasons. They feared that the Aboriginal rights proclaimed were too broad and would result in depletion of the fishing resources, and they felt that the decision accorded favourable or "special" status and rights to Aboriginal fishers. The Court eased both of these concerns. As discussed above, the first concern was alleviated by the Court's significant narrowing of the Aboriginal rights in *Marshall 2*. The rights were narrowed in terms of their geographic scope, in terms of the types of resources to which they applied, and in terms of the number of people who could exercise the rights (i.e., only those with a communal authorization). The second concern was lessened by the Court's definition of the rights in "equitable access" terms. The clear implication of the equitable access formulation is that the exercise and fulfilment of Aboriginal rights takes no precedence over non-native commercial or recreational usage of the resources. In light of this rather extensive recognition of non-Aboriginal fishing interests, it is no surprise that the *Marshall 2* decision "was applauded by non-Aboriginal fishers and their supporters."[146] This, of course, stands in sharp contrast to their reaction to the first decision.

The Court also took steps to placate the governmental actors. In fact, some components of the *Marshall 2* decision were directly helpful to the federal government in facilitating negotiations with Aboriginal peoples. For example, one of the problems that emerged at the early stages of negotiations was whether agreements reached with band authorities could be enforced against those band members who refused to accept the agreement and wished to pursue their rights individually. The Court's proclamation that the rights are exercisable "by authority of the local community" resolved this concern. As Saunders notes, "[w]hat was missing from the majority decision in *Marshall #1*, but provided in *Marshall #2*, was the identification of a limited number of parties with whom agreements could be concluded, as opposed to a large number of independent actors, each with their own interests to negotiate."[147] While, as argued above, the facts of the case and the *Marshall 1* decision do not address the issue of communal versus individual authority, taking account of developments occurring outside the courtroom provides important insights into why the Court went out of its way to introduce the communal restriction in the *Marshall 2* decision. In fact, within two weeks of the release of *Marshall 1*, Fisheries Minister Dhaliwal publicly stated that his department was "studying whether the ruling . . . gives fishing rights to individuals who can apply it across the country, or whether it is a communal right to which only residents of native reserves are entitled."[148]

146 Sauvageau, Schneiderman & Taras, *supra* note 89 at 138.

147 Saunders, *supra* note 119 at 70.

148 Kevin Cox & Erin Anderssen, "Ottawa, Micmacs Try to Resolve Fishing Feud: DFO Urged to

The Court was also directly helpful to the federal government through its introduction of the geographic restriction on the scope of the right in *Marshall 2*. This restriction served to strengthen the governmental negotiating hand by decreasing Aboriginal prospects for demanding entitlement to resources outside traditional communities.[149] It is no wonder then that in addition to non-Aboriginal fishers, federal politicians, both in and out of opposition, also expressed jubilation at the release of the *Marshall 2* decision.[150]

Aboriginal people, for their part, expressed criticism towards the Court and its *Marshall 2* reasoning. This reaction was primarily due to the impression that the Court was backtracking and taking away what it seemed to have already granted.[151] From the Court's perspective, however, it was probably more important to appease non-Aboriginal fishers and governmental actors, even if that appeasement came at the cost of some backlash from the Aboriginal constituency. In fact, it is difficult to avoid the conclusion that once it found itself in a highly visible and unfavourable environment the Court rebalanced its decision in such a way so as to give something to each of the key political stakeholders involved in the dispute and, therefore, to ensure better acquiescence to its decision.

Hypothesis 3: Judges will tend toward moderation of judicial activism

It is clear from the above discussion that the Court considerably moderated its activism by rendering the *Marshall 2* decision. In fact, all four of the changes between the two decisions are in the direction of less activism and more deference. Compared to *Marshall 1*, the *Marshall 2* decision, therefore, reduced the geographic scope of the Aboriginal right, decreased the number of right beneficiaries who can exercise the right, narrowed down the types of resources to which the right can be applied, and defined the right in narrower terms and in such a way so as to incorporate the status-quo interests of non-Aboriginal fishers. The Marshall case, therefore, falls clearly in line with the hypothesis that when operating in highly visible political environments, as opposed to environments characterized by relative obscurity, the courts will exhibit greater proclivities towards moderation of judicial activism.

Close Native Lobster Fishery" *The Globe and Mail* (29 September 1999) A4.

149 Saunders, *supra* note 119 at 72–73.

150 Sauvageau, Schneiderman & Taras, *supra* note 89 at 162.

151 Barsh & Henderson, *supra* note 10 at 16–18; Saunders, *supra* note 119 at 87–88.

Hypothesis 4: Jurisprudence will tend to be informed by the tenor of the extant political environment

According to the final component of the legitimacy cultivation hypothesis, when operating in highly visible environments courts are expected to devise and utilize doctrines that are sensitive to the extant political environment. Such politically sensitive jurisprudence is evident in two elements of the *Marshall 2* decision: in the redefinition of the Aboriginal right in "equitable access" terms, and in the Court's discussion of justificatory standards the federal government must meet if it wants to limit the right through regulation.

The policy area the Court tackled in the *Marshall* case was complex and contentious. Two sets of economically vulnerable actors (Aboriginal communities stricken with poverty and largely dependent on the welfare system and non-Aboriginal fishing communities that had already experienced several shocks to their economic well-being, such as the collapse of the North Atlantic cod fishery) were vying for space in an industry characterized by strong apprehensions about resource sustainability. Having received considerable backlash and having placed the Court at the centre of a highly visible controversy, it was apparent that the *Marshall 1* decision did not reflect well the complexity of the political environment on the ground. The distributional effects of the decision proved to be exorbitant, even though the Court did exhibit some sensitivities towards distributional concerns through its formulation of the moderate livelihood restriction. In this context, further redefining the Aboriginal right in "equitable access" terms was an apparent attempt to develop a more prudent doctrine that better addresses the complexity of the political environment on the ground. A right subjected to an equitable access to resources amounted to a jurisprudential solution that was clearly rooted in the political environment, and that exhibited keen sensitivity to it. Given the increase in the visibility of the case, it was also a formulation that was more sensible in terms of cultivating the Court's institutional legitimacy.

The extent to which the Supreme Court engaged in politically sensitive jurisprudence can also be seen through its discussion of justificatory standards the federal government must meet if it wants to infringe upon Aboriginal rights. While these standards did not come directly into play in the case because government did not seek to justify any of the prohibitions on which Marshall was charged, in *Marshall 2* the Court discussed these standards at considerable length.

Since Aboriginal and treaty rights were recognized and affirmed by section 35(1) of the *Constitution Act, 1982*,[152] the Court has developed a series of conditions the federal government must meet if it wants to infringe on these rights. The initial *Sparrow* (1990) test outlined two conditions the Crown must meet: (1) there must be a "valid legislative objective" for the infringement, and (2) the measures taken to meet the objective must be consistent with the fiduciary duty the federal government has towards Aboriginal peoples.[153] In consequent decisions, the Court further elaborated on the issue of justification. In *Gladstone* (1996), the Court developed a less stringent version of the test that incorporated public interest concerns as a legitimate justification for limiting Aboriginal rights. In particular, the Court proclaimed that a variety of considerations, including "conservation goals . . . objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups," are all the type of objectives that can satisfy the justificatory standard.[154] The Court also made a general claim that "aboriginal societies exist within, and are a part of, a broader social, political and economic community" and that limits placed on Aboriginal rights are justified "where the objectives furthered by those limits are of sufficient importance to the broader community as a whole."[155] According to McNeil, this justificatory standard basically amounts to a "public interest justification" as it suggests that the protection of Aboriginal rights is delimited by what the Canadian public as a whole is willing to allow.[156]

In its *Marshall 2* discussion of the scope of the federal government's regulatory authority over treaty rights, the Court prominently invoked and discussed this public interest justification. "[E]conomic and regional fairness" and "participation in . . . the fishery by non-aboriginal groups" were listed as potentially compelling grounds for governmental limitations of Aboriginal rights.[157] These "public interest" formulations amount to politically sensitive jurisprudence because they allow the Court to ensure that its resolution of individual cases remains within the boundaries of what the larger political environment can tolerate. By assessing the impact that any proclamation of rights may have on other actors and interests, judges can ensure that rights

152 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

153 Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified" (1997) 8 Constitutional Forum 33 at 33–34.

154 *Gladstone, supra* note 75 at para. 75.

155 *Ibid.* at para. 73.

156 McNeil, *supra* note 153 at 35.

157 *Marshall 2, supra* note 9 at para. 41.

protection remains sensitive to divergent political conditions. In the *Marshall 2* decision, for example, the Court suggested that Aboriginal rights can be more restrictively defined, and more stringently regulated, with respect to the highly lucrative, congested and controversial lobster fishery than with respect to the much less profitable and crowded eel fishery. Indeed, the fact that much of the uproar following the release of *Marshall 1* had to do with implications of the ruling for the lobster fishery is most likely the reason why the Court made sure to specify in *Marshall 2* that regulatory regimes of the two fisheries are to be independently assessed.[158]

In light of the theory of strategic legitimacy cultivation, it is of particular significance to note that the Court emphasized this public interest justification in the *Marshall 2* decision even though no mention of such jurisprudence was made in the *Marshall 1* decision. In fact, as Rotman argues, the *Marshall 1* decision does not contemplate the relaxed *Gladstone* test for assessing governmental regulation, but only more stringent *Sparrow* and *Badger* tests, which do not incorporate the public interest justification.[159] As with its formulation of the right in "equitable access" terms, the Court resorted to such politically sensitive jurisprudence in the context of high visibility.

Conclusion

The *Marshall* case shows that cultivating institutional legitimacy leads courts to engage in strategic decision making. In particular, with the dramatic increase in the visibility of the case and the widespread voicing of public discontent towards the Court, the Court went out of its way to bring the decision better in line with the state of specific support, to avoid further clashes with dominant political actors, to qualify the level of judicial activism, and to utilize and develop jurisprudence that is more sensitive to the extant political environment. What is particularly interesting about the *Marshall* case is that it was the same set of judges, working on the same court, dealing with the same case and with the same factual record that delivered such a conspicuous reversal. Given that there are no other differences in the context of the two decisions, it is indeed difficult, if not impossible, to ascribe the Court's turnaround to anything but the pressures emanating from outside of the courtroom.

Admittedly, it will always be difficult to provide adequate empirical support for a theory by applying it to a single case, no matter how carefully selected. For this reason, the persuasiveness of the theory of strategic legitimacy

158 *Ibid.* at para. 15.

159 Rotman, *supra* note 124 at 24–25.

cultivation outlined in this paper will ultimately depend upon future empirical studies and the extent to which they show that the theory illuminates the Supreme Court's decision making in other cases and in other areas of law. In this regard, one should note that some existing research shows that the theory sheds explanatory lights on the Court's behaviour in the Quebec *Secession Reference,* as well as in a number of other high profile decisions.[160] Future avenues for testing the theory can take the form of quantitative analyses of large numbers of cases, qualitative analyses of particular areas of Court's jurisprudence, or further case studies.[161]

The above analysis also illustrates limits of the principled-reasoning and dialogue explanations of how courts attain institutional legitimacy. According to the principled-reasoning explanation, courts obtain legitimacy through principled reasoning and through application of legal principles such as that of *stare decisis.* Yet, facing a legitimacy crisis in the form of a mounting wave of public criticism, the Supreme Court's tendency was not to make sure it reinforced its *Marshall 1* ruling, but to alter it in line with the four legitimacy cultivation hypotheses outlined above. As a tool of legitimacy attainment, *stare decisis* is simply not helpful in the context of the *Marshall* case, for the Court in *Marshall 2* was obviously contradicting some of what it stated just two months prior in *Marshall 1*. According to one scholar, the discrepancies between the two *Marshall* decisions are "rather disconcerting."[162] Others make more forceful assessments: "Never has the US or Canadian Supreme Court reversed itself so precipitously in the face of public criticism."[163]

It is interesting to note that the Court denied that there were any apparent inconsistencies between the two rulings. One could speculate that the reason for this had to do with the Court's imperative of sustaining the *perception* that its work was driven by principled reasoning, and not by external, political factors. Overtly admitting the influence of external factors could have invited further criticism that the Court's decision making does not derive from impartial understanding of internal strictures of the law. Therefore, while the Court devised its *Marshall 2* decision by keeping a very close eye on the political developments occurring in the aftermath of *Marshall 1,* it also refused to acknowledge the influence of such pressures on its work.

160 Radmilovic, *supra* note 12.

161 See Vuk Radmilovic, *Between Activism and Restraint: Institutional Legitimacy, Strategic Decision Making and the Supreme Court of Canada.* Ph.D. Dissertation. Department of Political Science. University of Toronto. Forthcoming.

162 Rotman, *supra* note 112 at 619.

163 Barsh & Henderson, *supra* note 10 at 15.

The *Marshall* case also illustrates limitations of the dialogue theory as an explanation for how the Supreme Court of Canada ensures legitimacy of its judicial review function. First, the case shows that legitimacy cultivation occurs beyond the processes specified by the dialogue theory which emphasizes the capacity of legislative actors to reverse, modify or otherwise avoid unfavourable judicial decisions through the introduction of a new legislation. No new legislation was introduced in the aftermath of *Marshall 1*, and since the case dealt with Aboriginal treaty rights it was out of the reach of those sections of the *Charter* that facilitate the dialogue between courts and legislatures, including sections 1 and 33. Yet, the larger political environment, including legislative actors, ultimately succeeded in exerting pressure on the Supreme Court and in modifying the Court's original approach to the protection of Mi'kmaq rights.

Second, the case suggests that by focusing only on legislative responses to judicial decisions, the dialogue theory fails to capture the complexity of the Court's linkages with the external political environment and the complexity of legislative-judicial relations in Canada. Apart from legislative actors, the Supreme Court is responsive to a range of other actors such as organized groups and the public. Also, by focusing solely on legislative sequels enacted in response to judicial decisions, the dialogue theory ignores the extent to which justices mould their decision making in anticipation of potentially unfavourable legislative reactions. Extending the strategic approach to the study of the Canadian Supreme Court can shed important new lights onto the character of legislative-judicial relations in Canada.

Finally, one could suggest a potential alternative explanation for the Court's conduct in the *Marshall* case by noting that the Court simply realized it had made a mistake in its first application of the law and corrected that mistake by releasing the *Marshall 2* clarification.[164] This explanation, however, is not inconsistent with the explanation provided in this paper through the legitimacy cultivation theory. In fact, while the Court might very well have realized that it made a mistake in its first application of the law in *Marshall 1,* this realization became apparent to the Court *only after* it had an opportunity to survey the reaction that the decision aroused among the key political stakeholders involved in the dispute and among the Canadian public. Therefore, the case confirms the main implication of the legitimacy cultivation theory

164 For an argument that the *Marshall 1* decision was wrongly decided see, for example, Cameron *supra* note 24 at 9 (In deciding *Marshall 1,* the Supreme Court of Canada "disregarded procedural impropriety, compelling evidence, and well-established legal doctrines that were inconsistent with the court's decision.")

which is that what the Court deems to be a correct application of the law is in part determined by the constellation of external, political factors. Legitimacy cultivation compels courts to keep an attentive eye on political and social realities from which cases arise, such as public attitudes and preferences and mobilization of key political stakeholders. These factors, in turn, serve to affect judicial disposition of individual cases and importantly delineate the boundaries of rights protection. For these reasons, understanding constitutional jurisprudence necessitates taking close accounts of the external political environment and how it affects judicial decision making.

This view that courts are sensitive to the larger political environment as they go about their decision making, and that proper application of the law requires judicial responsiveness to external factors, has in recent times been advanced by none other than the current Chief Justice of the Supreme Court of Canada. According to her:

> The idea that there is some law out there that has nothing to do with consequences and how it plays out in the real world is an abstract and inaccurate representation of what the law is. I think it is essential to good judging that the rule be sensitive to consequences, and judges, when they make rulings, give some thought to how their rulings are going to fit into the institutional matrix of society.[165]

What is particularly interesting about this statement is that it was made in a rare media interview conducted on November 5, 1999, which was some month and a half after the *Marshall 1* decision was delivered and twelve days *before* the Court released its unprecedented clarification in the form of *Marshall 2*. Given the timing, one cannot help but speculate that the comments were at least partially inspired by the Chief Justice's contemplation of the public reaction to the *Marshall 1* decision and of the Court's soon-to-be-released, unprecedented *Marshall 2* reprise. In her dissent in *Marshall 1*, the Chief Justice did note that the Court was risking "functioning illegitimately" by creating "an unintended right of broad and undefined scope."[166]

165 Sheldon Alberts, "McLachlin Signals a New Realism" *National Post* (6 November 1999) A1.
166 *Marshall 1, supra* note 8 at para. 112.

Restraint and Proliferation in Criminal Law

Jula Hughes*

This paper considers why the criminal law continues to grow despite broad-based policy consensus on the harms of over-criminalization. I argue that political expediency combines with the Canadian constitutional arrangement under ss. 91 and 92 of the Constitution Act, 1867 *to drive the expansion of Canadian criminal law. The federal power to criminalize and the provincial responsibility for enforcement amounts to a constitutionally directed unfunded mandate. In a case study of the Westray Bill, the paper examines the political mechanisms and institutional forces that further the expansion of the criminal law and that result in ineffective, inefficient and ultimately harmful prohibitions. The paper concludes that it is legitimate to invoke the constitutional power of the courts to limit the scope of the criminal law and shows how this can be achieved without abandoning established constitutional and criminal law principles and precedent.*

Dans cet article, l'auteur examine les raisons pour lesquelles le droit pénal continue de se développer en dépit d'un consensus de principe général sur les maux liés à la surcriminalisation. L'auteur soutient que l'opportunisme politique se joint à l'arrangement constitutionnel prévu par les articles 91 et 92 de la Loi constitutionnelle de 1867 *pour pousser le développement du droit pénal canadien. Le pouvoir fédéral touchant la criminalisation et la responsabilité provinciale en matière d'exécution représentent un mandat non financé axé sur la Constitution. Dans une étude de cas du «projet de loi Westray», l'auteur examine les mécanismes politiques et les forces institutionnelles qui contribuent au développement du droit pénal et qui entraînent des prohibitions qui sont inefficaces et nuisibles, en fin de compte. L'auteur conclut qu'il est légitime d'invoquer le pouvoir constitutionnel des tribunaux pour limiter la portée du droit pénal et montre comment il est possible d'y parvenir sans toutefois renoncer aux principes et aux précédents constitutionnels et de droit pénal établis.*

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> It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.
>
> —James Madison, *Federalist Papers*

> For the good that I would I do not: but the evil which I would not, that I do.
>
> —Paul, *Letter to the Romans* 7:19

Many judges, lawyers, academics and policy experts in Canada have advocated for restraint in the expansion of criminal law.[1] This paper argues that the harms associated with increasing criminalization are sufficiently serious to warrant critical examination of, first, why this expansion is occurring and, second, who should be responsible for ending it. The analysis points to particular features of the Canadian constitutional arrangement, as interpreted by the courts, that are contributing significantly to the problem. It argues that it is legitimate to invoke the constitutional power of the courts to limit the scope of the criminal law and shows how this can be achieved without abandoning established constitutional and criminal law principles and precedent.[2]

The pushmi-pullyu of criminal law: restraint and expansion

In November 2002, the federal Department of Justice issued two major reports on criminal law policy. One documented a round-table discussion organized by the Department that involved criminal law specialists from government, the Crown, the defence bar, and legal academics.[3] The round-table discussion dealt with a number of broad criminal law policy issues, and a diversity of opinions was expressed. However, these experts were unanimous

1 As William Stuntz has noted in the U.S. context: "Of course, criminal law's breadth is old news. It has long been a source of academic complaint; indeed, it has long been the starting point for virtually all the scholarship in this field, which (with the important exception of sexual assault) consistently argues that existing criminal liability rules are too broad and ought to be narrowed. Yet the implications of this piece of old news are not well understood." Cited in William Stuntz, "The Pathological Politics of Criminal Law" (2001) 100:3 Mich. L. Rev. 505 at 507. For the Canadian context, see *infra* note 3.

2 This problem is not exclusive to Canada, but neither is it universal. Compare John C. Coffee, Jr., "Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law" (1991) 71 B.U.L. Rev. 193 at 246 for a similarly pessimistic description of the U.S. situation, and Christoph Krehl, "Reforms of the German Criminal Code -Stock-taking and Perspectives—also from a Constitutional Point of View" (2003) 4:5 German Law Journal 421 at 424 (for an example of systematic decriminalization and criminal law reform in Germany).

3 Justice Canada, *Report of Minister's Roundtable on Criminal Law* (1 November 2002).

that the primary goal of criminal law policy in the next decade should be restraint, i.e., an attempt to rein in the ever-expanding girth of the *Criminal Code* and its related statutes:

> Several principles of criminal law were discussed but one was emphasized repeatedly—restraint. Several participants noted that the criminal law is increasingly being used to attempt to solve a host of social and economic problems. It was suggested that "the criminal net is being cast too wide" and that the criminal justice system is "the pot into which we dump every social problem." By making more and more acts criminal, participants said Canadians are getting a false sense of security. The criminal law should be restricted to behavior that is truly criminal and several participants wanted restraint in the criminal law to be a key priority in any reform project. Said one: "We've spent 20 years criminalizing everything. We have to stop. We have to acknowledge we have a crisis." Politicians must resist the temptation to create a new offence every time there is a crisis.[4]

The other report presented the results of a ten-year process initiated by the Westray Mine disaster which would lead, in 2003, to the coming into force of Bill C-45, the Westray Bill.[5] The goal of that Bill was to facilitate the criminal prosecution of corporations directly. It purported to give the criminal law a much-expanded subject: the punishment of corporations for the criminal acts of its employees, officers and directors. It also created new offences with respect to occupational health and safety, as well as financial reporting.

