UNDERSTANDING JUDICIAL APPOINTMENTS REFORM:
COMPARING AUSTRALIA, CANADA, AND THE UNITED STATES

by

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ABSTRACT

The appointment of a judge, regardless of the process followed, is a political act. With the global expansion of judicial power, the topic of judicial appointments has become one of growing political importance. However, comparative research on judicial appointments reform has so far been limited. This dissertation proposes and tests a theory for understanding the timing and nature of reforms to judicial appointments systems, the Judicial Politics Trigger Theory, by looking at the final courts of appeal in Canada, Australia, and the United States. Examining these three courts from their respective origins to the present day, the dissertation situates contemporary interest in judicial appointments reform within the larger framework of each court's institutional history. Drawing upon in-depth interviews and archival research, it finds that changes to judicial appointments systems in these cases have tended to evolve incrementally over time. In addition, the dissertation highlights the importance that institutional rules can play in structuring the opportunities for and outcomes of reform, and confirms that there is a correlation between the perception of increased judicial empowerment and calls for judicial appointments reform. Consequently, as the judicial branches in various countries continue to gain political power, interest in and attempts to reform the judicial appointments processes of these courts are likely to continue, making research of such reform all the more essential.

RÉSUMÉ

La nomination d'un juge, quelle que soit la procédure suivie, est un acte politique. Avec l'expansion mondiale du pouvoir judiciaire, le sujet de la sélection des juges est devenu d'une importance politique plus forte. Cependant, la recherche comparative sur la réforme des processus de nominations judiciaires a été limitée jusqu'a present. Cette thèse propose et teste une théorie pour comprendre le calendrier et la nature des réformes des systèmes de sélection des juges, la théorie du «Judicial Politics Trigger», en examinant les tribunaux de dernière instance au Canada, en Australie et aux États-Unis. En faisant l'examen de ces trois tribunaux de leurs origines respectives à aujourd'hui, la thèse situe l'intérêt contemporain pour la réforme des systemes de sélection des juges dans le cadre plus large de l'histoire institutionnelle de chaque tribunal. S'appuyant sur des entretiens avec les élites politiques et des recherches dans les archives, la thèse etablit que les changements de processus de nominations judiciaires dans ces cas ont eu tendance à évoluer progressivement au fil du temps. En outre, la thèse met en évidence l'importance que les règles institutionnelles peuvent jouer dans la structuration des possibilités et des résultats de la réforme, et confirme qu'il existe une corrélation entre la perception de l'augmentation du pouvoir judiciaire et les appels à la réforme des systemes de selection des juges. Par conséquent, parce les branches judiciaires continuent de conquérir le pouvoir politique, l'intérêt et les tentatives de réformer les processus de sélection des juges de ces tribunaux sont susceptibles de se poursuivre, ce qui rend la recherche de telles réformes d'autant plus indispensable.

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Introduction

This is a study about judicial appointments reform. Until recently, this was a topic that attracted relatively little political or academic debate. The global expansion of judicial power[1] in more recent decades, however, has led to a growing interest – whether in developed or developing, common law or civil law countries – in the way judges are selected.[2] The importance of judicial appointments reform is further enforced by a general belief that the system of judicial selection chosen will affect the types of women and men who serve and, in turn, the choices they will make as judges. Indeed, as Lee Epstein and Jack Knight have observed, some of the most passionate constitutional debates over the judicial branch – whether they transpired in Philadelphia in 1787 or in Moscow in 1993-4 – did not concern its power or jurisdictions, but who would select and retain its members.[3] Yet, while changes in judicial selection systems have been widely noted, they have been the subject of very little systematic analysis. In particular, there has been a notable absence of the question *why*? Why does judicial power appear to lead to appointments reform? Why does reform occur at particular moments and not others? Why does reform take on a particular form? In sum, why do reforms to judicial selection systems occur?

To help address these questions, this dissertation analyses reforms to judicial appointments systems in order to understand the timing and form of reforms. In particular, this research posits theories to explain why formal and informal reforms to judicial appointments systems in advanced, stable democracies occur by comparing the final courts of appeal of Canada, Australia, and the United States. As will be seen in the chapters that follow, while the analysis of formal reforms is undoubtedly important for understanding change to judicial appointments systems, the histories of these three final courts of appeal tell stories that are largely dominated by incremental, informal changes.

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[1] C. Neal Tate and Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995); Patricia J. Woods and Lisa Hilbink, "Comparative Sources of Judicial Empowerment: Ideas and Interests," *Political Research Quarterly* 62, no. 4 (2009).

[2] Kate Malleson, "Introduction," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, ed. Kate Malleson and Peter H. Russell (Toronto; Buffalo: University of Toronto Press, 2006), 2. See also, Ron Levy, "Judicial Selections Reform in Comparative Context," *U.B.C. Law Review* 40, no. 2 (2007).

[3] Lee Epstein and Jack Knight, "Courts and Judges," ed. Austin Sarat, *The Blackwell Companion to Law and Society* (Malden, MA: Blackwell Pub., 2004), http://www.blackwellreference.com/subscriber/uid=3/book?show=all&id=g9780631228967_9780631228967.

Thus, to fully understand the institutional evolution of judicial appointments systems, it is important to look at instances of both formal and informal change. The thrust of these arguments will be presented later on in this chapter, but to begin, the findings of existing works that consider judicial appointments reform are presented.

Approaches to the Study of Judicial Appointments Reform

While relatively little research on the reasons for judicial appointments reform has been undertaken, two exceptions are the works of Lee Epstein, Jack Knight and Olga Shvetsova, [4] and F. Andrew Hanssen, [5] whose research offer theories of judicial appointments reform using the U.S. states as their case studies.

Addressing the question of why systems of selection for final courts of appeal are formally altered, Epstein, Knight and Shvetsova posit their explanation against what they call the 'standard story' of judicial selection systems in the United States. According to this traditional explanation, the initial choice of institutions and consequent reforms come through changes "in the tide of history," whereby societies respond to popular ideas with the supposed goal of creating a "better judiciary."[6] Rather than questioning the role of political interests, the standard story instead "views the choice of institutions (and changes in that choice) as a simple, nearly reflexive, response to a prevailing social sentiment that something is amiss in the judiciary."[7]

Finding this explanation lacking, Epstein *et al*. instead approach judicial selection reform as a bargaining process between political actors. Decisions, they argue, reflect the relative influence, preferences, and beliefs of the relevant actors at the moment when the new institution is introduced. "Political uncertainty" is used as the key explanatory variable – that is, the types of information available to political actors at the time they are establishing beliefs concerning the long-term effects of institutional rules. Particularly relevant to their analysis are two types of information: (1) information regarding the designers' personal political futures, and (2) information about popular preferences that

[4] Lee Epstein, Jack Knight and Olga Shvetsova, "Selecting Selection Systems," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Stephen B. and Barry Friedman Burbank (Thousand Oaks: Sage Publications, 2002).
[5] F. Andrew Hanssen, "Learning About Judicial Independence: Institutional Change in the State Courts," *The Journal of Legal Studies* 33, no. 2 (2004).
[6] Epstein, "Selecting Selection Systems," 196.
[7] "Selecting Selection Systems," 201.

will affect future political outcomes, such as elections and plebiscites. With this model it is anticipated that incumbent politicians will make reforms lowering opportunity costs for judges when they are uncertain about their own political future. In other words, political uncertainty produces selection mechanisms with stronger elements of judicial independence, such as life tenure or long terms of office.

Hanssen argues that the roots of institutional change stem from agency problems between citizens, their elected representatives, and judges. Using historical analysis to illustrate how political contexts have shifted over time, Hanssen notes that the understanding of what constitutes the appropriate roles for the judiciary and judicial institutions also shift in response.[8] However, while a general trend towards greater judicial independence is observed, considerable variance amongst the cases remains. Hanssen explains this variance by introducing three potential costs to reform: (1) the administrative expense, (2) resistance by incumbents in the other branches, and (3) generalized opposition to changing institutions.[9] On the first point, Hansen notes that judicial selection and retention procedures most often require constitutional amendment, a procedure that is both lengthy and costly. He finds that the adoption of new procedures was most frequent where state constitutions did not have to be amended. His second point is similar in concept to what Epstein *et al*. term political uncertainty. Using the size of the legislative majority as a proxy for the strength of an incumbent's hold on power, Hanssen hypothesizes that resistance by incumbents in other branches to increased judicial independence will vary according to the strength of the incumbent. The more certain an incumbent is that he or she will remain in power, the greater the incentive to maintain strong policy control and hence, the lower the incentive to install greater independence in the judicial branch. Finally, Hansen finds that the earlier a U.S. state joined the Union, the lower the likelihood that it would switch judicial selection and retention procedures. From this he hypothesizes that the more firmly entrenched an institution's supporters, the more difficult an institution will be to change, all else being equal.[10]

There is much that unites these two studies. Both anticipate that the timing of reforms will be influenced by political incumbents' electoral security and the preferences

[8] Hanssen, "Learning About Judicial Independence: Institutional Change in the State Courts," 432.
[9] "Learning About Judicial Independence: Institutional Change in the State Courts," 457.
[10] "Learning About Judicial Independence: Institutional Change in the State Courts," 461.

of the electorate. Moreover, both expect that these background factors will affect whether reforms to the judicial appointments system will increase or decrease the judicial independence of the courts in question. While Hanssen's findings are consistent with the 'standard story' insofar as he finds that appointments reforms are undertaken to create what at the time is considered a 'better judiciary,' the consideration of actors' strategic self-interest and institutional constraints help to provide a clearer understanding of why reforms occur than the studies critiqued by Epstein *et al*.

Speaking more generally, these two studies help to illustrate a broader division in approach to the study of judicial politics. While the breadth of research topics in the field is now quite considerable and continues to grow, some of the most prominent studies have focused on the causes of judicial empowerment, particularly the adoption of justiciable bills of rights[11] and the protection of judicial independence.[12] With these works, two theoretical approaches to the study of judicial politics have emerged, which are referred to here as the *rational-strategic* and *historical-contextual* approaches.[13]

Until the early 2000s, two primary extrajudicial forces were used to explain the growth of judicial review: the spread of federalism, and the prevalence of rights ideology and discourse.[14] In more recent years, these historical explanations of rights ideology

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[11] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); David Oliver Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford; New York, N.Y.: Oxford University Press, 2010); Tom Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases* (Cambridge, UK ; New York: Cambridge University Press, 2003); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.; London: Harvard University Press, 2004); Rainer Knopff and F. L. Morton, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

[12] Rebecca Bill Chavez, "The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System," *Journal of Latin American Studies* 36, no. 3 (2004); John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," *Southern California Law Review* 72(1998-1999); Jodi S. Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame, Ind.; London: University of Notre Dame Press, 2008); Pedro C. Magalhães, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics* 32, no. 1 (1999); Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (New York: Cambridge University Press, 2012); J. Mark Ramseyer, "The Puzzling (in)Dependence of Courts: A Comparative Approach," *The Journal of Legal Studies* 23, no. 2 (1994); Peter H. Russell and David M. O'Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville: University Press of Virginia, 2001).

[13] These terms come from Woods and Hilbink, "Comparative Sources of Judicial Empowerment: Ideas and Interests."

