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Guarding the Guardians : Pressures for Reform to the Supreme Court Nominations Process

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There exist, in year 12 of the Charter era, powerful and growing pressures for reform to the system by which judges are appointed, trained, promoted, disciplined and in some exceptional cases removed from Canada's Courts. Though attention for the moment is primarily focused on the lower courts, the Supreme Court cannot long remain immune from calls for considerably greater scrutiny.

In the first part of this essay, I will examine how those pressures for change derive from the Court's greatly expanded role under the Charter. I will then move on to consider what, if anything, about the current system ought to be reformed in response to these pressures.

I. THE COURT'S CHANGING ROLE

Has the Charter transformed the Supreme Court into a creature of a different order? No, says Madam Justice Claire L'Heureux Dubé in the speech she was to have delivered to the Association québécoise de droit comparé conference on March 10, 1994. Judge Dubé argues that the advent of the Charter has not given rise to a profound or revolutionary change in the Court's function :

> J'aimerais toutefois rappeler que la Charte n'a rien changé fondamentalement à la fonction judiciaire : de tout temps, aujourd'hui comme hier, les tribunaux ont pour mission de calibrer les législations tant provinciales que fédérales à la norme constitutionnelle.[1]

She asserts that, in the pre-Charter era, "les tribunaux n'ont jamais hésité à assurer aux justiciables de ce pays le respect de leurs droits fondamentaux". As evidence, she cites three Supreme Court decisions : *Saumur*, *Switzman* and *Roncarelli*.[2]

Judge Dubé uses these cases to suggest that the Charter has little altered what was already the Court's established role as the determiner of rights and liberties. This assertion deserves closer scrutiny. In the first two cases, the majority's decision was founded on the BNA Act's federal-provincial division of powers; in *Roncarelli*, in which the Court found against the Premier of Québec for an illegal revocation of a liquor license, it did so on narrow due process grounds, essentially

1. Speech by Madam Justice Claire l'Heureux Dubé to l'Association québécoise de droit comparé, Montreal, March 10, 1994.

2. *Saumur* v. *Ville de Québec*, [1953] 2 S.C.R. 299; *Switzman* v. *Elbling*, [1957] S.C.R. 285; *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121.

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over the division of powers between the discretion of the executive and the law-making powers of the legislative. In the *Switzman* case, though the Supreme Court struck down Québec's *Act Respecting Communistic Propaganda*, the so-called Padlock Law, it did so on similarly narrow division of powers grounds : the Québec law was in pith and substance legislation in respect of criminal law, and criminal law is a federal responsibility. As for the *Saumur* decision, it was also based on division of powers grounds, and it is worth remembering that it even left open a loophole by which the province was temporarily able to amend its *Freedom of Worship Act*, thereby keeping in operation the Québec City bylaw against public distribution of religious literature. These were not decisions removing certain rights and liberties from the reach of government; instead, the decisions answered the question of which level of government was competent to legislate.

The BNA Act called for "a Constitution similar in Principle to that of the United Kingdom". That meant parliamentary supremacy, and a liberal democracy anchored in an "unwritten" constitution. That unwritten constitution, still the fundamental law in Great Britain, largely focuses on the rights of the individual — but those rights are held to be guaranteed not by judicial review, but by an elected accountable legislature. And as Professor F.L. Morton notes, "[d]uring its first 93 years Canada indeed had such a constitution, with the one important exception of federalism".[3]

So British was this Constitution that, though it described a federal system by means of a written document which clearly assigned areas of legislative competence to one level of government or another, and was enforceable by judicial review, it did not explicitly assign power over civil liberties to anyone. This is not because civil liberties have been removed from the sphere of government action : on the contrary, civil liberties are not even treated as a distinct subject matter. As Professor Peter Hogg notes, under the BNA, "generally a law's impact has not been treated by the courts as the leading characteristic in determining the law's classification : the impact on civil liberties has been treated as an incidental or subordinate feature of the law".[4] The result, according to Professors Russell, Knopff and Morton, was that in the pre-Charter era, "the Court remained badly divided on whether fundamental liberties constitute[d] a distinct subject matter of legislation".[5] There is, however, according to Hogg, "authority for the proposition that [under the BNA Act] speech and religion... are assigned exclusively to the federal Parliament".[6] That authority resides most prominently in the first two cases Judge Dubé has cited. The fundamental right protected in these cases? It is the right not to have provincial governments legislate *ultra vires*, in federal territory. The Court, charged with defining the boundaries of that right, was thereby given great responsibilities and powers — but responsibilities and powers of a considerably lower order than those it enjoys under the Charter.