The publication of these two reports in the same month highlights a phenomenon in criminal law policy that is easily observed but not as readily understood. The statutory criminal law is expanding in both volume and complexity with every legislative session.[6] At the same time, there is agreement at the policy level that the criminal law needs to shrink, not grow. It is, of course, not unusual for complex systems such as law-making bodies to produce results that are contrary to everyone's stated goal. It would seem useful, however, to pinpoint why the phenomenon exists; what drives it; and, possibly, what might be done to limit or stop it.

4 *Ibid*. at 3.

5 Justice Canada, *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights: Corporate Liability* (November 2002), online: Department of Justice <http://justice.gc.ca/eng/dept-min/pub/jhr-jdp/legis.html>.

6 The law-and-order agenda of the present Harper government has attracted much attention. However, the expansion of the criminal law is not limited to governments pursuing such an agenda. Even a cursory review of the amendment history of the *Criminal Code* reveals its unrelenting expansion under governments of various political stripes.

Having briefly explained the nature of the existing tension between expansion and restraint in criminal law, the remainder of this paper proceeds in three parts. In the first part of the discussion, I set out why people engaged in considering criminal law policy—including judges, lawyers, legal academics and government policy advisors—believe that the criminal law should not be allowed to expand further. In the second part, I analyze the Westray Bill as a case study for understanding what drives the parliamentary expansion of the criminal law.[7] I will show that ss. 91 and 92 of the *Constitution Act, 1867* interact with political realities in a way that makes proliferation of the criminal law through the legislative process almost inevitable, and that these same forces eliminate any realistic chance that political action will reverse the process. In the third part, I will analyze how the courts have contributed to the expansion of criminal law and will argue that they have failed in their proper role as guardians of the Constitution. From this last point will flow some concluding thoughts on how the constitutional discourse might change to protect the values that underlie the policy ideal of restraint in criminal law.

Why restraint?

There are, broadly speaking, four reasons why critics think that the criminal law should not be allowed to expand further: the negative effect on civil liberties,[8] the cost of administering a proliferating criminal justice system,[9] the loss of efficiency brought about by an increasingly complex system,[10] and the promotion of a false sense of security.[11] To these concerns I would add a fifth, related to the last: the reputational loss to the system that flows from

7 There are numerous other possible examples including car theft, street-racing, drug-impaired driving, etc. I have chosen the Westray Bill because of the very extensive and well-documented public policy debate surrounding its adoption, and because it highlights many of the areas of concern, such as duplication of provincial laws, political expediency, crisis management, ineffective law-making, and systemic under-enforcement. The expansion of criminal liability in the area of workplace health and safety to corporate actors, the increased party liability, and the focus on negligence are all consistent with the trend towards criminalizing hitherto civil wrongs.

8 Some, but not all of these concerns have been acknowledged by the courts: see *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 (CanLII) [*Malmo-Levine*]. Despite commenting on the impact on civil liberties, the Court in *Malmo-Levine* was not prepared to constitutionally review the exercise of the criminal law power on this basis. Much the same could be said for *Gladue* and *Proulx*, see *infra* note 9.

9 *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 52–57, 171 D.L.R. (4th) 385 (CanLII) [*Gladue* cited to S.C.R.]; *R. v. Proulx,* 2000 SCC 5, [2000] 1 S.C.R. 6 at paras. 16–17, (CanLII) [*Proulx*].

10 *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 34 at para. 34 (CanLII).

11 Canadian Bar Association, National Criminal Justice Section, *Bill C-10–Criminal Code Amendments (Minimum Penalties for Offences Involving Firearms)*, online: <http://www.cba.org/CBA/sections_criminal/pdf/c10.pdf>.

non-enforcement.[12] Let us consider these concerns in turn.

In *R v. Malmo-Levine*, the Supreme Court of Canada recognized that the mere existence of criminal prohibition, whether rigorously enforced or not, has an impact on civil liberties:

> if the court imposes a sentence on conviction that is no more than a fit sentence, which it is required to do, the other adverse consequences are really associated with the criminal justice system in general rather than this offence in particular. In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system. Whenever Parliament exercises its criminal law power, such costs will arise.[13]

Every prohibition brings a necessary restriction of the conduct in which a citizen can engage without being in peril of criminal prosecution. It is widely recognized that the area of restriction is always somewhat larger than the area of prohibited conduct because there is always a margin of uncertainty surrounding criminal offences. This is particularly true of new offences where case law has not yet resolved statutory ambiguities. It is also understood that there exists a constitutional limit on the size of the margin surrounding criminal prohibition through the related doctrines of overbreadth and vagueness,[14] but that limit is not particularly stringent. Civil libertarians have long argued that the state should only prohibit conduct that is demonstrably harmful to others and give citizens greater freedom to decide what risks they are willing to take with respect to their own physical, mental, or moral integrity. An example of this argument can be seen in the factum of the Canadian Civil Liberties Association in *Malmo-Levine*:

> To allow persons to be incarcerated when the state has no reasoned apprehension that their conduct is harmful constitutes a deprivation of liberty that cannot be said to be in accordance with the principles of fundamental justice. The state should not be permitted to jail people on a whim.[. . .] Where only harm to the self is in issue, it is consistent with civil liberties principles to require the state to show, at the very least, that the harm is serious, substantial or significant, before incarceration could be imposed.[15]

12 *Ibid*. See also Erik Luna, "Principled Enforcement of Penal Codes" (2001) 4 Buff. Crim. L. Rev. 515.

13 *Supra* note 8 at para. 174.

14 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 (CanLII); *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348 (CanLII).

15 *Malmo-Levine, supra* note 8 (Factum of the intervener Canadian Civil Liberties Association at

Prohibitions that are aimed at conduct that is merely offensive, but not or only marginally harmful, should be constitutionally restrained. From a civil-liberties perspective, there should therefore be a content restriction on the kinds of conduct the state can validly prohibit. The difficulty with this argument is two-fold. First, it would require the courts to adopt a unified view of the purpose of the criminal law, something they have consistently refused to do.[16] Second, even if such a view is attained, it would not restrain the proliferation of the criminal law in an era where the notion of harm is highly developed and expansive.[17] It is indisputable, however, that increased criminalization seriously impacts civil liberties, and not only those of citizens prepared to deliberately break the fundamental rules of society. It affects the civil liberties of generally law-abiding citizens by broadening the areas in which law enforcement can validly investigate "crime," and thus reduces the sphere in which the citizen can reasonably expect to be left alone by the police.

Increased criminalization also increases police discretion. In the face of inevitably limited police resources, what crimes are investigated, and to what extent, remains somewhat unpredictable. We constitutionally protect against the invention of new crimes after the fact,[18] but no similar protection exists from a shift in enforcement focus. This point was brought home to the many Canadian small-scale users of marijuana as *Malmo-Levine* and its companion cases made their way through the courts, and the enforcement of the simple possession offence became an on-again, off-again proposition. In fact, in the wake of the Supreme Court's decision in *Malmo-Levine,* some police forces warned the public that they would once again enforce the possession prohibition.[19]

Criticism of increasing criminalization also comes from another, sometimes opposing, quarter of the political spectrum, that of equality rights advocates. Increased criminalization has profound effects on equality rights. It is trite to note that criminal law enforcement and the criminal justice and

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paras. 15, 26).

16 *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at paras. 118–121, 151 D.L.R. (4th) 32 (CanLII) [*Hydro-Québec* cited to S.C.R.].

17 *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 (CanLII); *R. v. Butler*, [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 (CanLII); Larry Alexander, "Harm, Offense, and Morality" (1994) 7 Can. J.L. & Jur. 199; Stuntz, *supra* note 1.

18 I am referring, of course, to the constitutionalization of the doctrine of *nulla poena sine lege* in s. 11(g) of the *Charter*.

19 See also: *R. v. P. (J.)* (2003), 67 O.R. (3d) 321, 231 D.L.R. (4th) 179 (C.A.) (CanLII) and *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104, 14 C.R. (6th) 1 (Ont. C.A.), leave to appeal to S.C.C. denied, [2004] S.C.C.A. No. 5 (6 May 6, 2004) (CanLII).

corrections system primarily affect vulnerable groups.[20] Every increase in the number and complexity of offences exacerbates this effect.[21] The more difficult it is to know what is prohibited and the more difficult it is to understand the process by which guilt or innocence is determined, the more the need for expensive and inaccessible advisors will increase, and thus the more the system will favour the privileged and discriminate against the poor, women, members of minority communities, and people who are less educated.[22] This discriminatory effect operates independently from and in addition to inherent discriminatory tendencies within justice institutions.

A third voice of criticism comes from yet another political perspective, that of fiscal conservatives.[23] The criminal justice system is famously expensive and the increasing use of the criminal law to deal with societally undesirable conduct imposes great costs on governments, and thus tax payers, without much evidence that this money gives much in return. Crime rates are notoriously unresponsive to rates of imprisonment, harshness of sentences, and legislative change.[24]

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20 *Gladue, supra* note 9; Jerome G. Miller, S*earch and Destroy: African-American Males in the Criminal Justice System* (Cambridge, NY: Cambridge University Press, 1996); Patricia Hughes and Mary Jane Mossman, "Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses" (2002) 13 Windsor Rev. Legal Soc. Issues 1; David Tanovich, *The Colour of Race: Policing in Canada* (Toronto: Irwin Law, 2006).

21 Interestingly, this has proven true even in the area of criminalization of workplace health and safety violations. While the Westray Bill was intended to target chiefly large-scale corporate crime, one of only two charges ever laid targeted a low-level owner-operator in a small company. See *infra* note 52.

22 The fastest-growing prison sub-populations are women, aboriginals, and individuals with mental health issues. See successive reports of the ombudsman for prisons: Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator 2008–2009* by Howard Sapers (29 June 2009) and *Annual Report of the Office of the Correctional Investigator 2007–2008* by Howard Sapers (26 June 2008), online: Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/index-eng.aspx> (the reports provide ample evidence of the disproportionate targeting of these equity-seeking groups).

23 *Proulx*, *supra* note 9. Sentencing reform legislation is being prepared or has been adopted in more than a dozen U.S. states, often with the express goal of reducing government spending. See for example *Mandatory Sentencing Reform Bill* in New Jersey which restores judicial discretion in sentencing drug offenders: U.S., Bill 2762, *An Act concerning distributing, dispensing or possessing controlled dangerous substances on or near school property*, 213th Gen. Assem., NJ, 2008, online: <http://www.drugpolicy.org/docUploads/S1866_A2762.pdf>.

Connecticut's campaign to decriminalize small possession of marijuana was tellingly titled "Decrim makes cents": Drug Policy Alliance, *Reform in Connecticut*, online: <http://www.drugpolicy.org/statebystate/connecticut/>.

24 Law Commission of Canada, *What is a Crime? Challenges and Alternatives: Discussion Paper* (Ottawa: Queen's Printer, 2003); Anthony N. Doob & Carla Cesaroni, "Political Attractiveness of Mandatory Minimum Sentences" (2001) 39 Osgoode Hall L.J. 287.

Concomitant with this expensive failure of an expanding criminal justice system to deliver on any of its stated goals, such as better protection of society,[25] more prevention of future criminality,[26] or the moral improvement of offenders, is a dangerous loss of reputation of the system and those who administer it. As any politician knows, promises make great election tools. However, creating expectations that cannot be met does nothing for the respect the citizenry will feel for politicians and, in due course, politics. The same holds true for the criminal justice system: the more society is promised in the way of protections by criminal law, the more continued criminality shows up as a failure of the system.

This last point understates the damage done to the reputation of the criminal justice system by over-criminalization. Since enforcement and court resources are limited, more criminal prohibition rarely translates into more law enforcement. Instead, the police are left with enforcing some laws, some of the time.[27] For example, while there is still a "theft under" offence on the books,

25 It has been argued that expanded criminalization not only fails to protect but actually diffuses enforcement away from more to less vulnerable victims: see Ehud Guttel and Barak Medina, "Less Crime, More (Vulnerable) Victims: The Distributional Effects of Criminal Sanctions," Abstract (1 September 2005), online: Social Science Research Network <http://ssrn.com/abstract=797764>.

26 Deterrence research, both theoretical and empirical, supports the idea that a criminal justice system has a general deterrence effect, though there is considerable debate as to its extent. Within the justice system, two effects may arise through incarceration: (1) specific deterrence which sends a message to an offender not to commit the crime again, and (2) incapacitation which makes it impossible, for the time of the incarceration, to commit further offences. While specific deterrence in theory continues long past the period of incarceration, incapacitation does not. If a claim is made that an offender is less likely to re-offend because of the deterrence message sent through incarceration, such a claim needs to be controlled for the effect of incapacitation. Studies have shown that the tweaking of the substantive rules or harsher sentences have generally been found ineffective in increasing the general deterrent effect or achieving specific deterrence when the resulting deterrence is controlled for the incapacitation effect. See e.g. Anthony N. Doob and Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime and Justice* 143; Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Portland, Or.: Hart, 1999); Paul Robinson and John Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24:2 Oxford J. Legal Stud. 173; Richard E. Redding, "Adult Punishment for Juvenile Offenders: Does it Reduce Crime?" in Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson, eds., *Handbook of Children, Culture, and Violence* (Thousand Oakes, Cal.: Sage, 2006). The failure of more criminal prohibition to deter more crime is not limited to drug offences: see Harlon L. Dalton, "Criminal Law" in Scott Burris, Harlon L. Dalton & Judith Leonie Miller, eds., *AIDS Law Today: A New Guide for the Public* (New Haven, Conn.: Yale University Press, 1993) 242. In some areas, it has been found that personal criminal liability exposure has deterrent effects, particularly in white-collar crime, but that these effects are atypical for more conventional crimes: see Carla Cesaroni and Nicholas Bala, "Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges" (2008) 34 Queen's L.J. 447.

27 Police associations have argued against the further pursuit of law-and-order agendas precisely because of the associated costs, and noted the budgetary impact of federal laws on local police

most police forces treat minor thefts as insurance matters. Enforcement of nearly all criminal offences is patchy, which is why "no tolerance" policies such as those in the area of domestic assault cause such a stir.

The Supreme Court has held on many occasions that the criminal law power is plenary in nature, but that the overall purpose of the criminal law is to protect core societal values.[28] Criminalization can often be understood as a solemn promise on the part of legislators that they are taking the plight of the victims of a particular conduct seriously, in that they are using Parliament's ultimate policy weapon to protect against the conduct.

The failure to enforce criminal prohibitions on a systemic scale is therefore a breach of this promise. Victims of unenforced or under-enforced crimes are in effect told that when Parliament said it was going to do its utmost to put a stop to behaviour X or Y, it did not really mean it. On the other hand, economic inefficiency, the threats to the fiscal integrity of the state, the civil liberties of the citizenry and the rights of equality-seeking groups that would flow from consistent enforcement of existing criminal law are beyond contemplation. If we actually enforced all criminal law, including prohibitions against issuing Zellers points (s. 427 of the *Criminal Code*), cheating on the LSAT (s. 404) and waterskiing by night (s. 250),[29] we would indeed have a police state. This is a safe indicator that the range of prohibitions is excessive. In sum, there is widespread agreement from a variety of political perspectives that the criminal law should not be expanded further and that the existing *Code* is in need of simplification and revision, if not outright reform.[30]

Despite various law reform efforts over the last twenty years, such simplification and revision have not come about, and every legislative session ends with more offences, more complex procedure, and less transparency. This brings me to the second part of the paper, a case study of the Westray Bill as a particularly egregious example of the expansion of the criminal law.

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forces. See Stephen Thorne, "Federal Law-and-order agenda ignores higher local costs, police say" *The Canadian Press* (20 April 2010), online: <http://www.news957.com/news/national/article/46831>.

28 *Labatt Breweries of Canada Ltd. v. Canada (A.G.)*, [1980] 1 S.C.R. 914 at 933, 101 D.L.R. (3d) 594 (CanLII) [*Labatt* cited to S.C.R]; *Malmo-Levine, supra* note 8 at paras. 73–74.

29 All the provisions excerpted from the *Criminal Code* are cited to: *Criminal Code*, R.S.C. 1985, c. C-46.

30 At the same time, it is amply apparent that the current conservative government does not agree with the need for the restraint or simplification of the criminal law. However, it is difficult to see any evidence-based justification for this policy stance, particularly in light of decreasing crime rates.

Westray, or: why the criminal law will continue to grow

The Westray Bill is a good case study on the expansion of the criminal law because it brings together a number of features that in my view drive the expansion, both from a constitutional and a political perspective. The background of Bill C-45, the Westray Bill, is widely known and I am only very briefly going to refer to a number of steps that are relevant to my analysis.[31] On May 9, 1992, an explosion at the Westray Mine, Nova Scotia, killed 26 workers. On March 31, 2004, Bill C-45, the Westray Bill, came into force.[32] Between these two events lie the Richard Inquiry[33] into the disaster and a number of failed or aborted attempts at prosecuting those who had caused the death of the 26 miners. The failed prosecutions and the Inquiry both conveyed to the public a need to take action against those corporations that play fast and loose with the health and safety of their employees and the public. The United Steel Workers of America, who had been engaged in an organizing drive at the mine when the disaster occurred, was a particularly active lobbyist. Its efforts were predominantly aimed at creating a system of personal accountability for upper management and did not envision or endorse the law that ultimately came about in Bill C-45. At the parliamentary committee stage, it was felt that the existing law made it too difficult to prosecute corporate offenders for crimes. In particular, many objectors saw the need to prove *mens rea* with respect to corporate offenders as an insurmountable obstacle. Also, the absence of an affirmative criminal law obligation to ensure occupational health and safety and the doctrinal issues surrounding omission offences were seen to immunize corporations from criminal liability. Finally, the narrow interpretation of the courts in cases like *Dredge and Dock Co. v. R.*[34] and *R. v. Safety-Kleen Canada Inc.*[35] as to who qualified as the directing mind of a corporation was understood to limit corporate criminal liability beyond what was desirable from a public policy perspective. However, none of these concerns became the actual basis for the failure in the Westray prosecutions. Rather, according

31 For an excellent analysis of the background and legal response to the Westray explosion see: Eric Tucker, "The Road From Westray: A Predictable Path to Disaster?" (1998) 28:1 Acadiensis 132, and Eric Tucker, "The Westray Mine Disaster and its Aftermath: The Politics of Causation" (1995) 10:1 C.J.L.S. 91.

32 *An Act to amend the Criminal Code* (criminal liability of organizations), S.C. 2003, c. 21, Proclaimed in force 31 March, 2004, S.I./2004–22, C. Gaz. 2004.II.75.

33 Nova Scotia, Westray Mine Public Inquiry, *The Westray Story: A Predictable Path to Disaster* by Justice K. Peter Richard (Halifax: Westray Mine Public Inquiry, 1997).

34 *Canadian Dredge and Dock Co. v. R.,* [1985] 1 S.C.R. 662, 19 D.L.R. (4th) 314 (CanLII) [*Dredge and Dock* cited to S.C.R.].

35 *R. v. Safety-Kleen Canada Inc.* (1997), 32 O.R.(3d) 493, 145 D.L.R. (4th) 276 (C.A.) (CanLII) [*Safety-Kleen* cited to O.R.].

to the report by Beveridge and Duncan,[36] two respected Nova Scotia lawyers charged by the Department of Justice with investigating the Crown's actions in these cases, the Westray prosecutions failed because of a lack of prosecutorial resources and expertise. They also failed because an expert witness for the Crown changed his mind about the causes of the explosions and created a situation where a finding of reasonable doubt was most likely. Bill C-45 responded to the long-standing legal concerns respecting criminal prosecutions of corporations, but did not and could not address the actual reasons for the Westray prosecutions' failure. Bill C-45 was preceded by three private member's bills: each would have held directors and officers personally criminally liable for occupational health and safety (OHS) violations causing serious harm that occurred during their tenure.[37] These efforts met with considerable opposition from corporate lobbyists and were ultimately abandoned in favour of Bill C-45. This bill combines all the worst features of new criminal legislation. It is designed to be ineffective; it is extremely complex with potential effects in areas quite outside the original thrust of the bill; it invites abuse[38]; and it duplicates provincial statutory offences.

Why was Bill C-45 enacted?

The dramatic events of the Westray explosion and its aftermath are clearly sufficient to explain why governments would feel a need to do something. Following Westray, there was pressure for action. The event was too horrific and the failure of the justice system to deal adequately with its aftermath was too glaring. As a first response to the Richard Inquiry, which had highlighted this failure, many provincial governments overhauled the enforcement of OHS legislation.[39] There was an effort to deal with under-enforcement by restructuring agencies, hiring more inspectors, setting new targets, and

36 Nova Scotia, *Review of the Nova Scotia Public Prosecution Service: Report on the Westray Prosecution* by Duncan R. Beveridge and Patrick J. Duncan (Halifax: Province of Nova Scotia, 2000).

