

provide a full explanation of all Polish developments. Those who allowed the creation of the Court could not think about insurance against becoming opposition after a lost election: there were no democratic elections at all, the domination of the Communist Party seemed to be permanently entrenched, and the opposition was placed in jails and not on the bench. Later, once the political transformation began, it took several years before politicians realized that - sooner or later - they all would have to experience the fate of an opposition. Only then, they learned to think prospectively and they understood that the Constitutional Court may be their last hope in confrontations with future majorities. This may have given more weight for the *insurance approach*, but - before that approach gained more recognition - the constitutional adjudication has already been well established. Thus, unlike in some other countries, in Poland the *insurance psychology* (that, by the way, seems to be a part of more general principles of pluralism and alternance) arrived relatively late and had not been relevant neither in the process of creation of the constitutional adjudication nor for the first formative years of the Constitutional Court.

Sujit Choudhry

Not a New Constitutional Court:

*The Canadian Charter, the Supreme Court and Quebec Nationalism**

Introduction

Why have political actors throughout the world adopted systems of judicial review that empower courts to assess legislation enacted by democratically elected legislatures for compliance with a constitutionally entrenched bill of rights? One widely held view is that judicial review is now integral to the very idea of a liberal democratic constitutional order, and states secure their legitimacy before both domestic and international audiences by adopting it. But as Tom Ginsburg

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¹ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) at 35.

² *Ibid.* at 18

³ *Ibid.*

⁴ *Ibid.* at 33

⁵ *Ibid.* at 247

⁶ *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 (hereinafter *Charter*).

observes in *Judicial Review in New Democracies*, this does not explain the considerable variation in the design of judicial review¹. His counter-thesis is that political actors have adopted systems of rights-based judicial review as a form of political insurance, to hedge against the possibility of losing political power in the future. Thus, if constitutional drafters *foresee themselves in power after the constitution is passed*, they will create weak constitutional courts *that will allow them to govern without encumbrance*². By contrast, *if they foresee themselves losing in postconstitutional elections*, they will create strong courts to provide themselves with *some access to a forum in which to challenge the legislature*³. The former is more likely to occur when there is a single dominant political party at the moment of constitutional transition, whereas the latter is more likely when political power is fragmented. Thus, *[a]lthough judicial review is associated with the global ideal of the rule of law ... the particular design of judicial review institutions reflects local political realities*⁴.

Ginsburg applies his thesis to explain the design of constitutional courts in three East Asian jurisdictions: Taiwan, Mongolia, and Korea. But he claims that these cases *illustrate the universal political logic of judicial review*⁵ and that his theory has explanatory power beyond them. Does the political insurance thesis fit the Canadian story? In this paper, I argue that it does not. Ginsburg's thesis has substantive and institutional limbs. The substantive limb is the adoption of a constitutionally entrenched bill of rights to enable constitutional drafters to insure against the future loss of political power through rights-based adjudication, in challenges brought either by themselves or individuals, institutions or organizations with aligned interests. The institutional limb is the creation of a new constitutional court as part of a constitutional transition to enforce this bill of rights. The power of judicial review is denied to the existing judiciary, including the Supreme Court.

Canada differs on both dimensions from Ginsburg's account. Canada adopted a constitutionally entrenched bill of rights, the *Canadian Charter of Rights and Freedoms*, in 1982⁶. But the principal political objective behind the adoption of the *Charter* was not to insure against the

potential loss of political power by threatened political elites, but rather, to combat sub-state nationalism in the province of Quebec. The *Charter* was meant to combat Quebec nationalism in two ways: through the imposition of rights-based limits on the ability of Quebec to engage in linguistic nation-building, and through the creation of a pan-Canadian constitutional patriotism that would compete with, and eventually overwhelm Quebec nationalism. Thus, the adoption of *Charter* was a central part of the struggle between competing nationalisms. This part of the Canadian story is well known.

But another part of the story has received less attention - that ultimate responsibility for enforcing the *Charter* was vested not in a new constitutional court specifically created for that purpose, but in the existing Supreme Court of Canada. Prior to the entrenchment of the *Charter*, the Supreme Court had ultimate responsibility for enforcing Canada's federal division of powers. It was viewed by political and legal elites in Quebec as systematically favouring federal over provincial jurisdiction, and indeed, sided with the federal government against Quebec in important cases that challenged the adoption of the *Charter* itself and turned on the location of constituent power in the Canadian constitution. The decision to empower the Supreme Court to enforce the *Charter* should therefore be viewed through the lens of this Court's pre-existing place in the constitutional politics of Canadian federalism.

The Charter and Quebec Nationalism

The link between the Charter and the rise of nationalism in Quebec was perhaps most famously made by Peter Russell⁷. Russell's question was why federal politicians, principally Pierre Trudeau, made the *Charter* their major constitutional priority over between 1968 and 1981. Until that point, the federal goal had been the *patriation* of the Constitution. Like many former British colonies, Canada's Constitution was (and remains) a statute of the Imperial Parliament,

⁷ Peter H. Russell, *The Political Purposes of the Charter of Rights and Freedoms*, *Canadian Bar Review* 61 (1983): 30

but was unique in that the power of constitutional amendment rested with Westminster. This was because Canadian political actors had been unable to agree on the locus of constituent power in Canada-i.e. what combination of the federal and provincial legislatures and/or populations should possess the power of constitutional change-because answering that question required agreement on the basic character of the Canadian political community, which the amending procedure would reflect. Placing the *Charter* front and centre of the federal constitutional strategy was therefore a dramatic change. Russell's answer was the rise of Quebec nationalism, or more precisely, a significant shift in the character of Quebec's constitutional demands. Until the 1960s, Quebec constitutional claims had been defensive, aimed at safeguarding the existing areas of jurisdiction granted to Quebec under Canada's federal division of powers, established by the *British North America Act* in 1867 as part of the creation of Canada (known as Confederation)⁸. However, in the 1960s, Quebec's goals shifted to the expansion of its jurisdiction over social and economic policy, to enable the province to engage in a nation-building enterprise and construct a modern Quebec whose major institutions operated in French. Why this shift in Quebec took place is itself a complex story⁹. To a considerable extent, it was a defensive response to the dramatically increased role of the federal government in the economic and social policy arena after the Second World War. Federal policy activism meant an increase in the importance of federal institutions, especially the federal bureaucracy, which worked in English and in which francophone Quebecers were a small minority. Another factor was the enormous social change within Quebec. After the Second World War, there was massive urbanization and industrialization, in a context where Anglophones dominated positions of economic leadership and many of the professions. These demographic and economic shifts underlined and reinforced the role of language as the basis for the unequal distribution of economic power within the province. Quebec's political elites responded by mobilizing Francophones

⁸ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (hereinafter *British North America Act*).

⁹ See generally Kenneth McRoberts, Quebec: *Social Change and Political Crisis* (Toronto: McLelland and Stewart, 1988)

around the nationalist project of *maîtres chez nous*, which encompassed both the expansion of Quebec's jurisdiction and the use of these new tools to construct a modern set of economic and political institutions to ensure the survival of a modern, francophone society. In an important sense, then, modern Quebec nationalism was a movement led by French-speaking elites, against the English-speaking elites in Ottawa and Montreal. The dispute, as Andrée Lajoie and her colleagues put it, was *where, on the geographical and political maps, they would place the powers they wanted to give the state*¹⁰.

As Russell persuasively argues, the *Charter* was the federal government's defensive response to these centrifugal pressures. The primary sources support Russell's analysis. The most important federal document is *Federalism for the Future*, which was released in February 1968¹¹. The document acknowledged that the impetus for constitutional reform was Quebec, specifically *the dissatisfaction of the people of Canada of the French language and culture with the relative positions of the two linguistic groups within our Confederation*¹². But the response was not to meet Quebec's demands for enhanced autonomy on the terrain of federalism. Rather, the federal government's view was that *first priority should be given to that part of the Constitution which should deal with the rights of the individual—both his rights as a citizen of a democratic federal state and his rights as a member of the linguistic community in which he has chosen to live*¹³. This choice was initially presented as a matter of logic, since *the rights of people must precede the rights of governments*¹⁴. Yet *Federalism for the Future* went on to emphasize the contribution of a constitutional bill of rights as the basis for national unity. The constitutional entrenchment of *individual human rights for all Canadians... is a fundamental condition of nationhood and are... fundamental to the will of the nation to survive*¹⁵. [T]ake these rights away, it continued, *and few Canadians would think their country worth preserving*¹⁶.

How exactly was the *Charter* supposed to further national unity? We can get a handle on the nation-building function of the *Charter* and bills of rights more generally by making three sets of distinctions. The first is the distinction between two varieties of nationalism. On the

¹⁰ Ivan Bernier and Andrée Lajoie, *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: University of Toronto Press, 1986) at 25

¹¹ Canada, *Federalism for the Future* (Ottawa: Queen's Printer, 1968)

¹² *Ibid.* at 2

¹³ *Ibid.* at 8

¹⁴ *Ibid.*

¹⁵ *Ibid.* at 18

¹⁶ *Ibid.*

one hand, nationalism is often paired with claims of self-determination and sovereignty. This is the nationalism of national minorities, such as the Quebecois, the Scots, and the Catalans. The political goal underlying the kinds of nationalist movements ranges from autonomy to states of their own. This is the dominant understanding of nationalism in the legal imagination. Accordingly, the regulation of nationalist politics becomes a matter for international law, with the dominant question being under what circumstances peoples' right to self-determination encompasses the right to statehood.