While the Court surely was, in Judge Dubé's words, calibrating provincial laws to the constitutional norm, that constitutional norm was considerably more narrow and focused, and less open to judicial activism, than it is in the Charter

3. F.L. MORTON, "Judicial Review of Civil Liberties," in *Law Politics and the Judicial Process in Canada*, Calgary, F.L. Morton ed., University of Calgary Press : 1992, p. 396.

4. P. HOGG, *Constitutional Law of Canada*, 2nd ed., Toronto, Carswell, 1985, pp. 705-706.

5. P. RUSSELL, R. KNOPFF and F.L. MORTON, *Federalism and the Charter*, Ottawa, Carleton University Press, 1989, p. 318.

6. P. HOGG, *op. cit.*, note 4.

era. It is true that there were instances where a minority of judges on the Supreme Court — notably in the *Saumur* case, and one of its precedents, the *Alberta Press Case*[7] — appeared to infer from the BNA Act preamble statement about "a Constitution similar in Principle to that of the United Kingdom", that some manner of speech and religious practice were protected from both levels of government. This view, however, was always in the minority. There is no Supreme Court decision in which a majority supported the existence of such an implied bill of rights. Nor could there have been. For the Court to have read into the pre-Charter constitution a bill of rights which removed authority to legislate from *both* provincial and federal governments would have been activism of the highest order, whose validity and authority would have been highly constitutionally suspect. It would have been, as Justices William Rhenquist and Byron White called the majority's decision in *Roe* v. *Wade*, "judicial legislation" and "an exercise of raw judicial power".[8]

While a very limited and clearly demarcated number of rights were protected by the BNA Act from both levels of government, notably Catholic and Protestant minority education rights, there is simply no comparing this limited ambit for judicial intervention to the Court's expanded role in the Charter era.

Another example: In his address to the Canadian Bar Association's mid-winter meeting, on February 20, 1994, Mr. Justice Antonio Lamer, Chief Justice of the Supreme Court of Canada, spoke of the judiciary as being, "the very institution that is charged with the vindication of rights".[9] Today, that sounds like a pretty straight-forward statement of fact. Seen in historical context, it is an astonishing and sudden development.

Only 16 years ago, in the final hours of the pre-Charter age, Justice Beetz of the Supreme Court, in *Attorney General of Canada and Dupond* vs. *Montreal*[10], was able to dismiss an appellant's case against a Montreal by-law that restricted gatherings and demonstrations in public places with the following words: "None of the freedoms referred to [freedom of assembly, press, association, speech and religion] is so enshrined in the Constitution as to be above the reach of competent legislation".

The role and importance of the judiciary, in short, has undergone a radical transformation since the advent of the Charter. It has been radical in the truest sense of the word, in that it is a change that goes right to the roots of the Canadian political system. In the past, if you wanted to change a policy you didn't like, you lobbied the institution that could make law. You looked to Parliament, or to the various provincial parliaments, to redress your grievance. To borrow Judge Lamer's phrasing, under the BNA Act, Parliament was the institution charged with the vindication of rights. In Charterland, that is no longer the case. The Court has assumed the power to make a whole series of critical societal decisions that used to be made elsewhere, changing the whole dynamic of Canadian politics. Today, if you want those decisions made in your favour — if you want the laws made in your favour — you go to court, and not to your member of Parliament.

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7. *Reference re Alberta Statutes*, [1938] S.C.R. 100.

8. *Roe* v. *Wade*, 410 U.S. 13,174 (1973) (RHENQUIST J. dissenting); *Doe* v. *Boulton*, 410 U.S. 179, 222 (1973) (WHITE J. dissenting).