37 Private Members' Bill C-468, *An Act to amend the Criminal Code (criminal liability of corporations, directors and officers)*, 1st Sess., 36th Parl., 1997–1999 (Alexa McDonough); Private Members' Bill C-259, *An Act to amend the Criminal Code (criminal liability of corporations, directors and officers),* 2nd Sess., 36th Parl., 1999 (Alexa McDonough); Private Members' Bill C-284, *An Act to amend the Criminal Code (offences of corporations, directors and officers)*, 1st Sess., 37th Parl., 2001–2002 (Beverley Desjarlais).

38 While C-45 is usually considered the "corporate crime" bill, its scope goes reaches far beyond corporations and includes unions and not-for-profit organizations.

39 For example, Nova Scotia presented a number of law reform initiatives in its 2003/2004 annual report, including new regulations governing underground mining and amendments to the general regulations under the *Occupational Health and Safety Act*: Nova Scotia, Department of Labour and Workforce Development, Occupational Health and Safety Division, *Annual Report: For the Year April 1, 2003 to March 31, 2004* (Halifax: 2004).

changing reporting systems. Some provinces also overhauled their legislative schemes, including some significant increases in the amounts of fines.[40] The federal response included some fairly limited changes to Part II (Occupational Health and Safety) of the *Canada Labour Code*.[41] Provincial governments rather than the federal Parliament had been at the forefront of responding to Westray to this point.

These changes to the regulatory law appeared inadequate to the families, friends, and allies of the victims; they did not create a sense that justice had been done or would be done in the future. This is consistent with a complaint about regulatory law generally, viz., its lack of symbolic value.[42] The language surrounding OHS regulatory law, such as "accident," "no fault," and "occurrence," rather than "murder," "guilt" and "crime," only serves to add to this lack of symbolism, and thus lack of stigma.[43] However, as Gerard Lynch points out, the stigmatizing power of the criminal law is only effective when it is not diluted over too broad an area.[44] Additionally, the Law Commission of Canada validly noted that stigmatization through the criminal law creates its own tensions, in that the power to stigmatize is attractive even when the mechanism of the criminal law is less than optimal:

> Often, the value of criminal law is symbolic—calling something a crime symbolizes our condemnation of the action. But, at the same time, the symbolic power of the criminal law creates an incentive to use criminal law, even when other less coercive

40 *An Act to Amend the Occupational Health and Safety Act,* S.N.B. 2001, c. 35; *Occupational Health and Safety Act*, S.N.S. 1996, c. 7 and *Act to Amend Chapter 7 of the Acts of 1996, the Occupational Health and Safety Act,* S.N.S. 2000, c. 38; *An Act to Amend the Workplace Health, Safety and Compensation Act and the Occupational Health and Safety Act*, S.N.L. 2001, c. 10; *An Act to Amend the Occupational Health and Safety Act*, S.P.E.I. 2000, c. 15; *An Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions*, S.Q. 2001, c. 26 and *An Act to amend the Act respecting occupational health and safety and other legislative provisions*, S.Q. 2002, c. 76; *Occupational Health and Safety Amendment Act*, S.O. 2001, c. 26; *The Safer Workplaces Act (Workplace Safety and Health Act Amended)*, S.M. 2002, c. 33; *Occupational Health and Safety Amendment Act*, S.S. 2001, c. 25; *Occupational Health and Safety Amendment Act*, S.A. 2002, c. 31; *Workers Compensation Amendment Act,* S.B.C. 2002, c. 56, *Workers Compensation Amendment Act (No. 2)*, S.B.C. 2002, c. 66, and *Skills Development and Labour Statutes Amendment Act*, S.B.C. 2003, c. 65.

41 *An Act to amend the Canada Labour Code (Part II)* in respect of occupational health and safety, to make technical amendments to the Canada Labour Code (Part I) and to make consequential amendments to other Acts, S.C. 2000, c. 20 [*Canada Labour Code Amendment Act*].

42 Michael K. Block, "Optimal Penalties, Criminal Law and the Control of Corporate Behavior" (1991) 71 B.U.L. Rev. 395 at 411. Conversely, the criminal law is said to be expressive, symbolic or stigmatizing: *ibid*. and Stuntz, *supra* note 1 at 520–21.

43 Compare James Gobert, "Corporate Criminality: New Crimes for the Times" (1994) Crim. L. Rev. 722.

44 Gerard E. Lynch, "The Role of Criminal Law in Policing Corporate Misconduct" (1997) 60:3 Law & Contemp. Probs. 23 at 62ff.

> responses may be more efficient. In this way, the process of defining something as harmful and calling it a crime creates its own set of contradictions.[45]

Nonetheless, the need for stigmatization is a possible reason for invoking the criminal law, and many agree that the careless or deliberate putting at risk of employees' health and safety is a conduct to which stigma ought to attach.[46] Going beyond the specific case of Westray and its victims, in light of Human Resources and Skills Development Canada's information, the case for criminal sanctions in occupational health and safety seems easy to make on a statistical basis:

> Nearly 1,100 Canadians died in 2005 as a result of work-related causes. This means that on average, about 3 workers were killed every day. Approximately 338,000 work-related injuries and illnesses were reported in 2005.[47]

By comparison, homicides reported to police in Canada totalled 548 in 2003.[48]

So far, we have seen three reasons for the expansion of the criminal law in the Westray context: political expediency, the need for stigmatization, and the number of people killed in the workplace compared to street crime. The question that arises is whether these reasons are sufficient to invoke the criminal law and, if so, whether the particular amendments to the *Criminal Code* in Bill C-45 are appropriate.

Should there be criminal liability for OHS violations?

The high numbers of people killed in the workplace suggest that occupational health and safety violations would be a good candidate for criminalization if the purpose of the criminal law is the prevention of serious harm to individuals, particularly those who wield little political or economic power, and if the use of the criminal law is justifiably thought to be effective in achieving this task. However, even the statistical picture is really more complicated. In Ontario, for example, some two-thirds of occupational deaths in a year are the result of occupational disease,[49] and are thus far removed from the paradig-

45 Law Commission of Canada, *supra* note 24 at 16.

46 Whether stigmatization is effective against corporations, and if so, whether the criminal law is more effective than civil or administrative law sanctions in achieving stigmatization is open to some empirical doubt. See Block, *supra* note 42 at 415.

47 Human Resources and Skills Development Canada (HRSDC), *National Day of Mourning* (23 September, 2009), online: Ministry of Labour, Health and Safety: <http://www.hrsdc.gc.ca/eng/labour/health_safety/day_mourning.shtml>.

48 Statistics Canada, "Crime Statistics" *The Daily* (28 July, 2004), online: Statistics Canada, The Daily <http://www.statcan.ca/Daily/English/040728/d040728a.htm>.

49 Ontario, Workplace Safety and Insurance Board, *Current Health and Safety Statistics* (30 May,

matic industrial homicide model that underlies Bill C-45. Prosecutions based on occupational disease are extremely difficult and, for evidentiary reasons, unlikely to meet the prosecutorial standard of a likelihood of conviction.[50] Of the remaining third, about 30% are caused by traffic accidents on public roads, where the *Criminal Code* and provincial legislation dealing with road safety are more likely to be applied in appropriate cases.[51] And while most of the remainder falls into the category of preventable deaths, it is not clear that many will meet a standard of criminal negligence. This fact is borne out by the application of Bill C-45 so far: only two charges have been laid under the OHS offence—one was dropped when the owner-operator pleaded guilty to an offence under provincial legislation, and other resulted in a guilty plea, a $100,000 fine, and $10,000 in compensation to the victim's family.[52] No charges have been laid or reliance placed on any of the other parts of Bill C-45.[53] So despite the rhetoric of a crisis in occupational fatalities, it is highly doubtful that a criminal response could ever be mounted that would attach to more than a small percentage of deaths. As deplorable as negligent health and safety standards are, there is little to be gained by relabeling all deaths in the workplace as industrial homicides.

As the following graph based on Statistics Canada data shows, the rate of occupational injury has been decreasing fairly steadily since about 1990, thus preceding the legislative and operational changes just described.[54] This continues a trend that has existed across North America, with some fluctuations, since the 1970s.

2005).

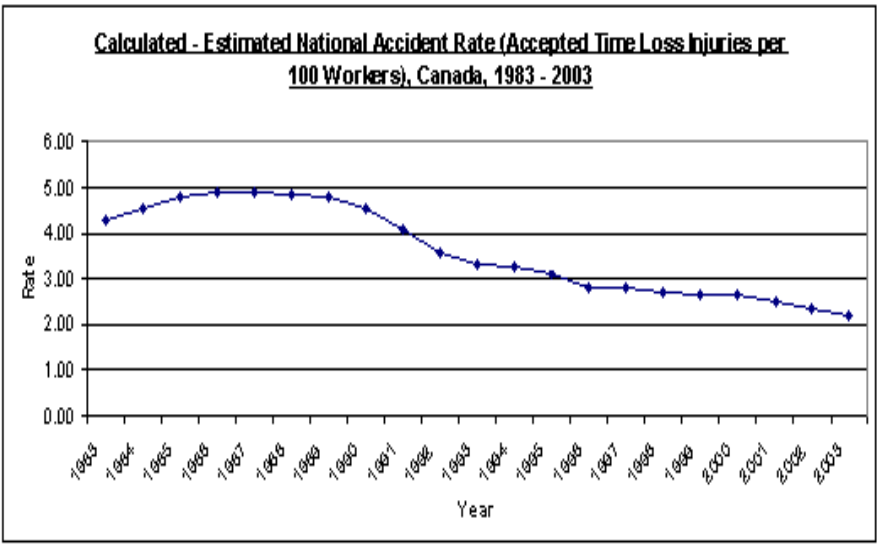
50 This difficulty is addressed in workers' compensation schemes by creating presumptions of causation for certain diseases. No such presumptions could constitutionally exist for criminal prosecutions: compare e.g. ss. 15(3) and (4) of the *Workplace Safety and Insurance Act, 1997,* S.O. 1997, c.16, Sch. A.

51 Indicative of this fact is that the Ministry of Labour does not investigate occupational traffic deaths.

52 *R. v. Transpavé Inc.*, 2008 QCCQ 1598, [2008] R.J.D.T. 742 (CanLII).

53 It may well continue to be impossible to convict a corporation without convicting the senior officers as well: *R. v. TFE Industries*, 2009 NBCA 39, 346 N.B.R. (2d) 202 (CanLII).

54 HRSDC, *supra* note 47.



It is therefore difficult to prove the claim by federal and provincial OHS agencies that the legislative and operational changes are substantially responsible for the lower injury rates.[55] It is more likely that changes in the economy and the nature of work are the most substantial contributors to the improvement. For instance, there have been job losses in blue-collar occupations with relatively high injury rates. On the other hand, there has been an increase in white- and pink-collar jobs, which are traditionally occupations with a lower-than-average injury rate. On the positive side, it does not appear that the changes in agency structures or legislation reversed the trend to fewer injuries. It is too early to tell whether Bill C-45 will have an impact on the injury rate, but, for reasons that follow, I predict that there will be no observable effect in the OHS field arising from Bill C-45.[56] Its effect will, in any event, be restricted to the occasional prosecution in a high-profile case.

55 These claims are almost universally made. An example can be found in: Government of Canada, Labour Program, *Occupational Injuries Among Canadian Federal Jurisdiction Employers 1998–2002* at 5.

56 The ineffectiveness of imprisonment as either a specific or a general deterrent is now well established: see *supra* note 26. However, the ineffectiveness of criminalization is broader than merely ineffectiveness of imprisonment and extends to criminalization more generally. For example, there is mounting evidence that deterrence of unwanted conduct through criminalization in the drug field is more of a myth than a reality. See: Craig Reinarman, Peter D. A. Cohen & Hendrien L. Kaal, "The Limited Relevance of Drug Policy: Cannabis in Amsterdam and in San Francisco" (2004) 94 Am. J. Pub. Health 836.

This does not rule out a role for the criminal law in relatively rare, but particularly egregious, cases of industrial homicide such as the Westray or the Giant Mine killings, but representations to the public that these criminal law responses are going to change the rate of occupational fatalities are almost certainly misplaced. Even in those most egregious cases, the criminal law prior to Bill C-45 was, in my view, adequate to the task, although prosecutorial expertise and resources, and possibly political will, were clearly inadequate in the case of Westray.

Assuming the desire to criminalize OHS violations that lead to serious bodily harm or death, and leaving aside my claim that such violations are already criminal and not in need of legislative amendment, the question arises as to whether Bill C-45 is an appropriate solution. For three reasons, my answer to this question is "no":

- Bill C-45 targets the wrong actor;
- Bill C-45 is incompetently drafted;
- Bill C-45 does not change the law with respect to occupational health and safety.

As mentioned above, the private members' bills that preceded Bill C-45 targeted directors and officers of corporations personally. By contrast, Bill C-45 creates an elaborate *mens rea* regime that combines features of the classical identification model[57] with a more progressive aggregate fault model,[58] which targets the corporation itself for criminal prosecution. But while it is undoubtedly true that corporations act in a collective sense that goes beyond the acts of individuals, this collective identity tends to hide the fact that there are still human actors who make decisions, who may act improperly, or who make mistakes. Targeting legal as opposed to natural persons obliterates the fact that there are individuals to blame for every act of corporate malfeasance, and blaming the corporation hides the identities of those blameworthy individuals.[59] It is worth remembering Hannah Arendt's important insight that only

57 *Dredge and Dock, supra* note 34 at para. 20.

58 Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity" (2000) 4 Buff. Crim. L. Rev. 641 at 661ff. One of the implications of aggregate fault is that it permits prosecution of a corporation without a case against individual managers or directors. Since this eases the evidentiary burden, prosecution might be expected to shift away from individuals towards corporate entities. Given the very small sample of cases under Bill C-45, this cannot be empirically tested.

59 For a good discussion of this line of criticism see: Gilbert Geis and Joseph DiMento, "Should We Prosecute Corporations and/or Individuals," in Frank Pearce and Laureen Snider, eds., *Corporate*

individuals can be guilty, but that collectives can bear responsibilities, and that in a world where the collective is guilty, blameworthy individuals can hide their personal guilt behind that collective *mea culpa*.[60]

Targeting legal persons also has important sentencing consequences. The criminal sentencing of a corporation under either the *Criminal Code* or provincial health and safety regimes leads to fines destined for the public purse. It would be preferable that a finding of responsibility against a corporation should lead to an order that directs the corporation's resources towards restoring or compensating those it has injured, including, where appropriate, the public. Fines that are minor to moderate will inevitably lead the victims of corporate crime feeling as if the harm they suffered had been weighed and found light. Fines are widely lamented as being either too low, and thus ineffective against rich corporations, or ineffective against low-asset corporations, since there is no stick to be applied when there is a failure to pay.[61] Very stiff fines, even in the case of moderately wealthy corporations, may put the continued viability of the business at risk, to the detriment of shareholders and employees. For this reason, it is often argued that sentencing a corporation mostly hurts those who have the least power to change the way it behaves and does little to those who hold power.[62]

There is, in my view, a most compelling reason why fines tend to be ineffective in deterring corporate malfeasance. Let us assume that the corporation is making a rational decision based on profit-maximization on whether to install safety shields on machinery as required by law. Let us further assume that the cost of installing and maintaining the shields together with the loss in productivity that comes from the safer operation is $10,000/month. Let us also assume that the company expects to kill a worker every ten years if it operates machinery without the shields. The expected benefit to the company of not complying with the law is $1.2 million over ten years. Let us, rather generously, assume that there is a 2% chance that the corporation will be convicted and fined for the death of the worker. Rationally, a fine that would deter a company under those circumstances would have to be in the order of

Crime: Contemporary Debates (Toronto: University of Toronto Press, 1995) 72 at 72ff.

60 See for example Hannah Arendt, "Collective Responsibility" in Jerome Kohn, ed., *Responsibility and Judgment* (New York: Schocken Books, 2003) 147.

61 As examples of this line of argument, see: *R. v. General Scrap Iron & Metals Ltd.*, 2003 ABQB 22, 322 A.R. 63 at para. 103 (CanLII) and Aust., New South Wales, Law Reform Commission, *Sentencing: Corporate Offenders* (Issues Paper 20) (Sydney: New South Wales Law Reform Commission, 2001), online: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip20toc>.

62 Stephen A. Radin, "Corporate Criminal Liability for Employee-endangering Activities" (1983–1985) 18 Colum. J.L. & Soc. Probs. 39 at 52.

$60 million. This fine would be clearly grossly disproportionate and would thus fail constitutional and appellate muster. Even if enforcement were to be cranked up beyond what is realistic, let us say to a level of 25%, the fine would still have to be in the order of $5 million. Current fines under provincial schemes range from negligible to about $300,000 in the circumstances I have described, and there are so few actual convictions that each one warrants a separate press release. Thus, the suggestion that fines should correspond to the expected economic benefit of engaging in the dangerous conduct seriously discounts the fine, in that it ignores the realities that only a small percentage of violations will lead to harm, that not all violations will be detected, that only a small percentage of those detected are likely to be prosecuted, and that an even smaller portion ultimately end in conviction. On the other hand, setting a fine at the multiple of the expected economic benefit that takes the probability of detection, prosecution and conviction into account would likely lead to fines that are otherwise disproportionate. Puri recognizes this basic problem, but then does not face the consequences of her insight.[63] At current enforcement levels, a fine that is sufficiently large to make compliance rational is almost inevitably constitutionally deficient, whereas a fine that is proportionate will render compliance irrational.

On the other hand, individuals in a corporation who make decisions, either individually or collectively as boards or management groups, can be sentenced in the usual way. Though much has been made of the legal and doctrinal difficulties surrounding the criminal prosecutions of corporations, many of these difficulties are hypothetical in the extreme since so few actual prosecutions go forward. My objection is not that the criminal prosecution of corporations is unjust or unjustifiable, but that the allocation of prosecutorial resources to corporations is ineffective unless a successful prosecution follows a substantial number of violations, at which point it may be effective, but is certainly no longer efficient.[64] Ultimately, this discourse has served to hide the guilty acts of individuals who wield power and engage in criminal acts in a corporate context. The new legislation, responding as it did to corporate pressure to prefer criminal liability of the corporation over laying the blame

63 Poonam Puri, "Sentencing the Criminal Corporation" (2001) 39 Osgoode Hall L.J. 611 at 618–19.

64 Contrast this with the view advanced by Jennifer A. Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998) 43 McGill L.J. 67. Quaid argues that the prosecution of corporations is both doctrinally defensible and desirable, because it shows that the rich are not beyond the reaches of the law. My point is that failed prosecutions of corporations show more effectively than any other means that the rich continue to be largely beyond the reaches of criminal prosecutions.

at the feet of directors and officers, furthers this discourse to the detriment of effective enforcement of OHS standards.

My second objection to Bill C-45 is the extremely poor level of drafting. This article is not the place to reveal all the drafting problems of the Bill, but I will give three examples of its particularly incompetent language. First, consider the definition of "senior officer," which reads:

> "senior officer" means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

This definition is intended to expand the application of the identification theory beyond those with policy-making authority to those engaged in the management of sectors, branches or regions of a corporation. In other words, it was designed to avoid outcomes like *Safety-Kleen*.[65] It seems to achieve this goal for all types of organizations but for the one that truly matters, viz., corporations. This is because the list of "director," "chief executive officer" and "chief financial officer" invites the application of the limited-class rule, so that the class can only be expanded to include other people at the very highest level of corporations, once again putting criminal acts of the regional or branch manager level beyond the reaches of prosecutors of corporations.[66] This reading is supported by the courts' continuing preference for readings consistent with the common law, the *Interpretation Act* notwithstanding.[67] In practice, this means that prosecuting the union steward will be considerably easier than prosecuting the corporation for the acts of its local manager, regardless of the power differential between the two.

The second major drafting problem I want to highlight is the inconsistent use of terminology expressing the reasonable steps test, particularly when compared to the French version of the Bill. The party liability for subjective *mens rea* offences section, now s. 22.2 of the *Criminal Code*, paragraph (c), provides that the corporation is a party to the offence if one of its senior officers:

65 It will be remembered that the prosecution of the corporation in *Safety-Kleen, supra* note 35, failed because the regional manager who had the requisite knowledge and intent for the offence was found not to constitute the directing mind of the corporation because he lacked policy-making authority.

66 *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, 183 D.L.R. (4th) at para. 16 (CanLII).

67 *Canada v. Schwartz*, [1996] 1 S.C.R. 254 at paras. 68–69, 133 D.L.R. (4th) 289.

> knowing that a representative of the organization is or is about to be a party to the offence, does not take *all* reasonable measures to stop them from being a party to the offence [emphasis added].

However, the provision enacting Bill C-45 and setting out the OHS offence requires merely that reasonable steps be taken. It reads:

> 217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to *take reasonable steps* [emphasis added] to prevent bodily harm to that person, or any other person, arising from that work or task.

This suggests that the test for the subjective *mens rea* offence is more demanding of the accused than that for the negligence offence in s. 217.1. However, when we consider the French version, it becomes apparent that this counter-intuitive result was likely not intended. The French version of paragraph 22.2 (c) reads:

> c) sachant qu'un tel agent participe à l'infraction, ou est sur le point d'y participer, omet de prendre *les mesures voulues* [emphasis added] pour l'en empêcher.

Compare the wording of the OHS duty:

> 217.1 Il incombe à quiconque dirige l'accomplissement d'un travail ou l'exécution d'une tâche ou est habilité à le faire de prendre *les mesures voulues* [emphasis added] pour éviter qu'il n'en résulte de blessure corporelle pour autrui.