[14] Tom Ginsburg, "The Global Spread of Constitutional Review," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford; New York: Oxford University Press, 2008).

have been critiqued by a number of scholars for their weakness in explaining variance in institutional design, forms of constitutional review, scope of judicial activism, and in particular, the timing of constitutionalization. These concerns have spurred a growing body of literature employing a rational-strategic approach, which focuses on "political power struggles, the interests of elites and other influential stakeholders, clashes of worldviews and policy preferences, alongside concrete choices and incentives as the main factors behind constitutionalization."[15]

Two of the more influential works using this theoretical framework come from Tom Ginsburg[16] and Ran Hirschl.[17] Ginsburg builds on and expands the "electoral market competitiveness" logic[18] to argue that insecure political environments during times of constitutional reform create a setting highly conducive to the establishment of constitutional review. He argues that during periods of political transition and uncertainty, incumbents will entrench judicial review as a form of "political insurance."[19] As Ginsburg explains, "the particular institutional design of the constitutional court will tend to reflect the interests of powerful politicians at the time of drafting, with optimistic politicians preferring less vigorous and powerful courts so they can govern without constraint."[20]

Similarly, Hirschl's "hegemonic-preservation" thesis explains judicial empowerment as a byproduct of the strategic interplay between three groups of actors: threatened political elites, economic elites, and judicial elites. Here again, constitutionalization is understood as a manifestation of political self-interest. Like Ginsburg, Hirschl argues that it is the threat of losing control over pertinent policy-

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[15] Ran Hirschl, "The Realist Turn in Comparative Constitutional Politics," *Political Research Quarterly* 62, no. 4 (2009): 826.
[16] Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases*.
[17] Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*.
[18] A large literature attributes independent courts to political competition. For examples see Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence; William M. Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law and Economics* 18, no. 3 (1975); Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England," *The Journal of Economic History* 49, no. 4 (1989); Ramseyer, "The Puzzling (in)Dependence of Courts: A Comparative Approach; Matthew C. Stephenson, "When the Devil Turns: The Political Foundations of Independent Judicial Review," ibid.32, no. 1 (2003).
[19] For another application of the political insurance model see Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*.
[20] Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases*, 18.

making processes and outcomes that is the major driving force behind attempts to transfer greater jurisdiction to the judicial branch. Hirschl's central hypothesis is that hegemonic elites advocate the constitutionalization of rights and judicial review in order to protect their increasingly threatened political power. These elites delegate power to the judicial branch in order to preserve their long-term interests. This distinction is particularly important as it concerns reforms to judicial selection systems. For Hirschl, political reform of judicial selection and tenure procedures is seen to ensure the appointment of "compliant judges and/or to block the appointment of 'undesirable' judges," as a consequence of the judicialization of politics.[21] Thus while there are differences in the background motivations that prompt political elites to pursue the constiutionalization of judicial review, scholars employing the rational-strategic approach are united in their assumption that political actors rationally pursue their individual self-interest and maximization of political power. The extent to which parties can impose their preferred institutions remains dependent on their bargaining power and the degree of uncertainty concerning future election results.

In contrast, a number of scholars have highlighted the explanatory value of historical and ideational contexts for understanding the growth of judicial power, and have critiqued the work of authors, such as Ginsburg and Hirschl, for their narrow understanding of political actors' interests and strategies.[22] While acknowledging that interests and strategies are indeed central to explaining institutional change, this alternative view emphasizes the importance of context. As Hilbink explains, "shared experiences, beliefs, identities, ideologies, and interpretations of events and sequences of events at home or abroad – shape the way that political actors perceive their interests,

[21] Hirschl, "The Realist Turn in Comparative Constitutional Politics; "The Judicialization of Politics," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford; New York: Oxford University Press, 2008), 137.

[22] For examples of this approach see Lisa Hilbink, "The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment," *Political Research Quarterly* 62, no. 4 (2009); Diana Kapiszewski, "How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal," in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. Javier Couso, Alexandra Huneeus, and Rachel Sieder (New York: Cambridge University Press, 2010); James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005); Rodrigo M. Nunes, "Politics without Insurance: Democratic Competition and Judicial Reform in Brazil." *Comparative Politics* 42, no. 3 (2010); Patricia J. Woods, *Judicial Power and National Politics: Courts and Gender in the Religious-Secular Conflict in Israel*, Suny Series in Israeli Studies (Albany, N.Y.: Suny Press, 2008); "The Ideational Foundations of Israel's "Constitutional Revolution"," *Political Research Quarterly* 62, no. 4 (2009).

formulate their strategies, and justify their decisions, and are thus crucial to explaining when, why, and how institutional designers choose to empower courts."[23]

With its emphasis on the multiple and, at times, layered factors motivating institutional designers, the historical-contextual approach appears complementary to the more general institutionalist approach of discursive institutionalism. Presented by Schmidt as the fourth new institutionalist approach, discursive institutionalism is a response to a perceived weakness in the three older new institutionalisms[24] – mainly, that in developing explanations that take institutions into account, these institutions have had "a tendency to be overly 'sticky,' and the agents (where they exist) have been largely fixed in terms of preferences or fixated in terms of norms."[25] This tendency is especially obvious in the works of rational choice scholars (such as the rational-strategic scholars considered above) where explanations are framed within the language of interests, utility-maximization, incentive structures, and collective action. Because rational choice institutionalism has a narrower conception of agency and rationality, political actors are, according to Schmidt, rational in an almost unthinking manner – responding to incentive structures in order to maximize their own interests. By contrast, discursive institutionalism provides space for agents to be rational in a thinking manner: while similarly pursuing their goals in accordance with understood beliefs, actors are also able to reflect upon these beliefs and more importantly, change their mind in response to the actions of others.[26] In other words, ideas matter.

Though differences between the rational-strategic and historical-contextual approaches exist, it also seems clear from these reviews that they are not at fundamental

[23]For example, Hilbink notes that it is not necessarily insecure political actors who seek to introduce or strengthen judicial review. Political actors, in any relative position of power, may find good reasons, anchored in ideological convictions or political experiences and perceptions, to enhance judicial power. Lisa Hilbink, "The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment," ibid.: 782.

[24] The three other institutionalist approaches being referred to here are rational choice, historical, and sociological.

[25] Vivien A. Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse," *Annual Review of Political Science* 11(2008): 313.

[26] In the words of Schmidt, actors are able to "think about their thoughts, reflect upon their actions, state their intentions, alter their actions as a result of their thoughts about their actions, and say what they are thinking of doing and change their minds in response to persuasion by others regarding what they are thinking, saying, and doing." See "Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth "New Institutionalism"," *European Political Science Review* 2, no. 1 (2010): 17.

odds with one another, but instead place a different importance and emphasis on ideas, history, and parsimony. As Michael McCann points out, the variables added by the historical-contextual approach engage with and supplement the projects of rational-strategic scholars and could well be viewed as intervening variables useful for explaining the relative capacity of elites to achieve their goals.[27] Schmidt holds a similar view, arguing that discursive institutionalism is not necessarily at odds with its three institutitutionalist counterparts. As one example, rational choice – with its emphasis on incentive-based structures – can be understood as framing the institutional contexts within which ideas and discursive interactions develop. As such, it offers the background information for what one normally expects, given structural constraints, as opposed to what may actually occur – the unexpected – which, by Schmidt's account, may be explained better by discursive institutionalism.

Arguably, the largest chasm that divides these two approaches is one of generalizability. By underlining the centrality of elite motivations concerning insurance or hegemonic preservation, rational-strategic scholars have moved toward a more parsimonious model, which by their own acknowledgement may undervalue other explanatory factors. However, in defense of this approach, Hirschl contends that the more universal and widespread certain norms and practices become – for example, the international convergence toward constitutional supremacy and judicial review – the less effective or significant contextual concerns should be.[28] Despite the value of parsimony, however, works employing a more historical and contextual-based approach make clear that less emphasized factors can sometimes prove more important than the designs of political elites who fear loss of their own power. On this point, the differences between the approaches should not be underemphasized: depending on how a scholar stresses the role of elite self-interest, historical context, and ideational influences, the conclusions presented by one may prove to be at odds with the conclusions of another.

While ultimately the differences between the rational-strategic and historical-contextual approaches may be matters of degree, in practice there appears enough to differentiate the two that the distinction is a meaningful one. Thus, it is desirable to make

[27] Michael W. McCann, "Interests, Ideas, and Institutions in Comparative Analysis of Judicial Power," *Political Research Quarterly* 62, no. 4 (2009): 835.
[28] Ran Hirschl, "The Realist Turn in Comparative Constitutional Politics," ibid.

clear at the outset that this dissertation's own theoretical approach most comfortably fits within the historical-contextual framework. I have opted for this approach for a number of reasons. First, because the comparative study of judicial appointments reform remains largely under-theorized, there appears to be value in taking a more historical approach so that a wider range of factors can be identified and analyzed across and within this project's case studies. Moreover, even a cursory glance at our case studies indicates that the existing literature's focus on judicial independence is not as strongly at play outside of the subnational level of the United States. For example, while formal reforms to the judicial appointments systems in the Canadian provinces have – from time to time – been undertaken, the ultimate power of judicial selection has remained with the Lieutenant Governor in Council (in practice, the attorney general) and all judges continue to serve under good behaviour. Changes have instead come at the front end of the process, with the addition in many instances of advisory councils that review potential nominees before judicial appointments are made. In these cases, then, the question is not to what extent reforms have impacted on the opportunity costs of the judiciary, but rather the opportunity costs of the government in selecting a nominee. By contrast, many subnational courts in the United States utilize elections or require reappointment after set terms. In these cases, a measure of how judicial selection and retention systems impact on judicial independence appears appropriate, but its importance may not hold up with more extensive comparative analysis. At the very least, these visible differences indicate that there is more work to be done in constructing a generalizable theory of judicial appointments reform.

Judicial Politics Trigger Theory

Formal Reform

In setting out the model that will be tested for this study, it is first important to define what is considered a formal reform to a judicial appointments system. For all three cases, constitutional and statutory modifications to the appointments process are considered formal reforms. Because the institutional components of the American judicial appointments system, and system of government more generally, differ from those of Canada and Australia, for the U.S. case formal reform will also include Senate

rules that specifically address reforms to the Senate's role in the judicial appointments system.

I use the work of David Erdos as a starting point to build a model for judicial appointments reform.[29] In his study of why bills of rights are adopted in advanced, stable democracies, Erdos attempts to solve the puzzle of why elite political actors choose to support reforms that would seemingly diminish their own powers. Erdos presents what he calls a 'postmaterialist trigger' theory (PTT), which holds that bills of rights are created by the confluence of the gradual development of background forces conducive to change (most notably the growth of a powerful postmaterialist rights constituency) and a political trigger which provides an immediate rational and impetus for change. Two political triggers are identified. The first trigger is what Erdos terms an 'aversive' trigger, which is activated when a political party gains power and sets out to respond to negative events experienced while in opposition. These negative experiences serve to loosen prior attachment to power-hoarding and executive-minded approaches to political power and make these newly installed executives willing to devolve power via a bill of rights. Erdos's second trigger comes as a response to a 'threat to political stability.' In this case, a bill of rights is adopted in the face of destabilizing centrifugal regional or ethnic political forces. The bill of rights is viewed by incumbent elites as a mechanism capable of reasserting the primacy of the national polity and national political identity.

Importantly, under the PTT model, the type of political trigger that prompts the installation of a bill of rights affects its strength. By Erdos's account, the aversive trigger, rooted in reactions to past experiences (as opposed to clear, prospective self-interest) will only generate a relatively weak bill of rights, such as the New Zealand Bill of Rights Act (1990). On the other hand, the 'threat to political stability' trigger, which is grounded in immediate and pressing self-interested concerns to preserve the authority of national political institutions, will bring about a stronger and constitutionalized bill of rights, such as the Canadian Charter of Rights and Freedoms (1982).[30]

Erdos's theory, of course, concerns the adoption of bills of rights, not the modification of judicial appointments systems. Nonetheless, the underlying mechanisms

[29] Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World*.
[30] *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World*, 5-6.

explaining why and when bills of rights are adopted appear to offer explanatory value beyond Erdos's own particular topic of study. This dissertation adapts the PTT model, specifically the importance it places on background factors and political triggers, to explain the modification of judicial appointments processes in final courts of appeal. For the sake of clarity, this adapted approach is called the Judicial Politics Trigger (JPT) model.