9. Remarks by Mr. Justice Antonio Lamer to the Canadian Bar Association's mid-winter meeting, Jasper, Alberta, February 20, 1994, p. 3.

10. [1978] 2 S.C.R. 770. A case which, note well, rejects the *Alberta Press Case's* implied bill of rights.

Judge Beetz's declaration of absolute Parliamentary supremacy, however recent its authorship, is essentially ancient history. It is a curiosity, which tells us much about how the Constitutional order once worked, and absolutely about how it now works. For that, we must look to Judge Lamer's statement that the judiciary in Canada is the institution charged with the vindication of rights.

Is there anything wrong with this state of affairs? In that 1994 address to the Bar Association, Judge Lamer focused on a problem of some concern to him, namely what he called his fear that "public confidence in the judiciary is being unfairly and unjustifiably eroded". In the course of examining this issue, he said a few things that may help us to understand how his court's role has been greatly expanded, perhaps not entirely for the best :

> Although the judiciary is very powerful in certain respects, it is also very fragile. As Alexander Hamilton put it, the judiciary has 'neither force nor will but merely judgement'. The true judicial power rests on public confidence in the courts. Any misleading picture may unfairly sap public confidence and damage the very institution which is charged with the vindication of rights. The judiciary is fragile, not simply because its ultimate authority rests in long term and deeply held public confidence, but because it is extremely limited in the ways it can respond to publicity.[11]

Judge Lamer meant this as a plea for responsible coverage of the judiciary, but his words also reveal, more by accident than design, why pressures exist for reform of the system of Supreme Court nominations.

Begin with the quote that Judge Lamer has borrowed from Alexander Hamilton. Hamilton was one of the authors of *The Federalist Papers*, and the quote is taken from Federalist, Number 78, in which Hamilton addresses the role of the judicial branch in the new United States of America. Judge Lamer uses this line from Hamilton as proof of how fragile and easily damaged by criticism the judiciary is, but that's not quite the way Hamilton intended it. What he instead offered was an explanation of why the judiciary is so much weaker than the executive or legislative branches of government — and hence so much less dangerous to the rights of citizens. Here's a fuller version of what Hamilton actually wrote :

> The executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse : no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and it must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments... It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power. The celebrated Montesquieu, speaking of them, says, 'Of the three powers above mentioned, the JUDICIARY is next to nothing'.[12]

That may have been the U.S. constitution as Madison and Hamilton helped to frame it in 1787, but as anyone who has followed the progress of U.S. Constitutional law in the 20th century knows, it is far from the case today. The same clearly holds true for Canada. Ever since 1982 and the advent of the Charter, the Canadian judiciary has ceased to be an institution whose powers could be considered, as Montesquieu put it, "next to nothing".

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11. A. LAMER (judge), *op. cit.*, note 9, p. 3.

12. J. MADISON, A. HAMILTON and J. JAY, *The Federalist Papers*, Toronto, Penguin Classics edition, Penguin Books, 1987, p. 437.

Under the Charter, the Supreme Court has made such very robust, forceful, willful and political decisions as rewriting the rules of Unemployment Insurance for paternity leave; preventing one province from attempting to control health costs by restricting physicians' ability to practice under the sponsorship of public medicare; forcing Ottawa to completely redesign the refugee determination system, and spend tens of millions of additional dollars doing so, ruling that courts have the power to "read in" clauses to legislation — to literally re-write the law, rather than simply striking it down — and sinking the federal abortion law. By narrow margins of 5-4, it barely missed putting a constitutional prohibition on the death penalty, in the *Kindler* case, thereby preventing the extradition of two murderers to the United States. By a similarly slight margin, in the *Symes* case, it narrowly avoided performing surgery on the sections of the tax code governing deductions for child care expenses. The Court did, however, leave the door open to the possibility that, should future appellants be members of a "disadvantaged" group, it might be willing to change its mind. These decisions are not necessarily mentioned as criticism of the Court — though some of them are more than worthy of serious questioning. The point is that in these judgments, the Court finds itself answering questions that lie very much in the political sphere, and as such were considered to be the domain of elected legislatures, rather than appointed judges, prior to 1982. The Court, in other words, is a political actor, and on many questions it is in fact the pre-eminent political actor. The Court makes law. This is a far cry from Hamilton's judiciary of neither force nor will.