Evidently, the same words in the French version, "les mesures voulues," are used to convey both "all reasonable measures" and "reasonable measures" in the English version. It should be noted that in other parts of the *Criminal Code* that impose obligations or prohibitions and where the English version reads either "reasonable measures" or "all reasonable measures," the French rendition of "les mesures voulues" is not used. This means that the case law dealing with these expressions, such as *R. v. Darrach*,[68] is not going to help resolve the conflict.[69] The most compelling interpretation of the section, in my

68 (1998), 38 O.R. (3d) 1, 13 C.R. (5th) 283 (C.A.) (CanLII), where Morden A.C.J.O. considered the expression "reasonable steps" in a section limiting consent for sexual assaults (s. 273.2 (b)), and concluded that the drafting change from "all reasonable steps" to "reasonable steps" indicated the parliamentary intent to impose a less onerous burden. The French version of s. 273.2 (b) uses "les mesures raisonnables."

69 The only other place where the expression "reasonable measures" corresponds to "mesures voulues" is in the context of a court making a probation order to take reasonable measures to ensure that the offender understands the order in paragraph 732.1 (5) (b), which is of little interpretive assistance here, other than to note that the paragraph does not require "all reasonable measures" to be taken.

view, is to read the French version as authoritative, thus eliminating the "all reasonable steps" requirement for subjective *mens rea* offences that appear in the English version. However, it is difficult to conceive of situations where a senior executive would not be able to raise a reasonable doubt that they took at least some reasonable step to prevent a workplace death or injury, and only the truly incompetent will be caught by the provision.

The third example of incompetent drafting lies in one of the factors set out for sentencing corporations. It provides:

> 718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors: . . .
>
> (h) any penalty imposed by the organization on a representative for their role in the commission of the offence.

This drafting problem is flagrant both in what it says and, perhaps more importantly, in what it fails to say. The sentencing factors are generally poorly worded in that they leave it up to the judicial imagination whether a factor should be considered aggravating or mitigating. If my best guesses are correct, then the order of the factors does not assist, in that the aggravating and mitigating factors seem to follow each other in no particular order. Returning to paragraph (h), the discipline factor is presumably mitigating. In other words, if the company has meted out discipline, then the fine should be reduced. What is glaringly absent from this factor is any protection of the workers who witnessed an offence or who participated in it and subsequently co-operated in the investigation of the offence. Such reprisal protections are standard fare in all provincial OHS regimes. It is difficult to see how a sentencing judge could, on the evidence likely available at sentencing, possibly distinguish those disciplinary actions taken by the company against workers for participating in the offence from those taken in retaliation because the same workers subsequently co-operated with the authorities. According to this factor, a company could order a worker to remove a safety shield, fire the worker for this act, and then benefit at the sentencing hearing from this line of action. This is manifestly absurd and defies the purpose of the new duty imposed in s. 217.1.

My third point of critique of Bill C-45 is that it is unnecessary legislation. It was never legal to expose workers to working conditions that could threaten their lives or cause them serious bodily harm. The appearance of legality is the result of a large-scale non-enforcement of the existing *Criminal Code* and provincial offence provisions, and not the result of some *lacunae* in the law prior to Bill C-45. OHS legislation both at the provincial and at the federal level

imposes nearly universal obligations on employers to ensure worker health and safety. By way of example, the Ontario *Occupational Health and Safety Act* imposes a general duty on employers to "take every reasonable precaution in the circumstances for the protection of a worker."[70] The federal Parliament exempts its own workers from OHS protections under the *Canada Labour Code*, but this can surely not be used as an excuse to amend the *Criminal Code*, when a simple proclamation bringing Part III of the *Parliamentary Employees and Staff Relations Act*[71] into force would suffice.

Since statutory duties to protect workers' health are near universal, the duty imposed by s. 217.1 is largely redundant even on the assumption that only a statute can impose a duty sufficient for omission offences. While the case law with respect to common-law duties is somewhat unclear,[72] there is still some basis to believe that a general tort duty not to injure could found a legal obligation for the purposes of para. 219(1)(b) of the *Criminal Code*, thus rendering an omission with respect to that duty criminally negligent. It follows that even prior to Bill C-45, an employer, including a corporation under the identification theory, has always been potentially liable for the negligent killing of a worker (negligent manslaughter). So why do we not have an abundance of case law either finding employers guilty or acquitting them on the basis that the duties I have set out do not reach as far as I have claimed? The most likely reason lies in a continuous, not irrational, unwillingness on the part of the Crown to initiate prosecutions where (1) a provincial body is already charged with co-existent enforcement obligations and (2) prosecutorial resources in terms of time, money and expertise would likely be stretched considerably while outcomes are unpredictable. Further, some researchers have found that there is a close relationship between an offender's socio-economic status and the likelihood of prosecution.[73] Therefore, the fact that the potential accused in these cases are of a type that is typically not prosecuted might add to the reasons for a lack of case law. Bill C-45 has addressed none of these reasons.

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70 *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, para. 25(2)(h)[the *OHSA*]. Note that the *OHSA* excludes domestic workers, farm workers, and teachers from its protections, though the scope of these exceptions is substantially narrowed by the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 [the *OLA*] and by O. Regs. 352/91 and 353/91. The duties imposed by the *OHSA* and the *OLA* and the regulations made under those acts are certainly sufficient to impose a statutory duty on employers generally to safeguard their workers from serious bodily harm or death for the purposes of para. 219(1)(b) of the *Criminal Code*.

71 R.S.C. 1985 (2nd Supp.), c. 33.

72 See *R. v. Coyne* (1958), 31 C.R. 335, 124 C.C.C. 176 (N.B.C.A.)(QL); but see *R. v. Thornton* (1993) 2 S.C.R. 445, 13 O.R. (3d) 744, affm'g (1991), 1 O.R. (3d) 480 (C.A.) (CanLII).

73 Law Commission of Canada, *supra* note 24 at 19.

In conclusion then, the new legislation is aimed at actors who cannot be imprisoned and who cannot rationally be deterred by constitutionally valid fines. The legislation is extremely poorly drafted and it does nothing to overcome the real hurdles that stand in the way of criminal convictions of those who catastrophically violate workers' health and safety rights.

And so I return to my earlier question: why was Bill C-45 enacted? To this question, I would add another: why was it enacted in its present form? We have already seen that political expediency is one of the driving forces behind the proliferation of the criminal law. This observation is both true and utterly unhelpful, since there is no obvious legal mechanism that could counteract political expediency. It seems to me, though, that the discussion could benefit from some elaboration on why the use of the criminal law, as opposed to other forms of legislative or administrative intervention, is so popular and so expedient.

The effect of the constitutional framework on the proliferation of the criminal law

That s. 91 of the *Constitution Act, 1867*, provides the federal Parliament with broad, exclusive jurisdiction over the substantive criminal law requires no rehearsing.[74] The less discussed, but for present purposes more interesting, aspect of the constitutional distribution of powers is that s. 92 imposes jurisdiction over the administration of justice on the provinces. This has significant implications. When the federal Parliament expands the substantive criminal law, it has neither the power nor the obligation to advance implementation of the new law. The provinces pay for the investigation and prosecution of, and correctional facilities for, all but the most serious offences.[75] The provinces provide the "bricks and mortar," the people power, the training, and the

74 *Reference Re Firearms Act (Can.),* 2000 SCC 31, [2000] 1 S.C.R. 783 at para. 28 (CanLII) [*Reference Re Firearms Act*].

75 Note that just over 1% of Canada's post-conviction prison admissions are to penitentiaries: see Statistics Canada, "Study: Changing profile of adults in custody, 2006/2007" *The Daily* (15 December, 2008), online: Statistics Canada, The Daily <http://www.statcan.gc.ca/daily-quotidien/081215/dq081215b-eng.htm>. The remainder is admitted to provincial (and, marginally relevant, territorial) prisons.

Add to that the financial burden on the provinces of imprisoning people who are remanded in custody while awaiting a bail hearing or trial (typically in excess of 50% of the provincial prison population). Still, the overall prison populations are more equally distributed between federal and provincial institutions. For example, in 2008/09 the populations were 13,343 in federal prisons and 23,504 in provincial institutions: see Statistics Canada, "Average daily count of adults in custody" *The Daily* (8 December, 2009), online: Statistics Canada, The Daily <http://www.statcan.gc.ca/daily-quotidien/091208/t091208a1-eng.htm>.

resources for court houses, police stations, Crown attorneys, duty counsel, legal-aid lawyers, and provincial correctional facilities. The federal Parliament merely enacts.[76] This is particularly true for new offences, which are much more likely to represent an expansion into areas previously addressed through administrative law and therefore to lead to provincial sentences. This means that when the substantive criminal law is expanded, particularly in the area of offences not likely to attract prison sentences exceeding two years, all the public reputational benefit goes to the federal Parliament or, more precisely, the federal government of the day, while all the costs go to the provinces. This in turn translates into a constitutionally authorized federal power for unfunded mandates. The problem with unfunded mandates, as the U.S. courts have observed, is that they effect an undue expansion of the federal powers over the states, or, in the Canadian context, the provinces. This is why U.S. federal legislation that presses state officials into federal service or requires states to pass legislation or administer a federal law is constitutionally invalid since it is contrary to the dual-sovereignty doctrine.[77] The U.S. Supreme Court has observed that this extension of federal might is not restrained by any budgetary implications for the federal power, making it doubly inviting:

> The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States . . .
>
> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.[78]

The same effects occur in Canada, but because this pressing into service of provincial officials for the administration of federal statutes, i.e., the criminal law, is specifically directed in ss. 91 and 92, there is no basis on which Canadian courts could fashion a corresponding "unfunded mandate" jurisprudence in Canada. The combination of high visibility, low cost, and low ac-

76 This is true for the vast majority of criminal prosecutions. Legal-aid funding from federal sources has been frozen and, with the notable exception of drug prosecutions, almost all prosecutions are provincial.

77 The U.S. Supreme Court restricted the sphere of federal legislative competence in this manner first in *New York v. United States*, 505 U.S. 144 at 188 (1992), where the Court held that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."

78 *Printz v. United States*, 521 U.S. 898 (1997).

countability has proven irresistible to federal politicians, and there is no reason to think that the future will be different from the past.[79] There simply is no political pressure that could counteract these effects, and thus the words of the round-table participant quoted above, "Politicians must resist the temptation to create a new offence every time there is a crisis," will remain a pious wish.[80]

The picture that has emerged following the enactment of Bill C-45 bears this out. Bill C-45 has remained largely unused. The groups engaged in lobbying during the legislative process of the Bill have not returned to Parliament Hill to complain about its complete lack of effectiveness. Instead, they have blamed provincial prosecutors for inaction.[81] Academic and policy commentators have not blamed the government for the continued absence of corporate criminal liability.

This is not the only way in which the constitutional division of powers contributes to the proliferation of the criminal law. The federal Parliament has power over a variety of rather important matters, most of which have very marginal impact on the day-to-day lives of Canadians. These would include currency, foreign policy, and immigration. Conversely, the provinces hold power over a variety of often more parochial matters, many of which are of abiding and direct interest to even the most a-political Canadian—such as health, education, or property and civil rights. There are two exceptions to this general rule: the federal taxation power and the criminal law power. Neither is substantively restrained, both have been construed by the courts as plenary powers,[82] and both provide federal parliamentarians with opportunities to insert themselves into matters that are otherwise allocated to the province. It is

79 While it is true that provincial politicians are often supportive of more punitive criminal law, and occasionally in the same law-and-order rhetoric now routinely used by federal politicians, the picture at the provincial level is much more mixed. In a recent *Globe and Mail* poll, six provincial governments expressed concerns over the provincial fiscal impact of Ottawa's tough-on-crime agenda: Gloria Galloway, "Provinces fear hefty costs of federal get-tough crime bills" *The Globe and Mail* (20 May, 2010).

80 *Supra* note 3. It is important to note that the expansion of the criminal law, either in Canada or in the U.S., is not a new phenomenon and thus cannot be explained by recent populist stances of "new punitiveness."See Dawn Moore and Kelly Hannah-Moffat, "The Liberal Veil: Revisiting Canadian Penalty" in John Pratt *et al.*, eds., *The New Punitiveness: Trends, Theories, Perspectives* (Portland, Or.: Willan, 2005) 85 (noting Canada's dodging of the trend towards higher rates of incarceration); Stuntz, *supra* note 1 at 527ff (noting that the expansion of the criminal law is constant and not focused on populist preoccupations).

81 United Steelworkers of America, *Whatever Happened to the Westray Bill? Why Are We Still Dying for a Living?* (March 2006), online: United Steelworkers, Health and Safety <http://www.uswa.ca/program/content/3376.php>.

82 For the criminal law power, see *supra* note 28; for the taxation power, see: *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 390, 68 D.L.R. (3d) 452 (CanLII).

therefore no accident that the two federal statutes most in need of slimming down and shaping up are the *Income Tax Act* and the *Criminal Code*.[83]

Again, Westray is a good illustration. As we have seen, there was pressure for governments to take action and to be perceived as taking action. Provincial legislation dealing with occupational health and safety was put in place, imposed similar, if more extensive, duties compared to s. 217.1 of the *Criminal Code,* and sanctioned violations through a quasi-criminal scheme for enforcement. Prosecutions under OHS acts are conducted by OHS officials before the provincial courts, and corporations may be fined to various limits, e.g., up to $500,000 per occurrence in Ontario. A proper provincial response was therefore to review OHS legislation and to improve operations where necessary, responding to the problems identified in the Richard Inquiry. For example, Ontario responded somewhat belatedly by hiring an additional 200 inspectors to deal with the notorious under-enforcement of its *Occupational Health and Safety Act*.[84] The federal government had more limited options since its reach in the OHS field is limited to federal employees. There was little enthusiasm for spending a lot of money on additional enforcement. In fact, many of the changes to the *Canada Labour Code*[85] downloaded responsibility for enforcement onto employers and unions under the guise of stakeholder involvement.[86] All measures that might have proven even mildly effective would have required the allocation of federal government and federally regulated industry resources to improve occupational health and safety. Instead, the federal government opted for the high-visibility, low-to-no-cost option of

83 In a recent blog post on Canadian income taxation, economics professor Frances Wooley notes a number of reasons for the ever increasing complexity of the *Income Tax Act*: see Frances Wooley, "Why is the Personal Income Tax System So Complicated?" *Worthwhile Canadian Initiative: A Mainly Canadian Economics Blog* (3 May, 2010), online: Worthwhile Canadian Initiative <http://worthwhile.typepad.com/worthwhile_canadian_initi/2010/05/why-is-the-personal-income-tax-system-so-complicated.html>. Below the Wooley's post, commentator Bob Smith responds: "[i]n the introductory tax law course at UofT my old professor used to introduce the course by comparing the *Income Tax Act, 1917*, with the *Income Tax Act, 1985* (as amended). First, he'd drop the 1917 Act on the Table. Being, essentially, a 12 page pamphlet, it would drift lazilly [sic] to the table. Then, he'd drop the bound copy of the 1985 Act (complete with the accompanying regulations, remission orders, and a couple of tax treaties). Being, essentially, a 3000 page collection of run-on sentences, it crashed to the table with a resounding thud."

84 Gillian Livingston, "Ontario to hire 200 more inspectors to target unsafe workplaces" *The Canadian Press* (9 July, 2004).

85 *Canada Labour Code*, R.S.C. 1985, c. L-2, as am. by *Canada Labour Code Amendment Act, supra* note 41.

86 The Canadian Autoworkers Union has been complaining that the *Railway Safety Act* effectively amounts to OHS deregulation: Canadian Autoworkers Union, "Rail News in Brief," *Railfax 6:10* (24 March, 1998), online: Canadian Autoworkers Union, Railfax <http://www.caw.ca/en/5043.htm>.

amending the *Criminal Code*. Except, of course, that this option is not cheap in the long run. It contributes to all of the problems that were outlined in the first part of the paper, but it does so subtly and without hurting the people exercising it, since the long run is longer than the election cycle.

What is the role of the courts in bringing about restraint?

I have argued that politicians have consistently overused the criminal law and I have shown that this trend will continue for political and constitutional reasons. The last two questions to address in this paper are: what role have the courts played in contributing to the current state of affairs, and what role they could and/or should play in advancing the goal of restraint?

The jurisprudence of the Supreme Court shows an almost unbroken record of giving the federal Parliament free rein in exercising its criminal law power. The Court has variously characterized this power as being plenary in nature,[87] not tied to a single purpose or set of purposes,[88] reviewable only on a standard of extreme deference, and not in need of justification of its clearly detrimental effects on a proportionality standard.[89] This jurisprudence is well known and not in need of further exploration. There are some notable exceptions. Again, these are well known, but they might bear some discussion from the perspective of this paper, since the principle of restraint has so far not formed the matrix for an analysis of this jurisprudence.

The starting point for any discussion of a substantive limit on the criminal law power is, of course, *Margarine Reference*.[90] The case stands out as the Supreme Court's most famous example of a legislative purpose, i.e., the prohibition of the sale of a type of margarine, which was found to be an invalid criminal-law purpose. The Court has recognized from time to time that the extensive definition of the criminal law power may create problems in the federal-provincial balance, such as in *Scowby v. Glendenning*, where Estey J. recognized that "Parliament's legislative jurisdiction properly founded on s.

87 *Labatt, supra* note 28.

88 *Hydro-Québec, supra* note 16.

89 *Malmo-Levine, supra* note 8; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 32, 127 D.L.R. (4th) 1 (CanLII) [*RJR-MacDonald* cited to S.C.R.]*; Reference Re Firearms Act, supra* note 74 at para. 27.

90 *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, [1949] 1 D.L.R. 433 (CanLII) [*Margarine Reference*]. See also *Boggs v. R.*, [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 718 (CanLII) where a criminal offence piggy-backed onto provincial administrative action of suspending a driver's licence. The offence was found *ultra vires* the federal Parliament, since at least some of the reasons for suspending a licence provincially could not be tied back to the public purpose of road safety.

91(27) may have a destructive force on encroaching legislation from provincial legislatures, but such is the nature of the allocation procedure in ss. 91 and 92 of the Constitution."[91] However, such cases are exceptional and for the most part the Supreme Court has refrained from imposing substantive limits on the kinds of conduct that could be targeted through the criminal law, regardless of whether the provinces had occupied the field and regardless of any threshold evidence of either need or effectiveness of the prohibition.

There was some hope that the advent of the *Charter* would make a difference, and some of the early *Charter* cases suggested that such a hope might have been well founded.[92] However, the Court's appetite for controlling Parliament in this regard has long since waned.

Should the Court play a role in restraining Parliament? My answer is a hesitant "yes" because I have come to the conclusion that Parliament cannot be expected to exercise self-restraint—for the reasons set out earlier. My answer is hesitant because the foundation in the constitutional language is fairly slim, and the Supreme Court's jurisprudence, much of it very well established, does not favour most of the arguments one could make in support of restraint. Notably, the rejection of the harm principle[93] and the unwillingness to impose a closed list of permissible purposes for criminalization[94] foreclose two otherwise promising avenues. Justice Arbour's reasons (dissenting in part) in *Malmo-Levine* provide some insight into the potential of a limited acceptance of the harm principle and its link to a limited-purpose doctrine. She would have required the government to identify the criminal law purpose of the particular prohibition (here: public health or protection of vulnerable groups) and required a demonstration that there was a reasoned apprehension of non-trivial harm to either of these interests.[95] One of the difficulties with the harm principle is that it is largely an evidentiary rather than a doctrinal principle, at least when we understand "harm" not as actual harm, but as risk of harm. Since there is some risk of harm in practically everything anyone does, the question cannot be the presence or absence of risk of harm, but rather its relative degree. The Court has frequently stated that such drawing of lines in the

91 *Scowby v. Glendinning*, [1986] 2 S.C.R. 226 at para. 11, 32 D.L.R. (4th) 161 (CanLII).

92 For example, in requiring *mens rea* for all offences that carried prison sentences put a cap on the types of regulatory offences that could be created, at least in their application to individuals. See *Reference Re: B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 (CanLII).

93 *Malmo-Levine, supra* note 8.

94 *Hydro-Quebec, supra* note 16; *R. v. Hinchey*, [1996] 3 S.C.R. 1128 at para. 29, 147 Nfld. & P.E.I.R. 1 (CanLII).

95 *Malmo-Levine, supra* note 8 at para. 250 and *passim.*

sand is the proper task of the legislature and not the courts.[96] Unsurprisingly, therefore, Gonthier and Binnie JJ., writing for the majority in *Malmo-Levine*, express concern over the legitimacy of limiting the criminal law in the way urged by the appellants. For example, at para. 133 the Court cautions against the imposition of a "serious and substantial" standard that "would involve the courts in micromanagement of Parliament's agenda." Similarly, at para. 139 the Court is concerned that requiring Parliament to criminalize more harmful substances before less harmful ones would "involve the courts in not only defining the outer limits of the legislative action allowed by the Constitution but also in ordering Parliament's priorities within those limits. That is not the role of the courts under our constitutional arrangements."[97] It should be noted that in other contexts this distinction has not concerned the Court too much. For example, in the human rights context, McLachlin J. (as she then was) accepted in *Grismer* that every driver posed a certain level of risk and that society had to be tolerant of some of the risks posed by drivers with disabilities.[98] In the context of obscenity prohibitions, the Court was even prepared to read in a requirement of proof (or reasonable inference) of an appreciable risk of harm, albeit in the context of the need of balancing freedom of expression rights.[99] Moreover, the Court extended the harm element to its indecency jurisprudence, first in a performative context[100] and later to indecent acts that, in the view of the majority, had no expressive or other recognized constitutionally protected element.[101] Again, the Court did not shy away from identifying a degree of risk, viz., the harm must be substantial or incompatible with the proper functioning of society. Similarly, in the context of implementing not-criminally-responsible verdicts, the Court held that some risk of recurrence had to be tolerated.[102] In both instances, the court found that drawing lines that define acceptable levels of risk lay within their proper function of adjudication. There is no indication in any of these cases that the courts are limited to a *de minimis* analysis of whether there is any harm.