How is Erdos's model adapted for this study? First, the background factors influencing reform are modified for the JPT model. I propose two background factors that promote judicial selection reform: (1) a series of decisions by the court that draws the attention of political actors; and/or (2) an appointment(s) to the court that draws the attention of political actors. The broad definition of these background factors is intentional. Because the likelihood that any particular decision or appointment will attract the interest of any political actor will be contingent on how its importance is perceived and understood by that actor (i.e., the political context), specifying particular types of 'court decisions' and 'appointments to the court' or a measure of their strength is impractical. As will be seen, while division of power decisions by one court may raise the attention of subnational governments during a particular time period, at another, decisions focused on rights-based review may elevate the attention of federal opposition parties and media pundits. Put another way, the same decision or series of decisions in one political context will not necessarily elicit the same reaction by political actors if taking place in another. The question then becomes, what makes any particular actor view an appointment(s) or court's decision(s) as important enough to warrant a change in the judicial appointments process? Assuming, as this model does, that political actors behave rationally, they are more likely to seek reform to the process of judicial appointments if it is viewed as having produced a bad effect. For our purposes, a 'bad effect' is conceptualized in two ways: (1) an appointments process that produces a court that makes undesirable decisions; and/or (2) an appointments process that detracts from public confidence in the court. Thus, at any time it is possible that any number of political actors will be interested in reforming a court's judicial appointments process. In fact, depending on the particular court and its appointments process, such calls may be more

or less constant. These background factors, then, help to explain what produces interest in judicial appointments reform, but, importantly, not when such reforms will occur.

The issue of timing leads to our second step, the political trigger. It is important to note that a political trigger is ultimately an actor-driven action. That is, the choice to reform is made by the individual or group of individuals who are empowered to take such action. How is this decision to act made? The decision-making process is understood here as a simple political calculation: will we be better or worse off if reforms were implemented? How these potential political costs and benefits are calculated will again depend on the political context, particularly the background factors and type of political trigger.

The two political triggers, as outlined by Erdos, remain largely the same and I still anticipate that the 'threat to political stability' trigger will promote more substantive reforms to a judicial appointments system than the 'aversive' trigger. I have, however, made some modifications. For Erdos, the aversive trigger is initiated after a party attains political power. This introduces a scenario where a credible commitment is tested: a politician or political party that called for reforms to a court's judicial appointments process while in opposition, is likely to have fewer incentives to initiate reform once in power. However, the anticipated political costs associated with failing to keep a previous policy commitment may be high enough that the reform is still considered a net benefit. Moreover, these newly seated incumbents may genuinely believe that reforms will create a better judicial appointments system than the status quo. In addition, while Erdos limits the 'aversive' trigger to new political incumbents, there appears to be no particularly compelling reason to maintain this limit for judicial appointments reform. In advanced, stable democracies, governments generally value maintaining the appearance of an independent judicial branch and the public's confidence therein; incumbents, then, have an incentive, beyond their own immediate political interests, to maintain a respected judicial appointments system. Thus, in a scenario where the appointments process becomes out of sync with expectations as a consequence of the noted background factors, incumbents may become interested in reform in order to protect public confidence and to avoid possible political costs. Accordingly, under the JPT model, an 'aversive' response

can come as a reaction to the predicted background factors while in either political power or opposition.

The 'threat to political stability' trigger is also slightly modified. With Erdos's PTT model, this trigger leads incumbent elites to implement a bill of rights as a response to centrifugal threats to a country's political regime. In the case of Canada, for example, Erdos argues that the Charter was adopted largely to counteract Quebec nationalism.[31] However, one aspect of bills of rights' genesis that is arguably under-acknowledged by Erdos and others is the consequences of having a bill of rights negotiated as part of a larger constitutional initiative, as was the case with Canada's Charter of Rights and Freedoms. In this example, both the federal and provincial governments worked under the assumption that a high degree of consensus had to be obtained in order for a constitutional bill of rights to be implemented. In circumstances where institutional rules require competing political incumbents to work together, political trade-offs can be anticipated. As will be explored further in chapter two, one of the potential trade-offs to achieve a final constitutional package can be reform to a judicial appointments system. With a 'threat to political stability' response, then, reforms to the judicial appointments system may be undertaken not because political elites believe that such modifications are capable of combating centrifugal forces, but because these reforms are a necessary component of a larger package that attempts to do so.

This Canadian example also highlights a third important factor that affects judicial appointments reform – mainly, institutional rules. If one conceives of institutions as sets of rules that are enforced or complied with by actors and organizations of various sorts, then institutional rules will have an important impact on modifications to judicial appointments systems. Rules establish constraints on and opportunities for action and thus affect both the kinds of reforms that will be sought, as well as whether efforts to reform are ultimately successful. Though it may be an obvious statement to make, it is nonetheless an important one: for formal reforms to judicial appointments systems to be successful, the relevant institutional rules must be met.

Taken together, I offer the following hypothesis: a political trigger must be present for a reform attempt to occur. If formal reform is to be successful, it must satisfy

[31] *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World*, chapter 5.

the necessary institutional rules. Thus, under the JPT model, a political trigger is a necessary, but not sufficient condition for formal reform of judicial appointments processes.

Informal Reform

In the American literature on judicial appointments, the scholarly consensus suggests that formal selection mechanisms are a predominant influence on judicial behaviour.[32] However, given how infrequently formal reforms to judicial appointments systems are undertaken, informal reforms appear critical for understanding how judicial appointments systems evolve over time. Moreover, recent scholarship suggests that informal developments may have an even more substantive impact on judicial behaviour than formal selection mechanisms.[33] The next logical question to ask, then, is why are informal, rather than formal, reforms to judicial appointments systems sometimes selected? To respond to this question, it is first useful to consider both the advantages and disadvantages that accompany informal modifications. First and most obviously, is the relative ease of introduction, and flexibility in application, of informal reforms. For example, in Canada and Australia – where the governing party at the federal level has almost complete control over the review and selection of judicial candidates – the government can easily layer additional procedures onto the existing formal process. Another advantage to informal reforms is that they do not face the same institutional barriers that can obstruct a government's efforts to modify or dissolve formalized procedures. To that same end, however, a potential disadvantage of this flexibility can come with a change in government as there are no formal barriers in place to keep new leaders from either ignoring or modifying a previous government's informal changes. Thus, while there is little question that informal modifications allow for comparative ease

[32] Paul R. Brace and Melinda Gann Hall, "The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice," *The Journal of Politics* 59, no. 4 (1997); Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (Austin: University of Texas Press, 1980); Melinda Gann Hall, "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform," *American Political Science Review* 95, no. 2 (2001); Charles H. Sheldon and Nicholas P. Lovrich Jr., "State Judicial Recruitment," in *The American Courts: A Critical Assessment*, ed. John Boatner Gates and Charles A. Johnson (Washington, D.C.: CQ Press, 1991).

[33] David L. Weiden, "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia," *Political Research Quarterly* 64, no. 2 (2011).

and flexibility in their implementation, they are less likely to bring the same degree of stability as formal reforms.

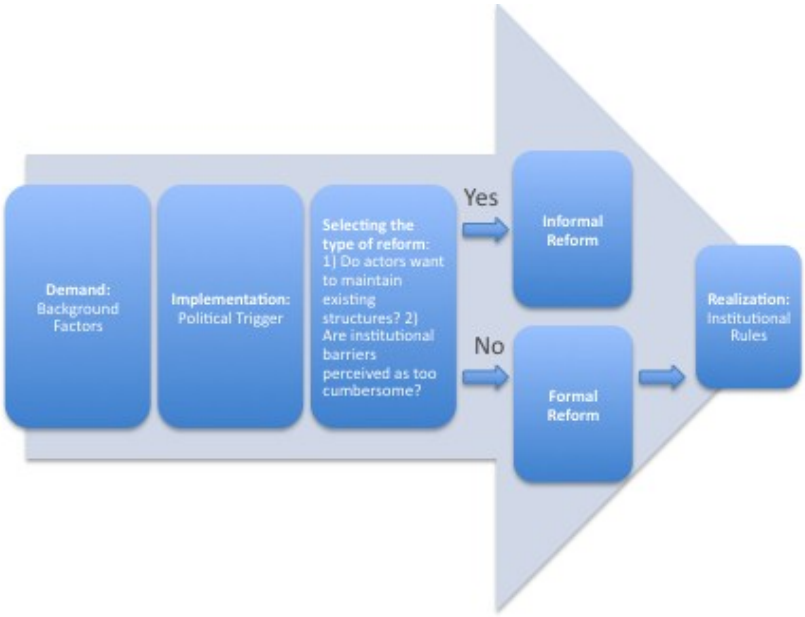
It is anticipated that the same background factors, triggering mechanisms, and institutional rules that structure formal reforms are also at play for informal reforms. I anticipate that actors will choose informal over formal reforms for two possible (sometimes interacting) reasons: (1) out of an interest to maintain formal control over the appointments process, and/or (2) because institutional rules create high enough barriers that formal reform is impractical.

It is also worth highlighting what these theories do not predict, mainly the content of the reforms. In contrast to the theories posited by Epstein *et al.* and Hanssen, I do not anticipate that reforms will necessarily impact on judicial independence, though it is possible that some will. Additionally, it does not specify the type(s) of political actors who will become interested in judicial appointments reform when the noted background factors are present. As will be seen in the chapters that follow, a variety of actors, including governing and opposition members of government (both federal and subnational), bar associations, legal academics, the media, and judges themselves have all – from time to time – called for reforms to judicial appointments systems. The combination and force of these actors varies; of importance is whether those in a position to change the appointments process at any given time view these factors as compelling enough to necessitate reform.

Thus, to summarize, the Judicial Politics Trigger model anticipates that a formal attempt to reform the judicial appointments process of a final court of appeal in an advanced, stable democracy is more likely to occur when the following background factors are present: (1) a series of decisions by the court that attracts the attention of interested political actors, and/or (2) an appointment(s) to the court that garners the attention of interested political actors; and when either an 'aversive' trigger or a 'threat to political stability' trigger is initiated. For informal reforms, the JPT model anticipates the same factors to be at play, but that actors will instead choose informal reforms for two possible reasons: (1) out of an interest to maintain formal control over the appointments process, and/or (2) because institutional rules create great enough barriers that formal reform is impractical. Should reforms, either formal or informal, be implemented with

neither of these proposed background factors present, the JPT theory will have failed, making these hypotheses easily falsifiable. The hypothesized paths to reform of judicial appointments systems, then, look something like this:

Figure 1: Judicial Politics Trigger Model



Defining the Scope of the Project

Case Selection

Why have final courts of appeal been selected as the focus of analysis? Judges in final courts of appeal are charged with the kind of decision-making that often has far-reaching social and political implications, and in general greater emphasis is placed on accountability in the appointments processes of these courts. Arguably, the threat to judicial independence, particularly in stable, advanced democracies is less of a concern for final courts of appeal. Judges at this level have reached the pinnacle of their judicial careers and consequently are considered better protected from political pressures when compared to lower courts. Additionally, there is an important difference between the types of cases decided by final courts of appeal versus their lower court counterparts. At the trial court level, judicial independence is viewed as critical so that the public may confidently view judges as impartial and capable of deciding cases without 'fear or

favour.' However, in the case of final courts of appeal, where judges are often called upon to decide between competing ideologies, values, or policies, which underlie the law, the notion of impartiality is made more complicated.[34] In turn, what constitutes an appropriate judicial appointments system, and why, is likely to be different for final courts of appeal. Consequently, there appears value in considering final courts of appeal across countries, rather than considering different levels of courts within the same country.

Second, why select the final courts of appeal of Australia, Canada, and the United States? Since the set of hypotheses presented here predicts a series of steps between causal factors and outcomes, it was important to get variation in terms of the intermediate steps in the causal process. These cases provide examples of efforts to formally modify the appointments systems, including those initiated by a 'threat to political stability' trigger (Canada) and an 'aversive' trigger (Canada, Australia, United States). Only Australia, however, has implemented formal reforms successfully: in 1979, the commonwealth government modified the High Court of Australia Act to require that the attorney general consult with the state attorneys general before an appointment to the High Court is made.[35]

The cases chosen also offer an advantage in avoiding confounding factors. All three countries operate with federal systems, which have contributed to the long history of judicial review for these courts. While each court is now recognized as an important actor in the politics of its country, advancement to this stage has developed at a different pace for each. The introduction of the American Bill of Rights in 1791 made the Supreme Court of the United States an important political actor well before its counterparts in other democracies, including Canada and Australia. The entrenchment of the Canadian Charter of Rights and Freedoms in 1982 helped to elevate the political importance of Canada's Supreme Court. By comparison, Australia remains the only advanced, stable democracy without some sort of national justiciable rights document, which has undoubtedly contributed to the relatively lower political profile of its High Court. Finally, there also exist key institutional differences, which allow for the consideration of the role

[34] Malleson, "Introduction," 6.
[35] This provision is located in Section 6 of the *High Court of Australia Act 1979*.

of fragmented authority in judicial appointments reform. The selection process for each court relies on executive appointment, though with some variation: in the cases of Canada and Australia, power over appointments is held by the Governor in Council, and more practically the prime minister, while in the United States power over appointments is split between the president and Senate. Thus, while all three cases have fragmented authority due to their federal systems, the presidential system of the U.S. case, adds an additional observable source of fragmented authority. The lacuna in terms of centralized authority provides a direction for future research on other countries, such as those with unitary systems.