On the other hand, nationalism can be understood as what Rogers Brubaker has called *nationalizing nationalism*¹⁷. The goals of this variety of nationalism are neither internal autonomy nor statehood. Rather, the energy of nationalism is directed at an existing political community, in a process whereby states, already extant, create nations. At its core, nationalizing nationalism consists of a set of policies that are designed to homogenize the national culture and language to coincide with those of the dominant ethnolinguistic group, and to centralize political and legal power in institutions dominated by the majority group and which operate in its language. In states that contain minority nations, such as Quebec, these minorities respond to nationalizing nationalism¹⁸ by engaging in defensive nation-building projects of their own.

Legal scholars have focussed on the first form of nationalism but not on the second. So here we get to the second distinction- between different ways in which constitutions can serve as instruments of nationalizing nationalism. Historically, the most direct way has to be to centralize legal and political power. This occurred, for example, in Spain, with the abolition of the *Generalitat* in Catalonia in 1714, and the *Fueros* of the Basque province and Navarre in the early 19th century. The state would possess jurisdiction over language and education, which would allow it to set the majority's language as the official language of the state and of instruction in schools. Another mechanism was the elimination of pre-existing forms of legal pluralism, to require all ethnolinguistic groups to participate in a common legal-constitu-

¹⁷ Rogers Brubaker, *Nationalism Reframed* (New York: Cambridge University Press, 1996)

¹⁸ Michael Hechter, *Containing Nationalism* (Oxford: Oxford University Press, 2000); Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007); and Wayne Norman, *Negotiating Nationalism: Nation-building, Federalism, and Secession in the Multinational State* (Oxford: Oxford University Press, 2006)

tional order, organized around common judicial institutions dominated by members of the majority group, applying the legal system of the dominant group (as occurred in France). In other words, one way of responding to Quebec nationalism would have been to engage in a centralizing project of this sort. As I will explain below, the use of constitutional design in the service of nationalising nationalism in fact was attempted in the colonial period in Canada between 1840 and 1867. It was a spectacular failure.

But the *Charter* project points to the use of a constitutional bill of rights to engage in a similar nationalizing project. At first blush, this seems bizarre, since the first set of nationalizing strategies involve the centralization of political and legal power, whereas a bill of rights sets limits on such policies. But a bill of rights can nonetheless serve this role, and this takes us to the final distinction. There are two ways to think about the nation-building role of a bill of rights: the *regulative* conception and the *constitutive* conception. On the regulative conception, the function of a bill of rights is to enable individuals to invoke the machinery of the courts to set binding constraints on political decision-making. Serving this function does not depend on a bill of rights having any effect on citizens' political identities. On the constitutive conception, a bill of rights constitutes the demos that it also constrains. It encodes and projects a certain vision of political community-in particular, the idea of a political community as consisting of rights-bearing citizens of equal status. To serve as an instrument of nation-building, a bill of rights must alter the very self-understanding of citizens. This is the idea of civic citizenship, most famously presented by Ernest Renan¹⁹.

The *Charter* relies on both the regulative and constitutive conceptions of a bill of rights to serve as instrument of nation-building. In regulatory terms, the *Charter* imposes legal restraints on minority nation-building by Quebec, through the rights to inter-provincial mobility and to minority language education for their children. The centrality of the mobility and minority language education rights provisions to the

¹⁹ Ernest Renan, *Qu'est-ce qu'une nation*, (1882), <http://archives.vigile.net/04-1/renan.pdf>

nation-building project of the *Charter* is underlined by their exemption from the legislative override, which enables the federal Parliament and provincial legislatures to enact laws notwithstanding that they violate the *Charter*. Both rights can be understood as a response to potential or actual policies of linguistic nation-building by Quebec, and indeed, Quebec objected to both²⁰.

The *Charter* prohibits the use of disincentives to inter-provincial migration, by guaranteeing the right to *move and take up residence in any province and to pursue the gaining of a livelihood in any province*²¹. These rights are subject to laws of general application *other than those that discriminate among persons primarily on the basis of province of present or previous residence and laws setting down reasonable residency requirements for the receipt of social services*²². These rights prohibit policies that would encourage and legitimize discrimination against inter-provincial migrants in the delivery of public services, contracting, and public employment. Quebec objected because the province *legitimately discriminates in its legislation to preserve and enhance its integrity as a culturally different [sic] society operating within the context of the dominant Anglophone culture of the continent*²³.

Far more important as a tool of minority nation-building in Canada is the linguistic assimilation of international and inter-provincial migrants. The key tool here is education. Under the Canadian Constitution, education lies in provincial jurisdiction, and encompasses power over the language of instruction and curriculum²⁴. This has been a crucial power for Quebec, because it has permitted Quebec to establish and operate a primary and secondary educational system that works in French, which is a centerpiece of linguistic nation-building. It has also enabled Quebec to create French-language universities, an indispensable support for the use of French in economic and political life that is the source of considerable controversy in other multinational states. Conversely, it has denied to the federal government the power to set a standard curriculum in a shared national language, a common instrument of nation-building in many countries.

Absent the *Charter*, Quebec could have mandated that the exclusive language of public education in Quebec-at all levels-be French. But

²⁰ See, for example, *Letter from Premier René Lévesque to Prime Minister Margaret Thatcher, December 19, 1981*, reprinted in McGill Law Journal 30 (1985): 645 at 708-14

²¹ *Charter*, *supra* note 6, s. 6(2)

²² *Ibid.* at s. 6(3).

²³ *Letter from Premier René Lévesque to Prime Minister Margaret Thatcher*, *supra* note 20, 710.

²⁴ *British North America Act*, *supra* note 8

the *Charter* granted the right to certain categories of citizens to receive minority language primary and secondary education for their children where numbers warrant. The federal government justified this right by reframing the problem of linguistic disadvantage. For Quebec, the problem was the diminished status of French within Quebec. The federal government responded by attempting to break the equation of French with Quebec, by making the issue the status of Francophones across Canada. As *Federalism for the Future* put it, *the people of the French language and culture do not have the same opportunities as do those of the English language to live their lives, to raise their children ... in their own language in all parts of Canada*²⁵. The goal was to make Canada the home for Francophones from coast to coast. The minority language education provisions were the centerpiece of this strategy. But the language rights applied symmetrically to Quebec's Anglophone minority.

The flashpoint of controversy within Quebec has been the right of Anglophones who received their primary school instruction anywhere in Canada in English to have their children educated in English in Quebec- the so-called *Canada Clause*²⁶. This provision was sharply attacked by Quebec Premier René Levesque as undermining *the capacity of our National Assembly to protect French culture in Quebec*²⁷. *Quebec's Charter of the French Language* attempted to limit this right to parents who had been educated in English in Quebec. The *Charter* was drafted specifically to render this policy unconstitutional, which the Supreme Court did in one of its first *Charter* judgments. Another provision of the *Charter*, which grants citizens whose children have received their schooling in English anywhere in Canada the right to English-language education for their children in Quebec, also limits Quebec's ability to linguistically integrate migrants from other provinces.

For Quebec, minority language education rights are very controversial, precisely because they limit Quebec's ability to encourage the linguistic integration of migrants to Quebec from other parts of Canada, not just immigrants to Canada. Although the minority language rights provisions apply symmetrically to Francophone minorities outside

²⁵ *Canada*, *supra* note 11, 4

²⁶ *Charter*, *supra* note 6, 4

²⁷ *Letter from Premier René Levesque to Prime Minister Margaret Thatcher*, *supra* note 20, 710

Quebec and the Anglophone minority in Quebec, they are rather unequal in their impact. The reason is the status of English as the dominant language of North America, and indeed, as the dominant language of international economic life. So the economic pressures for Francophones within Quebec to assimilate are great. What this means is that for Quebec to continue as a French speaking community in the modern world, it must adopt linguistic policies that in other provinces are unnecessary. The symmetrical character of the minority language education rights provisions conceals a lack of symmetry in fact.

However, the *Charter* was also intended to function constitutively as the germ of a pan-Canadian constitutional patriotism. In a federal state such as Canada, since citizens share these rights irrespective of language or province of residence, a bill of rights serves as a transcendent form of political identification—the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed polity across the country as a whole. In this light, the minority language education rights provisions are more than regulative measures that constrained linguistic nation-building by Quebec. They communicate a conception about the place of language in Canada, with two components. First, they were designed to inculcate a self-understanding in Francophones that Canada as a whole was their home, not simply Quebec, and a corresponding set of understandings for Anglophones in Quebec. Second, by detaching linguistic identity from province of residence, by opting for personality over territoriality as the basis of language of education, and by granting a right for linguistic minorities to choose their linguistic identity, the *Charter* adopted a stance of neutrality on matters of linguistic choice. This challenged the very legitimacy of linguistic nation-building by Quebec.