96 *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 990, 58 D.L.R. (4th) 577 (CanLII) [*Irwin Toy* cited to S.C.R.].

97 *Ibid*. at paras. 133, 139.

98 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paras. 24, 32, 181 D.L.R. (4th) 385 (CanLII) [*Grismer*].

99 *R. v. Butler*, [1992] 1 S.C.R. 452 at para. 50, 89 D.L.R. (4th) 449 (CanLII) [*Butler* cited to S.C.R.].

100 *R. v. Mara*, [1997] 2 S.C.R. 630, 33 O.R. (3d) 384 (CanLII).

101 *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 at para. 62 (CanLII) [*Labaye*].

102 *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 49, 175 D.L.R. (4th) 193 (CanLII).

The B.C. Court of Appeal in *Malmo-Levine* attempted to show that the Supreme Court had already endorsed a harm principle in a variety of contexts, and that this endorsement had been based on a broad range of legal and policy sources that supported the harm principle as a mode for limiting the valid purposes of the criminal law power.

Even the most valiant supporter of the decision of the Court of Appeal would have to admit that the reliance on precedent was somewhat precarious. The Supreme Court had fairly consistently taken the view that the criminal law power under s. 91 of the *Constitution Act, 1867*, was plenary in nature and not restrained by a substantive review in the courts. If anything, the scope of the criminal law power had seen an extension in the last decade, including any area of policy making that was found to be sufficiently important and connected to Canadian values. In recent years, this trend has encompassed public health[103] as well as environmental protection.[104]

However, there is a starting point for an argument in the majority reasons in *Malmo-Levine.* The Court was clearly prepared to impose two limits on the exercise of the criminal law power through s. 7 of the *Charter*: criminal prohibitions can be neither arbitrary nor grossly disproportionate. This is only a starting point because on both of these measures, as Justices LeBel and Deschamps point out in their separate dissents, the possession offence should have fallen. The key to reversing this outcome seems to me to lie in the appreciation of the evidence of harms caused by criminalization. Doing so would avoid changing the analytical approach and upsetting well-established precedent. Further, the Court has frequently preferred to frame issues not in terms of overturning precedent, but in terms of rebalancing factors because the underlying evidence has changed. This approach would track changes in approach in other cases, such as the change to the scope of s. 12 of the *Charter* in death-penalty extradition in *Burns and Rafay*[105] or the change to obscenity law in *Butler*.[106] In *Malmo-Levine*, the majority held that there were some harms caused by the recreational use of marijuana. The harms caused by the criminalization of marijuana use had to be grossly disproportionate in order to render the offence unconstitutional. The majority then proceeded to restrict its analysis and only consider the harms of criminalization of *the particular offence*, while leaving the harms caused by excessive use of the criminal law, such as those pointed out in this paper, out of the proportionality equation. It

103 *RJR-MacDonald, supra* note 89.
104 *Hydro-Québec*, *supra* note 16.
105 *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 (CanLII) [*Burns and Rafay*].
106 *Butler, supra* note 99.

merits repeating the Court's statement, as quoted in the introduction:

> if the court imposes a sentence on conviction that is no more than a fit sentence, which it is required to do, the other adverse consequences are really associated with the criminal justice system in general rather than this offence in particular. In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system. Whenever Parliament exercises its criminal law power, such costs will arise. To suggest that such "inherent" costs are fatal to the exercise of the power is to overshoot the function of s. 7.[107]

It is precisely because these costs arise "whenever Parliament exercises its criminal law power" that the Court should have taken them into account in the evaluation of proportionality. Contrast the Court's stance in *Malmo-Levine* with the view expressed in *Labaye.* The advantage of a "requirement of a risk of harm incompatible with the proper functioning of society," according to the majority in *Labaye,* is that it "brings this area of the law into step with the vast majority of criminal offences, which are based on the need to protect society from harm."[108] The majority in *Malmo-Levine* asked the right question, but then failed to take a broad and systemic view. This should be reversed, and such a reversal would not alter the doctrinal approach fundamentally. Indeed, the development of the harm-based approach was described in *Labaye* as being incremental in the tradition of the common law.[109]

Conclusion

This paper has argued that the criminal law will continue to grow, absent some intervention from the courts. The ill-fated efforts of the Law Commission of Canada in its "What is a Crime?" project may have provided a further incentive for parliamentary reform of the *Criminal Code*, but it is difficult not to be sceptical about whether any intellectual insight will bring about lasting change in light of the constitutional and political realities behind the proliferation of the criminal law. There is little hope, based on the existing jurisprudence, that judicial intervention is imminent. However, the Supreme Court could effect better outcomes with fairly minor changes to the test set out in *Malmo-Levine.* The advantage of approaching criminalization and its harms in a systemic way lies chiefly in the Court's capacity to rein in some

107 *Malmo-Levine, supra* note 8.
108 *Labaye, supra* note 101 at para. 24.
109 *Ibid*. at para. 26.

of the marginal creep while not interfering with the exercise of criminal law powers at the core. When we accept that the generic harms of criminalization are a factor to be weighed in the proportionality analysis, criminalization of conduct that gives rise to a reasoned apprehension of direct harm to others will very unlikely be found grossly disproportionate. However, where the harm is remote, trivial or inferential, the sum of generic and specific costs of criminalization will more likely outweigh the benefit. Arguably, the Court has already taken the first step in this direction in *Labaye*. Further development of a harm-based analysis of criminalization taking into account systemic harms would further the objective of restraint while leaving Parliament free to exercise its criminal law power at the core. For some offences, the constitutional justification for restraining Parliament may arise from the need to protect fundamental freedoms such as the freedom of expression, assembly or association. For the majority of cases, the rights guaranteed by s. 7 of the *Charter* will provide the appropriate framework.

Boumediene and the Meanings of Separation of Powers in U.S. Emergency Law

Emily Hartz* **and Dimitrios Kyritsis†**

This article examines the conception of the U.S. courts' role vis-à-vis the political branches of government in a national emergency that underlies the recent case-law on the rights of the detainees held in Guantanamo Bay and in the U.S. These cases struck historic blows to the Bush Administration's policies on terrorism—the latest of these blows being the Court's 2008 decision in Boumediene v. Bush. *It has been argued that these cases confirm a pattern in the U.S. Supreme Court's approach to rights during war-time, namely to revert to procedural arguments rather than to develop a framework of substantive constitutional rights to evaluate conflicts between security and rights during times of crisis. We argue that this approach does not square with* Boumediene. *Instead, we offer an alternative analytical approach, whereby courts retain a supervisory role with regard to the content of such measures and their conformity with substantive constitutional guarantees. According to this approach, judicial duty in a national emergency is determined by the proper combination of considerations of both content and institutional design. We call this the "mixed approach" and we argue that it better accords with the Court's decision in* Boumediene.

Dans cet article, l'auteur examine la conception du rôle des tribunaux états-uniens devant les branches politiques du gouvernement pendant une situation de crise nationale qui sous-tend la jurisprudence récente sur les droits des détenus de Guantanamo Bay et ceux des É.-U. Ces affaires ont porté des coups historiques aux politiques sur le terrorisme de l'administration Bush, le dernier de ces coups étant la décision de la cour dans l'affaire Boumediene c. Bush en 2008. On a soutenu que ces affaires viennent confirmer une tendance dans l'approche de la cour suprême des É.-U. aux droits en temps de guerre, à savoir de revenir aux arguments procéduraux plutôt que d'élaborer un cadre de droits constitutionnels fondamentaux afin d'évaluer les conflits entre la sécurité et les droits en temps de crise. L'auteur soutient que cette approche ne cadre pas avec l'affaire Boumediene et présente plutôt une démarche analytique de rechange, au moyen de laquelle les tribunaux continuent de jouer un rôle de supervision à l'égard du contenu de telles mesures et leur conformité avec les garanties constitutionnelles fondamentales. Selon cette démarche, le devoir judiciaire pendant une situation de crise nationale est déterminé par la bonne combinaison de considérations du contenu et du design institutionnel. Il s'agit de « l'approche mixte », selon l'auteur, qui soutient qu'elle concorde mieux la décision de la cour dans l'affaire Boumediene.

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Introduction

The events of 9/11 stirred constitutional reflection on security and rights in the U.S. Following the declaration of a "war on terrorism" by the Bush Administration, the question of whether and to what extent "presidential prerogatives increases to meet a growing threat to the nation" moved to the forefront of constitutional discussions.[1] In large part, these discussions were framed by the Supreme Court decisions on the rights of those detained by the government on grounds of their suspected connection with terrorism.[2] With its most recent decision in *Boumediene,* it appears that the Court has closed a cycle of tackling this issue. So, as the social climate changes and the threat of terrorism is being replaced by other threats at the top of the political agenda, we can draw some more definitive conclusions about this chapter in the Court's history. *Boumediene* is very important in this connection[3] because, among other things, it provides some crucial insights into the Court's understanding of its role vis-à-vis the political branches of government in an emergency.[4]

Of course, *Boumediene* was not the first legal defeat the government suffered in connection with the "war on terror." From early on, the Court refused to be sidelined. Hence, in the three separate cases of *Rasul v. Bush, Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*, it scrutinized the administration's policies in relation to the detainees and found them unlawful. Still, the reception of those early decisions was mixed, even among those who were otherwise relieved to see the government's efforts meeting some resistance, at least in the

1 See Thomas M. Franck, "*Hamdan v. Rumsfeld*: Presidential power in wartime" (2007) 5 Int'l J. of Const. L. 380 at 381.

2 The Supreme Court addressed the issue on five occasions so far. In 2004 the Court decided *Rasul v. Bush*, 542 U.S. 466 (2004) [Rasul]; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) [*Hamdi*]; and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) [*Padilla*]. In 2006 it decided *Hamdan v. Rumsfeld* 548 U.S. 557 [*Hamdan*]. The last in this line of cases is *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) [*Boumediene*].

3 Ronald Dworkin has written that it is "one of the most important Supreme Court decision in recent years." See Ronald Dworkin, "Why It Was a Great Victory" N.Y. Review of Books, Aug. 14, 2008, at 18.

4 The already burgeoning literature on *Boumediene* has for the most part focused on the Court's interpretation of the constitutional guarantee of habeas corpus and its separation-of-powers implications as well as its extra-territorial application. See among others: J. Erik Heath, "Writing Off the Great Writ: Preserving Habeas Corpus in *Boumediene v. Bush* Against Strong National Security Pressures" (2009) 1 NE. U. L. J. 9; Jennifer Norako, "Accuracy or Fairness?: The Meaning of Habeas Corpus After *Boumediene v. Bush* and Its Implications on Alien Removal Orders" (2009) 58 Am. U. L. Rev. 1611; Jordan J. Paust, "*Boumediene* and Fundamental Principles of Constitutional Law" (2009) 21 Regent U. L. Rev. 351; Stephen Vladeck, "*Boumediene*'s Quiet Theory: Access to Courts and Separation of Powers" (2009) 84 Notre Dame L. Rev. 2107.

courtroom. So, while many have interpreted the Court's position as a major assertion of its role as guardian of constitutional propriety and as vindication of the view that the "law is not silent" in the terrorism conflict,[5] it has also been argued that the Court did not go far enough. For example, some commentators have suggested that *Rasul* "leaves untouched the question of petitioner's rights under the Constitution,"[6] while *Hamdi* has been regarded as being "of limited utility in preventing unconstitutional detentions in the event of future terrorist attacks."[7]

More relevant for the purposes of this article is that a major theme running through the aforementioned cases was the relevance of the legislative involvement in the war on terror. At times, the Court appeared to make the level of protection afforded the detainees turn more on the willingness of the legislature to protect them than on its own interpretation of what is due them under the Constitution. Thus, *Rasul* turned on the interpretation of the statutory provisions governing the jurisdiction of federal district courts.[8] In *Hamdi,* the Court decided that the Authorization for Use of Military Force issued by Congress in September 2001 extended to the detention of enemy combatants captured in Afghanistan because preventing captured individuals from returning to the field of battle by detaining them is a "fundamental and accepted incident to war."[9] It came as no surprise, then, that the administration's reaction focused on pushing legislation through Congress to legally underpin or redefine the policies that the Court had rejected. The Court's rulings in *Rasul* and *Hamdi* provoked the *Detainee Treatment Act* of 2005.[10]

5 Arthur H. Garrison, "The Judiciary in Times of National Security Crisis and Terrorism: Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes" (2006) 30 Am. J. of Trial Advocacy 165 at 169.

6 Sameh Mobarek, "*Rasul v. Bush*: A Courageous Decision but a Missed Opportunity" (2005) 3 Loy. U. Chicago Int'l. L. Rev. 41 at 70.

7 Vijay Sekhon, "More Questions than Answers: The Indeterminacy Surrounding Enemy Combatants Following *Hamdi v. Rumsfeld*" (2005) 9 Boalt J. of Criminal Law 1.

8 *Judiciary and Judicial Procedure,* 28 U.S.C. § 2241(a) & (c)(3).These provisions grant federal district courts the authority, "within their respective jurisdictions," to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." The Court decided that under these provisions the jurisdiction of the Federal Courts to hear habeas petitions did reach to Guantanamo, since the Government practiced "complete jurisdiction and control" over the Naval Station on Guantanamo Bay. Thus, the Court in *Rasul* did not reach the question of whether detainees had a constitutional right to habeas corpus. It held, instead, that the detainees had a *statutory* right to habeas corpus hearings in the federal courts (*Supra* note 2 at 473 and 468).

9 *Hamdi, supra* note 2 at 2640. Writing for the plurality, Justice O'Connor concluded that the AUMF constituted, " . . . *explicit* congressional authorization for the detention of individuals in the narrow category we describe" (*Hamdi* at 2640, emphasis added).

10 Pub.L. 109–148, Div. A, Title X, (Dec. 30 2005) 119 Stat. 2739.

The Act barred detainees at Guantanamo Bay from bringing future habeas corpus challenges against their detention or the conditions of their detention. Likewise, the Court's overturning of the military commissions authorized by the President in *Hamdan* led to the passing of the *Military Commission Act,* one of the last acts of the Republican-controlled Congress in 2006.[11] The Act authorized trial of "unlawful enemy combatant[s]" by military commission and laid down rules for such trials that were almost indistinguishable from the rules governing the military trials originally set up by the President and subsequently overturned by the Supreme Court.[12]

Predictably, the ensuing round of constitutional wrestling over the scope of emergency powers focused on the question of the legality of the congressional authorizations granted by these Acts. The Court addressed this question with its decision in the *Boumediene* case, thus adding one final link in the chain of the "Guantanamo detainees" saga.

The aim of this article is to challenge a common view, whereby in the midst of a national emergency the U.S. Supreme Court's approach to rights is guided by procedural concerns about whether the policies in question have the support of both the executive and the legislature. Focusing on *Boumediene*, the article argues that the judiciary retains a critical supervisory role that goes well beyond such calls for judicial deference. In order to prepare the ground for our interpretation, it starts by working out a conceptual framework for understanding the interaction between different branches of government in a national emergency (Part 1). It then applies this framework to interpret the U.S. Supreme Court's decisions in *Boumediene* (Part 2).

Part 1: The meanings of separation of powers in emergency law

1.1. Historical outline

The only provision explicitly sanctioning limitations on civil rights in emergencies in the U.S. Constitution is the Suspension Clause (Art. I, §9, cl. 2), which states that: "The Privilege of the Writ of Habeas Corpus shall not be

11 In *Hamdan* the Court concluded that the military commission which was set up to try Hamdan flouted the requirements of military justice laid down in the Uniform Code of Military Justice (UCMJ) which is the foundation of military law in the United States. The Court found that a) the procedures did not comply with the standards of military justice and that b) the crime of conspiracy, of which Hamdan was accused, did not fall within the kind of military necessity on which the executive's authority to make use of military commissions is based (*Hamdan, supra* note 2 at 2773). On the MCA see Michael Dorf, "The Orwellian Military Commissions Act of 2006" (2007) 5 J. International Criminal Justice 10.

12 Franck, *supra* note 1, at 385.

suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." But, while the authority to suspend this fundamental right is obviously a potent mandate, it is also a very explicit, and therefore limited, one. As a result, most governments have instead looked to the provisions of the constitution allocating war powers to find a legal underpinning for emergency policies and for the attendant curtailment of individual liberties. Article I section 8 of the U.S. Constitution allocates comprehensive war powers to Congress, making specific reference to the power

> to declare war [. . .]to raise and support Armies [. . .] to provide and maintain a Navy [. . .] to make Rules for the Government and Regulation of the land and naval Forces [. . .] to provide for calling forth the Militia [. . .] and to provide for organizing, arming, and disciplining, the Militia." Article II section 2 provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

The exact implications of these provisions are famously ambiguous. As Justice Jackson noted in a case concerning executive action during the Korean War:

> . . . [a] century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.[13]

Thus, the Constitutional allocation of war powers has been interpreted by the Supreme Court to provide that the President may unilaterally commit acts of war under special circumstances;[14] that, when acting on implied authorization from Congress, the President may institute trial by military commission of spies captured on American soil outside any immediate theatre of war;[15] and that Congress and the President acting together are not precluded from imposing severe ethnicity-based limitations on personal liberty (*Hirabayashi v. United States*,[16] *Korematsu v. United States*),[17] even if none of these limitations are explicitly provided for in the Constitution. In general, the Court has sought to underpin such findings, relying on the principle that "[t]he war power of the national government is 'the power to wage war successfully.'"[18]

13 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) at 634 [*Youngstown*].

14 *The Prize Cases*, 67 U.S. 2 Black 635 635 (1863)[*Prize*] is the popular name referring to a set of cases concerning four vessels that had been brought in as prize in connection with the blockade: The Brig Amy Warwick, The Schooner Crenshaw, The Barque Hiawatha, and The Schooner Brilliante.

15 *Ex Parte Quirin,* 317 U.S. 1 (1942)[*Quirin*].

16 320 U.S. 81 (1943) [*Hirabayashi*].

17 323 U.S. 214 (1944)[*Korematsu*].

18 *Supra* note 16 at 93.

In *Hirabayashi,* the Court employed this principle to argue that the war power

> extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war.[19]

However, while the Court has frequently referred to the war powers, it has tended to construe its rulings narrowly and has refrained from committing itself to any general scheme regarding the scope of these powers. Furthermore, it has deliberately emphasized both the potential reach of the war powers and the Court's obligation to oversee the Government's interpretation of their scope. Thus, while siding with the government in *Ex Parte Quirin,* which the Court itself has later argued "represents the high-water mark of military power to try enemy combatants for war crimes,"[20] the Court noted that "the duty [. . .] rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."[21] Likewise, while siding with the government in one of its most notorious decisions ever, *Korematsu,* the Court stressed that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject [such decisions] to the most rigid scrutiny."[22] Furthermore, while voting *against* the President in *Youngstown Sheet & Tube Co. v. Sawyer*,[23] which has since been heralded as "one of the most significant Supreme Court decisions *of all time*"[24] because it determined "at a crucial juncture in the nation's political history"[25] that "the President of the United States possesses no inherent, unilateral legislative power in time of war or emergency,"[26] the Court took care to note that, while the President could not unilaterally claim such power, "[t]he power of Congress to adopt such public policies as those proclaimed by the [presidential] order is beyond question."[27]

19 *Ibid.*
20 *Hamdan, supra* note 2 at 590.
21 *Supra* note 15 at 19.
22 *Supra* note 17 at 216.
23 *Supra* note 13.
24 Michael Stokes Paulsen, "Youngstown Goes to War" (2002) 19 Const. Commentary 215 (emphasis in original).
25 *Ibid*.
26 *Ibid*.
27 *Supra* note 13 at 588.

1.2. The role of courts in a national emergency: Three approaches

A sceptic might be tempted to conclude from the brief outline just rehearsed that U.S. emergency law is fraught with ambiguities, both in the Constitutional text and in the jurisprudence, which the Court and the other branches of government can manipulate, depending on the exigencies of the moment, in order to promote their political agendas.[28] And a pragmatist might insist that, despite appearances to the contrary, the historical record shows that "the government's policies usually pass muster."[29] Against the sceptic and the pragmatist, we wish to spell out an analytical framework for conceptualizing the question of the constitutional allocation of powers in a national emergency that hopefully offers a solid and rigorous basis for our thinking. With its help we will position a number of recent accounts of emergency law in a broader theoretical landscape.[30] Throughout, our focus will be on the judicial role vis-à-vis the political branches of government.

We will ask: How far does the court's power to review decisions by the political branches extend in time of war? We will examine three approaches

28 There is more than a hint of scepticism in Justice Jackson's lament in the *Youngstown* case quoted above.

29 Robert J. Pushaw Jr., "The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review" (2007) 82 Notre Dame L. Rev. 1005 at 1009.