Time Periods Chosen

For the topic of judicial appointments reform, there appears particular value in taking an historical approach. Interest in reform in recent decades has generally been linked to the global expansion of judicial power. Examining these courts from their origins forward allows us to consider whether the factors impacting on judicial appointments reform in recent years constitute a meaningful departure from earlier periods. Thus, the periods of study for all three cases begin approximately at the time of the establishment of their final court of appeal (Australia, 1903; Canada, 1875; U.S., 1789) and continue up to 2011. For the Australian and Canadian cases, separate time periods are presented to facilitate within-case analysis. For Australia, the evolution of the High Court's system of judicial appointments is divided into three time periods: 1903-1949, 1949-1987, and 1987-2011. The first period (1903-1949), follows the early court up until the defeat of the Labor government in 1949. The second period (1949-1987), is marked by the states' criticisms of the court's role in intergovernmental relations and the pursuit of greater state participation in the appointments process. The third period (1987-2011), begins with the appointment of Sir Anthony Mason to the position of chief justice on the High Court and how ensuing criticism of the court's activism spurred interest in judicial appointments reform. For Canada, three distinct time periods are also presented: 1875-1949, 1949-1992, and 1993-2011. The first period (1875-1949), follows the early court during a time when it and its appointments process received little attention and no serious reform efforts were undertaken. The second period (1949-1992) begins with the

Supreme Court's transition to Canada's final court of appeal and continues through to Canada's last attempt at major constitutional reform, the Charlottetown Accord. This period witnessed several formal attempts to reform the court's appointments process via constitutional modification – reforms that would have considerably increased the influence of the provinces. The third period (1993-2011) will focus on the most recent efforts to reform the Supreme Court's appointments process. These two later time periods are marked by both differences in approaches to reform and the interests that underpinned them. Because efforts to reform the U.S. Supreme Court's appointments system do not lend themselves to easy demarcation of separate time periods, the U.S. case will be presented from 1789 to 2011, without divisions into separate time periods.

Methodological Approach

To capture and understand the roles of both actors and ideas, a method of analysis put forward by Bates *et al.*, known as analytic narratives, offers a useful starting point.[36] While its founders' own research falls within the rational choice approach, its emphasis on narrative – that is, paying close attention to the stories, accounts, and context in order to extract explicit and formal lines of reasoning – provides a broad enough framework to take ideas seriously. Analytic narratives aim to account for historical outcomes by explaining causes, causal mechanisms, and identifying agents. Through extensive research of primary and secondary sources to understand actors' "preferences, their perceptions, their evaluation of alternatives, the information they possess, the expectations they form, the strategies they adopt and the constraints that limit their actions," Bates *et al.* seek to "locate and trace the processes that generate the outcome of interest."[37] In drawing these elements out, the goal of the analytic narrative approach is to move from "thick" accounts to "thin" forms of reasoning – to construct a formal model in which assumptions, conclusions, and implications are clearly understood and accessible for future comparative study. Following from this example (though not necessarily its more strictly defined rational choice assumptions), this project will consider and analyze its case studies through the construction of analytic narratives.

[36] Robert H. Bates *et al.*, *Analytic Narratives* (Princeton, N.J.: Princeton University Press, 1998).
[37] *Analytic Narratives* (Princeton, N.J.: Princeton University Press, 1998), 11-12.

To construct these analytic narratives, process-tracing is employed for cross-case and within-case comparison. As explained by George and Bennett, process-tracing "attempts to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (or variables) and the outcome of the dependent variable."[38] In other words, the method seeks to demonstrate that a process connects a cause and an outcome.[39] A process-tracing strategy is particularly useful for small N, qualitative research, like that undertaken here, as it allows the research to "unpack" the different relevant variables in what might otherwise be an indeterminate causal relationship. Thus, careful process-tracing that is focused on the sequencing of "who knew what, when, and what they did in response," can aid in the effort of establishing causal direction.[40]

However, like any methodological approach, process-tracing holds certain limitations and these must be acknowledged as well. Correlation analysis using a small N approach is generally unable to provide an appropriate basis for evaluating causal claims. For this project, then, while the explanatory variables and outcomes are correlated as the theoretical framework predicts, there remain insufficient cases relative to the number of explanatory variables to convincingly establish the causal relationships. Thus, this is a project of theory building rather than one of definitive theory testing.

Methods for Collecting Data

The first stage of research was a search for literature related to the historical development of each court's judicial appointments systems. This allowed for the development of a preliminary timeline of judicial appointments reform attempts in each country. In addition to secondary literature, I conducted a search for published primary documents, including reports published by government agencies, legislative committees, and professional legal associations. These materials provided additional details to the

[38] Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Mass.: MIT Press, 2005), 206.
[39] Andrew Bennett and Colin Elman, "Complex Causal Relations and Case Study Methods: The Example of Path Dependence." *Political Analysis* 14, no. 3 (2006), 260.
[40] Henry E. Brady and David Collier, eds. *Rethinking Social Inquiry Diverse Tools, Shared Standards*. (Lanham, Md.: Rowman & Littlefield Publishers, 2010), 209.

preliminary timelines and helped the process of identifying important themes in different periods in each country.

From here, data collection for Australia and Canada was approached differently than for the U.S.[41] Since an extensive body of literature addressing judicial selection reform in the U.S. already exists, original fieldwork was not undertaken for this case. For Canada and Australia, archival resources were accessed in order to verify and refine the chronological narratives of reform efforts established by the initial literature review. These efforts focused primarily on the second time period for each case (Canada 1949-1992; Australia 1949-1987), which were marked by significant debates on constitutional reform. While a considerable body of literature exists on these constitutional events generally, very little is focused on court reform in particular. Examining primary documents, particularly reform proposals by various actors, provided clearer insight into how court reform fit into these larger discussions around constitutional change.

The research for Canada and Australia also included undertaking thirty-two semi-structured interviews (eighteen in Canada; fourteen in Australia). Six of these interviews were conducted with former attorneys general who served in their positions in the 1990s and 2000s (three in each country). In Canada, several active public servants in departments of intergovernmental relations were interviewed in order to confirm provincial positions on Supreme Court reform. Former Canadian prime minister, Paul Martin (2003-2006), former leader of the Canadian Reform Party, Preston Manning (1987-2000), and former Australian deputy prime minister, Tim Fischer (1996-1999), were also interviewed. Eight interviews were conducted with academics whose research focuses on these courts. These interviews provided helpful guidance in trying to understand the motivations and conditions leading up to more recent reform attempts.

Theoretical Implications and the Argument in Brief

In addition to explaining the cases in question, by developing a general theory concerning reforms to judicial appointments systems, this study contributes to broader

[41] Fieldwork was conducted between July 2010 and September 2011. Fieldwork in Australia was undertaken from January to June 2011. Canadian fieldwork was undertaken throughout this time, minus the time spent in Australia.

theoretical debates within political science and the literature on comparative judicial politics in particular.

First, this dissertation can speak to ongoing debates regarding the relative explanatory capacity of interests versus ideas for understanding institutional change. As already discussed, many of the major works in the judicial politics literature employ a rational choice model. More recently, however, scholars in judicial politics and political science more generally[42] have defended the inclusion of ideational variables in their analyses of political behaviour. This study contributes to this new research agenda by assessing the relative explanatory power of ideas in comparison with other factors.

Second, by examining both formal and informal reforms of judicial appointments processes, this research goes beyond an understanding of institutional change via critical junctures, which is now arguably the dominant approach in political science. In contrast to the common dualist view, which separates institutional stability from change,[43] this research finds change to be continuous, occurring in incremental ways over time.[44]

Third, this study highlights the importance that institutional rules play in structuring the opportunities for and outcomes of reforms. Rules establish important constraints on actions and this dissertation illustrates that a developed understanding of judicial reform requires a clear account of the institutional rules at play.

Finally, this research highlights an important consequence of the global expansion of judicial power. My analysis confirms that there is a strong correlation between the perception of increased judicial empowerment and calls for judicial appointments reform. Consequently, as the judicial branches in various countries continue to gain political power and influence, interest in and attempts to reform the judicial selection processes of these courts is likely to continue, making research of such reform all the more pertinent.

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[42] See for example Sheri Berman, *The Social Democratic Moment: Ideas and Politics in the Making of Interwar Europe* (Cambridge, Ma.: Harvard University Press, 1998); Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge University Press, 2002).

[43] Giovanni Capoccia and R. Daniel Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism," *World Politics* 59, no. 3 (2007); Avener Grief and David D. Laitin, "A Theory of Endogenous Institutional Change," *American Political Science Review* 98, no. 4 (2004); Barbara Koremenos, Charles Lipson, and Duncan Snidal, *The Rational Design of International Institutions* (Cambridge, UK; New York: Cambridge University Press, 2004).

[44] This approach is developed and advocated, in particular, by James Mahoney and Kathleen Ann Thelen, eds., *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge; New York: Cambridge University Press, 2010).

Taken together, I find that the predictions of the Judicial Politics Trigger theory are borne out by the evidence of the empirical chapters that follow. The respective background triggers, (1) judicial decisions and (2) judicial appointments, are found to be the drivers that create interest in judicial appointments reform. The Canadian and Australian chapters provide instances when both the 'aversive' and 'threat to political stability' triggers are prompted, resulting in one example of successful formal reform (Australia) and several examples of failed efforts at formal reform (Canada). However, despite the almost complete absence of formal reform in all three countries, the appointments processes for these final courts of appeal appear markedly different from the practices followed when the courts were first created. I find that the initial institutional choices made in the three cases strongly influenced the development of the judicial appointments system in each country: the rigidity of their constitutional amending processes has made formal modifications extremely difficult, and moreover, has left selection powers in the hands of political actors with few incentives to devolve powers to others. Given the rigidity of each system's formal rules, informal changes have played a major role in the development of the appointments systems. Over time, issues such as subnational governments' participation, representation, and process transparency have emerged as criteria perceived as necessary for maintaining an 'appropriate' judicial selection process. To address these shifts in normative expectations, additional components have been layered onto the appointments processes. Importantly, however, these relatively small changes have not acted to displace the system's formal rules or power structures.

Roadmap

In order to support this argument, this project proceeds as follows. Chapters two and three analyse the appointments system of the Supreme Court of Canada. While there have been many attempts to formally reform the Supreme Court's appointments system, none have been successful. While Canada's 'mega constitutional politics' of the late twentieth century provided the opportunity for many of these reform efforts, the nature of these types of negotiations, most particularly the high threshold needed for their ratification, meant that despite strong provincial desires to formalize their participation in

the selection process of the court's judges, and agreement to this by the federal government during every round of constitutional negotiations of this period, all attempts to formally reform the Supreme Court's appointments process ended in failure. Given the high threshold for formal reform and lack of incentives under normal political conditions for the governing federal party to devolve judicial appointments powers, informal change has dominated the appointments process's evolution. While on a number of occasions informal changes were linked to patronage appointment controversies, on the whole, ideational factors, and particularly public expectations concerning what constitutes a legitimate selection process, are the major contributors to these incremental adjustments. The importance of expectations concerning the legitimacy of the appointments process is especially apparent when comparing reform efforts pre- and post-Charter of Rights and Freedoms. Between these two time periods, an ideational shift can be observed in terms of the key reasons articulated in favour of judicial selection reform: whereas in the first period, principles of federalism drove reform discussions, in the second, concerns relating to the principles of public transparency and political accountability became dominant.