Russell was sceptical of the constitutive effects of a bill of rights, stemming from an underlying skepticism regarding the efficacy of symbolic constitutionalism²⁸. For Russell, a constitution can only become a source of political identification and the basis of a national identity because of its concrete effects on public policy. Subsequent expe-

²⁸ Russell, *supra* note 7, 36

rience proved that Russell was right and wrong. Outside of Quebec, the *Charter* has generated a new pan-Canadian patriotism, likely much more quickly than even the most optimistic predictions suggested. However, within Quebec, the *Charter* has decidedly not had this effect. The Charter has not served to bind francophone Quebecers to the Canadian constitutional order. Indeed, the sharply differentiated effect of the *Charter* on Canadian constitutional culture suggests that it may now be harder, because of the *Charter*, to build a unifying account of the Canadian constitutional order that transcends linguistic and regional divides.

The conflicting reactions to the *Meech Lake Accord* within and outside Quebec powerfully illustrate these points. The entrenchment of the Charter was agreed to by the federal government and the nine provinces other than Quebec, which insisted unsuccessfully that there was a constitutional convention granting it a veto over constitutional change. Although Quebec's lack of consent had no impact on the legality of the *Charter*, both the failure to accept that Quebec possessed a veto and that the veto had been exercised damaged the legitimacy of the *Charter* in the eyes of many Quebecers. The *Meech Lake Accord*, signed in 1985, was a series of constitutional amendments that together were an attempt to bring Quebec into the constitutional fold. Ultimately, however, the Accord failed to attain the requisite degree of provincial consent to amend the constitution.

Outside of Quebec, the public reaction to the *Meech Lake Accord* was very hostile, as famously described by Alan Cairns²⁹. There were two points of criticism. The first was the process whereby the Accord was reached. The proposed constitutional amendments were arrived at as the result of closed-door negotiations between the premiers and the Prime Minister. The complete package was then presented to the Canadian public as a *fait accompli*, a seamless whole that could not be altered for fear that the whole deal would unravel. As a legal matter, this approach grew out of the relevant procedures for constitutional amendment themselves, which require the consent of the two cham-

²⁹ Alan Cairns, *Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake*, Canadian Public Policy 14 (1988): S121

³⁰ *Constitution Act*, 1982 (U.K.), 1982, c. 11, ss. 38, 41, and 43

bers of federal Parliament and the provincial legislatures³⁰.

Citizens outside Quebec rejected this process for constitutional change by rejecting its underlying theory. They asserted themselves, not governments, as the constituent actors in the constitutional process. The constitution did not belong to governments; it belonged to them. This was a dramatically different way in which citizens situated themselves *vis-à-vis* the constitution before the *Charter*. The *Charter* had transformed Canadians outside Quebec into constitutional actors and the basic agents of constitutional change. The view fuelled by the *Charter* that Canadian citizens irrespective of province of residence are the constituent actors in the amending process is largely irreconcilable with a veto for Quebec. To be clear, the idea of a veto for Quebec does not preclude the idea of public consultation. Rather, it suggests that rather than there being a single, national community that must be consulted, there are in fact two-i.e., the two constituent nations of Canada-whose consent must be separately given.

The transformative effect of the *Charter* on constitutional culture also explains the hostile reaction to perhaps the central provision in the *Meech Lake Accord*- the Distinct Society clause. The clause would have mandated that the Constitution be interpreted to recognize *that Quebec constitutes within Canada a distinct society* and would have affirmed [*i*]he role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec³¹. The clause did not identify in what precise respects Quebec was distinct from the rest of Canada, and indeed, the precise legal effect of the clause was the subject of widespread contestation.

Outside Quebec, the fear was that the clause would provide for the unequal application of the *Charter*, by authorizing Quebec to limit the *Charter* in a manner not open to other provincial governments. In particular, there was a concern that it would provide additional constitutional support for linguistic nation-building on the part of Quebec. Now the question is why the unequal effect of the *Charter* mattered at all. Canadian public policy has long been differentiated on a provincial or regional basis, because of vast differences in demography and the

³¹ *Motion for a Resolution to Authorize an Amendment to the Constitution of Canada* (Ottawa: Queen's Printer, 1987), ss. 2(1)(b) and 2(3).

structure of the economy. The answer was that for Canadians outside Quebec, the *Charter* was what made Canada a country, and was the spine of a Canadian citizenship that was shared by all Canadians, both those within and outside Quebec. Consequently, the potential for its unequal application across Canada was an assault on a basic, non-negotiable term of the Canadian social contract and very identity of the country.

But within Quebec, the view on the Distinct Society clause was exactly the opposite, rooted in a particular account of the history and origins of Canada. For Quebec, the adoption of federalism and the creation of Quebec was a direct response to the failure of the United Province of Canada, a British colony that resulted from the merger of the previous colonies of Lower Canada (later Quebec) and Upper Canada (later Ontario), and which existed between 1840 and 1867. The history here is complex³². In brief, citizens of both Lower and Upper Canada elected equal numbers of representatives to a legislative assembly, although the largely francophone citizens of the former outnumbered the largely anglophone citizens of the latter³³. The language of government was meant to be English³⁴. The goal behind the merger and departure from representation by population was to facilitate the assimilation of Francophones. As time went on, Upper Canada became more populous and demanded greater representation in the joint legislature, which was resisted by Francophones who feared they would be outvoted on matters important to their identity. The result was political paralysis. Federalism was the solution- providing for representation by population at the federal level, but also creating a Quebec with jurisdiction over those matters crucial to the survival of a francophone society in that province, such as education through institutions that operated in French.

So to Quebec, Canada is unintelligible except against the backdrop of the idea that the institutions of federalism are designed to protect Quebec's linguistic distinctiveness. But the odd thing about the Canadian constitution is that it lacks express recognition of this fact,

³² Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997).

³³ *An Act to Reunite the Provinces of Upper and Lower Canada, and for the Government of Canada*, 3 and 4 Vict., c. 35 (U.K.), s. XII

³⁴ *Ibid.* at XLI

³⁵ Sujit Choudhry, Jean-Francois Gaudreault-DesBiens, and Lorne Sossin, *Afterword: Solidarity Between Modesty and Boldness*, in Sujit Choudhry, Jean-Francois Gaudreault-DesBiens, and Lorne Sossin, eds., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: University of Toronto Press 2006), 206

³⁶ Charles Taylor, *Shared and Divergent Values*, in Charles Taylor, ed., *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal and Kingston: McGill-Queen's University Press, 1993), 155

and treats Quebec on a basis of juridical equality to the other provinces. The Constitution is absolutely silent on who Canadians were, or were to be³⁵. When compared to other constitutions, for example that of the United States of America, the Constitution is a rather conservative, if not uninspiring, document. This silence may be nothing more than a function of the peculiar legal character and political function of the *British North America Act*, a statute of the British Parliament that granted Canada extensive powers of internal self-government but not independence. But it may also reflect a lack of agreement on such a shared account at the time Canada came into being. This silence may have shown some prescience about the possibilities, but also the limits, of a federalism designed to manage the conflict between competing nationalisms rooted in a basic disagreement on the fundamental nature of the Canadian political community. But as Charles Taylor has perceptively argued, whatever the reasons for this silence, the lack of such a statement did not come without its costs³⁶. The reason is that it was accompanied by a political culture outside of Quebec that refused to acknowledge the French-Canadian understanding of Confederation. The formal juridical equality of the provinces reinforced this refusal, setting up the dominant constitutional conversation as the contest between province-building and pan-Canadian nation-building. The Distinct Society clause therefore mattered a great deal, because it was the first time the constitution would explicitly acknowledge a view of what Canada was for. The concrete legal effect of the clause counted for a whole lot less than this simple statement. And so the repudiation of the clause on the basis of a theory of Canada that was grounded in the *Charter* set up the *Charter* as an obstacle to, rather than as a central component of, how many Quebecers understood the nature of their relationship with the rest of Canada.

Empowering the Supreme Court of Canada

So the story of the adoption of the *Charter* is intimately tied up with the history of Canadian federalism. In particular, the adoption of the *Charter* was an intervention in a longstanding debate over the place of Quebec within the Canadian constitutional order, and more fundamentally, the underlying conception of political community that is reflected in Canada's constitutional arrangements. But there is another connection between the adoption of the *Charter* and Canadian federalism, in which the courts and constitutional interpretation take centre stage. I now want to turn to this story, because it directs our attention to the significance of vesting the Supreme Court of Canada with responsibility for enforcing the *Charter*, as opposed to a new Constitutional Court.