30 Our discussion is not meant to be exhaustive of the possible positions. Importantly, it leaves out the view encapsulated in the maxim *salus populi suprema lex est*. According to this view, emergencies that threaten the very existence of a political community call for extreme measures, which it would be wrong to evaluate according to constitutional standards suitable for normal periods. To do so would both undermine the state's capacity to defend itself in the face of grave danger and plant in our constitutional doctrine and practice what Justice Robert Jackson famously labelled a 'loaded weapon' in his dissenting opinion in *Korematsu*; it would give government a legal foothold to claim ever extensive powers in normal times. On this view we do better to clearly mark out emergencies as exceptional, even at the price of allowing government a free hand in dealing with them. As for courts, they can do nothing but wait for the storm to pass, so that they may then resume their normal duties. Works in this tradition include: Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick, NJ: Transaction Publishers, 2002); and Carl Schmitt, *Political Theology: Four Chapters On The Theory Of Sovereignty* (Cambridge, Mass: MIT Press, 1985). John Locke also belongs in this tradition. In *Two Treatises Of Government* he argued that the executive possesses extra-legal authority to perform acts that are not provided for by positive law, but may be justified with reference to natural law, if they are done for the sake of the public good. Notably, Locke was a strong advocate of limiting the powers of the king, but he found that the unpredictability of emergencies necessitated the granting of extraordinary executive power: "since in some governments the law-making power is not always in being, and is usually too numerous, and so too slow for the dispatch requisite to execution, and because, also, it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with inflexible rigour on all occasions, and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the law do not prescribe." John Locke, *Two Treatises of Government* (Hamilton: McMaster University, 2000) at para.160.

to the question of the constitutional role of courts in a national emergency, which we will label procedural, extra-legal, and mixed. By choosing to talk about courts, we do not mean to imply that one cannot or should not discuss issues of constitutional allocation of power from the vantage point of the relationship between the legislative and the executive branch,[31] or that one cannot use the analytical framework defended here to account for this relationship. But to do so would require a far more comprehensive discussion than we can provide here.

It would help to start by drawing a distinction between two dimensions along which we assess a political decision. The first dimension has to do with the content of the decision, with what that decision enjoins legal subjects and legal officials to do. We will call the considerations that shape the first dimension *first-order* or *content-oriented* considerations. Some first-order considerations are included in the U.S. Constitution. When, for example, the Constitution dictates that Congress may not abridge freedom of speech, it states a requirement that the content of political decisions issued by Congress must satisfy: It must respect freedom of speech.

Of course, constitutional guarantees do not exhaust the list of considerations that bear on the content of political decisions. For instance, some come from judicially developed principles that lack constitutional footing, such as the maxim that "no man may profit from his own wrongdoing," or from general precepts of political morality. And others are considerations of policy. Surely, part of what makes something a good political decision is that it advances some important collective goal. But constitutional guarantees are among the most important first-order considerations, and for the remainder of this paper we will focus on those guarantees.[32] Besides, content-oriented constitutional guarantees have special significance from the standpoint of the judge. At least in normal circumstances, constitutional guarantees are more than just a consideration that makes something a good political decision. They state conditions of legal validity. If a political decision violates them, the courts are not bound by law to implement it.[33]

31 For a recent example see Mark Tushnet, "The Political Constitution of Emergency Powers: Some Lessons from *Hamdan*" (2007) 91 Minn. L. Rev. 1451.

32 For a sophisticated attempt to draw the distinction between constitutional guarantees and other content-based considerations see Lawrence Sager, "The Why of Constitutional Essentials" (2004) 72 Fordham L. Rev. 1421. See more generally his *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004).

33 In the U.S. this has been the case since the famous Supreme Court decision in *Marbury v. Madison* 5 U.S. 137 (Cranch) (1803).

By contrast, the second dimension of assessment has to do with who gets to decide what. It draws attention to the features of the institution or set of institutions that has produced this or that decision and to the way that the decision has been produced. The first thing that comes to mind when someone says that a political decision is one that courts are bound by law to implement is that the right person or the right institution has made it following the proper procedure. This is the idea captured by the second dimension, which, accordingly, we will call the dimension of institutional design. This dimension comprises the considerations defining which person or institution has power to make a decision, and what the proper decision-making procedure is. It includes for example the democratic pedigree of the decision maker, the mechanisms of accountability that check the exercise of power by the decision maker, the fairness of the decision-making process, and so forth. Again, many of the considerations of institutional design, such as separation of powers and democracy, are directly or indirectly derived from basic features of the constitutional order.

It is important to note right from the outset that both types of consideration are ultimately driven by certain important legal or, more generally, political principles, like freedom of speech and democratic accountability. It is not, of course, our intention to sidestep doctrinal analysis by going straight for the general principles. Rather, our hope is that the doctrine itself will make more sense in light of those principles. To this effect, we will start by outlining the three approaches to the role of courts in an emergency that we listed above in terms of the kind of interaction between the dimensions of content and institutional design each of them propounds.[34] We will then map these approaches on the Court's decision in *Boumediene* in order to evaluate their explanatory force. With this goal in mind, we now turn to the first approach, the procedural.

1.2.1. The procedural approach

The first approach says that courts ought primarily to monitor whether a certain decision pertaining to national security has been issued from the proper institution, following the proper procedure. Using the terminology introduced a few paragraphs ago we would say that their duty to implement this decision is a function of considerations of institutional design. Now, once the decision passes the institutional-design test in the sense that it is sufficiently backed

34 In this sense the thrust of our proposal is not the distinction between institutional design and content itself, but the "mix" of those two dimensions in the determination of judicial duty. We are grateful to an anonymous reviewer who urged us to make this clarification.

by considerations of institutional design, courts have to defer to the balance of first-order considerations struck by the decision, except perhaps in cases of flagrant and serious violation of a content-oriented constitutional imperative. Among the considerations of content that courts ought to leave upon the competent body to adjudicate on are those enshrined in the U.S. Constitution. This means that, during emergencies, they may not, for example, scrutinize whether the decision meets due process requirements or whether it unduly interferes with freedom of speech, as they routinely do in normal times.[35] Put differently: On the first approach, authority to decide on, say, how liberty and security ought to be balanced belongs to the political branches; and at the limit it belongs to them *exclusively*, in the sense that it is not shared between them and the courts.[36]

Although of course stylized in many respects, the procedural approach, as we have portrayed it, is meant to echo an increasingly popular trend in the constitutional law literature following the 9/11 terrorist attacks. A characteristic figure in this trend is Cass Sunstein. He has argued that the jurisprudence of American courts in emergency cases can best be understood as resting on the principle that curtailments of liberty by the executive at times of emergency are lawful only if they have clear congressional support.[37] In a similar vein, Samuel Issacharoff and Rick Pildes have insisted that in assessing emergency measures courts have, as a general matter, sought to preserve a system of "bilateral institutional endorsement" rather than second-guess the soundness of those measures. In a language that echoes the distinction drawn above, the two authors claim that "the judicial role has centered on the second-order

35 That is not to say that on the procedural approach there is no room for considerations of content at all. When courts interpret statutes, they are often guided by a sense of that which the legislature had wanted to achieve in making the decision it did. In this respect, they obviously rely in some part on considerations of content. The difference is that in such a case the goals pursued by the legislature and the steps it takes in their pursuit are largely taken for granted; they are not questioned for their conformity with the content-oriented principles of constitutional propriety that should have guided it. In other words, in statutory interpretation, as understood by the proceduralist, considerations of content do not acquire the force of benchmark that statutes must rise up to in order justifiably to command authority over courts.

36 An analogy can be drawn here with Joseph Raz's conception of authority. Raz thinks that once we accept someone's authority over us on a certain issue, his directives acquire exclusionary force. They pre-empt our acting on the reasons that the authority was supposed to adjudicate on with his directive. See generally Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press,1986) at Chapters 1–3. Of course we do not mean to imply by this analogy that the procedural approach presupposes Raz's theory or that Raz's theory entails it.

37 Cass Sunstein, "Minimalism at War" (2004) 47 Sup. Ct. Rev. at 77 [Sunstein]. Crucially, Sunstein adds that courts have also insisted on maintaining a system of procedural rights for those whose freedom is interfered with during an emergency. See also Mark Rahdert, "Double-Checking Executive Emergency Power: Lessons from *Hamdi* and *Hamdan*" (2007) 80 Temp. L. Rev. 451.

question of whether the right institutional processes have been used to make the decisions at issue, rather than on what the content of the underlying rights ought to be";[38] in this sense courts "have tied their role to that of the more political branches,"[39] and they "have shown great reticence about engaging the permissible scope of liberties in direct first-order terms."[40] After reviewing the case-law from *Ex Parte Milligan,*[41] through the WWII internment cases,[42] to *Youngstown,*[43] Issacharoff and Pildes conclude that the case-law is underlain by the Court's

> fidelity to an overall constitutional commitment to dynamic, deliberative judgments reached by the politically accountable branches, the legislature and the executive, as to how the trade-off between liberty and security ought to be made during wartime.[44]

They see the same pattern in the recent terrorism-suspected detainees' cases, which, in their view, make "no suggestion that the judicial role should be to determine on its own the substantive content and application of 'rights' during wartime."[45]

Writers of the proceduralist persuasion claim to be occupying an intermediate position. On the one hand, they dismiss as "unrealistic" and "undesirable"[46] the "aggressive, rights-based"[47] view, whereby courts have a constitutional responsibility to second-guess the political judgment about the scope of the fundamental liberties of individuals even in the midst of war. But equally, they distance themselves from the view that the measures advanced during a national emergency fall within the role of the President as Commander-in-Chief, and that to challenge them would be to usurp power that the constitution has bestowed upon the executive.

This stylized version of the procedural approach may be said to be motivated by a certain view about the proper institutional response to national

38 Samuel Issacharoff & Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights at Wartime" (2004) 5 Theor, Inq. L. 1 at 2 [Issacharoff &Pildes, Institutional Process].

39 *Ibid.* at 44.

40 Samuel Issacharoff & Richard H. Pildes, "Emergency contexts without emergency powers: The United States' constitutional approach to rights during wartime" (2004) 2 Int'l J. Const. L. 296 at 299 [Issacharoff & Pildes, Emergency contexts].

41 71 U.S. (4 Wall) 2,(1866).

42 *Supra* notes 16–17; *Ex Parte Mitsuye Endo* 323 U.S. 283 (1944).

43 *Supra* note 13.

44 *Supra* note 40 at 310.

45 *Supra* note 40 at 324.

46 The characterizations are Sunstein's. See Sunstein, *supra* note 37 at 51.

47 *Supra* note 40 at 307.

emergency and the changes in the constitutional structure that such a situation brings about. On the one hand, it emphasizes the heightened need for swift government response, expediency and the like that national emergencies typically give rise to. It taps on the intuition that we want to be able to defend ourselves effectively against emergencies, and to do this we need to bestow upon our government extensive powers that we would otherwise be unwilling to accede to it. On the other hand, the procedural approach questions the role courts can play at times of crisis. For instance, it makes much of the fact that courts are unsuited to appreciate what are the best strategies to deal with an emergency and hence to evaluate the measures actually taken by the government. Courts, it points out, have no access to information that is available to the executive, and even if they did, they lack the expertise that is necessary to draw the right conclusions from it. Besides, courts are generally reluctant to resist government heavy-handedness or abuse of power. The record shows that when they have felt that the stakes are too high, judges have by and large declined to intervene in order to stop the executive from going too far, out of fear of the public outcry that would ensue should their decisions be seen as thwarting the nation's effort. So here we have two possible bases for the procedural approach's mistrust of judicial supervision of content-based issues: Courts are unfit meaningfully to scrutinize the government's conduct at times of crisis and have proved ineffectual whenever they have been called to do so. These context-specific reasons complement the more generally applicable reasons typically invoked against judicial creativity, which, to use Justice Scalia's words from his dissenting opinion in *Hamdi* "encourages [the lassitude of the political branches] and saps the vitality of government by the people" because it substitutes for the will of the political branches the view of a few unelected judges.[48]

It would be wrong to infer from this that the procedural approach neglects the importance of putting in place mechanisms that will check executive aggrandizement. However, it shifts our attention from judicial to parliamentary checks. It says that legislatures are both more sensitive to considerations of policy and strategy and endowed with more political capital than courts and can therefore more effectively counterbalance an encroaching executive playing the emergency card. Besides, even in this picture the judiciary can be said to retain some subsidiary supervisory role. It is there to ensure that executive measures have the endorsement or approval of a body, the Congress, which by virtue of its composition and decision-making process satisfies certain conditions of political accountability, publicity and deliberation. Unless the Court

48 *Hamdi, supra* note 2 at 576 (Scalia J. dissenting).

finds that executive measures have sufficient legislative backing, it will not implement them. Its role is then to guarantee that the political process with its legislative checks works properly in an emergency; in other words, it is to police "limits of institutional process, not of individual rights."[49]

1.2.2. The extra-legal approach

As we have been tirelessly reminded in recent years, national emergency is a time when politics takes over from law and ordinary rule-of-law constraints yield to political necessity. In Abraham Lincoln's words, "are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?"[50] Some have even gone so far as to suggest that emergencies create a legal void and replace legal requirements with the imperative of the *salus populi*. Most people, of course, would balk at this extreme position, but we cannot fail to notice how the emergency rhetoric, whether it is cast in extreme or more modest terms, carries with it a sense that during wartime or some similar critical situation all—or at least many—bets are off.

Well, maybe governments faced with an emergency should do whatever is in their power to save the republic, even at the expense of fundamental rights? But what about individual citizens? Do they have to simply acquiesce to or perhaps even positively support the government's efforts? Or should they try so far as possible to react to executive encroachments of their liberties and frustrate them, if they can? This is where the extra-legal approach comes in. The extra-legal approach starts from the rather commonplace view that "lawyers and citizens recognize a difference between the question of what the law is and the question of whether judges or any other official or citizen should enforce or obey the law."[51] It insists that, even if there is good reason

49 *Supra* note 40 at 310. Here is another characteristic formulation of the position at 315: "[T]he courts have, in practice, neither abdicated their role entirely nor defined their role aggressively; instead, courts have only sought to ensure vigilance over the institutional tendency to concentrate power in the hands of the executive and its military. If Congress endorses, or perhaps even acquiesces in that concentration, the courts have accepted that judgment. If Congress has resisted, the courts have found that the executive has gone beyond even its wartime powers."

50 Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), online: Teaching American History <http://teachingamericanhistory.org/library/index.asp?document=1063>.

51 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) at 109 [Dworkin]. Dworkin makes a distinction between the grounds of law and its force. Law, in his view, "provides a justification for the use of collective power against individual citizens or groups" (*Ibid*). When a proposition of law is true, he claims, it comes with a certain "case for coercion" (*Ibid*. at 110). But this case may be defeated in exceptional circumstances. Whether it will depends on the relative power of this case, the force of law, under this or that set of circumstances. Notice that the validity of the distinction does not hinge on accepting Dworkin's theory of law. Most legal theorists adopt some similar view, including analytical legal positivists, Dworkin's opponents. In

in general to heed political decisions when they are underpinned by important considerations of institutional design, there may be exceptional circumstances that override this reason. When, for instance, the executive, with the complicity or acquiescence of the legislature, is bent on perpetrating a gross injustice, the extra-legal approach would say that it falls upon everyone, including judges and private citizens, to do whatever is in their power to thwart this evil intention even if this means flouting legality as well as one's official duty. The dilemma poses itself with particular force in the case of judges. The duty to give effect to the legislative will lies at the very heart of the courts' role, so judges who are willing to sacrifice legality to justice sometimes do better—strategically speaking—to preserve a façade of deference to the legislature, so as to avoid the backlash from being openly political. They might for instance manipulate statutory interpretation in order to refuse to condone and further the injustice that the legislature intended to commit, thus saving face. In this picture, then, statutory interpretation becomes the smokescreen behind which the subversion takes place.

Note that the "extra-legalists" agree with the proceduralists that under the constitutional scheme governing states of emergency it is the political branches that have the sole responsibility (or something close to that) of adjudicating content-based considerations. That is why on the second approach judges who care for constitutional rights are faced with a dilemma when they are called upon to implement an incorrect decision on the import of those rights in a national emergency. They must choose between legality, the value that defines their official duty and presumably orders them to defer to the authority of the political branches, and the respect they owe first-order constitutional rights. For, arguably, to enforce those rights would be to disregard a decision that they ought not in law to have questioned, either explicitly or covertly. This explains the choice of name for the second approach. The role it reserves for content-based concerns is not integral to its conception of the courts' official duty; it is extraneous to it. In this respect, the second approach is no different from the first one.

1.2.3. The mixed approach

We noted above that there is an uncanny commonality in the view the two

fact, for legal positivists this view forms part of the core of their credo. They even dispute that saying that something is the law means that we have a *prima facie* moral reason to obey it. So, for instance, H.L.A. Hart famously warned against the "enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this rule of law to be obeyed?'" (H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593 at 618).

aforementioned approaches take of the courts' role and the ideal of separation of powers, more generally, at least as applied to emergency law. They assume that at the most fundamental level, courts are there to give effect to the bilateral will of the political branches—so either they rest content to police that the terms of the "executive-congressional partnership"[52] are respected, or they abdicate their role completely and instead subvert the joint legislative and executive will, if only covertly, in the name of justice. In other words, both approaches assume that a political decision designed to meet a national emergency is one that courts and citizens more generally have at least a *prima facie* legal duty to obey, just in case it is supported by certain considerations of institutional design that we deem of special importance.

It is this premise that the mixed approach rejects. It starts from the view that in the American context the constitutional duty of courts is taken to be a combination of both types of consideration counting in favour of or against a certain decision in their proper measure.[53] Predictably, the two types of consideration will often pull in opposite directions. So, for instance, a decision duly passed may be defective along the dimension of content. Such a decision will give rise to a tug-of-war between content and institutional design, and it takes an exercise of judgment in political morality to determine which side wins out. There is nothing surprising about this observation. It merely affirms the American constitutional common law tradition, and insists that this tradition, and the power of substantial judicial review which lies at its heart, does not retreat during times of emergency, as the procedural approach seems to suggest.

It is important to note that the mixed approach does not merely say that content-based values play a role in the determination of judicial duty. Rather, it invites us to think more closely about the way in which the dimensions of institutional design and content work together, in normal times as well as in times of crisis. Thus, the mixed approach concedes that situations of national emergency make special claims on institutional design; that they necessitate institutional readjustments that reflect the need to secure expediency, efficiency, co-ordination and so forth, primarily in the direction of expanding

52 *Supra* note 40 at 321.

53 This view is meant to echo Dworkin's position that integrity, the distinctive value exemplified by law and underlying the ideal of legality, partakes of both justice and procedural fairness. See Dworkin, *supra* note 51 at 263: "Integrity is distinct from justice and fairness, but it is bound to them in that way: integrity makes no sense except among people who want fairness and justice as well. So Hercules' final choice of the interpretation he believes sounder on the whole—fairer and more just in the right relation—flows from his initial commitment to integrity." We interpret justice and fairness in Dworkin's scheme to correspond by and large to the notions of content and institutional design in the sense defined above.

executive power. It is not an attempt to downplay the importance of legislative checks from the perspective of institutional design. On the contrary, it acknowledges that, when an emergency measure has the backing of both elected branches, it comes with a special claim to the courts' respect.[54] Hence, it agrees with the procedural approach that the ambit and intensity of judicial review in cases of national emergency must be circumscribed accordingly.[55] Nonetheless, the mixed approach resists the idea that government action in a national emergency should come with a "talismanic guarantee of deference."[56] It insists that the need for swift government response and co-ordinated effort in a national emergency does not warrant the blind submission of courts to legislative and executive determinations. However strong the pull toward falling in line with the decisions of the elected branches, it cannot eclipse our content-based concerns; even in times of crisis concerns of the latter type continue to exert an independent normative pull on our reasoning, albeit not as strong then as in normal times.

This, of course, is no more than a bird's eye view of the issue. But it highlights two important facts: first, in a national emergency certain considerations of institutional design acquire increased weight and thus tip the balance against content, and, second, content doesn't just disappear. According to the mixed approach, then, content-based considerations may still do a lot of work in judicial reasoning, in the sense that the extent of judicial deference to executive and legislative will is also a function of the content-based values at stake. The proceduralist approach, by contrast, lacks the resources to account for these doctrines in any satisfactory way. That is because the proceduralist approach blocks out content-based considerations from the equation. In fact, given the availability of the description of the problem provided by the mixed approach, it is the proceduralist who now seems to bear the burden of defending a position that is beginning to sound rather counter-intuitive, namely that

54 See e.g. Justice Jackson's often quoted model of emergency powers in *Youngstown*, *supra* note 13.

55 In this sense the mixed approach is not vulnerable to the arguments that Eric Posner and Adrian Vermeule have launched against what they call the "strict" view, which holds that "constitutional rules are not, and should not be relaxed during an emergency," and hence that courts should subject executive measures in wartime to the same standard that applies in peace. See Eric A. Posner & Adrian Vermeule, "Accommodating Emergencies" (2003) 56 Stan. L. Rev. 605. The mixed approach accepts that national emergencies call for a higher degree of deference. It also offers an explanation for this conclusion, namely that the degree of deference is a function of the considerations of institutional design bearing on different situations.