The fourth chapter examines Australia's High Court. Australia is unique among the case studies considered here as it provides the only example of successful formal reform. Similarly to Canada, in the late twentieth century Australian state governments pushed for judicial appointments reform via constitutional amendment. However, the absence of any credible concerns over political stability, compounded by the states' disadvantage vis-à-vis the institutional rules of constitutional reform, meant that the commonwealth government never seriously contemplated constitutionally enshrining the states' participation in the appointments process. Rather, the turning point for formal reform came with a change in the commonwealth government, when the Liberal Party entered power with a stated commitment to state interests. This 'aversive' trigger led the commonwealth government to place a duty to consult the states on appointments in the High Court Act; however, this reform has proven to be limited and commonwealth governments of all political stripes have refused to make more substantive reforms.

The fifth chapter examines the Supreme Court of the United States. Despite what seems to be a general, though by no means unanimous, view that the court's appointments process is in need of change, the process over its some two hundred-year

history has remained formally untouched. The broad constitutional powers outlining the roles for the president and Senate, in combination with a rigid constitutional amending formula, and the absence of a catalyzing political trigger, have meant that efforts to formally modify the Supreme Court's appointments process have never come close to succeeding. Despite the constitutional rigidity of the appointments system, the actual appointments process is now very different from the one followed in 1789. In particular, the ambiguity surrounding how the president and Senate should exercise their respective roles has provided both bodies considerable discretion, allowing space for incremental informal changes over time. As the court has become more politically important, the attention paid to judicial appointments has increased and contributed to a more formalized and detailed role of 'advice and consent' for the Senate.

Chapter six concludes the project. It summarizes the main arguments and findings of the dissertation, briefly describes how they can explain judicial appointments reforms in final courts of appeal in advanced, stable democracies, and more fully elaborates on the theoretical contributions described above. It also brings attention to a series of questions for future research.

The Supreme Court of Canada (1875-1992)

Introduction

When Peter Russell, one of Canada's preeminent constitutional scholars, appeared before the House of Commons' Justice Committee during its study of the Supreme Court's appointments system in 2004, he explained to members that "Canada is the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court and interpret its binding constitution."[45] Indeed, other than a few formal guidelines set out in the Supreme Court Act, the discretion of the prime minister in selecting a justice is practically unlimited. It is hardly surprising then that proposals for the reform of the court's appointments system date back nearly as far as the court itself. Despite a widely held and longstanding view that the process by which justices of the Supreme Court are selected is problematic, the original system set out in 1875 has never been formally modified. Nonetheless, today's process, in practice, appears to be a markedly different one from that which was followed in the early decades of confederation.

To better understand the history of appointments to the Supreme Court of Canada, the next two chapters will trace the development of reform efforts from 1875 to 2011. Three distinct time periods are presented for the Canadian case. The first period (1875-1949), follows the early court during a time when it and its appointments process received little attention and no serious reform efforts were undertaken. The second period (1949-1992) begins with the Supreme Court's transition to Canada's final court of appeal and continues through to the last attempt at constitutional reform, the Charlottetown Accord. This period witnessed several formal attempts to reform the court's appointments process via constitutional modification – reforms that would have considerably increased the influence of the provinces – yet none succeeded. Finally, in the chapter that follows, the third period (1993-2011) will focus on the most recent efforts to reform the Supreme Court's appointments process. Importantly, the reasoning behind calls for reform shifted markedly between these two later time periods: instead of federalism being the driver of reform efforts, political actors now appear concerned with entrenching the principles of political accountability and public transparency into the process. The role of the Canadian

[45] Peter H. Russell, "A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada," (Ottawa: Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 2004).

Charter of Rights and Freedoms, constitutionally entrenched in 1982, will be a particular focus in trying to understand this change.

As these next two chapters will show, the initial institutional choices made by Canada's constitutional framers greatly influenced the development of the Supreme Court's appointment system. In particular, the federal executive's strong veto position over reforms meant that it had little pressure or incentive to formally devolve its powers. While the court's decision making certainly affected interest in the court's appointments system, as we will see, judicial activism alone was not enough to trigger reforms. During the second period in particular, it was other political developments that created the opportunity for formal court reform, most importantly efforts to repatriate the constitution and Quebec's strengthening nationalism. However, while the "mega constitutional" politics that dominated Canada for much of this period created the opportunity for major reforms to the Supreme Court appointments process, its form made successful reform incredibly difficult.

At the same time, while the two periods reviewed in this chapter saw no formal reforms made to the Supreme Court appointments process, informal changes can be clearly observed. A number of these modifications were triggered by scandals related to patronage appointments, but on the whole, ideational factors, particularly public expectations concerning what constitutes a legitimate selection process, appear to have been a major influence in informing these incremental adjustments.

This chapter, then, will proceed as follows. First, the debates and efforts leading to the Supreme Court's creation in 1875 are presented. From there, the first and second time periods are considered. Finally, these two periods are compared with the differences and similarities in efforts to reform the court's appointments process given particular consideration.

Foundations: Confederation and the Founding of the Supreme Court of Canada (1864-1875)

In comparison to its American and Australian counterparts, the Supreme Court of Canada received little in the way of attention or careful planning when the country's constitution was founded. The recorded debates leading up to the British North America

Act, 1867 (BNA Act) give little mention to a proposed federal court of appeal, and on the whole, the few comments made provide scant insight into the framers' views on the courts and judicial review.[46] In fact, because the British North American colonies already had a well-established right of appeal to the British Judicial Committee of the Privy Council (JCPC or Judicial Committee), a right that was expected to continue after confederation, the issue of Canada's final court of appeal could largely be set aside. The BNA Act, in fact, did not even create a federal court of appeal, but merely provided for its possible creation by the federal Parliament at a later date.[47] Placing Canada's federal court system on a future to-do list undoubtedly contributed to its conceptual underdevelopment in these early years. With only the potential of a general court of appeal provided for, the inevitably divisive issues of court jurisdiction, composition, and selection were set aside for a future debate. Thus, while the confederation project was successful insofar as it brought together Nova Scotia, New Brunswick, Quebec and Ontario in an act of union, its governing constitution was certainly far from complete – notably it remained a simple act of the British parliament, with no formal domestic amendment mechanism, and would remain without its own federal court of appeal for nearly ten years.

Despite the lack of attention paid to the federal court system during the confederation debates, delegates from Lower Canada[48] were clearly concerned about the effects union would have on their unique legal system. Predominantly francophone, Catholic, and following a system of civil law,[49] residents of Lower Canada were skeptical of the creation of a federal court of appeal, which was likely to be composed

[46] Two works that look at pre-confederation views on the Supreme Court in considerable depth are: Barry L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968); Jennifer Smith, "The Origins of Judicial Review in Canada," *Canadian Journal of Political Science/Revue canadienne de science politique* 16, no. 1 (1983). They will be leaned on considerably for this chapter's review of the confederation debates.

[47] Section 101 of the BNA Act states that "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

[48] By the time of the confederation debates, Upper (parts of what is today southern Ontario) and Lower (parts of what today is southern Quebec, as well as Labrador) Canada had already been merged by the British Parliament to form the United Provinces of Canada (1841-1867). However, to more easily identify the representatives for the region of the former Lower Canada, it is the term used in this chapter.

[49] For a historical account of Quebec's civil law up to confederation, see Jean-Maurice Brisson, *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 À 1867* (Montréal: Éditions Thémis, Université de Montréal, 1986).

predominantly of English-speaking, Protestant, common law lawyers, neither proficient in civil law, nor sympathetic to their interests. Amongst both major political parties in Lower Canada, les Bleus and les Rouges, there was agreement that the autonomy of a French-Canadian Lower Canada was the most important objective in any new constitutional arrangement.[50] Joseph Cauchon, a delegate from Lower Canada, noted his apprehension regarding a general court of appeal, particularly its capacity to deal with civil law disputes from Lower Canada.[51] Another delegate of Lower Canada, Henri Taschereau, held that his compatriots would "assuredly be less satisfied with the decisions of a Federal court of Appeal than with those of Her Majesty's Privy Council."[52] Indeed the worries articulated by Cauchon and Taschereau were not without some basis: speaking to the Legislative Assembly of the Province of Canada in 1865, George Brown, a prominent delegate from Upper Canada, noted approvingly that by "placing the appointment of the judges in the hands of the General Government, and the power of establishment of a central Court of Appeal, we have secured uniformity of justice over the whole land."[53]

It should be noted that deliberations concerning the constitution's distribution of powers (sections 91 and 92) were greatly affected by the ongoing experiences of the United States. At the time of Canada's constitutional negotiations in the 1860s, Americans had recently been engaged in civil war, a conflict that many delegates attributed to state powers; John A. Macdonald, in particular, sought to create a highly centralized federation in an effort to avoid these same political troubles. Thus, despite the efforts of some delegates to secure significant powers for the provinces, the judicial system finally set out in the BNA Act (much like the rest of the new system), was clearly a federally dominant one. The pre-confederation superior, district, and county courts of the provinces remained in place, but their judges were to be appointed, paid, and subject to removal by the federal government. This was further enhanced by the federal government's jurisdiction over the law, including the field of criminal law (section 92

[50] A. I. Silver, *The French-Canadian Idea of Confederation, 1864-1900* (Toronto; Buffalo: University of Toronto Press, 1982), 38.
[51] Smith, "The Origins of Judicial Review in Canada," 123.
[52] Quoted in Strayer, *Judicial Review of Legislation in Canada*, 22.
[53] Peter B. Waite and Ged Martin, *The Confederation Debates in the Province of Canada, 1865* Second ed. (Montreal and Kingston: McGill-Queen's University Press, 2006), 50.

(13)). Additionally, sections 94 and 97 anticipated that at some future point "the law relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts of those Provinces" would be unified upon provincial agreement. Arguably most important, by vesting the federal government with the authority to appoint the provinces' lieutenant governors, who in turn had the power to reserve and disallow provincial legislation, the federal government was, in theory, capable of overseeing the work of the provinces. It was these powers, in fact, that led federalism scholar K.C. Wheare to view Canada's constitution as at best "quasi-federal."[54] With the federal government effectively able to strike down provincial legislation, the use of judicial review, whether by the JCPC or federal court, was seriously undermined.

Establishing the Supreme Court of Canada

Following Canada's first federal election in 1867, Macdonald's Conservative Party (1867-1873; 1878-1891) successfully emerged with a majority government. Less than a year later, Macdonald, who was serving both as prime minister and minister of justice, began the initial groundwork to establish a federal court of appeal. After considerable consultation and drafting, legislation to create the Supreme Court was submitted to Parliament in May of 1869; however, it was withdrawn soon after when objections were raised. Just ten months later, a second bill was introduced, though it too would eventually be withdrawn. The proposed court under this second bill would have provided no special protection for Quebec's civil law tradition, or for areas of law coming under provincial jurisdiction; as described by James Snell and Frederick Vaughan, it was a court "designed to deal with an inferior level of government and to be used as an instrument of homogenization and centralization."[55] For its remaining three years in power, the Conservative government did not return to the issue.