The Charter, to return to the original question, has transformed the Court into a very different creature, a far more powerful creature. The next question to be asked is whether that suggests a need for transformations in other areas. I would answer yes, in part. The Charter's radicalness, its newess, is not itself a problem: far from it. I will not argue that a return to absolute parliamentary supremacy would be preferable — and if it were to be preferred, it certainly wouldn't be for reasons of simple "tradition". That said, one does not have to be filled with nostalgia for the past to see the weaknesses and imperfections in the present system. My objections to the current regime, and those of a number of other Charter sceptics, are practical, not sentimental. In the recent Supreme Court rulings mentioned above, the Court finds itself making decisions that were, not without reason, left up to legislatures in the past: courts do not always have the institutional ability to make good policy.

The adjudicative process — which involves judges applying law to one specific dispute between defined parties at a discrete point in time — does not always lend itself to the formulation of laws and policies of general and permanent application. One must also note how the courtroom setting, with its time constraints, restrictions on the number and types of intervenors and narrow categories of permissible evidence, may serve to limit the scope of investigation. The result may be policy-making done with an incomplete understanding of the facts and consequences: in short, bad policy. And court procedures aside, judges themselves are no more and no less human and fallible than the rest of us. The Supreme Court, in short, is not perfect. It is no sin against the Charter to say so. One can support Charter adjudication by the courts while still recognizing the institution's imperfections and limitations.

The Charter has created, in the words of Professor Christopher P. Manfredi, the "central paradox in the political theory of liberal constitutionalism in Canada":

> This paradox stems from a tension between the fundamental principles of this political theory — constitutional supremacy — and the mechanism by which this principle is enforced — judicial review. Constitutional supremacy requires that political power only be exercised 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 principle responsibility for interpreting and applying these rules in specific instances... As the speed and scope with which the courts exercise this power increases, they become constitutional "oracles", and the document itself becomes less relevant as the authoritative source of the rules governing the use of political power... None of this would be particularly worrisome were it not for the ambiguity surrounding the normative legitimacy and institutional capacity of courts undertaking this function in liberal democracies. As expositors of a constitution's meaning, courts exercise a power over specific policy measures and the general political character of the regime that is not subject to the ordinary mechanisms of democratic accountability.[13]

The Courts are more likely to become "oracles" if their power is not restrained by any counterweight. To return to the *Federalist Papers*, specifically James Madison's conception in Federalist 51 of checks and balances as the best protection against tyranny, what checks and balances have we on the powers of the courts? Governments are held in check by the fact that they must follow the rules of the Constitution as defined by the courts — but what guarantee have we that the courts' decisions are themselves constitutional? Who is guarding the guardians? Who is judging the judges?

II. Reforms

The most obvious and increasingly popular way to address Manfredi's paradox is by means of a more public process for the appointment of judges to the Supreme Court. The idea has several arguments in its favour. The current system, in which the federal government canvases, nominates and confirms entirely under the veil of cabinet prerogative and secrecy, has two major downsides. From the point of view of democratic theory, such a shadowy process for such a powerful institution seems somehow flawed. The decision as to who will occupy such a high office, theory would suggest, ought to be a public one. The government felt an obligation to hold public hearings in the winter of 1994 when it was considering the crucial matter of which new cable TV stations it should license — yet Ottawa feels no need to let the public in on the deliberations over the choice of the next person to sit on the Supreme Court of Canada. It does look a little absurd.

From a practical standpoint, and this is perhaps more compelling, the current process is also questionable. Judges are given tremendous freedom once they are put on the bench; they are essentially unaccountable, in the sense that they cannot be thrown out of office through the ballot box the way members of legislatures can be. Their decisions, unlike those of democratically elected legislators, are similarly unaccountable, in that, barring the use of the notwithstanding clause or a Constitutional amendment, they cannot be overturned. The latter is almost impossible to secure; the use of the former is, outside of Québec and at least for the moment, viewed by most Canadians as a tainted, even illegitimate, instrument.