56 Jonathan Masur, "A Hard Look or a Blind Eye: Administrative Law and Military Deference" (2005) 56 Hastings L. J. 441, at 452. Writing in a slightly different context, Masur makes the important point, relevant to the claim we are putting forward here, that the fact that the Constitution grants an agent a certain power says nothing about the external limits to that power stemming, for example, from individual rights. *Ibid*. at 445.

expediency and co-ordination and democratic accountability are so weighty in cases of national emergency that they sweep aside any content-based concerns that we may have with the way government handles the emergency.

In this sense the mixed approach adopts an attitude toward the role of courts, that is very different from the one put forward by the other two. We may say that on the mixed approach the power of the political branches to weigh national security and individual liberty may in appropriate measure be held in account by courts. Again, this is not surprising, given the influence of the doctrine of judicial review in American Supreme Court jurisprudence. The interesting point is that this doctrine continues to exert force in judicial interpretation during times of emergency and enables the Court to take substantive claims into account. Of course, it is a matter for further elaboration to determine what that force is in specific circumstances and how it ought to be balanced against competing considerations of institutional design.[57]

It would be natural to associate the mixed approach with "judicial activism" or "legislation from the bench." But the mixed approach does not necessarily recommend such attitudes. At best, activism will be a surface characteristic of a court committed to the mixed approach, in the same way that a higher degree of deference is more likely to follow from the procedural approach. The gist of the mixed approach—and the basis of its difference from the other approaches—is its understanding of the determinants of judicial duty vis-à-vis the political branches. It is this understanding that explains the ease or difficulty with which a court strikes down government measures. It also provides the basis for other surface properties of judicial practice such as the fact that courts interpret government measures constructively or strictly. The same goes for the other two approaches. We have already indicated that adoption of the extra-legal approach leads to a more strategic use of interpretive methods. Similarly, some interpretive methods are more congenial to the understanding of the relationship between courts and the political branches that underlies the procedural approach.

Part 2: Boumediene and the irresistible attraction of content

In Part 2 we intend to put the aforementioned approaches to practice.

57 An interesting question is whether the analytical framework of the mixed approach may reveal that substantive concerns do play a more significant role in the older emergency cases that have usually been seen as driven primarily by proceduralist concerns. However, that analysis goes beyond the scope of the present article, which aims to uncover the jurisprudential lessons of the recent *Boumediene* case to which we turn in the next section.

Primarily, we will be concerned with testing the cogency of the procedural approach. We will focus on *Boumediene,* the last in the line of cases on the rights of terror-suspected detainees.[58] In our analysis we will attempt to single out the elements of that decision that cast doubt on the analytical and explanatory potential of the procedural approach and suggest that the Court's own perception of its role in the emergency context allows for strong reliance on content-related principles, which interact with and occasionally shape questions of institutional propriety. We will claim that support for this suggestion can be found in both the majority opinion (sub-section 1) and from Chief Justice Roberts's dissenting opinion (sub-section 2). But before embarking on the analysis, it is important to give some background.

Boumediene consolidates two cases, both of which were filed by a group of detainees who were not American citizens after the Court's decision in *Rasul*, where the Court had held that detainees had a statutory right to bring habeas corpus claims in American federal courts.[59] Relying on *Rasul,* the claimants sought habeas corpus from the federal courts. In the meantime, however, the legal landscape had changed dramatically. As a response to *Rasul* and *Hamdi,* Congress had enacted the 2005 *Detainee Treatment Act* (DTA) regulating the treatment and legal protections of detainees in the custody of the Department of Defense.[60] As a response to *Hamdan,* Congress had enacted the *Military Commission Act* (MCA) in 2006, which sets up military commissions to try unlawful enemy combatants for acts related to the war on terror.[61] Both Acts contain jurisdiction-stripping provisions, limiting detainees' access to federal courts. The DTA § 1005(e) provides that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo," and it gives the D.C. Court of Appeals "exclusive" jurisdiction to review decisions by the Combatant Status Review Tribunal (CSRT) set up by the government to assess the enemy combatant status of detainees. MCA § 7(a) further explicitly denies "jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants." In addition, it provides that the amendments to the DTA that it introduces "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11,

58 *Boumediene, supra* note 2.
59 *Rasul*, *supra* note 2, at 473 and 468.
60 *Supra* note 10.
61 120 Stat. 2600.

2001." Hence, it also covers the claimants in *Boumediene*.

Both Acts, then, amount to a clear statement of Congressional intent to limit the access of alien detainees to federal courts. They follow hard on the heels of the Court's decisions in *Rasul* and *Hamdan* with the purpose of extinguishing the procedural rights that these two cases had recognized. As a result of these developments, when the habeas issue reached the Court in *Boumediene*, it was no longer open for the Court to say that the detainees were entitled to habeas hearings under §2241, as it had done in *Rasul*, since Congress had specifically acted to limit that jurisdiction in the case of detainees held on Guantanamo. Nor could the Court invoke lack of congressional authorization for the Government's detention policies, for the executive policies now had explicit congressional backing.

It therefore became pivotal for the resolution of this case to evaluate the legal import of such congressional interventions. Would the Court pursue a procedural approach and simply defer to those interventions? Would it reinterpret congressional intent so as to read away any content-based concerns raised by the government's detention policies? Or, would it directly address those concerns even in the teeth of explicit bipolar endorsement? The case therefore brought into sharp relief the institutional issue that was lurking in *Hamdan*, concealed behind the proceduralist language of the majority opinion, which was whether courts have the power in an emergency context to enforce their own view of the content of a constitutionally guaranteed individual liberty, such as the privilege of habeas corpus, that runs contrary to the view jointly held by the political branches.

The *Boumediene* Court was sharply divided. Four Justices joined Justice Kennedy's opinion that alien detainees in Guantanamo have the constitutional privilege of habeas corpus and that the jurisdiction-stripping provisions of the DTA and the MCA amount to an unconstitutional suspension of the writ of habeas corpus (*U.S. Const.*, Art. I, §9, cl. 2). Kennedy's opinion was heavily criticized in the dissenting opinions of Chief Justice Roberts (with whom Justice Scalia, Justice Thomas and Justice Alito joined) and Justice Scalia (with whom the Chief Justice, Justice Thomas and Justice Alito joined). The dissenters opposed both the claim that the constitutional privilege of habeas corpus extends to alien detainees in Guantanamo and the claim that the procedures set out in the DTA and MCA fall short of the constitutional guarantee of habeas corpus. Thus, they questioned Justice Kennedy's view of the applicability of the constitutional guarantee of the writ to petitioners and his interpretation of the content of that guarantee. They protested that the majority

opinion "warps the Constitution" and "misdescribes important precedents."[62] But, despite their unbridgeable disagreements—and more importantly for the purposes of this article—the majority and the minority were united in one thing: They abandoned the procedural approach, which the *Hamdan* Court seemed to affirm. It is on the identification of this area of agreement that the following analysis will focus.

2.1. Habeas Corpus Redux

The majority opinion examines in considerable detail the extent to which the two-tier process for the review of petitioners' detention complies with habeas review requirements. It concludes that it falls considerably short of them. It draws attention to the limited reviewing powers of the Court of Appeals for the District of Columbia vis-à-vis the decisions of the CSRT regarding the status of detainees as "enemy combatants." Writing for the majority, Justice Kennedy notes:

> For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.[63]

But how can such a judgment enter the court's decision on the lawfulness of that review process? A *Hamdan*-inspired, hard-nosed proceduralist will say that it cannot. If it did, it would amount to illicit second-guessing by courts of an issue that in an emergency rests squarely with the political branches. For the proceduralist, when the political branches have spoken in one voice, the Court cannot intervene. But the majority does not follow this route. Equally, the majority dismisses the option of interpreting the provisions in question in a way that makes them compatible with habeas review requirements. By pursuing this option, the Court would conceal the collision between Congress and Court and thus muzzle accusations of judicial interventionism. But it would not be showing Congress genuine respect. In essence, it would be following the extra-legal approach, which recommends that the Court manipulate the legal materials to avoid confrontation and save face, while at the same time implementing its own political agenda.

62 *Boumediene*, *supra* note 2, at 2307 (Scalia, J., dissenting).
63 *Boumediene, supra* note 2 at 2270.

Kennedy is at great pains to distinguish the position he is taking from the extra-legal approach. To this effect, he notes:

> To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation.
>
> . . . [E]ven if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so.[64]

So, according to Justice Kennedy, the Court ought genuinely to take the views of the political branches into consideration. In this sense he appears to bow to the authority of Congress. He acknowledges that the MCA was enacted as a direct response to the Court's decision in *Hamdan* that the military commission convened to try Hamdan was unlawful because Congress had not sanctioned commissions of that kind,[65] and he recognizes that when Congress decides to revisit the issue, its decision is owed the Court's respect. He writes:

> If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. *If Congress amends, its intent must be respected even if a difficult constitutional question is presented*.[66]

But the kind of respect Kennedy has in mind in this passage is a far cry from the attitude toward congressional authorization that the procedural approach recommends courts to adopt. He portrays courts and the political branches as partners in a dialogue, where each of them ought to make a bona fide effort at interpreting the meaning of constitutional provisions. In this dialogue courts are under a duty to take congressional interpretations into account, but they cannot allow those interpretations to trump or neutralize their own independent responsibility to interpret the Constitution, as the procedural approach would have them. Here is a characteristic expression of this point:

64 *Boumediene, supra* note 2 at 2270.

65 *Boumediene,* supra note 2 at 2244: "[W]e cannot ignore that the MCA was a direct response to Hamdan's holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us."

66 *Boumediene, supra* note 2 at 2243. (emphasis added).

> The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one; and the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case.[67]

Hence, the majority in *Boumediene* does not consider congressional authorization the be-all and end-all in the emergency context. It confirmed that the established doctrine of judicial review extends to cases related to issues of national security. In *Boumediene*, the constitutional question that the Court felt itself under a duty to give its independent judgment on was whether the legislative provisions under consideration were compatible with the Suspension Clause. But the answer to this question depends on a prior inquiry into whether the review process set up by Congress constitutes an adequate substitute to habeas review. It is this inquiry that gives the Court the occasion to pass judgment on the content of the congressional scheme and to declare its inadequacy. To sum up, the majority opinion gives weight both to considerations of institutional propriety and to considerations of content. It thus exemplifies the mixed approach.

The interpretation advanced here faces an immediate objection. It may be suggested that the Court ultimately submits itself to the procedural approach, insofar as the majority's conclusion that the MCA is unlawful relies on a procedural argument, namely that Congress failed to employ the correct procedure for suspending the writ of habeas corpus as specified in the Suspension Clause. Of course, the Court leaves it open whether such an attempt by Congress would have been deemed lawful in the present context anyway. In this sense, it reserves for itself the power ultimately to determine the legal validity of a formal congressional suspension. Still, it accepts that, through the device of the formal suspension, the Constitution accords Congress the power to override a conflicting judicial interpretation of the Constitution and impose its will. The Court thus appears to give way to proceduralism at a higher level.

However, Kennedy's interpretation of the Suspension Clause itself relies on an idea of separation of powers that is at once more nuanced and assigns courts a much more active role than the procedural approach allows. This is particularly apparent in Kennedy's analysis of the history of habeas corpus. He sees the privilege of the writ as a central element in the institutional system envisaged by the Constitution to protect individual liberty. Thus, he writes:

67 *Boumediene, supra* note 2 at 2243.

> The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty.[68]

He concludes his account of the history of the writ by noting that "[t]he separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause."[69]

The same qualified approach to the interpretation of the Suspension Clause is manifest in Kennedy's analysis of when and whether Constitutional provisions apply beyond American borders, which was a preliminary issue that the Court needed to clear out of the way before it could apply the Suspension Clause to alien detainees not held in American soil. Again the issue of separation of powers is central. He argues that the Government's model of governance in Guantanamo implies that the government can switch constitutional principles on and off at its will. But that violates the fundamental separation of power principle, which informs our understanding of the Constitution itself:

> The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.
>
> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S.Ct. 747, 29 L.Ed. 47 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."[70]

Here Kennedy insists, first, that it is the Court, not Government, which decides which Constitutional provisions apply and which provisions are impractical, thus maintaining a strong supervisory function. And second, that the

68 *Boumediene, supra* note 2 at 2247.
69 *Boumediene, supra* note 2 at 2247.
70 *Boumediene, supra* note 2 at 2258.

government's attempt to exclude Guantanamo detainees from the constitutional privilege of habeas is unlawful because it enables a construction of the constitution, that is not in accordance with its basic principle of separation of powers, which in turn is underlain by the goal of protecting individual liberty from government abuse.

2.2. Judicial self-restraint without proceduralism: The opinion of the Chief Justice

It was inevitable that Kennedy's expansive reading of the Court's role in the emergency context would backlash. And backlash it did. The dissenting opinions written by Chief Justice Roberts and Justice Scalia are vocal and fierce, and contest the majority opinion point by point. We do not seek to adjudicate between the opposing views on the various constitutional issues raised in the case. In this section our sole aim is to show that all nine Justices take a decisive stand against the procedural approach. We should not lose sight of this overarching agreement. In fact, it is an indispensable part of the legacy of the Court's case-law on the rights of terror-suspected detainees.

Of course, the minority repeats some of the arguments that are at the heart of the procedural approach. Thus, the concern about legitimacy that animates in large part the proceduralist's recommendations also underlies Justice Roberts' statement that the majority simply shifted "responsibility for [. . .] sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary."[71] The same concern is present in his lament that:

> [t]he majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.[72]

Equally, when the Chief Justice disputes the judges' competence to make sound judgments about the balance between national security and individual rights that the DTA and MCA sought to strike and finds it questionable whether the detainees rights will be better protected under the constitutional habeas corpus procedure, that the Court decided the detainees were entitled to, then they would have been under the review-procedure drawn up

71 *Boumediene, supra* note 2 at 2280 (Roberts, J., dissenting).
72 *Ibid.*

by Congress in the DTA and MCA,[73] he is making an argument that echoes proceduralist sensibilities. He is rehearsing the familiar point that the courts lack the expertise and information required for the assessment of the risks posed by the terror-suspected detainees.

It would be too quick, though, to take this as evidence that Justice Roberts champions a clear-cut proceduralism. His opposition to the striking down of the jurisdiction-stripping provisions in the DTA and the MCA does not stem from a commitment to the procedural approach. It is not premised on the assumption that, since Congress had clearly expressed the intent to limit federal habeas jurisdiction, the Court could not sanction the opposite. As we will argue, it is subtler, and, like the majority opinion, it is best described as based on some kind of mixed approach

According to Roberts, "[t]he critical threshold question in these cases [. . .] is whether the system the political branches designed protects whatever rights the detainees may possess." This question, he argues, is necessarily "prior to any inquiry about the writ's scope."[74] Therefore, insofar as the majority approach focused on the reach of the Suspension Clause, it was "misguided."[75] It missed one important step, because

> [i]f the CSRT procedures meet the minimal due process requirements outlined in [previous cases], and if an Article III court is available to ensure that these procedures are followed in future cases, there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" or something else. The question of the writ's reach need not be addressed.[76]

His answer to the threshold question is that the provisions at stake pass constitutional muster, and thus the Suspension Clause does not apply. His reasoning is based on two pillars: 1) the variability of the content of the writ and 2) the Court's own interpretation of the content of the writ in the emergency context.

The Chief Justice takes as his starting point the nature of the constitutional privilege of habeas corpus. For him, it does not grant a right with a fixed content. On the contrary, "[t]he scope of federal habeas review is traditionally more limited in some contexts than in others, depending on the status of the

73 *Boumediene, supra* note 2 at 2279.
74 *Ibid*.
75 *Ibid*.
76 *Boumediene, supra* note 2 at 2281 (internal reference omitted).

detainee and the rights he may assert."[77] Roberts infers from this that, when determining the content of the writ, the Court ought to be less categorical and leave ample room for its interpretation in the light of different circumstances.

Now, with regard to the question of what rights were owed the detainees, Roberts takes its cue from the Court's decision in the 2004 case *Hamdi v. Rumsfeld,* which as mentioned was a habeas case brought by an American citizen who was held as enemy combatant by the government. In *Hamdi* the Court had made an attempt to define the "process that is constitutionally owed to one who seeks to challenge his classification."[78] Of course, *Boumediene* did not concern American citizens as *Hamdi* did. However, alien detainees cannot be entitled to more protection than citizens. Thus, if the DTA met the standard of protection mandated by *Hamdi*, it could not be thought to fall short of the constitutional guarantee of habeas corpus in the case of aliens. The plurality in *Hamdi* had defined its task as involving a balance between "the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right."[79] Writing for the plurality, Justice O'Connor had found on the one hand that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker,"[80] and, on the other, that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[81]

More specifically, the plurality had found that:

> [h]earsay [. . .] may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.[82]

77 *Boumediene, supra* note 2 at 2286.
78 *Hamdi*, *supra* note 2 at 2635.
79 *Boumediene, supra* note 2 at 2646.
80 *Boumediene, supra* note 2 at 2648.
81 *Boumediene, supra* note 2 at 2649.
82 *Ibid*.

In *Boumediene,* Roberts made the point that the Court ought to have followed this precedent when assessing the procedural rights of people held by the government as enemy combatants. Had it done so, it would have concluded that:

> "[t]he DTA system of military tribunal hearings followed by Article III review looks a lot like the procedure *Hamdi* blessed. If nothing else, it is plain from the design of the DTA that Congress, the President, and this Nation's military leaders have made a good-faith effort to follow our precedent."[83]

By ignoring this "good-faith effort," the majority reneges on its precedent. It does not "take 'yes' for an answer."[84] So, although at a practical level Roberts argues for an increased level of deference, he does not do so out of a conviction that in emergency cases courts ought to switch to procedural mode. He believes that standard constitutional interpretation will resolve many issues, and, at the very least, it will frame and constrain government's options, and he confidently engages in it. In this regard, Roberts is definitely on the same side as the majority. He disagrees with the majority, not because he thinks that the Court has a constitutional duty to refrain from interpreting substantive constitutional guarantees, but because he takes a different view of what these constitutional guarantees mean. Institutional considerations are, as already mentioned, not absent from this exercise. Quite the opposite: their role is pervasive. To begin with, they assign primary responsibility to design policies for the defence of the nation to those who are more competent to do so and who have the democratic legitimacy to make the judgment calls in this area.[85] They also fuel Roberts' scepticism regarding courts' ability to establish a comprehensive and coherent alternative review scheme in a piecemeal fashion, through the resolution of future cases.[86] And they open up a range of options for the government, which the Court ought to respect and not interfere with. They are thus meant to interact with the substantive constitutional guarantees in accordance with the mixed approach.

83 *Boumediene*, *supra* note 2 at 2285 (Roberts, J., dissenting).

84 *Ibid*.

85 Chief Justice Roberts faults the decision for the fact that it imposes a "rule of lawyers who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants" and assigns "control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges." (*Boumediene, supra* note 2. at 2280, Roberts dissenting, internal references omitted)

86 "The Court's analysis leaves [litigants] with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit -where they could have started had they invoked the DTA procedure." (*Ibid*.)

Conclusion

In a recent article, Mark Tushnet sees the following pattern in responses to national emergencies:

> The government acts, the courts endorse or acquiesce, and–sooner or later–society reaches a judgment that the action was unjustified and the courts were mistaken. The retrospective critical view is a compound of two other judgments: that the threat to which the actions were responses was exaggerated, and that the responses were excessive in relation to the exaggerated threats (obviously) and even to the real threats that existed.[87]

He concludes that "ordinary citizens should take a stance of watchful skepticism about claims from executive officials that the actions the officials take are in fact justified by, and sensible policy responses to, national security threats."[88] This is an important insight, but it is not confined to ordinary citizens. There are institutional pivots of this "watchful skepticism." Legislatures may be one, but so are courts. This article has sought to indicate the general parameters of a conception of separation of powers that operationalizes this stance in constitutional doctrine. It also sought to demonstrate that, when cast in terms of this conception, the most recent decision regarding the Guantanamo detainees make better sense than under the recently revived process-based theories.

87 Mark Tushnet, "Defending *Korematsu*?; Reflections on Civil Liberties in Wartime" (2003) Wis. L.Rev. 273, at 287.

88 *Ibid.* at 307.

Self-Defeating and Self-Transforming Dimensions of Proportionality Analysis:

Review of *Contested Constitutionalim: Reflections on the Canadian Charter of Rights and Freedoms*

Dwight Newman*

Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms by James B. Kelly & Christopher P. Manfredi, eds. (University of British Columbia Press: Law and Society Series, 2009), 336 pp.

Canada's entrenchment of rights protections in the *Charter of Rights*[1] is not unique, for many states have enacted constitutional bills of rights. Indeed, core elements of our *Charter* jurisprudence are not even particularly unique. The central analysis of rights limitations in s. 1 of the *Charter*, enunciated by the Supreme Court of Canada in its famous *Oakes* test,[2] is part of a continuum of similar tests from various states around the world, all employing a form of "proportionality analysis,"[3] around which an international theoretical and doctrinal literature continues to grow.[4] It is perhaps fitting, then, that a

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I am grateful for funding from a Borden Ladner Gervais Summer Research Fellowship for my research assistant, Kristen MacDonald, to work on my project on "Canadian Constitutional Values," from which my argument here partly stems.

1 *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*. The standard citation format would go on to reference the *Constitution Act, 1982* to a piece of legislation in the United Kingdom. Such a citation format has constitutional and political implications that I respectfully decline to support.

2 *R. v. Oakes*, [1986] 1 S.C.R. 103.