The starting point is the *British North America Act*, which created Canada through the union of three pre-existing British colonies, and then proceeded to create a federal state with two levels of government, each with a legislature and executive, and to allocate jurisdiction between them. Although the framers of Canadian federation agreed on this basic, thin account of Canada's constitutional architecture, they disagreed profoundly on the substantive vision that lay behind it. I have already described the understanding of Confederation within Quebec. This manifested itself in a particular view of the powers of provincial governments, their relationship with the federal government, and the scope of provincial jurisdiction. On this view, provinces possessed a complete set of executive and legislative powers, identical to those possessed by the federal government; provinces enjoyed a coordinate relationship with the federal government, such that their legislative and executive machinery was entirely independent of federal control; and the scope of provincial jurisdiction was broad, encompassing jurisdiction over all matters central to the distinct identity of Francophones which they had lacked when co-existing in a unitary state with Anglophones, and to which the adop-

tion of federalism was a direct response. On the other hand, many Anglophones (including Canada's first Prime Minister, Sir John A. MacDonald) conceptualized Canada as a highly centralized federation. They read Canadian federalism against the backdrop of the American Civil War. For MacDonald, the American constitution had made the Civil War possible by leaving the residue of legislative power not explicitly assigned to the federal government to the states who had accordingly had quasi-sovereign status, much like a treaty. The *British North America Act*, in contrast, did precisely the opposite. On the centralist vision of Confederation, the federal government possessed the full range of executive and legislative powers, which were denied to the provinces; the provinces were subordinate to the federal government, which had the power to direct the executive and legislative machinery of the provinces; and the scope of federal jurisdiction was broad, while the scope of provincial jurisdiction was very limited. The constitutional text did not resolve which of these competing interpretations of the *British North America Act* was correct. One reason is that the document was adopted against the backdrop of British constitutional practice, which leaves the existence, status, powers and relationship of many institutions to unwritten constitutional conventions. For example, the *British North America Act* declares that all executive power in Canada vests with the Queen³⁷. There is no mention of the office of the Prime Minister, the cabinet, and the doctrine of responsible government. Moreover, many of the most important provisions conferring legislative are open-ended, and are therefore open to a multiplicity of interpretations. The *British North America Act* assigns *exclusive* legislative jurisdiction to the federal and provincial governments over a lengthy list of powers³⁸. However, many of those provisions overlap. To pick but one example, the federal government is assigned jurisdiction over *Trade and Commerce*³⁹, whereas the provinces is granted jurisdiction over *Property and Civil Rights*⁴⁰. Given that most trade and commerce occurs through the vehicle of contracts that create civil and proprietary rights, the overlap between federal and pro-

³⁷ *British North America Act*,
supra note 8, s. 9

³⁸ *Ibid.* at ss. 91 and 2

³⁹ *Ibid.* at s. 91(2)

⁴⁰ *Ibid.* at s. 92(13)

vincial jurisdiction is great. Moreover, as discussed above, the document does not contain any language that sets out an overarching vision of Confederation that could guide the interpretation of the document, and resolve the conflict between these competing interpretations.

It therefore fell to the courts to resolve these basic disagreements over the very nature of Canada. The *British North America Act* did not explicitly authorize judicial review, because it was incorrectly assumed that the text was sufficiently clear to not require judicial interpretation. However, the *British North America Act* was adopted against the backdrop of a long-standing practice pre-dating Confederation whereby colonial courts reviewed local legislation for repugnance with Imperial law, which prevailed in the event of a conflict. Since the *British North America Act* is also an Imperial statute, very soon after Confederation, the lower courts began to review federal and provincial laws for compliance with its terms. As a consequence, judicial review grew out of a prior mechanism for maintaining imperial control over a far-flung empire. Moreover, because Canada remained part of the Imperial constitutional order, the court of final appeal was not the Supreme Court of Canada, but the Judicial Committee of the Privy Council (JCPC), which sat in London. The JCPC-which still exists today-is not a court in a formal sense. Rather, appeals are made from colonial courts to the British monarch, who acts on the JCPC's advice. In practice, however, the JCPC is a court that is largely staffed by members of the Judicial Committee of the House of Lords, Britain's highest appeal court. For the first eighty years of Canada's history, the JCPC was Canada's court of final appeal. It soon fell to the JCPC to settle disagreements among governments over constitutional meaning.

The JCPC quickly set out a vision of a Canada with strong provinces and a weak federal government, in which the provinces had jurisdiction over the major aspects of social and economic policy. There were two major sets of cases. One concerned the status and powers of provincial executive and legislative power. To recall, under the *British North America Act*, executive authority was vested in the British

monarch. However, the Governor-General exercises all of these powers in Canada on behalf of the British monarch. The Governor General in turn appoints provincial Lieutenant-Governors. The question was whether Lieutenant-Governors also possessed the full range of executive powers within provincial jurisdiction, or only those expressly conferred by the Governor-General, and therefore subject to federal control. The JCPC held that Lieutenant-Governors were representatives not of the Governor General, but of the Queen, and therefore possessed the full range of executive power with respect to matters falling within provincial jurisdiction⁴¹. A parallel issue was the ability of provincial legislatures to delegate law-making power to administrative agencies, ministries, etc. In the British constitutional tradition, Parliament may delegate its law-making powers, but the subordinate decision-makers who receive those powers are prohibited from delegating them away. The question was how to conceptualize provincial legislatures-as Parliaments who could delegate legislative powers, or as subordinate decision-makers like municipalities who could not delegate away powers they received. The JCPC affirmed that they were the former, not the latter⁴².

Another set of cases concerned the relative scope of federal and provincial legislative jurisdiction. The *British North America Act* grants the federal Parliament jurisdiction to legislate with respect to the *Peace, Order and Good Government* (pogg) of Canada, and then enumerates a list of specific areas of federal jurisdiction. Although this language is open to the interpretation that the pogg power is a broad, general grant of federal jurisdiction, and the specific areas of jurisdiction merely illustrative, the JCPC quickly took the view that pogg was a residuary power granting the federal Parliament jurisdiction over areas not specifically assigned to either level of government. Moreover, the JCPC held that laws enacted pursuant to pogg could not incidentally affect provincial areas of jurisdiction, which limited the scope of the pogg power even further⁴³. JCPC's next move was to declare that the pogg power was in fact an emergency power⁴⁴. A similar story can be

⁴¹ *Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437

⁴² *Hodge v. The Queen*, [1883] 9 A.C. 117 (P.C.).

⁴³ *Ontario (A.G.) v. Dominion (A.G.)*, [1896] A.C. 348 (P.C.) [hereinafter *Local Prohibition Reference*]

⁴⁴ *Reference Re Board of Commerce Act, 1919 (Canada)*, [1922] 1 A.C. 191, 60 D.L.R. 513 [hereinafter *Board of Commerce*]

told about the federal trade and commerce power. Although potentially broad in scope, particularly given that the Commerce Clause in the U.S. Constitution only confers on the federal government jurisdiction over interstate and international trade, the JCPC limited federal jurisdiction under the trade and commerce power to the regulation of international and inter-provincial trade, as well as the *general regulation of trade*⁴⁵. The Supreme Court of Canada then further narrowed the power, by excluding intra-provincial transactions from the scope of federal jurisdiction, even if they had important economic effects both inter-provincially and internationally⁴⁶. The JCPC also held that the *general regulation of trade* excluded legislation that was industry-specific⁴⁷, and later suggested that it lacked any independent content⁴⁸. In these same cases, the JCPC read the provincial power over property and civil rights broadly, as encompassing jurisdiction over the whole law of private relations found in contract, tort and property. This was in effect a plenary jurisdiction, which was not limited by inter-provincial and international implications of provincial regulatory activity.

Why did the JCPC read the *British North America Act* in this way? Scholars have offered competing stories. James Mallory argued that the JCPC's jurisprudence reflected a commitment to the principles of laissez-faire, and hostility to the regulatory, redistributive state⁴⁹. Since most legislation regulating market relations was enacted by the federal Parliament, this attitude manifested itself in an expansive toward provincial power, and a narrow reading of federal power. The link between underlying ideological commitment and constitutional doctrine, however, was entirely contingent. Another view, offered by Alan Cairns, is that the provincial bias of the JCPC reflected the trajectory of Canadian constitutional development⁵⁰. In the first decades after Confederation, the federal government had completed the tasks which the *British North America Act* contemplated it would undertake—the territorial expansion of Canada, the building of the national railway, and the creation of new provinces in Western Canada. The centre of political gravity then shifted to the provinces, which became the major

⁴⁵ *Citizens Insurance Company v. Parsons*, [1881] 7 A.C. 96 (P.C.)

⁴⁶ *King v. Eastern Terminal*, [1925] S.C.R. 434, 3 D.L.R. 1 [hereinafter *Eastern Terminal*].

⁴⁷ *Canada (A.G.) v. Alberta (A.G.) (The Insurance Reference)*, [1916] 1 A.C. 589 [hereinafter *Insurance Reference*]

⁴⁸ *Toronto Electric Commissions v. Snider*, [1925] A.C. 396, 2 D.L.R. 5 (P.C.).