With the election of Alexander Mackenzie's Liberal Party in 1874, the Supreme Court returned to the political agenda. Introducing a Supreme Court bill in February 1875, Minister of Justice Télephore Fournier emphasized that the new court would

[54] K. C. Wheare, *Federal Government* (New York: Oxford University Press, 1964).
[55] James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto; Buffalo: Published for the Osgoode Society by University of Toronto Press, 1985), 7.

provide a desirable venue for resolving constitutional questions. In part, the creation of the Supreme Court at this time was a response to growing concerns over the federal government's use of its reservation and disallowance powers to oversee provincial legislation; the new court was seen as a tool capable of overseeing jurisdictional matters while maintaining a more convincing appearance of impartiality.[56] The Liberal's bill proposed to establish the Supreme Court of Canada, which would be charged with hearing appeals from the highest provincial courts of appeal, as well as directly from courts of original jurisdiction with the consent of both parties.[57] In addition, the federal cabinet would be able to refer questions for advisory opinions on any matter whatsoever. Appeals from the provincial courts directly to the Judicial Committee would continue,[58] but section 47 provided that decisions by the Supreme Court were to be final. This later proposal, however, was opposed by some members of Parliament, particularly those from Quebec, who worried about the court's effect on provincial autonomy.[59] British authorities were also concerned and threatened to disallow the entire act; it was only after the federal government conceded that appeals by leave to the JCPC would not be changed that the legislation was allowed to take effect.[60]

The statutory requirements concerning the composition of the Supreme Court were, and continue to be, few. Unlike the failed legislation proposed by the Macdonald government, this bill contained an explicit provision requiring that at least two of the six members of the court be chosen from the Quebec bar. Following the British model, the Governor in Council would appoint the chief justice and puisne judges. In practice, justices have been selected by the prime minister on the advice of the attorney general since the court's beginning. Two restrictions were imposed on the government's selection: the appointee would have to be either a judge of a superior court of a province or have had ten years' professional experience as a lawyer. Supreme Court justices would

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[56] *The Supreme Court of Canada: History of the Institution* (Toronto; Buffalo: Published for the Osgoode Society by University of Toronto Press, 1985), 9; Smith, "The Origins of Judicial Review in Canada," 127.
[57] For a more detailed account of the bill's provisions see, "The Origins of Judicial Review in Canada."
[58] These "per saltum" appeals from provincial courts directly to the JCPC were not unusual. Nearly half of the constitutional cases decided by the Privy Council were appealed directly from provincial courts. See Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), 336.
[59] Smith, "The Origins of Judicial Review in Canada," 126.
[60] Michael John Herman, "Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council," *Ottawa Law Review* 8, no. 1 (1976): 13-23.

be required to live in Ottawa, hold office during good behaviour, and could only be removed by the Governor General on address of the Senate and House of Commons – all points that carry on to this day. The original Supreme Court Act did not include a mandatory age of retirement, although in 1927 the act was modified so that no one beyond the age of seventy-five could serve on the bench.

Period 1: The Supreme Court as Second Fiddle (1875-1949)

By no one's account did the Supreme Court of Canada get off to an especially strong start. As noted by Peter Russell, for its first three decades the court suffered constant criticism from both politicians and lawyers.[61] Frank MacKinnon paints an even bleaker picture, explaining that "[t]he general weakness of the Court was a lack of respect characterized by ridicule, distrust, or, in many cases, cold indifference."[62] While there were many factors that contributed to the court's low standing, it was most certainly its inferior position to the Judicial Committee during its first seven decades that made up the root of its challenges.[63] While some attention was paid to appointments to the Supreme Court during this early period, the institution's own weakness meant that governments of all stripes often struggled to attract qualified members to the bench. The court's status was further impeded by the dominance of patronage appointments, a practice that would be criticized over the course of this first period.

In the lead-up to the court's opening, Prime Minister Mackenzie is described as having been inundated with requests for judicial appointments. Rather than bowing to political patronage, however, Mackenzie attempted to publicly distance the court from simple partisan pressures, explaining, "…legal fitness and personal character will alone be considered."[64] Despite this promise, it is generally thought that technical qualification was not the defining feature of Mackenzie's first six appointments. While Russell notes that three of the newly appointed judges had respectable judicial credentials (William Buell Richards, William Johnstone Ritchie, and Samuel Henry Strong), the remaining

[61] Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969), 17.
[62] Frank MacKinnon, "The Establishment of the Supreme Court of Canada," *Canadian Historical Review* 27, no. 3 (1946): 272.
[63] Herman, "Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council."
[64] Quoted in MacKinnon, "The Establishment of the Supreme Court of Canada," 268.

appointees (Jean-Thomas Taschereau, Télesphore Fournier, and William Alexander Henry) were seen as much less impressive.[65] At least two candidates – A.-A. Dorion, chief justice of the Court of Queen's Bench in Quebec, and Edward Blake, a barrister and former Liberal premier of Ontario – were known to have declined offers to the bench during this first round of appointments, a trend that would continue for several decades.[66] Instead, provincial representation[67] and political affiliation appear to have been the key criteria for these first appointments.[68] Of the six seats, two were statutorily guaranteed to Quebec, and by virtue of established regional attitudes, Ontario expected, and received, two seats as well; the remaining two positions were split between the two maritime provinces. (As the west expanded, its representation on the bench would also become an accepted convention. The first western judge, Albert Clements Killam, was appointed in 1903.) In terms of political affiliation, the bench was made up of two Liberals, three Conservatives, and one non-partisan, all but one of whom had been active politically.[69] It should be noted that patronage appointments were widespread in Canadian politics during these early years of confederation, and the strong relationship between political affiliation and judicial appointments was in keeping with other executive appointments of the time.[70]

The Supreme Court's Early Struggles

Dissatisfaction with the early Supreme Court can hardly be pinned to problems with judicial appointments alone. Rather, the court was faced with the doubly challenging circumstances of its low prestige, as junior partner to the JCPC, and concerns over the court's effect on the administration of justice in Canada. Complaints on this later point stemmed almost entirely from Quebec and Ontario, where provincial courts of appeal had

[65] Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, 18.
[66] Snell and Vaughan, *The Supreme Court of Canada: History of the Institution*, 15.
[67] This concession to regional pressure was in keeping federal cabinet selection. See Norman Rogers, "Federal Influences on the Canadian Cabinet," *The Canadian Bar Review* 11, no. 2 (1933).
[68] Rooted in the regional criterion were other demographic considerations including language (French and English) and religion (Roman Catholic and Protestant). In its early years, the court often contained an equal number of judges of the Roman Catholic and Protestant faiths. See Snell and Vaughan, *The Supreme Court of Canada: History of the Institution*, 129.
[69] *The Supreme Court of Canada: History of the Institution*, 12-15.
[70] Gordon T. Stewart, "Political Patronage under Macdonald and Laurier 1878-1911," in *Canadian Political Party Systems: A Reader*, ed. R.K. Carty (1992); John English, *The Decline of Politics: The Conservatives and the Party System, 1901-20* (Toronto; Buffalo: University of Toronto Press, 1977).

been in place before the Supreme Court's creation, and were considered by many to be superior legal institutions. In fact, during the 1878 election, which would see Macdonald's Conservative Party returned to power, a number of successful Quebec candidates ran on a platform of either abolishing or severely curtailing the powers of the Supreme Court. Over the next few years, several private members' bills were forwarded proposing to abolish the court, with the primary concern uniting these efforts being the court's supervision of Quebec's civil code. With only two of six judges actually experienced in civil law, Quebec representatives remained concerned that the Supreme Court was an ill-suited venue for shaping the province's unique system of law.[71] While in 1882 the Macdonald government did attempt to improve the court's civil law expertise by proposing the addition of two "judges-in-aid" to serve on a rotating basis from the Quebec court system, the bill elicited enough controversy that it was not pursued past second reading.

It should be noted that despite a general discontent with the Supreme Court, it was by no means an issue holding a place at the top of the political agenda. At an inter-provincial conference held in 1887, for example, the topics of the federal disallowance power and federal subsidies were the most discussed by the provinces in attendance, while the Supreme Court's status was left unaddressed.[72] Thus, while both judicial appointments and the court itself received, at best, a mixed reception during Macdonald's time as prime minister, little in the way of formal change marked the court's development. Writing in 1895, the *Canada Law Journal* offered this assessment: "May we be forgiven for venturing to suggest that the opinion of the profession is that though the Supreme Court contains much valuable judicial material, it is not the strongest, does not command the greatest confidence, and is in many respects most disappointing and unsatisfactory."[73]

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[71] There is some question as to whether the Judicial Committee necessarily provided a more hospitable venue for cases dealing with Quebec's civil code. Looking at the JCPC's record on Quebec cases, for example, F.R. Scott questioned the long-held assumption that the Judicial Committee was more sensitive to minority rights than the Supreme Court. See F. R. Scott, "The Privy Council and Minority Rights," *Queen's Quarterly* 37(1930).

[72] Macdonald and the Conservative premiers of British Columbia and Prince Edward Island declined invitations to attend. Attendees included, Nova Scotia, New Brunswick, Quebec, Ontario, and Manitoba. Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, Second ed. (Toronto: University of Toronto Press, 1993), 40.

[73] "Supreme Court Changes," *Canada Law Journal* 31(1895): 527.

In office for some fifteen years following Macdonald's defeat, the Liberal government of Wilfrid Laurier (1896-1911) had an extraordinary opportunity to shape the Supreme Court, appointing ten puisne and two chief justices during its time in power. While, like Mackenzie and Macdonald before him, Laurier did make a number of well-received appointments, these selections were overshadowed by the nomination of partisan followers who often held weak credentials.[74] By 1902, the *Canada Law Times'* assessment of the bench had fallen further: "The composition of the tribunal has never been regarded by lawyers as satisfactory, but there can be no doubt that it is less so now than at any former period of its existence."[75] Beginning in the early 1900s, there were even some in the legal profession who put forward the idea of judicial elections.[76] Indeed, the number of appeals taken to the Judicial Committee during Laurier's time as prime minister suggests a court struggling to hold its ground: from 1903-1913, 14.5% of lower court decisions were appealed to London, whereas in the decade prior (1892-1902) only 5.1% of appeals made it to the JCPC.[77]

Laurier's electoral defeat in 1911 brought the Conservative Party, this time led by Robert Borden (1911-1920), back to power. While Borden's early judicial appointments were well received, by 1912, the Ontario Bar Association was debating whether its participation in the process of judicial selection might minimize the influence of patronage.[78] Likewise, when the Canadian Bar Association (CBA) was founded in 1914, one of its first acts was to consider the state of judicial appointments. By 1918, a motion was passed by the bar calling for the government to receive advice on judicial selection from Canadian bar and law societies.[79] However, neither Borden, nor later Liberal prime minister, William Lyon Mackenzie King (1921-1926; 1926-1930; 1935-1948), took up such calls.

A momentary shift in attitude did occur, however, during the relatively short-lived government of Conservative prime minister, R. B. Bennett (1930-1935). At the time of his election victory, Bennett was outgoing president of the CBA and used the opportunity

[74] Snell and Vaughan, *The Supreme Court of Canada: History of the Institution*, 92.
[75] "Editorial Review," *Canadian Law Times* 22, no. 3 (1902): 107.
[76] William H. Angus, "Judicial Selection in Canada: The Historical Perspective," *Canadian Legal Studies* (1967): 232-33.
[77] Snell and Vaughan, *The Supreme Court of Canada: History of the Institution*, 113.
[78] Angus, "Judicial Selection in Canada: The Historical Perspective," 235-6.
[79] "Judicial Selection in Canada: The Historical Perspective," 237.

of his presidential address to speak out against patronage appointments.[80] Addressing the House of Commons a few years later, Bennett explained why he believed Canada's judicial branch suffered from low esteem: "I attribute that to two things. First the inadequacy of the salary makes it impossible to attract to the bench the best legal minds we have. Secondly, and I am saying this in no over-critical sense or as indicating one party more than another, there has been too much political patronage concerned in appointments to the bench."[81] During his five years in office, Bennett appointed four judges to the Supreme Court and promoted one other member to the position of chief justice, all selections that were widely praised. However, even Bennett, who was strongly committed to the principle of meritocracy, reportedly struggled under the conventions and expectations of the existing appointment system. His personal secretary was to note that "[i]n choosing men for appointments, he would like to make merit the chief consideration. Instead, he has found that party, race, religion, occupation and geographical location of the nominee are more important than his qualifications."[82] While Bennett was unique amongst federal executives of this first period for acknowledging weaknesses in the appointments process, there is no indication that he thought the process of selection should itself be changed. The problem was not the formal process, but rather the informal criteria used to select judges, as well as institutional deficiencies, particularly low wages, that limited the number of qualified candidates the court was able to attract.