3 For an important recent discussion, see Alec Stone Sweet & Jud Matthews, "Proportionality Balancing and Global Constitutionalism" (2008) 42 Colum. J. Trans. L. 72.

4 On the theory side, see especially Robert Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers (Oxford: Oxford University Press, 2002). Alexy's influence has clearly made it to Canadian discussions and is prominent in the wonderful recent collection on the *Oakes* test edited by Luc

major trend in constitutional rights theory and doctrine is currently oriented towards an internationalized rights analysis.[5]

Most of the authors in *Contested Constitutionalism: Reflections on the Canadian Charter*[6] examine Canadian constitutional developments in the twenty-five years since the enactment of the *Charter* in a manner that seeks to examine the interaction between the Canadian *Charter* and Canadian politics and policy-making.[7] In doing so, they swim somewhat against the international current and mostly tend to write as if it is unique, for instance, that Canadian governments have developed mechanisms for the prior review of legislation for its constitutionality, when this practice has in fact developed in each jurisdiction with similar modes of legal analysis.[8] That said, those addressing this development within the volume do so in a textured manner

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B. Tremblay and Grégoire Webber: *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (Montréal: Thémis, 2009). It is to be hoped that this latter book draws even a bit of attention to Luc Tremblay's ongoing very important writing on rights limitation, to which the unfortunate inattention to date is arguably explicable only in terms of an appalling failure by the leading anglophone constitutionalists to pay attention to French-language writing on the topics they address.

5 This is a trend in legal education as well. Considering, for instance, two of the country's leading law schools, the McGill Law Faculty's transsystemic approach adopts this trend explicitly on principled grounds, and the University of Toronto's Law Faculty has mostly shifted away from work on specifically Canadian topics, arguably in response to incentives related to seeking greater international attention.

6 James B. Kelly & Christopher P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009). I will concentrate on a central corpus of authors from this edited collection, with several of the chapters not fitting the main issues of the book. The chapter by Kiera Ladner and Michael McCrosson on Aboriginal rights does not really belong in a book on the *Charter* (as its title affirms, as do its origins from a conference on *The Charter @25*), and its presence almost risks perpetuating the all-too-common error that refers to s. 35 as part of the *Charter*. The pieces by Graham Fraser and Troy Riddell on language rights are somewhat straightforward reviews of the law in particular areas, and the same would be true of Kent Roach's piece on national security cases, save for his brief undeveloped observation that focusing on *Charter*-proofing national security legislation distracts from making wise policy (Kent Roach, "National Security and the *Charter*," in Kelly & Manfredi, eds., *supra* note 6, 145 at 145–46, 161–62).

7 The book originated from the Charter @ 25 Conference held at the McGill Institute for the Study of Canada in early 2007. The number of articles, conferences, and books referring to the *Charter*'s twenty-fifth birthday make it seem like our legal academia and broader legal communities are under the sway of some kind of numerology. We should, of course, discuss the *Charter* in other years as well!

8 On the broader claim, see *e.g.* Sweet & Matthews, *supra* note 3 at 110 (concerning the authority of constitutional jurisprudence in German legislative deliberations), 131 (concerning constitutional vetting of legislation in South Africa), 137 (concerning constitutional rights analyses within the Israeli executive branch), and 119–21 (Canadian incorporation of similar analysis thus being part of a broader pattern in the context of proportionality analysis). For an exception within the book, see the chapter by James B. Kelly, "Legislative Activism and Parliamentary Bills of Rights: Institutional Lessons for Canada," in Kelly & Manfredi, eds., *supra* note 6, 86, further discussed below.

sensitive to the overall development of the Canadian polity and to the impact of constitutionalizing various political questions within Canada specifically. Indeed, two of the authors even refer to the too-often-forgotten role of constitutions in constituting a nation and examine symbolic dimensions of the *Charter*.[9]

However, I wish to focus, rather, on a different theme from the volume, one which I believe actually embodies the underlying main trend of argument within the collection. Various actors and agents behave in manners responsive to the opportunities, constraints, and incentives that touch upon them—with even that sort of adumbrated fragment of a theoretical account, one could integrate much of the mix of theory, qualitative empirical work, and anecdote[10] of the book's central corpus. I wish first to outline some of the arguments of the authors fitting within such an account and then to reflect further on its broader significance in the context of what it tells us about what has happened with proportionality analysis, seeking in particular to open discussion of a significantly different theoretical framework than has been traditional.

Andrew Petter discusses the internal dynamics of government decision-making in the context of *Charter* opinions from government lawyers, identifying the degree of power attained by government lawyers and attorneys general in light of the risk aversion of governments not wanting their legislation struck down on *Charter* grounds[11]—which we can also read as arising from the constitutionalization of these experts' specialized knowledge, something not done, for instance, with the view of government economists, scientists, or anyone else. Indeed, Petter goes on to discuss briefly letter-writing by law professors,[12] another group of individuals who gain the opportunity to shroud their views in the veil of constitutionalization, with some inclined (often even without any constitutional law specialty) to tell parliamentarians that their

9 I refer here to Sujit Choudhry's piece, "Bills of Rights as Instruments of Nation Building in Multinational States: The Canadian *Charter* and Quebec Nationalism," in *supra* note 4, 233, and to Guy Laforest's "The Internal Exile of Quebecers in the Canada of the Charter," in *ibid.*, 251.

10 I do not use this term pejoratively, but as something to distinguish claims backed by experiential evidence from those backed by more thorough-going qualitative research evidence. The experiential evidence presented by some of the authors does reflect knowledge presented from certain privileged positions of observation (Andrew Petter, for instance, being able to offer the perspective of a Cabinet Minister). But there arguably remains room for more thorough-going empirical accounts on some of the claims. Janet Hiebert might be embarking on such a study in her forthcoming *Legislating Under the Influence of Charter Norms*, although the final book was not at this writing available to confirm this.

11 Andrew Petter, "Legalise This: The *Chartering* of Canadian Politics," in Kelly & Manfredi, eds., *supra* note 6 at 34–35, 37–39.

12 Petter, *ibid.*, at 44–45.

academic policy preferences are constitutionally mandated from on high.[13]

James Kelly's chapter, implicitly extending Petter's discussion, is one that does draw on comparative foreign developments, comparing the emergence of rights-vetting of legislation in Canada and New Zealand.[14] One particular dimension in Canada and New Zealand, which differs from Britain's use of parliamentary committees to discuss rights effects arising from legislation, is the centralization of rights-vetting processes. The Department of Justice becomes transformed into a central agency, and robust debate around rights issues becomes submerged in legalism.[15] This fleshes out Petter's description of what has happened, although Kelly does not speak as explicitly as Petter to why this occurs, which relates of course to the opportunities and incentives offered to different parties.

Grant Huscroft's chapter challenges the claims of so-called "dialogue theory," which has made the claim that there is a sort of equal balance between courts and legislators as they undertake together the task of interpreting rights guarantees.[16] In arguments that he has also developed elsewhere,[17] Huscroft makes manifest the dominant judicial role in constitutional interpretation, discusses how some of the constraints on the notwithstanding clause undermine the claims dialogue theory has usually made about it, and reflects briefly on the elitist preferences he thinks are held by most proponents of dialogue theory.[18] The symbolic interpretation under which some have taken the opportunity to construct for the notwithstanding clause as involving an anti-rights orientation now poses a fundamental challenge for an at least notionally claimed dimension of dialogue theory. Although dialogue theory has in principle considered the notwithstanding clause part of the balance it claims, in practice the notwithstanding clause has often been treated as a sort of compromise with those adhering to the role of democratic discourse in legislatures and parliaments (usually described in more pejorative terms). Janet Hiebert, in one of the parts of the book that does situate Canada's constitutional choices

13 For those interested, I am engaged in a separate writing project on this issue and anticipate publishing an article from it shortly.

14 Kelly, *supra* note 8.

15 *Ibid.* at 89–93.

16 Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory," in Kelly & Manfredi, eds., *supra* note 6, 50.

17 See especially Grant Huscroft, "Constitutionalism from the Top Down" (2007) 45 Osgoode Hall L.J. 91. See also Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008), particularly the important and somewhat symbiotic chapter on the structure of s. 1 analysis by Bradley W. Miller, "Justification and Rights Limitation."

18 Huscroft, "Rationalizing Judicial Power," *supra* note 16 at 52–61.

more internationally, challenges this conventional wisdom as historically inaccurate, as missing the international developments of similar nature elsewhere, and as missing the richer symbolism of the notwithstanding clause as recognizing political capacity to engage in rights conversations.[19]

Strategic choices by litigants and by judges themselves will also influence the shape of the legal system under the *Charter*. Matthew Hennigar's chapter offers an especially rich account of the federal government's litigation strategy on same-sex marriage that draws on political science literature influenced by game theory to analyze choices by political actors.[20] The chapter offers a particularly nuanced account of competing dynamics (or "nested games") that influenced the complex path the same-sex marriage litigation strategy took.[21] The incentives and constraints faced by different political actors influence the course of litigation and ultimately of constitutional developments. The chapter by Rainer Knopff, Dennis Baker, and Sylvia LeRoy examines the impact of dynamics like pressures on appellate courts to present unified positions and seek to show how this influenced particular cases or the longer-term development of an area like voting rights for prisoners.[22]

The chapter by Christopher Manfredi and Antonia Maioni, in turn, invites reflection on some of the policy implications of developing constitutional constraints in an area like health care. The Supreme Court of Canada's judgment in *Chaoulli*,[23] they argue persuasively, did not mark a departure from prior jurisprudence, but, was the logical implication of various doctrinal developments.[24] However, this development introduces new constraints into provincial policy-making processes in the health care field.[25]

19 Janet L. Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding," in Kelly & Manfredi, eds., *supra* note 6, 107.

20 Matthew Hennigar, "*Reference re Same-Sex Marriage*: Making Sense of the Government's Litigation Strategy," in Kelly & Manfredi, eds., *supra* note 6, 209.

21 See *ibid.* at 217–25.

22 "Courting Controversy: Strategic Judicial Decision-Making," in Kelly & Manfredi, eds., *supra* note 6, 66.

23 *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (combination of policy and legislation blocking access to medical treatment being an infringement of security of person, with lead judgment finding a breach of the principles of fundamental justice through lack of rational connection to government aims, although deciding vote and thus technical *ratio* being based on Quebec *Charter*).

24 Christopher P. Manfredi & Antonia Maioni, "Judicializing Health Policy: Unexpected Lessons and an Inconvenient Truth," in Kelly & Manfredi, eds., *supra* note 6, 129.

25 *Ibid.* at 142 (framing the challenges of individual rights-based litigation at a national level in the context of a system that inherently involves balancing of different needs and priorities and experimentation concerning approaches at a provincial level).

Constitutional rights determinations do not simply magically usher into existence the claimed objects, policies, or structures, but they transform the policy-making setting. They not only do this in substantive terms in respect of the now constitutionalized requirement to deliver certain entitlements, but they do so also in procedural terms, in reshaping power structures within governments, in adding to the incentives for certain approaches to policy-making that might or might not have otherwise been the best ways of making policy, and in generating various procedural constraints on political processes. If the book makes this much clear, even if it is to some degree a reiteration of claims put by these scholars elsewhere over the years,[26] it makes an important contribution. Indeed, *Contested Constitutionalism* provides a simultaneously accessible and rich introduction to a set of deeper conversations we need to have about the *Charter* in various scholarly and public settings.

That said, the central claim around which the arguments within the book circle has further implications that have yet to be fully discussed in Canadian academic and civil society settings. Legal scholars, specifically, are too often prone to ignoring the secondary and feedback effects generated by constitutional determinations. If this book were to be part of a movement changing that thinking in any way, it would have an even greater potential.

Consider, for instance, the implications of recognizing the role of feedback effects in understanding the implications of proportionality analysis, the mode of analysis exemplified in Canada by the *Oakes* test[27] but sharing an essentially common structure with the same analysis used by other constitu-

26 A colleague, on hearing that I was doing a review of the book and glancing at the table of contents, dismissed it as a collection from the "usual suspects." Canadian legal academia is of course filled with various ideological positions that will make many of those subject to them unlikely to read the book simply because of those commitments. We can often wonder what happened to the idea of academic commitments. Pursuit of academic inquiry surely involves a readiness to engage seriously with those who have come to different views on some issue so as to examine why and what we might learn from one another. However, an unfortunate proportion of academic organizations appear oriented to drawing together those with similar ideological views, immediate dismissal of someone's arguments by identifying that person's association with certain people or organizations is commonplace, junior academics receive warnings from senior academics about the effect on their reputation of speaking at the same conferences with people of different ideologies, and a large proportion of academic discussion becomes about slightly different ways of reaching the same results. A junior colleague at another law faculty has put to me the thesis that the whole tone of academic constitutional discussion will change in the next few years as the new generation's wave of currently untenured academics attain tenure. This thesis supposes that perceived intimidation around tenure decisions is the leading constraint contributing to these phenomena. I worry that their roots are deeper and require a more significant shift in the culture of Canadian legal academia.

27 *Supra* note 2.

tional courts around the world.[28] Proportionality analysis claims to provide a principled means of analysis of rights limitations that is within the proper role of courts. However, within systems in which political actors and structures adjust themselves to the demands of law, proportionality analysis arguably has a different effect than on the usual assumption of unchanging parliamentary and legal processes on which proportionality analysis serves as a check in instances where legislators go too far. And the challenges do not arise from judicial inconsistency in respect of their approach to proportionality analysis but, indeed, from the very kind of consistent, principled proportionality analysis that well-functioning legal institutions pursue, thus exposing, I will argue, certain inherent contradictions and self-transformations at the heart of proportionality analysis.

The different effects than those expected from proportionality analysis will be particularly apparent in a context like that which has developed within Canadian political structures, which involves, as in some of the chapters discussed above, centralized *Charter*-vetting processes. These processes naturally tend to what we might call a form of "*Charter* chill."[29] On the assumption that lawyers involved in *Charter*-vetting exercises act in good faith in their *Charter* analyses, they are nonetheless subject to greater penalties for errors in suggesting that a particular piece of legislation will be secure against the *Charter* than for errors in suggesting that a particular piece of legislation will fail *Charter* scrutiny.[30] In a sense, the former misestimation in legal analysis is subject to grand public exposure in the courts, whereas the latter is typically subject only to the appreciation of legislators that the lawyer has helped them avoid the embarrassment of having enacted what all go on thinking would have proved to be unconstitutional legislation. The managerial state, maintaining a particular set of programs and policies in relatively stable forms, is implicitly favoured over bolder legislative visions advancing any particular ideological premises in either direction. Only in rare circumstances will there be perceived political advantages in passing legislation that is at significant risk from constitutional rights norms,[31] and the safer course thus generally becomes to avoid grander

28 See *e.g.* Sweet & Matthews, *supra* note 3.

29 In her judgment in *R. v. Keegstra*, [1990] 3 S.C.R. 697, the dissenting judgment of McLachlin J. (as she then was) repeatedly discusses the potential chill effects on expression from laws that limit freedom of expression. The same concept applies to chill effects on legislation from constitutional norms that limit legislation.

30 This very important insight is presented by Petter, *supra* note 11 at 34–35.

31 There will be, for example, in the context of certain hot-button political issues where a political party wishes to present itself as ready to fight the Supreme Court of Canada on an issue. The same may apply in rare instances where certain implications of its jurisprudence put the Supreme Court genuinely out of step with any plausible political result, although it may then take the case as an

visions of any change to *status quo* operations. There is thus, to begin, a widergoing constraint on legislative action, a sort of hypothermic legislative paralysis arising from *Charter* chill.

Perhaps even more interestingly, however, proportionality analysis now ends up facing different circumstances than those on which it was premised. Proportionality analysis is premised on the idea that there will be a range of circumstances in which courts need to override legislators' choices to undertake legislative projects not meeting certain relatively formal standards of constitutional analysis as expressed in the proportionality analysis test.[32] The aspiration of proportionality analysis is, taking it at its word, to help courts hew to their proper role within a democratic state, one not concerned applying different policy preferences but with carrying out a particular legal analysis.[33] However, once legislative processes are responsive to constitutional norms, and in particular seek to take account of proportionality analysis prior to passing legislation, the premises change.

If (as I began by assuming) proportionality analysis has developed in a reasonably consistent form, then its conclusions are reasonably predictable, subject to the *Charter* chill in cases of slight uncertainty. And if legislators overwhelmingly avoid passing legislation that they know will be unconstitutional (very commonly because it never even comes before the legislative body on account of pre-vetting), then situations where they have reached a different conclusion than the court has tended toward will generally not resemble the situation on which proportionality analysis is premised. Instead of being situations in which the legislators have slightly failed a formal legal test in the natural development of policy processes, the bulk of the situations in which courts see legislators failing proportionality analysis will be situations where either (i) the courts would approach differently certain factual uncertainties that are part of the proportionality analysis test;[34] or (ii) the courts would weigh certain values differently. If the bulk of proportionality analysis concerns with legislation now arise in these situations, then the bulk of proportionality analysis concerns will be in contexts differing from the main contexts this mode of legal reasoning was designed to address.

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opportunity to wrestle itself out of such a problem, as occurred for example in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45.

32 On the underlying theory of proportionality analysis, see Sweet & Matthews, *supra* note 3.

33 See *ibid.*

34 This is the important context discussed by Sujit Choudhry, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charters's* Section 1" (2006) 35 Sup. Ct. L. Rev. (2d) 501.

If not stated this explicitly, there has nonetheless of course been a dawning awareness of this phenomenon.[35] However, contemplating the secondary and feedback effects of constitutional norms on legislative processes analytically makes explicit the reasons why this phenomenon occurs, without needing the more problematic premises on which some such accounts have based themselves. The problems of proportionality analysis can and typically will arise even with well-intentioned judges who did not intend to go beyond their institutional ken. This kind of thinking exposes that it is proportionality analysis itself that is problem-laden, although the problems become apparent only gradually in the post-*Charter* constitutional history. And, indeed, these problems arise not so much from "contested constitutionalism" as from "uncontested constitutionalism."

Within the confines of this Review Essay of course, I cannot present this account in full, and there are obviously many further dimensions and counterarguments to consider. However, if I am right even in part, then the point follows that proportionality analysis has a *self-defeating dimension*. But, if we are concerned with incentives and constraints, we will obviously next question whether judges would remain complicit in an analysis that had such a character. What do judges do as they gradually realize (even if in a more subconscious form permitted by the legal context in which they operate) that their system of interpretation is now confronting situations differing from those they implicitly expected? They develop doctrines of deference, these being designed not to open up the generalized democratic approaches to rights that the constitutional norms first constrained but to try to avoid what would rapidly become the misapplication of proportionality analysis. The dominant narrative of any tendencies to deference by the courts, of course, is that they represent a "watering down" of *Charter* guarantees by courts in retreat.[36] Interestingly, the main corps of those who regard deference more positively see the doctrines, in their own way, as a retreat by the courts, but in the alternative version of some long-awaited recognition of the "dignity of legislation."[37] However, con-

35 It is implicit, for instance, in the innumerable articles on shifts in the *Oakes* test and in the various panicked reactions to *Chaoulli*, *supra* note 23.

36 For a particularly rich statement of this more widespread perspective in a more radicalized form, see Danielle Pinard, "La promesse brisée de *Oakes*," in Tremblay & Webber, eds., *supra* note 4, 131. For a more traditional statement, see C.M. Dassio & C.P. Prophet, "*Charter* Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada" (1993) 15 Advocates Q. 289.

37 On the concept, see Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999). This would be the implicit view of deference in the fascinating recent article by Grégoire Webber: "The Unfulfilled Potential of the Court and Legislature Dialogue" (2009) 42 Can J. Pol. Sci. 443. See also: Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial

sidering the secondary effects and constitutional feedback mechanisms opens our eyes to an interpretation differing from either of these narratives within a common dominant tradition. On my account, the moves to deference actually represent a second phase of an analytical structure developed in response to a changed set of circumstances it faces. If my account is at least partly right, then proportionality analysis now has a *self-transforming dimension*.

Contested Constitutionalism circles around an immensely important insight into a new approach to understanding Canadian constitutionalism and the authors get at that insight in what, by nature of the work, was arguably bound to remain a somewhat piecemeal form. But the insight we can develop from reflecting deeply on their arguments invites us to a potentially enriched understanding of constitutional law. The sort of broader theoretical account flowing from this insight obviously needs further development and further testing, but, if even partly right, it also has much more thorough-going implications. It potentially changes our understanding of Canadian constitutionalism and constitutional history and, indeed, our understanding of constitutional techniques on an international basis. As a result, it potentially invites judges to design their approaches to constitutional interpretation somewhat more explicitly in light of a different set of considerations than the Canadian legal academy has previously urged.[38] It is time to turn seriously to the international literatures that the dialogue theorists have neglected. Founded on evidence of how institutions are actually responding to the demands of *Charter* jurisprudence, a new theoretical framework has the potential to lead us in very different directions than either the dialogue theorists or their critics have been urging.

Role in Constitutional Adjudication" in Huscroft, ed., *Expounding the Constitution*, *supra* note 17, 184; Rosalind Dixon, "The Supreme Court of Canda, *Charter* Dialogue, and Deference" (2009) 47 Osgoode Hall L.J. 235.

38 For one example of a work partly based on such a perspective, see Adrian Vermeule, *Law and the Limits of Reason* (Oxford: Oxford University Press, 2008).