⁴⁹ J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954)

⁵⁰ A. Cairns, *The Judicial Committee and Its Critics*, in *Canadian Journal of Political Science* 4 (1971): 301

locus of governmental activity. The JCPC ratified, as opposed to spurring, the rise of provincial power. A third view holds that the JCPC was guided by a desire to preserve Quebec's autonomy. Although very cases actually arose from Quebec, the JCPC did refer to Quebec's distinct constitutional status as justification for its narrow interpretation of federal power. As mentioned above, Quebec is treated on a basis of juridical equality with other provinces. One exception is a constitutional provision that authorizes the federal Parliament to harmonize areas of private law normally within provincial jurisdiction with provincial consent, but explicitly excludes Quebec from its scope. The JCPC reasoned that the exclusion of Quebec from the harmonization provisions was meant to preserve Quebec's autonomy, which would be undermined if those areas already fell within federal jurisdiction and thus did not require provincial consent for federal legislation⁵¹. As well, the JCPC did state on one occasion that *the preservation of the rights of minorities was a condition upon which the whole structure of the British North America Act was built, and hence that [t]he process of interpretation ... ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded*⁵².

But regardless of its reasons, the JCPC's interpretation of the *British North America Act* eventually became a source of binational cleavage. The event that brought this to the fore was the Great Depression. The apogee of the JCPC's decentralist vision of Canada was a series of decisions handed down in the late 1930's which struck down the Canadian version of the New Deal—a federal legislative package designed to alleviate the social and economic upheaval of the Depression by regulating markets and creating the beginnings of the Canadian welfare state. In many ways, the decisions were not a surprise, because they involved the application of the JCPC's narrow interpretation of the scope of federal authority. However, it had been hoped that the exceptional economic circumstances of the Depression would lead the JCPC to decide differently. The academic reaction to these decisions in English Canada was fiercely emotional. Leading Anglophone scho-

⁵¹ *Citizen's Insurance Company of Canada v. Parsons*, [1881] 7 App. Cas. 96

⁵² *Reference Re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at para. 27

lars-Frank Scott and William Kennedy-advanced two lines of attack⁵³. One was originalist, i.e. that the design of the Canadian federation was centralist, and that the failing of the JCPC was its refusal to respect both the clear text and intent behind the *British North America Act*. Another was that the JCPC had erred in not adapting the *British North America Act* to enable the federal government to deal, effectively and quickly, with its pressing social and economic needs, and more fundamentally, to respond to a vastly different set of expectations regarding the responsibilities of the state than prevailed in the mid-19th century. The solutions proposed were to amend the *British North America Act* in order to augment federal authority, and to end appeals to the JCPC. Without these changes, they argued, Canada could not be a true nation, and would be incapable of controlling its destiny. But the latter were considered fundamental, because of the concern that the JCPC had misinterpreted a document that had been framed with a strong federal government, and could therefore not be entrusted to interpret a new constitutional arrangement. Of these two options, the federal government only pursued the latter-the abolition of appeals to the JCPC. In large part, this was because wholesale constitutional reform was a political non-starter⁵⁴. The reason was national unity. At the time of the Great Depression, there was no clear Anglophone majority in favour of an expanded role for the federal government, and the government of the day, a Liberal administration, was dependent on seats from Quebec for its survival. In addition, Quebec was governed by the Union Nationale, which was a staunch defender of provincial autonomy. By comparison, the abolition of appeals to the JCPC was not transparently directed toward the same end. Indeed, the public justification offered for the abolition of JCPC appeals was not to shift the interpretation of the federal division of powers, but rather, to complete the process of Canadian independence, which occurred between 1919 and 1931⁵⁵. The issue was external sovereignty, not the internal distribution of sovereign power. Of course, these arguments were not entirely distinct, since some critics linked the case for increased federal jurisdic-

⁵³ W.P.M. Kennedy, *The British North America Act: Past and Future*, in *Canadian Bar Review* 15 (1937): 393 and F.R. Scott, *The Consequences of the Privy Council Decisions*, in *Canadian Bar Review* 15 (1937): 485

⁵⁴ Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990) at 81-83

⁵⁵ Maurice Ollivier, *Problems of Canadian Sovereignty from The British North America Act, 1867, to The Statute of Westminster, 1931* (Toronto: Canada Law Book Company Limited, 1945) at ch. 15

⁵⁶ *Act to Amend the Supreme Court Act*, S.C. 1949 (2nd sess.), c. 37, s. 3

⁵⁷ *The Meaning of Provincial Autonomy*, (1951), *Canadian Bar Review* 29 (1951): 1126

⁵⁸ *Ibid.*

⁵⁹ J. Beetz, *Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867*, in P. Crepeau and C.B. Macpherson, eds., *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965) at 113

⁶⁰ Bora Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, in *The Canadian Bar Review* 1038 (1951): 1069

⁶¹ Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems* (Royal Commission of Inquiry on Constitutional Problems Imprint (Quebec City): Province of Quebec, 1956) Volume III, Book I at 287

tion to the need to implement international treaty obligations.

Appeals to the JCPC were abolished in 1949⁵⁶. The strongest, and most sustained opposition came from Quebec. Indeed, it is Quebec and particularly Francophone scholars who have been the strongest defenders of the JCPC and its legacy. Louis-Philippe Pigeon, a future justice of the Supreme Court, wrote that the *great volume of criticism ... heaped upon the Privy Council ... is ill-founded*⁵⁷, because its decisions *firmly uphold the principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another, to a legislative union*⁵⁸. Another future justice of the Supreme Court, Jean Beetz, also defended the record of the JCPC, again because it protected Quebec's autonomy⁵⁹. But since the JCPC appeals had been abolished, the question was what would replace them. By default, the Supreme Court had become the final court of appeal. There was no guarantee that the Supreme Court would interpret the *British North America Act* any differently. Indeed, after an initial period in the late 19th century when the Supreme Court had advanced a centralist interpretation of the federal division of powers, it quickly fell into line, and faithfully interpreted the JCPC's judgments. Moreover, as future Chief Justice Bora Laskin wrote, in those areas where there were no precedents and it had the legal space to strike out on its own, *[t]he Court as a whole appeared loath to strike out in new directions*⁶⁰. What would happen in the future was unknown.

But this did not stop Quebec from launching a sustained critique of the Supreme Court and proposing alternative arrangements for constitutional adjudication. The fullest statement of Quebec's position can be found in the Report of *Royal Commission of Inquiry on Constitutional Problems* (the Tremblay Commission) in 1956⁶¹. The Tremblay Commission was struck by Quebec to develop its response to the growth in federal policy activism brought about by the end of the Second World War. The Commission critiqued the Court on a number of mutually reinforcing grounds that could still be made. First, the Supreme Court's existence is not constitutionally entrenched. The *British North America Act* authorizes Parliament to create the Supreme

Court, and it is a creature of federal statute⁶². In other federal states, the existence, jurisdiction and membership of the Supreme Court is entrenched so that they are *beyond the reach of governmental whim*⁶³. Second, the federal government has asserted sole authority over the scope of the Supreme Court's jurisdiction, and through legislation, has expanded it to make the Court the final court of appeal in all legal matters of law, including the Quebec *Code Civil*⁶⁴. The Supreme Court therefore is *the greatest power for the standardization of law in Canada*⁶⁵. In addition, it argued that an expansive approach to the Supreme Court's jurisdiction flouted the original purpose of authorizing Parliament to create a final court of appeal for Canada, and interfered substantially in provincial jurisdiction over the areas of law within the Court' jurisdiction⁶⁶. Finally, the power to appoint Supreme Court justices vests solely with the federal executive. As the Commission stated, *[t]his might be acceptable if a mere matter of judging ordinary civil and criminal questions were involved, but in the case of constitutional disputes it is neither normal nor satisfactory that a single party should choose, name and pay all the arbiters*⁶⁷. How did the Commission propose to respond to these critiques? The re-establishment of appeals to the JCPC was a non-option. The Commission therefore proposed a radically different alternative: the creation of a specialist Constitutional Court with jurisdiction limited to constitutional matters. Although the German Federal Constitutional Court was the inspiration for the Commission's proposal, the Constitutional Court of Canada would be quite different. First, there would be one panel of judges, not two Senates, as in the German system. This may reflect the fact that at the time, the range of constitutional issues coming before the Supreme Court was much narrower than those falling within the jurisdiction of the German Federal Constitutional Court. For Canada, the principal constitutional questions at the time concerned federalism; for Germany, they included federalism, rights, the banning of political parties, and separation of powers disputes between federal institutions. Second, the selection process would provide for protection of provincial interests *not* by

⁶² *Ibid.* at 289

⁶³ *Ibid.* at 292

⁶⁴ *Ibid.* at 294

⁶⁵ *Ibid.* at 291

⁶⁶ *Ibid.* at 293

⁶⁷ *Ibid.* at 291

involving the upper chamber (the Canadian Senate) in the selection process, but by dividing up the power of appointment between the federal and provincial executives. The Commission proposed that the Constitutional Court consist of five federally appointed judges, and one judge appointed by each region of Canada (Quebec, Ontario, the Maritimes, and Western Canada). One reason for this difference is that the Canadian Senate is neither elected directly nor selected by provincial legislatures or executives, and therefore cannot provide a mechanism for provincial involvement over the membership of the Supreme Court like the Bundesrat does in Germany. In addition, whereas judges of the Federal Constitutional Court do not also sit as justices of the Federal Supreme Court, on the Commission's model, the five federally appointed judges on the Constitutional Court would be Supreme Court of Canada justices. Finally, the existence, jurisdiction and membership (including appointment mechanism) of the Constitutional Court would be constitutionally entrenched.