In any case, the return of MacKenzie King to government in 1935 also meant the return of party loyalty as the undisputed criterion for judicial selection.[83] However, though the process of appointments changed little during this period, views about the court and its role within Canadian governance underwent a notable transformation. While there had been some public discussion about discontinuing appeals to the JCPC prior to World War I, the issue gained little traction until after Canada's participation in the war

[80] R. B. Bennett, "Presidential Address," *Canadian Bar Review* 8, no. 8 (1930).
[81] R. B. Bennett, House of Commons, *Debates (Hansard)* (17 May 1932, 17th Parliament, 2nd Session): 2999.
[82] Andrew D. MacLean, *R.B. Bennett, Prime Minister of Canada* (Toronto: Excelsior Publishing Company Limited, 1934), 76.
[83] Snell and Vaughan, *The Supreme Court of Canada: History of the Institution*, 154.

effort.[84] A mounting tension between a new sense of Canadian nationalism and the country's legal subordination to a British court brought a stronger and more sustained push for ending appeals to the JCPC. Two events occurring in 1926 highlight this tension particularly well. First, the Balfour Declaration, which recognized the political independence of the self-governing members of the British Commonwealth, was passed. By contrast, a Judicial Committee decision during this same year struck down an 1888 amendment to Canada's criminal code that had made the Supreme Court the final court of appeal in all criminal matters.[85] While Canada's independence was increasingly being accepted by the British government and embraced by Canadians themselves, its legal system was not keeping pace.

With the passage of the Statute of Westminster in 1931, Canada's legal subordination to the United Kingdom was formally ended, and any final impediments preventing the Supreme Court from becoming Canada's final court of appeal appeared resolved. However, while the topic continued to be debated throughout the 1930s and 1940s, neither Bennett nor Mackenzie King seemed particularly hurried to sever Canada's judicial ties to Britain. The federal government did make a number of minor changes to the Supreme Court over the next few years, including increasing its bench to seven members, installing a mandatory retirement age of seventy-five (both in 1927), and reestablishing the Supreme Court as the final court of appeal in criminal matters (1933), but no immediate steps were taken to end Canada's ties to the Judicial Committee.

Beyond Canadians' increased sense of nationalism, however, a key catalyst for reform was the JCPC itself. In 1937, the Judicial Committee struck down several pieces of legislation that had been part of Bennett's "New Deal" package –decisions that were poorly received in Canada.[86] While the Judicial Committee's approach in these cases was consistent with its past work that had given a narrow scope to federal jurisdiction, in the face of the hardships brought by the Great Depression, the decisions convinced many that the JCPC's approach to Canada's constitution was out of step with the major social and

[84] "The Supreme Court of Canada," *Canada Law Journal* 52(1916); W. E. Raney, "The Appeal to England," *Canadian Law Review* 2, no. 9 (1903).
[85] *Nadan v. The King*, 482 AC (1926).
[86] F. R. Scott, "The Privy Council and Mr. Bennett's "New Deal" Legislation," *The Canadian Journal of Economics and Political Science/Revue canadienne d'economique et de science politique* 3, no. 2 (1937).

economic problems confronting the country.[87] The work of the JCPC had always been unpopular with a few;[88] however, on the whole its decisions had been widely praised and particularly well received by the provinces, whose jurisdictional powers had been generously interpreted by the JCPC. While the Judicial Committee's controversial decisions solidified a general consensus at the federal level that change was needed, continuing provincial fears that an unbridled Supreme Court would lead to a centralized federation, meant the justifications for reforms would have to be carefully presented. Accordingly, Russell notes that Ottawa "…preferred to present the idea simply as a logical step in Canada's attaining full national sovereignty."[89]

In 1938, Conservative opposition member, Charles Hazlitt Cahan, presented a private members bill in the House of Commons calling for the abolition of appeals to the JCPC. In 1939, Liberal minister of justice, Ernest Lapointe, submitted legislation to the same effect, but requested closer study of the possible constitutional and legal problems involved in the legislation.[90] The issue was submitted to the Supreme Court for an advisory opinion, and in January 1940, the court responded that the federal government did indeed have the power to end appeals to the JCPC.[91] In 1946, following a postponement for the duration of World War II, the Judicial Committee offered its concurrence with the Supreme Court's opinion. With the question of constitutionality finally resolved, all that remained was for the federal government to pass the necessary legislation.

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[87] Russell, *The Judiciary in Canada: The Third Branch of Government*, 338-39.
[88] For examples see Bora Laskin, ""Peace, Order and Good Government" Re-Examined," *The Canadian Bar Review* 25(1947); W. P. M. Kennedy, "The Interpretation of the British North America Act," *The Cambridge Law Journal* 8, no. 2 (1943). A skillful analysis of these critics of the JCPC is provided by Alan Cairns in "The Judicial Committee and Its Critics," *Canadian Journal of Political Science/Revue canadienne de science politique* 4, no. 03 (1971).
[89] Russell, *The Judiciary in Canada: The Third Branch of Government*, 339.
[90] While the BNA Act, 1867 clearly authorized the establishment of the Supreme Court, it was unclear whether the federal government had the right to make it Canada's final court of appeal. Further, it was unclear whether the federal government had the right to remove the provinces' right to make appeals to the JCPC. See William S. Livingston, "Abolition of Appeals from Canadian Courts to the Privy Council," *Harvard Law Review* 64, no. 1 (1950).
[91] *Reference Re Privy Council Appeals*, 49 S.C.R.(1940).

The Supreme Court Act, 1949

The Liberal government began consultations on Supreme Court reform in early 1948; however, as noted by Snell and Vaughan, these meetings, for whatever reasons, did not address the court's administrative centralization.[92] As previously noted, this centralization took a number of forms: the federal government selected the court's members; judges were required to reside in the national capital region; and its jurisdiction was under Ottawa's complete legislative control. While the Supreme Court was to serve as Canada's highest federal court, without question, the institution was distinctly national in nature. Unsurprisingly, then, there were a number of proposals forwarded to address what was considered by some to be the excessive centralization of the court.

The law societies of New Brunswick and British Columbia both proposed amendments requiring the federal government to gain approval from a majority of provincial legislatures before the court's organization could be changed.[93] During debate for Bill C-2, An Act to Amend the Supreme Court Act (1949), a Liberal member of Parliament from Quebec, Wilfrid LaCroix, proposed an amendment that would have required that four of the court's puisne justices be selected from a list of nominees submitted by the provinces, with one of the justices having to come from Quebec. This motion, however, was defeated without debate.[94] Ultimately, the reforms that accompanied the Supreme Court's promotion to that of final court of appeal were few: its membership was increased from seven to nine; justices' salaries were increased; and its jurisdiction was expanded.[95] The way judges were appointed, however, remained unaltered.

While the end of appeals to the JCPC was unquestionably one of the most important developments in the Supreme Court's history, Peter Russell seems right in observing that it stemmed more from discontent with the Judicial Committee than admiration for the Supreme Court.[96] The Supreme Court did not succeed by winning over

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[92] Snell and Vaughan, *The Supreme Court of Canada: History of the Institution*, 193.
[93] Ibid.
[94] Wilfrid LaCroix, House of Commons, *Debates (Hansard)* (4 October 1949, 21st Parliament, 1st Session): 493.
[95] The legislation came into force on 23 December 1949. Cases commenced before that date could be appealed to the JCPC; thus, it was not until 1959 that the Judicial Committee decided its final Canadian appeal.
[96] Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, 25.

politicians, the legal establishment, or the public. Rather, it experienced a number of challenges during this early period that can be summarized by three P's: politics, personnel, and prestige. The unpopularity of the court meant that government leaders had little to gain by improving the institution, while continuing patronage appointments provided useful political capital. Not unrelated, the low salaries and poor pensions offered to Supreme Court judges meant that it was difficult to entice top names away from more lucrative positions.[97] Together, this led to a bench that was hardly impressive in the eyes of the legal profession, politicians, and the public. Rather, the Supreme Court's promotion can largely be attributed to the fact that the JCPC's position as Canada's highest court of appeal became too out of sync with the country's governing ambitions.

Given that the reforms to the Supreme Court Act in 1949 were an obvious occasion to consider the judicial appointments process, the question of why calls for reform were not picked up should be considered. The JPT model predicts that two background factors will promote judicial selection reform: (1) a series of decisions by the court that draws the attention of political actors; and/or (2) an appointment(s) to the court that draws the attention of political actors. In this first time period, where the Supreme Court was second to the JCPC, its decisions garnered comparatively little political attention. However, appointments to the court did receive fairly consistent criticism because of the dominance of patronage considerations, and in response, the CBA began calling for its own participation in the process early on. The election of former CBA president R.B. Bennett to the position of prime minister appeared another key opportunity for reforms to be discussed, yet none emerged. On this point, it is important to note that while the CBA's interest in appointments and the reform proposals put forward by backbench members of Parliament do illustrate the existence of some discontent with the appointments process, on the whole, Supreme Court appointments were consistent with the accepted norms of executive appointments for the time. Thus, while Bennett may

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On second reading of Bill C-2, the minister of justice's justifications for the legislation placed strong emphasis on it being a final step towards Canadian independence and nationhood. See Stuart S. Garson, House of Commons, *Debates (Hansard)* (20 September 1949, 21st Parliament, 1st Session): 69-75.

[97] Snell and Vaughan note that by the time the salaries of Supreme Court judges were raised in 1920 ($15,000 for the chief justice and $12,000 for puisne justices), Canada still paid its members less than almost every other common law jurisdiction in the world. See *The Supreme Court of Canada: History of the Institution*, 135.

have been interested in casting off informal rules concerning patronage, this was not the prevailing view of the major political parties. And while party leaders in Canada now holds tremendous control over their caucuses,[98] the political power of prime ministers of this time period was considerably less and likely would have provided Bennett little room to maneuver when it came to judicial appointments. In addition, given that Bennett's five years in office provided the only interruption in Liberal rule from 1926 to 1957, there existed few political incentives for the federal Liberal Party to pursue reforms to judicial appointments. Altogether, while we can see examples of our predicated background factors during this first period, they were relatively weak; and even when political actors in a position to trigger reform, like Bennett, were sympathetic to the idea of change, the party system helped to ensure that the status quo was continued. It is not surprising, then, that during this first time period our predicted background factors did not bring about a political trigger prompting formal reform of the Supreme Court's appointments system.

Thus, while by 1949 the Supreme Court had finally become supreme in more than just name, the framework underpinning the institution continued to be greatly underdeveloped: the court remained the product of a simple federal legislative statute, and a substantive debate on the institution's structure had yet to take place. While the JCPC ruled, these issues could arguably be left unaddressed with scant concern; however, from this point forward, the Supreme Court's role would become an issue of greater political importance, and consequently, so too would the court's institutional development. While complaints concerning patronage appointments continued to follow the court into this new stage of its history, as the Supreme Court became more important in matters of federal-provincial jurisdiction, unease with its status and appointments process, became the focus of a new set of actors – the provinces. Unsurprisingly, provincial calls for reform soon followed; as important, however, is the forum in which these calls were heard – negotiations for constitutional reform.

[98] Donald J. Savoie, *Governing from the Centre: The Concentration of Power of Canadian Politics* (Toronto University of Toronto Press, 1999).

Period 2: The Supreme Court, Federalism, and the Politics of Reform (1949-1992)

Following the economic and social upheaval of the Great Depression and World War II, the federal and provincial governments undertook a comprehensive expansion of social programs. To complete these major projects, both levels of government relied heavily on intergovernmental negotiations, which allowed many of the complications of jurisdictional encroachment to be circumvented. Though the Supreme Court was now Canada's final court of appeal, intergovernmental cooperation during this period meant that cases dealing with federal-provincial jurisdiction were of far less consequence than in previous decades,[99] and judicial appointments, while hardly praised, continued to receive relatively little in the way of attention.