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13. C. Manfredi, *Judicial Power and the Charter : Canada and the Paradox of Liberal Constitutionalism*, Toronto, McClelland and Stewart, 1993, p. 188.

In the pre-Charter era, it may have been acceptable to keep Supreme Court nominations out of the public realm. But considering the Court's tremendous new powers and responsibilities, it is worth considering whether the Canadian public shouldn't be given an opportunity to know something about the people who are going to be making these decisions, before rather than after they are put on the bench until age 75.

A public nominations process would also provide an opportunity for sober second thought, with the government having the chance to discover that it made a mistake. Governments do make mistakes, and a bad appointment to the Supreme Court is the sort of mistake that would be rather difficult to fix. In the United States, where candidates for not just the Supreme Court but all top executive positions must be confirmed by the Senate, the Clinton administration last year discovered its nominee for a very senior post at the Justice Department, Ms. Lani Guinier, espoused concepts of civil rights that were simply anathema to the majority of legislators and to the public at large. Even the Clinton administration came to share this view, and Ms. Guinier never made it through her confirmation hearings. Ms. Guinier was, of course, not being appointed to the Supreme Court, but what if she had been? In the United States, she would have been vetted by Congress, and as a result, she would not have been given a seat on the top court. In Canada, if the government had decided it wanted to appoint her, that would have been pretty much the end of the story. Canadians would have awakened to find her name on the front page of the morning paper, her appointment to the Supreme Court a fait accompli instead of a possibility that still had to be debated. One has to wonder whether this is any way to select the members of what is arguably the most powerful institution in Canada.

What *The Globe and Mail* editorial board suggested, when last we wrote on this subject,[14] was that the system, now conducted entirely in secret, be made public. There are a whole series of ways to do this, and one does not have to be absolutely married to the idea *The Globe* settled on. What *The Globe* suggested was that the Prime Minister submit a short list, or perhaps even just one name as in the United States, to a Parliamentary committee for public hearings. That committee would most likely be the Commons justice committee. The committee would have an opportunity to meet and question the nominee, and at the end of the hearings, the committee would present a recommendation to the Prime Minister. If we go to a system where the Prime Minister presents one name, then the committee would either recommend the nomination or rejection of the candidate. If, on the other hand, we were to adopt a system where the Prime Minister puts forward a list of perhaps three to five names, then the committee would provide a recommendation on each candidate, perhaps ranking them in order of preference, perhaps choosing a single candidate.

The hope is that a system of multiple candidates would cause everyone on the committee to horse trade a bit and to compromise, because they would have to carefully balance their desire to see their ideal candidate on the bench with the fear of having a candidate they find unacceptable seize the brass ring. It sounds like the sort of jockeying for position that goes on at a political convention : unseemly, some will say, but it might work to moderate the choices.

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14. See *The Globe and Mail* editorials on April 7, 1994; July 29, 1993; November 17, 1992; June 15, 1992.

In addition, in whichever system one chooses, there would likely be majority and minority reports from the members of the committee, providing further grist for the mill of government decision making.

In the words of Professor David Beatty, legislative participation in the appointments process "forges a link through which those who are given authority to rule on the constitutionality of law are made accountable to those who will be governed by the decisions which result".[15] A public nominations process would, above all, serve as an important educational tool. Most Canadians know little of who sits on the Supreme Court, nor do they know much of the central role played by the Court in the political life of this country. A public nomination process would shed more light on the institution, and the one-time publicity of the hearings would foster, over the long term, a greater desire on the part of Canadians to understand — and to scrutinize — the Court's decisions.

Under the *Globe* proposal, one element of the current process, the most important element in fact, would not be changed : the Prime Minister would still have the final word. That is very different than the American system, as it does not put the decision to approve or reject a nominee in the hands of the committee. The Parliamentary committee would only have the right to recommend; the Prime Minister would still retain the power to decide. That decision, however, would be taken in light of Parliamentary and public input, the way most other policy decision are made. And in the age of the Charter, there aren't very many more important decisions the Canadian government and the Canadian people can make than deciding who sits on the Supreme Court of Canada.