Over the course of the next several decades, the Quebec government proposed several variations on the Constitutional Court model. Indeed, it first proposed this idea in 1947, in anticipation of the abolition of Privy Council appeals. The details have varied. At different times, Quebec has proposed that provincial executives appoint a majority or two-thirds of the Constitutional Court⁶⁸. For the latter variant, one-third of the judges would be appointed by Quebec, and another one-third appointed by the other provinces. Although many other provinces held concerns similar to those identified by the Tremblay Commission and advanced by Quebec, none supported the creation of a Constitutional Court as a solution to these problems. Moreover, the federal government consistently opposed the creation of a specialist constitutional tribunal.

The federal government offered its most extensive critique to the idea of a Constitutional Court in 1979⁶⁹. First, there were concerns regarding the proposed appointing procedure. The federal government feared that distributing the power of appointment among several gover-

⁶⁸ *Quebec's Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001* (Québec City: Secretariat of Canadian Intergovernmental affairs, 2001) at 38, 52

⁶⁹ Otto E. Lang, *Constitutional Reform: The Supreme Court of Canada*, reprinted in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson Limited, 1989) at 476

nments would turn the Court into a representative body, which *would not likely function as a independent judicial body interpreting the Constitution but more as a body or tribunal negotiating the interests of the various governments*⁷⁰. This critique was rooted in an understanding of adjudication and the judicial role that sharply distinguished legal and political decision-making. Second, the federal government cast doubt on the wisdom of separating constitutional from non-constitutional issues in the adjudication of particular dispute, which the creation of a Constitutional Court would necessitate. It envisioned a model of Constitutional Court jurisdiction in which there would be no direct access by litigants. Rather, ordinary courts would refer abstract constitutional questions to the Constitutional Court while retaining jurisdiction over the case. The Constitutional Court would send its answers back to the ordinary court, which would then apply it to the facts at hand. In the federal government's view, this would harm the development of the law, since *our system of law requires that decisions in a case be related to all the factors involved, including the facts and the other relevant law*⁷¹. In addition, it would produce delays. By contrast, a system of dispersed jurisdiction would *result in only the most contentious constitutional issues being appealed to the Supreme Court and allows them to be decided in reference to the factual situation and the case as a whole*⁷². Finally, the federal government questioned an argument sometimes offered in favour of a Constitutional Court: that constitutional issues are sufficiently different from other legal issues that they require special expertise, which is lacking on a generalist Supreme Court. Its response was that *[o]ur system is not one of specialization; we do not require that only experts in criminal law decide criminal law cases, or that only experts in commercial law decide commercial law questions*⁷³.

The opposition to the creation of a Constitutional Court did not mean that the status quo remained unchallenged. Rather, it had the effect of shifting the debate to the reform of the Supreme Court itself. Some proposals sought to constitutionally entrench the Supreme Court's existence, to guarantee Quebec's existing representation on the Court, but to modify the appointments process to provide for greater provin-

⁷⁰ *Ibid.* at 478

⁷¹ *Ibid.* at 482

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Meech Lake Accord, Amendment to the Constitution*, 1987, c. 11, s. 5

⁷⁵ *Supreme Court Act (R.S.)*, 1985, c. S-26, s. 6

⁷⁶ *Victoria Charter*, 1971, c. 38

cial involvement. A representative set of proposals can be found in the *Meech Lake Accord*, discussed earlier⁷⁴. If a vacancy occurred on the Supreme Court, each province would have been allowed to submit a list of nominees to the federal Minister of Justice. The power of appointment would have remained with the federal cabinet, but appointments would have had to be made from provincial lists. The amendment also made special provisions for Quebec. At present, the Court consists of nine members—three from each of Ontario and Quebec, one from the Maritimes (Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island), one from British Columbia, and one from the Prairie provinces (Alberta, Saskatchewan, Manitoba). Only Quebec's representation on the Court is entrenched in statute, whereas the distribution of the remaining seats is a matter of political convention⁷⁵. The proposed amendment would have entrenched Quebec's current level of representation, which is out of proportion to its share of the national population, and is predicted to decline further. This has been a common element in many otherwise disparate proposals. Moreover, the *Meech Lake Accord* would have required the appointment of judges from Quebec to be made from a list of nominees provided by that province. With respect to appointments to non-Quebec positions, the provision would have required appointments to be made from names provided by provinces other than Quebec.

This was not the only option. Other proposals provided that the appointment be agreed to by the federal and provincial executives without the requirement that the appointment be made off a provincial list (e.g. the 1971 *Victoria Charter*)⁷⁶. In the event of disagreement, a *nominating council* would be struck consisting of a federal representative, a provincial representative, and a mutually agreeable chair, or in the absence of agreement on a chair, the Chief Justice of the province from which the appointment would be made. The federal government would send a list of at least three names to the nominating council, from which a majority of the committee would recommend one. Other variations would have replaced the appointing power of

the federal executive with a power of nomination, and required legislative affirmation for an appointment to be made⁷⁷. Legislative affirmation would have been linked to the reform of the second chamber of the federal Parliament, the Senate, by enabling it to serve as vehicle for the representation of provincial interests in the federal Parliament—for example, by transforming it into a House of the Federation in which half of the members would be selected by the House of Commons, and the other half by and provincial legislatures. Some proposals (e.g. the *Victoria Charter*) would have entrenched the Supreme Court's jurisdiction over all constitutional disputes, while leaving other questions of jurisdiction to federal statute.

Other proposals were more radical. Thus, the *Victoria Charter* proposed that appeals from Quebec relating to the *Code Civil* should be heard by a special panel consisting of five judges, with three from Quebec. This would have the effect of restructuring the internal workings of the Court to respond to the fact of Quebec's juridical distinctiveness. It would in effect have been a form of asymmetrical federalism, not by denying the Supreme Court jurisdiction over appeals raising the *Code Civil* from Quebec and thereby leaving those issues to be resolved by the Quebec courts, but rather by restructuring a national institution to create a unique procedure not applicable to comparable issues from the nine common law provinces. Another set of provincial proposals developed in 1980 proceeded from similar premises but led to a different conclusion⁷⁸. These proposals would have expanded the size of the Supreme Court and increased the number of judges from Quebec—e.g. a Court of 13 or 11 judges (as opposed to the current 9) with 4 or 5 judges from Quebec. The idea here was that the disproportionate representation of Quebec reflected its unique vulnerability to constitutional interpretation of the division of powers, because it is home to Canada's Francophone minority. This increase in the size of the Supreme Court was often paired with a proposal for constitutional cases to be heard by a select panel of Supreme Court justices in which the proportion of the panel drawn from Quebec relative to the Court's

⁷⁷ *Constitutional Amendment Bill*, Bill C-60, 1978

⁷⁸ *Report on the Supreme Court, Document 830-83/010, 1980*, in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Document History* (Toronto: McGraw-Hill Ryerson Limited, 1989) at 633

configuration in non-constitutional cases would be higher-e.g. on a Court of 13 with 5 Quebec justices, there would be a constitutional panel of 11 with all 5 Quebec justices. Unlike the proposal for Quebec appeals on the Code Civil, Quebec judges would still be in a minority. But they would have disproportionate representation on all constitutional panels, not just those hearing appeals from Quebec.

In the end, the constitutional status of the Supreme Court was only modified slightly as part of the constitutional package that included the *Charter*. The most sweeping reforms were rejected. The Supreme Court remains a creature of statute, which provides that the Court has nine members, at least three of whom are from Quebec; that the Court's members are appointed by the federal executive; and that the Court's jurisdiction encompasses all legal questions. On the other hand, the rules governing constitutional amendment provide that changes to the *composition of the Supreme Court of Canada* require unanimous federal and provincial consent, and that amendments in relation to *the Supreme Court of Canada* require the consent of the federal government and two-thirds of the provinces accounting for at least 50% of the national population⁷⁹. Although it is not clear how any changes to the Supreme Court could require constitutional amendment given that the existence of the Court and its features are set by statute, the conventional wisdom is that these provisions have the effect of entrenching the Court's existence, its size and the requirement that at least three judges come from Quebec.

The reasons why the more ambitious constitutional reforms proposed for the Supreme Court were not adopted alongside the *Charter* is a complex story, in which the Court played a central role⁸⁰. The federal-provincial negotiations on the constitutional package including the *Charter*, the reform of the Supreme Court, and a range of other issues, including rules governing constitutional amendment that terminated the Imperial role in constitutional change, broke down in 1980. The federal government decided to proceed unilaterally, and requested the Imperial Parliament to amend the Constitution without provincial

⁷⁹ *Constitution Act*, 1982, *supra* note 30 at s. 41

⁸⁰ Sujit Choudhry and Jean-Francois Gaudreault-DesBiens, *Frank Iacobucci as Constitution Maker: From the Quebec Veto Reference to the Meech Lake Accord*, University of Toronto Law Journal 57 (2007): 165

agreement. The constitutional package sent to London was limited to the *Charter* and the rules governing constitutional amendment. The federal government's position was that once the power of constitutional amendment was transferred to Canada, a second round of constitutional negotiations could address the remaining issues, including the Supreme Court.

