The Supreme Court's Political Role



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Canadians are not accustomed to thinking about the Supreme Court's political role, but it is one that the Court has played almost from its inception. Most obviously, the Court's position as the umpire of federal-provincial relations has given it tremendous influence over the development of Canadian politics. The Court was responsible for making the provinces more powerful than Canada's original constitutional design provided for, it is responsible for restoring some of the federal government's supremacy, and it has played an important role in defining the rules governing constitutional change. Most recently, the Court's 1998 decision in the *Québec Secession Reference* established the framework within which our most important national question will be resolved.

With the possible exception of its decisions concerning constitutional change and national unity, the Court has been able to perform its political role in relative obscurity. That changed, of course, in 1982, when the Court assumed responsibility for interpreting and applying the Charter of Rights and Freedoms. The Charter's impact on Canadian law and politics has been so extensive over such a short period of time that it is perhaps easy to miss its truly revolutionary character. Consider, for example, that over 22 years (1960-1982), the federal Bill of Rights generated 34 Supreme Court decisions, 5 successful claims, and only one partial nullification of a federal statute.[1] By contrast, over its first 15 years of operation (1982-1997) the Charter generated 352 Supreme Court decisions, 117 successful claims, and 54 nullifications of federal and provincial statutes.[2] There is no question that the Charter, whether intentionally or not, has transformed the Supreme Court into a more active participant in the development of Canadian public policy.

The Court's political role under the Charter does not differ markedly from the role of other political institutions: it makes policy on the basis of a judgment about what rules will produce socially beneficial results. The principal difference is that the Court articulates those rules in the form of constitutional law rather than legislation. Its decisions concerning sexual orientation in *Vriend v. Alberta* (1998) and *M. v. H.* (1999) are good illustrations of the dynamic of judicial policy making. In each case, the Court saw a policy vacuum, used the Charter's equality-rights section to assert jurisdiction over it, and created a new policy to fill the perceived gap.

Not surprisingly, judicial policy making of this sort has generated criticism of the Court's political role. Critics charge that the Court has undemocratically usurped power from legislatures and executives. The Court has responded that its enhanced role under the Charter *cannot* be anti-democratic because it is the product of the "deliberate choice of our provincial and federal legislatures" and "promotes democratic values." As "trustee" of the Charter, the Court argues that it must "scrutinize the work of legislatures and executives not in the name of the courts, but in the interests of the new social contract that was democratically chosen." At the core of this conscious redefinition of Canadian democracy is "a more dynamic interaction among the branches of government." According to this argument, Charter-based judicial review enhances rather than undermines democratic discourse in Canada.[3]

This "dialogue" metaphor, adopted by the Court to describe its political role under the Charter has quickly become the dominant paradigm for understanding the relationship between judicial review and democratic governance.[4] For example, in its November 1999 decision upholding the "privacy shield" amendments to the Criminal Code (R v. Mills), the Court wrote that its willingness to accept legislation that "differs significantly" from an earlier judgment proves that "courts do not hold a monopoly on the protection and promotion of rights and freedoms." Unfortunately, this interpretation of Mills cannot withstand close scrutiny.

To understand why, one must revisit the *O'Connor* judgment, from which the "privacy shield" allegedly departs so significantly. In *O'Connor* the entire Court agreed that sexual assault defendants should have some access to the medical and therapeutic records of sexual assault victims, but it split 5-4 on the rules governing access. The *O'Connor* judgment thus articulated two separate regimes concerning access to medical and therapeutic records. In enacting the "privacy shield" amendments, the government simply followed the strict regime authored by Justice L'Heureux-Dubé. Indeed, the amendments repeat almost word for word important elements of her judgment. It is hardly surprising, then, that in *Mills* Justice McLachlin would uphold a policy regime that she "entirely" concurred with in *O'Connor*. If any dialogue occurred in *Mills*, it was an internal one among the justices about which *O'Connor* regime should prevail. The Court did not

defer to legislative judgment in the *Mills* decision, but merely affirmed a policy that four of its own members had constructed in 1995.

As the *Mills* example indicates, the growing political role of the Court has had a profound impact on legislative and executive behaviour. Rather than simply searching for the "best" policy, governments increasingly find themselves trying to predict which policy will survive judicial review. This should be cause for concern, for two reasons.[5] First, it distorts public policy by substituting constitutional defensibility for effectiveness as the principal criterion for choosing among alternative policies. Second, it debilitates democracy by removing the serious discussion of rights and liberties from the ordinary political realm and placing it exclusively in the less accessible legal realm. Genuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation.

The Supreme Court's political role under the Charter brings to the surface a tension between constitutional supremacy and judicial review. Constitutional supremacy requires that political power be exercised only according to the procedural and substantive rules laid down in a constitution. Judicial review means that one of the institutions in which political power is located bears primary responsibility for interpreting and applying those rules. The tension derives from the fact that judicial power to define constitutional language decreases the effective relevance of the constitutional text as the authoritative source of rules governing political power. As the speed and scope with which courts exercise this power increase, the eventual displacement of constitutional supremacy by judicial supremacy becomes more possible.

Fortunately, the Charter gives governments a tool for checking the Court's political power: the so-called "notwithstanding clause" found in section 33. The notwithstanding clause is controversial because of its use by Québec in 1988 to override the Supreme Court's decision on Bill 101, and the subsequent role that this played in the demise of the Meech Lake Accord on the constitution. However, we ought not to let this historical accident detract unduly from the clause's legitimacy. Its inclusion in the Charter initially made it more difficult for the Court to assert final authority over constitutional rights because it provided a clear institutional mechanism for governments to resist assertions of judicial power. Section 33 generated uncertainty about the locus of constitutional supremacy, which encouraged strategic moderation of judicial review to avoid a political confrontation that might undermine the Court's long-term institutional status. However, with this institutional check on judicial power now significantly weakened as a result of 1988, it is reasonable for the Court to assume that this constraint on its authority has become largely ineffective. The result is the more adventurous use of the Court's political power.

Why is the notwithstanding clause not such a bad thing? If constitutionalism means anything, it means that political power must be limited. Although we might rely on judicial self-restraint to limit the Court's political role, both experience and the political theory of liberal constitutionalism suggest that external checks are necessary. By inviting governments to invoke the notwithstanding clause in response to recent controversial judgments, the Court itself has recognized the importance of not leaving its political power unchecked by other branches of government. A re-legitimized notwithstanding clause would also prevent governments from ducking controversial issues on the pretext that the Court must have the last word on rights and liberties. In the final analysis the political role of the Supreme Court requires that it be integrated into the new regime of constitutional supremacy established in 1982, rather than elevated above it. ■

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1. Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), 343.
2. James Kelly, *Charter Activism and Canadian Federalism: Rebalancing Liberal Constitutionalism in Canada, 1982-1997*. Unpublished Ph.D. dissertation, McGill University, 1998.
3. See *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 562-67.
4. The source of this metaphor is a 1997 article in the *Osgoode Hall Law Journal*, cited favourably in *Vriend*. See Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures," *Osgoode Hall Law Journal* 35 (1997), 75-124
5. Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty," *Michigan Law Review* 94 (1995), 250, 261 n.60.