There will be objections to this plan. I divide them into four categories.

First, there are those who argue that a public appointments process will politicize the judiciary. The trouble with this argument is that the judiciary is already politicized. Now that the power of the Charter has been realized, interest groups of different stripes have fought and will continue to fight to get a favorite on the Court. This is what happened the last time there was a Supreme Court vacancy, in 1993. There was a tremendous push from feminist groups to put someone cast from the same mold as Bertha Wilson on the Supreme Court[16]. This overtly political move was, however, a covert operation. It took place entirely behind closed doors. A public nominations process would at least get all of this above board. It would only reveal the politicization which is already there.

Second objection : a public nominations process would interfere with judicial independence. It's hard to see how. The government already has a rough appointments process in place, involving consultation with the Bar and other experts, and a part of this would simply be made public. Unless one thinks that politicians shouldn't be involved at all in the appointment judges, one cannot argue that a change over to a more public system would undermine judicial independence.

The third objection is essentially the flip side of the second. A public appointments process is not enough, some say; what we need are further reforms of the system by which judges are appointed, promoted, trained, disciplined and

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15. D. BEATTY, *Talking Heads and the Supremes : The Canadian Production of Constitutional Review*, Toronto, Carswell, 1990, p. 261.

16. See the chapter "Mary Eberts," in J. SIMPSON, *Faultlines*, Toronto, Harper Collins, 1993, pp. 65-106.

removed from the bench. This sort of tinkering with the internal workings of the judiciary — gender and racial quotas in appointments, enforced gender and racial "sensitivity" training, a system of quick and easy punishment for judges who say the wrong thing — is a very real threat to the independence of the judiciary. A public appointment process merely provides screening at the beginning of a judge's career, while some of these other suggestions aim to monitor and influence judges on a constant basis. This sort of micro-management of the views and composition of the courts is truly an interference with judicial independence. A public appointments process interferes only minimally with judicial autonomy — and that minimal interference is the maximum that ought to be tolerated. Going much beyond a public appointments process in an attempt to control the judiciary and guarantee certain decision outcomes would be a serious mistake.

We now come to the fourth objection: that a public appointments process, while having certain virtues, cannot quite accomplish all that we would like it to. It does not actually address Manfredi's paradox of liberal constitutionalism, since it does not provide an effective check upon the potential for misuse of judicial power. This criticism is entirely valid.

There is, in short, one overwhelmingly strong reason for discounting the value of a public nominations process: not because it will politicize the judiciary or threaten its independence but quite simply because it won't work. Having a legislative committee screen nominees at the time they are appointed to the Supreme Court does not address Manfredi's paradox, nor does it "forge the link" of accountability between the governed and their governors that Beatty hopes for. It can't. As Manfredi notes, "the accountability provided by this appointments process is discrete rather than continuous",[17] which is just another way of saying that, once put on the bench, judges are not accountable at all. The career of Harry Blackmun, the most recent retiree from the U.S. Supreme Court, is proof enough of that. Blackmun was appointed by President Nixon as a law and order conservative, in the hopes of turning back the court's rising liberal tide. Only three years later, he authored the preeminent symbol of liberal judicial activism, *Roe* v. *Wade*. Public hearing would serve an important function, increasing public understanding and awareness on the Supreme Court and the Charter, but they can never constitute anything more than a symbolic check on judicial power.

On the other hand, a system of continuous accountability for the judiciary is hardly to be desired in a regime that aims to be one of constitutional supremacy. Truly continuous accountability, allowing for the removal of judges for unpopular statements or verdicts, would make courts indistinguishable from legislatures — and would defeat the whole purpose of having courts in the first place. It would, for that matter, defeat the whole purpose of having a written and binding Constitution, since it would return us to the realm of pure majoritarianism or parliamentary supremacy — something even most Charter sceptics would not advocate.