In response, three provinces launched a constitutional challenge to the federal government's unilateral plan, arguing both as a matter of constitutional convention and constitutional law that there was a requirement for *the consent of the provinces* flowing from constitutional convention or as a matter of constitutional law. In the *Patriation Reference*, a seven judge majority of the Supreme Court summarily dismissed the legal argument⁸¹. But the controversial part of the judgment was the decision of a differently constituted six judge majority that there was a constitutional convention for a *substantial degree of provincial consent*. The reference question asked whether there was a constitutional convention requiring provincial consent for amendments *affecting federal-provincial relationships or the powers, rights or privileges* of the provinces. Several constitutional amendments fell into this category and indicated the absence of a consistent practice, which should have led to the conclusion that there was no constitutional convention of any kind. But the Court evaded this conclusion, by narrowing the scope of the reference question to those which *directly affected federal-provincial relationships in the sense of changing provincial legislative powers*. This had the effect of excluding precisely those precedents where provincial consent had *not* been obtained, but created another problem. The remaining precedents indicated a practice of *unanimity*. But the Court reasoned instead that the failure of the reference questions to refer to *all* the provinces left it open to answer if the consent of some, but not all was required, and held this is what the precedents established. Finally, while the Court refused to specify the measure of provincial consent required, the consent of two provinces was deemed insufficient.

The *Patriation Reference* was likely driven by the Supreme Court's politi-

⁸¹ *Reference re a Resolution to Amend the Constitution (Patriation Reference)*, [1981] 1 S.C.R. 752

cal agenda. The Court's judgment call was that unilateral amendment of the Constitution would severely damage the fabric of federal-provincial relations. The judgment forced the parties back to negotiations. Both sides could claim victory—the federal government on legality, the provinces on legitimacy. Both parties also had strong incentives to reach a settlement. But the *Patriation Reference* increased the risk of isolating Quebec. Prior to the judgment, the provinces assumed that unanimity was required. The shift to a convention of a substantial measure of provincial consent divided the provincial coalition, because each province no longer could claim a veto.

Yet the *Patriation Reference* also gave Quebec the ammunition to challenge the legitimacy of the constitutional package that included the *Charter*, which it did soon after the *Charter* was adopted. Quebec made two arguments. First, it argued that the requirement for a *substantial measure of provincial consent* could be interpreted not only *quantitatively*, but also *qualitatively*, requiring the consent of Quebec in recognition of the binational nature of the Canadian federation. Second, it argued that the evidence suggested the existence of a distinct constitutional convention granting a veto to Quebec. The best support for a Quebec veto arises from two negative precedents, where Quebec's opposition to two attempts to secure agreement on a domestic amending formula (in 1964 and 1971) was regarded by the other constitutional actors as sufficient to scuttle them.

In the *Veto Reference*, the Court rejected both arguments⁸². Since the *Patriation Reference* had held that the convention was substantial provincial consent, it had by logical implication rejected unanimity. On the Quebec veto, the Court shifted gears. The criteria for a constitutional convention is a consistent practice of political behaviour, accompanied by *acceptance or recognition by the actors in the precedents* which distinguishes behaviour motivated by constitutional obligation from conduct driven by expediency. On the facts, the evidence of such acceptance was lacking. But this is very hard to square with the *Patriation Reference*, where the Court did not point to a single statement of the

⁸² *Reference re Amendment to the Canadian Constitution*, [1982] 2 S.C.R. 793

need for substantial provincial consent. The Court was willing to infer acceptance of such rule from constitutional practice. Had the Court imposed the standard applied in the *Veto Reference* in the Patriation Reference, it would have denied that claim as well. Had it done the reverse, it would have accepted Quebec's argument for the existence of a conventional veto.

Once again, a political agenda likely drove the judgment. By the time the Veto Reference was heard by the Supreme Court, the constitutional package including the *Charter* was a legal *fait accompli*. Since Quebec had only impugned the legitimacy, not the legality, of the constitutional amendments, the Court was faced with the prospect of finding that legally valid constitutional amendments were nonetheless illegitimate. A judgment to this effect would have inflicted serious damage on the constitutional order. But although the ruling may have been politically unavoidable, it was legally incoherent. Not only had the Court manipulated its analysis to achieve a result inconsistent with the evidence, but in doing so, it contradicted the *Patriation Reference*, handed down just one year earlier. The *Veto Reference* confirmed what critics had been saying all along—that although the Court claimed to have been acting impartially as a judicial tribunal, it had acted in a politically partisan way to favour the federal government. This is true no where more than in Quebec, where there was nearly universal denunciation of the Court. Quebec Premier René Lévesque used the metaphor of the *La Tour de Pise* to describe what he perceived as a partial and profoundly unjust attitude on the part of the Court. Quebec legal scholars were generally more circumspect, but no less critical. The Supreme Court's image was badly bruised in Quebec after the *Veto Reference*, and that its legitimacy was substantially weakened: the general court of appeal for Canada instantly became la *Cour des Autres*.

In contrast, the Supreme Court's actual track record in federalism cases prior to the enactment of the *Charter* was actually much more balanced. On the one hand, the Supreme Court had begun to expand federal jurisdiction to cover intraprovincial trade whose regulation was

⁸³ *Murphy v. CPR* (1958), 15 D.L.R. (2d) 145

⁸⁴ *Central Canada Potash Company v. Saskatchewan (Attorney General)*, [1979] 1 S.C.R. 42, *CIGOL v. Saskatchewan*, [1978] 2 S.C.R. 545

⁸⁵ *Commission du Salaire Minimum v. Bell Telephone Company of Canada*, [1966] S.C.R. 767

⁸⁶ *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373

⁸⁷ *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)*, [1980] 1 S.C.R. 914

⁸⁸ *Carnation Company Limited v. Quebec Agricultural Marketing Board et al.*, [1968] S.C.R. 238

⁸⁹ *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016

⁹⁰ *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790

necessarily incidental to the regulation of international and interprovincial trade⁸³, limited the ability of provinces to regulate the prices of products heading into export markets⁸⁴, rendered portions of the private sector subject to federal regulation (banking, telecommunications) immune from provincial labour laws⁸⁵, and held that pogg was not an emergency power⁸⁶. But on the other hand, it affirmed exclusive provincial jurisdiction over intraprovincial trade⁸⁷ even where it affected interprovincial trade⁸⁸, and read the pogg power narrowly. For Quebec language legislation in particular, the Supreme Court's judgments were mixed. Thus, while the Court struck down attempts to withdraw official language status from English in the legislature and the courts⁸⁹, it later upheld the constitutionality of legislation regulating the language of the private sector⁹⁰. However, whatever credit the Court had garnered in Quebec through its constitutional jurisprudence on the federal division of powers was overwhelmed by its involvement in the process surrounding the adoption of the *Charter*.

Conclusion

Ginsburg's thesis does not hold in the Canadian case. The *Charter* was not adopted as a form of insurance by political actors to hedge against the risk of future electoral uncertainty, and was not accompanied by the creation of a new Constitutional Court to enforce it. Rather, the adoption of the *Charter* was designed to combat Quebec nationalism, both by constraining Quebec's ability to engage in linguistic nation-building and to serve as the seed of a pan-Canadian constitutional patriotism. Moreover, the final court of appeal for the *Charter* is not a specialist Constitutional Court, but the Supreme Court of Canada. But the Canadian case is not important merely because it illustrates that the substantive and institutional limbs of Ginsburg's argument are not true in a prominent example. The Canadian example also offers more general lessons.

Canada is a linguistically divided society, in which language has served as the basis of political mobilization. The *Charter* project was an attempt to use a bill of rights as a nation-building instrument to build a shared political identity that transcends the linguistic divide. Moreover, the *Charter* was adopted a part of a process of constitutional transition, as Canada severed its final legal connections with the United Kingdom and adopted an indigenous source of title for the Canadian constitutional order. So the Canadian case is really a case about the nation-building role of a bill of rights at moments of constitutional transition in a divided society. Canada is far from alone in adopting a bill of rights in this context and for this purpose. Indeed, many of the most prominent and recent examples of constitutional engineering are in societies striving to overcome deep divisions on the basis of race, ethnicity, religion and/or language. And in these new constitutions, bills of rights are front and centre as nation-building instruments that serve both regulative and constitutive roles. In many divided societies, racial, ethnic, religious or linguistic status was the basis for the unjust distribution of primary social goods in the Rawlsian sense - liberty and opportunity, income and wealth, and the bases of self-respect. Bills of rights are meant to serve as hard checks on political power to ensure that such abuses will not occur again, and to provide groups with the political incentive to acquiesce and participate in the new constitutional-legal order. But bills of rights have been also looked to as constitutive documents to transform the political self-understanding of citizens. A bill of rights calls upon citizens to abstract away from race, religion, ethnicity and language, which have previously served as the grounds of political identity and political division, and to instead view themselves as citizens who are equal bearers of constitutional rights.