The point of restraining the Court's power is to *restore* constitutional supremacy, not to destroy it. Under a system where constitutional interpretation is entirely in the hands of Supreme Court judges, as in the United States, the Constitution stands under threat of becoming nothing more than what the judges say it is. Constitutional supremacy fades into judicial supremacy. It should not.

17. P. MANFREDI, *op. cit.*, note 13, p. 191.

There is a balance that must be restored, a pathway to constitutional dialogue that must be reopened. But if the discrete accountability of a confirmation hearing is not the solution, because it does not go far enough, and continuous judicial accountability is not to be desired either, because it weights the balance too heavily in the other direction, then what is the answer?

The tool in question already lies within the body of the Charter. It is section 33, the notwithstanding clause.

It is unfortunate that the notwithstanding clause, an eleventh hour addition born of political compromise, has never had its philosophical underpinnings properly elaborated. Section 33 needs a *Federalist Papers*, a Madison and Hamilton to make clear its legitimacy and necessity.[18] In the absence of such an apologia, the notwithstanding clause is believed by most English Canadians to be some sort of a sin against the principle of constitutional supremacy.

It is not. The great virtue of the notwithstanding clause is that it turns the focus from the structure and inner workings of the courts to their decision outputs. Instead of trying to micro-manage the courts, the notwithstanding clause allows them to continue to offer independent pronouncements. If, however, the people through their representatives feel that the courts erred in their judgments, they may choose to override the courts. That override, however, runs out after five years, meaning that the constitutional dialogue remains alive.

This is preferable to the American system, where the Supreme Court's word is always the final word. The only way to reverse it is by means of a constitutional amendment or, more common because slightly less difficult, through explicitly political court packing. One may not like the shameless politicking of the U.S. Supreme Court nominations process, but one has to recognize that it is the fact that this institution is so powerful and so unchecked, rather than the existence of public hearings themselves, which has turned some nominations into such partisan fights. The confirmation hearings don't create the atmosphere of partisanship, they merely lay it bare.

A Canadian system of public nomination hearings, in tandem with the checking power of the notwithstanding clause, could be an improvement on what is best in both the British and American system. Better than the British, because constitutional rights are put in writing; better than the American because the interpretation of those rights is not monopolized by one unaccountable branch of government. Better than the British, because judges armed with a Constitution are set as a check on the powers of Parliament; better than the American because the Supreme Court is itself checked.

Public nominations in the Canadian context would not necessarily become the pitched battles they often are in the U.S. because, with a modified and properly functioning notwithstanding clause, a Supreme Court decision, and hence a Supreme Court appointment, would not have the same irrefutable finality.

This is not to say that the notwithstanding clause is perfect. In its current form, it gives too much power to the legislature, since it allows Parliament or any provincial government to override, by simple majority vote, the rights enumerated in sections 2 and 7 to 15 of the Charter. There is a five year time limit on any use of the override clause, but that is the only restraint on a provision of the Charter

18. A good start is P. RUSSELL, "Standing Up For Notwithstanding", *Alberta Law Review* 29, no. 2, pp. 293-309.

that is simply too easy for the legislative to use. It would be ideal if it were modified so that it could only be used *after* the Supreme Court had rendered a verdict : right now, it can be applied to laws that have yet to be challenged. It should also be altered so that something more than a simple majority is required to invoke section 33. A supermajority, perhaps a two-thirds vote of the legislature, would be more appropriate for the passage of legislation of such gravity.

To sum up, a public appointments process for Supreme Court judges, one that has the virtue of allowing for public education and judgment while leaving the final decision in the hands of the government, would be highly desirable. So would a greater public appreciation of the fact that judges and courts are no less inherently imperfectible than the rest of society's individuals or institutions. That realization might lead to a greater recognition of the value of the notwithstanding clause. The ideal is of a system of ongoing constitutional dialogue, of continuous exploration of the principles and values that underly our nation. Without a notwithstanding clause that is accorded a certain legitimacy, and without a public nominations process for the Supreme Court, allowing for public scrutiny, the constitutional dialogue is dangerously one-sided.