Can a bill of rights serve this constitutive purpose? To answer this question, we need to first distinguish between two kinds of divided societies in the process of constitutional transition. In the first category, there are competing nationalisms within the same political place.

These places are variously referred to as multinational polities, plurinational polities, or, plurinational places. In some cases, these places are states, such as Bosnia Herzegovina, Sudan, Sri Lanka, and Cyprus. In other cases, it falls within part of a state, as does Northern Ireland. In yet other cases, it traverses the boundaries of a state, as does Kurdistan, which straddles the borders of Turkey, Iraq and Iran. In the second category, a divided society in constitutional transition is not the site of competing nationalisms. A good example is South Africa. Save for the very margins of political discourse, the South African debate generally presupposed a shared nation, with the claims of black South Africans framed in the language of inclusion and equal citizenship. So can a bill of rights constitute a national identity? I think the answer to this question can be found in the debates occasioned by another constitutional transition—the reunification of Germany. The question was how Germans should make sense of reunification. There were two options on the table. One was ethnic nationalism, which equates states with ethnic nations. On this account, reunification brought ethnic nation and state back into alignment, after a four decade interruption. The other was *verfassungspatriotismus* or constitutional patriotism, offered by Jurgen Habermas⁹¹. For Habermas, the core of the German political identity was the Basic Law, Germany's postwar constitution. Reunification was justified as the restoration of democracy and the *rechstaat* in a territory that had lacked both since the rise of Hitler. Now the best answer to Habermas came from Bernard Yack⁹². Yack argued that a purely abstract constitutional patriotism could not explain the defence reunification over the simple restoration of liberal democracy in East Germany, or why Germany did not unify with the former communist dictatorship of Czechoslovakia, with which it shared a border. Constitutional patriotism in Germany was accordingly best understood as an appeal to a certain audience, united by a shared historical memory and common historical experiences which gave the rules and institutions of liberal democracy a particular salience. The more general point is that even in nations which claim to define citi-

⁹¹ Jurgen Habermas, *Citizenship and National Identity*, in Jurgen Habermas, ed., *Between Facts and Norms* (Cambridge, MA: MIT Press, 1996), 491

⁹² Bernard Yack, *The Myth of the Civic Nation*, *Critical Review* 10 (1996): 193

zanship in civic terms, those principles are nested in a contingent context—a constitutional narrative drawing on a web of political memory forged by shared experiences, challenges, failures and triumphs, which is often but not necessarily tied to a particular set of institutions.

So it is very difficult for bills of rights, on their own, to serve a constituting role in defining a new political identity. In a case like South Africa, for a bill of rights to serve as the basis of a common political identity, it must be married to a constitutional narrative particular to South Africa, about the struggle for racial equality and democracy. The Canadian experience tells us that in plurinational places there is an additional hurdle. The task is not simply to situate a bill of rights in a contingent historical and political context. The task is to do so in a context where the existence of competing nationalisms makes the dominant question of constitutional politics the conflict between competing national narratives. If the ambition of a bill of rights as a constitutive instrument of nation-building is to serve as a central element of an overarching narrative, by standing apart from and transcending these competing narratives by, a plurinational context is a particularly difficult environment in which to do so. Indeed, there is the danger that rather than transcending those national narratives, a bill of rights will be drawn back into it. This is precisely what has happened in Canada.

The second lesson from the Canadian experience is that the institutional arrangements surrounding the enforcement of a new bill of rights is an important choice as well. Indeed, failing to address this issue carefully may further undermine the relatively limited ability of a bill of rights to serve as an instrument of nation-building in a divided society. To understand why, let us begin with Ginsburg. Ginsburg accurately observes the choice of centralized judicial review through a specialist constitutional court has emerged as a dominant feature of constitutional design for jurisdictions that have recently adopted bills of rights. He explains this institutional choice by linking the adoption of a bill of rights to the process of democratic transition. A diffuse system of review through the ordinary courts is a non-option, becau-

⁹³ Ginsburg, *supra* note 1 at 9

⁹⁴ *Ibid.* at 36

se the judiciary was typically trained, selected, and promoted under the previous regime⁹³. The old judiciary is tainted through its association with an undemocratic regime, and cannot be trusted to interpret and enforce a new bill of rights that fundamentally rejects the previous undemocratic constitutional order. Thus, as Ginsburg says, *[i]n many constitutional design situations, there is no real choice to be made here*⁹⁴.

Now the easy response to Ginsburg would be to say that Canada is clearly different from the cases around which he built his theory. The adoption of the *Charter* was not a component of a process of transition from authoritarian to democratic rule. There was no concern that the enforcement of the *Charter* could not be trusted to generalist courts, including the Supreme Court of Canada, that were part of the discredited, prior constitutional order. On this argument, the substantive question of the adoption of the *Charter* could be treated separately from the institutional question of which court should enforce it. A related point is Canada's common law tradition in constitutional law, in which the power of judicial review is vested with ordinary courts of general jurisdiction. This is true even in Quebec, notwithstanding its civil law tradition in the realm of private law. If pressed, I suspect most scholars of Canadian constitutional politics would offer this argument to defend the failure of the field to systematically reflect on the choice of the Supreme Court of Canada to enforce the *Charter*, and to focus exclusively on the substantive work that the *Charter* was intended to do. However, this would be an over-simplification. The Canadian story is complex, because there was not one moment of choice, but two. The first moment was the abolition of appeals to the JCPC. Although publicly defended in the name of Canadian independence, many of the most vocal proponents of this move hoped it would open the door to a radically different interpretation of the federal division of powers. The choice was between two options—the Supreme Court of Canada or a new Constitutional Court. How each would interpret the federal division of powers was unknown. But proponents of each had hopes. The Canadian nationalists who argued in favour of the Supreme Court

hoped that it would emerge from the shadow of the JCPC, depart from established precedent, strike out in a bold new direction and increase the power of the federal government. Quebec, which argued in favour of a Constitutional Court, hoped it would continue to favour provincial autonomy and adhere to the JCPC's jurisprudence.

The Canadian case turns on its head Ginsburg's account of the implications of this constitutional choice. On his account, creating a new Constitutional Court increases the likelihood of constitutional transformation, while vesting the power of judicial review in an old court diminishes that prospect. In Canada, the opposite was true. Constitutional actors who disagreed on the choice to be made nonetheless agreed that vesting ultimate authority with the existing Supreme Court was the choice for constitutional change, whereas creating a new Constitutional Court was the choice for the *status quo*. Why? What shaped constitutional actors' assessments of the impact of this constitutional choice was the mechanism of appointment. The Supreme Court was, and remains, federally appointed. Over time, it was assumed that the federal government would use its power of appointment to select justices who took an expansive view of federal legislative power. By contrast, the proposals for the Constitutional Court always assumed that provinces would have the power to appoint a significant proportion, perhaps even an outright majority, of the justices. Although Quebec's proposals to create a Constitutional Court gained little traction, they did give rise to a set of counter-proposals to reform the Supreme Court that would have institutionalized a major provincial role in appointments. Thus, the institutional limb of Ginsburg's thesis needs to be modified for federal states.

The choice of the Supreme Court as the ultimate judicial custodian of the *Charter* has to be analyzed against the backdrop of this earlier constitutional choice, and the decades of constitutional politics that it spawned. For Quebec nationalists, the Supreme Court was allied with the federal government, with the best evidence being its central role in the adoption of the *Charter* itself. Since the *Charter* was a nation-buil-

ding instrument directed at Quebec nationalism, the choice of the Supreme Court to enforce it had an added significance—and indeed, was viewed by Quebec nationalists as an added insult to Quebec. So the value of the Ginsburg thesis is not that it explains the Canadian case. Rather, its value is that it forces us to revisit and enrich our constitutional histories of the adoption of the *Charter*. In so doing, we recover a forgotten history that the institutional question of which court was vested with ultimate responsibility for its enforcement, which also a controversial choice.

Christoph Schoenberger

The Establishment of Judicial Review in Postwar Germany

I. Introduction

According to Tom Ginsburg's thesis⁹⁵, the introduction of judicial review is due to a sober calculation by hegemonic political elites trying to protect their increasingly threatened political power. They will adopt judicial review as an *insurance* against possible electoral defeats. By providing this *insurance* to prospective electoral losers, judicial review especially facilitates the transition to democracy. This general thesis is of course fascinating. The fascination is due to two elements: it is simple and, thereby, reduces the complexity of the question. And it claims to offer a *realist* account by opposing the *idealism* of usual lawyerly justifications of judicial review that stress the rule of law. But I have to confess immediately: I'm not convinced. To be sure, there may be some situations where Ginsburg can explain the introduction of judicial review (especially transitions from certain types of authoritarian regimes to democracy). But I tend to think that those cases are rather exceptional and that Ginsburg's thesis does not provide a convincing general frame of explanation. I will try to show this in some detail for the German case after World War II. But before doing so, let me offer

⁹⁵Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*, 2003; for a similar argument see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 2004