Though there was strong coordination between levels of government during this period, unquestionably, it was the federal government's powers that grew most significantly. The challenges brought by the Great Depression, and the subsequent nationalism engendered by Canada's participation in the great wars, meant that centralism was never stronger than in this quarter-century,[100] and this dominance played out most strongly in terms of fiscal federalism. In 1941, an intergovernmental agreement between Ottawa and the provinces (except Quebec) allowed the federal government to collect all direct taxes in return for the provinces receiving a guaranteed annual grant.[101] Other federally-initiated and -funded programs included grants to universities (beginning in 1951) and the hospital insurance program (beginning in 1958), which enabled Ottawa to have a major and long-term influence on how provincial governments allocated their resources in what, constitutionally, were provincial responsibilities.[102] The constitution

[99] During this time period, a succession of Canadian academics noted the declining significance of judicial intervention. See for example, J.A. Corry, "Constitutional Trends and Federalism," in *Evolving Canadian Federalism*, ed. Arthur Reginald Marsden Lower and F.R. Scott (Durham: Duke University Press, 1958); F. R. Scott, "Our Changing Constitution," in *The Courts and the Canadian Constitution: A Selection of Essays*, ed. William R. Lederman (Toronto: McClelland and Stewart, 1964); Donald V. Smiley, "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism," *The Canadian Journal of Economics and Political Science / Revue canadienne d'Economique et de Science politique* 28, no. 1 (1962); Richard Simeon, *Federal-Provincial Diplomacy; the Making of Recent Policy in Canada*, Studies in the Structure of Power: Decision-Making in Canada, 5 (Toronto; Buffalo: University of Toronto Press, 1972).

[100] Angus, "Judicial Selection in Canada: The Historical Perspective," 251.

[101] The tax rental scheme continued until 1962. Ontario did not participate in the program from 1947-52. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 62.

[102] Corry, "Constitutional Trends and Federalism," chapter 3; Edwin R. Black, *Divided Loyalties: Canadian Concepts of Federalism* (Montreal: McGill-Queen's University Press, 1975).

was also amended to expand federal powers: in 1940, Ottawa was given exclusive jurisdiction over employment insurance, and in 1951, jurisdiction over old-age pensions was added to the BNA Act, with the federal and provincial government holding concurrent jurisdiction.[103] While this centralization was at first largely accepted, some provinces, particularly Quebec, became increasingly concerned with the federal government's continued political dominance, and by the 1960s, the practice of 'cooperative federalism' had begun to disintegrate.[104]

In the face of mounting federal-provincial discord, increasingly the Supreme Court was asked to enter the political fray. In contrast to the earlier jurisprudence of the Judicial Committee, and much to the dismay of the provinces, the Supreme Court's decisions during this period were viewed as strongly favouring the federal government. A simple breakdown of the constitutional cases decided by the Supreme Court bears this view out: of the twenty federal laws challenged between 1950 and 1972, none was found invalid, whereas twenty of the fifty-four provincial laws challenged during this same period were struck down.[105] Such a numerical breakdown of the court's decisions can only tell part of the story, of course, as some cases will be of greater political consequence than others. However, the federal government's statistical advantage also included a series of important cases, which placed additional pressures on intergovernmental relations.[106] As just one example of these frustrations, Saskatchewan

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[103] In the case of conflict with old-age pensions, the federal law would prevail.

[104] Cooperative federalism describes the period of federal-provincial relations following World War II and extending into the 1960s. During this period, while formal federal and provincial jurisdictions were maintained, there existed close contact and discussion between ministers and civil servants of both levels of government so that, for example, changes in legislation at one level was the result of joint decisions. The approach was piecemeal and dominated by federal and provincial executives. See J. R. Mallory, "The Five Faces of Federalism " in *The Future of Canadian Federalism. L'avenir Du Fédéralisme Canadien*, ed. Paul-André Crépeau and C. B. Macpherson (Toronto: University of Toronto Press, 1965); Smiley, "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism."

[105] Peter H. Russell, "The Supreme Court since 1960," in *Politics Canada*, ed. Paul W. Fox (Toronto; New York: McGraw-Hill Ryerson, 1977), 541.
Peter Hogg offers a comparable breakdown. By his count, sixty-five provincial statutes were challenged in the Supreme Court between 1949-1979, with twenty-five found to be unconstitutional; whereas only four of thirty-seven federal statutes challenged were struck down. See Peter W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?," *The Canadian Bar Review* 57, no. 4 (1979): 727.

[106] Other notable Supreme Court cases decided against the provinces during this period included, *Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan*, (1979) 1 S.C.R. 42; *CIGOL v. Saskatchewan*, (1978) 2 S.C.R. 545; *Therrien v. Dionne*, (1978) 1 S.C.R. 884; *Munro v. National Capital Commission*, (1966) S.C.R. 663; *Reference re Anti-Inflation Act*, (1976) 2 S.C.R.; and *Reference re Offshore Mineral Rights of British Columbia*, (1967) 792 S.C.R. For comprehensive analysis of the

premier Allan Blakeney noted in 1978 that the constitutional decisions over the previous five years had revealed two striking features about the Supreme Court: the absence of effective limits on federal powers, and the serious erosion of provincial powers. By Blakeney's account, the court's decisions had gone "a long way towards undermining the concept of a balanced federalism developed by the Privy Council."[107] While there is general consensus in the academic literature that the Supreme Court did not demonstrate a centralized bias during this period,[108] provincial discontent with the court was clear, and undoubtedly helped to guarantee the court a place on the constitutional agenda in future years.

One early example of a provincial call for Supreme Court reform is found in the report of the Tremblay Commission. In February 1953, Quebec's premier, Maurice Duplessis, established this royal commission to inquire into the country's constitutional problems, particularly those relating to the fiscal relations between Ottawa and the provinces. While Duplessis originally conceived of the commission as a means to justify the provinces' exclusive right to direct taxation, the eventual report went far beyond that by exploring many of the country's political institutions and providing a comprehensive examination of the philosophical and moral basis of French-Canadian society.[109] On the topic of the Supreme Court, the report noted that "…it is fundamentally repugnant to the federative principle that the destinies of the highest tribunal of a country be surrendered to the discretion of a single order of government. And yet, as everyone knows, in Canada the Supreme Court depends on the central government alone from the threefold point of

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Supreme Court's federalism jurisprudence see Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006); John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, Osgoode Society for Canadian Legal History Series (Toronto; Buffalo: Published for The Osgoode Society for Canadian Legal History by University of Toronto Press, 2002).

[107] Canadian Intergovernmental Conference Secretariat, "Proposals on the Constitution, 1971-1978" (Ottawa, 1978), 244-59.

Premier Blakeney's criticism of the Supreme Court during the Saskatchewan provincial election in October 1978 was so great it was rumored the court had considered citing the premier with contempt. See Roy J. Romanow, Howard A. Leeson, and John D. Whyte, *Canada-- Notwithstanding: The Making of the Constitution 1976-1982*, 25th anniversary ed. (Toronto: Thomson Carswell, 2007), 35.

[108] Gilbert L'Ecuyer, "La Cour suprême du Canada et le partage des compétences 1949-1978," ed. Ministère des affaires intergouvernementales (Québec 1978); Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?." Although see André Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," *Canadian Journal of Political Science/Revue canadienne de science politique* 26, no. 01 (1993).

[109] David Kwavnick, ed. *The Tremblay Report* (Toronto: McClelland and Stewart, 1973), vii.

view of its existence, its jurisdiction and its personnel."[110] The Tremblay Commission went on to make several recommendations for the court's reform including: limiting the jurisdiction of the court exclusively to federal laws; having the provinces and federal government jointly select nominees to the court; and requiring that any case dealing with Quebec law be decided unanimously by the court's Quebec judges in order to have effect.[111]

Though the report itself gained little in the way of political influence, the Tremblay Commission's appraisal of the Supreme Court highlighted key principle-based complaints that would carry forward into the constitutional negotiations soon to follow. In contrast to this chapter's first period of study, in which the chief criticisms launched against the court concerned its quality and patronage appointments, the main critique of the process during this period would be reframed, moving away from concerns of practice and towards those of structure. While in the first period the provinces had an additional venue in which to appeal decisions, and notably a venue sympathetic to provincial powers, the Supreme Court in this second period was now the final arena for all division of powers cases, thus making it of far greater political importance. Whereas its centralized status had unsurprisingly raised little concern in the first period, the court's increasing impact on federal-provincial relations meant that reforming the court's centralized appointments process would now be a point of increasing interest for the provinces.

The Fulton-Favreau Formula (1966)

While the provinces', and particularly Quebec's, frustrations with the federal government's powers grew, in the background a quiet effort to repatriate Canada's constitution was underway. With the passage of the Statute of Westminster in 1931, the repatriation of the constitution now only required the agreement of Canada's political elites; however, repatriation proved a difficult issue for consensus making. After sporadic

[110] This quotation, translated from French, is from Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, 38.
[111] Secrétariat de la commission, *Table analytique des memoires et autres documents consultes par la commission*, vol. 10 (Québec: Commission royale d'enquête sur les problèmes constitutionnels, 1956), 86. The Supreme Court's final jurisdiction over Quebec's civil law was criticized by Quebec legal academics during this period as well. See Pierre Azard, "La Cour suprême du Canada et l'application du droit civil de la province de Québec," *The Canadian Bar Review* 43, no. 4 (1965).

meetings over several decades, it was not until September 1964, in fact, that a proposal was publicly presented. At the conclusion of this first ministers meeting, a conference scheduled to mark the centennial of the confederation conference held in Charlottetown in 1864, Liberal Prime Minister Lester Pearson (1963-1968) and the provincial premiers announced that they "had affirmed their unanimous decision to conclude the repatriation of the B.N.A. Act without delay."[112] By October of that same year, federal minister of justice, Guy Favreau, and his provincial counterparts had agreed unanimously on a domestic amending formula – a deal which would become known as the Fulton-Favreau formula.[113]

The agreement, however, was not to hold. While Quebec's premier, Jean Lesage, initially signed on to the formula, mounting provincial opposition criticizing the amendment formula for being excessively constraining and insufficient for Quebec's governing needs, meant that by January 1966, Lesage would withdraw the province's support. With this, Quebec's Quiet Revolution had made its first discernable mark on Canadian constitutional politics.[114] Moving forward, a different approach to constitutional negotiations would be taken: Quebec's interest in patriation was now tightly interwoven with its own goals of nationalism. Thus, with the demise of the Fulton-Favreau formula, the doors to Canada's constitutional 'Pandora's box' were opened, and all political institutions and jurisdictions were now up for debate – including the Supreme Court. The country was entering an intensive series of constitutional negotiations that would span several decades, a process that Russell has termed "mega constitutional politics."[115]

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[112] Quoted in Canada. Minister of Justice., *The Amendment of the Constitution of Canada* (Ottawa: Department of Justice, 1965), 30.

[113] The meetings leading up to this agreement and a description of the amendment formula are detailed in *The Amendment of the Constitution of Canada* (Ottawa: Department of Justice, 1965).

[114] The Quiet Revolution or *la Révolution tranquille* became the popular catchword used to describe the shifting beliefs about the purpose and character of Quebec's society and politics in the 1960s. Whereas French-Canadian nationalists had previously envisioned French Canada as rural and agrarian, during this period social and economic development began to be promoted in Quebec. According to Kenneth McRoberts, "[t]he consuming goal of French-Canadian nationalists became *rattrapage*, catching up to social and economic development elsewhere." See Kenneth McRoberts, *Quebec: Social Change and Political Crisis*, 3rd ed. (Toronto: McClelland and Stewart, 1988), 129.

[115] For Russell, mega constitutional politics can be distinguished from normal constitutional politics by two features. First, disputes in this form go beyond the merits of constitutional proposals and address "the very nature of the political community" on which the constitution is based. Second, mega constitutional politics is both emotional and intense, and tends to dwarf all other public concerns of the time. See Peter H.

The Victoria Charter (1968-1971)

Though initially hesitant to open up the process of constitutional review, Prime Minister Pearson returned to the negotiating table committed to talks that would be both "broad and deep."[116] This new approach was accompanied by a wider set of reform interests, intended to facilitate and strengthen a sense of Canadian community, including a constitutional bill of rights, official bilingualism, and changes to federal institutions.

Setting out its opening constitutional positions in the 1968 paper, *Federalism for the Future*, the federal government noted that the composition, jurisdiction and procedures of the Supreme Court should be considered in any future review of the constitution.[117] In its follow-up publication, *The Constitution and the People of Canada*, the Liberal government detailed its views on reforms to the Supreme Court. First, it acknowledged that it would be appropriate for the existence and jurisdiction of the court, as well as the appointment and tenure of its judges, to be included in the constitution.[118] On the point of judicial selection, the report noted that to ensure "continued confidence" in the court, some form of provincial participation in the process would be worthwhile.[119] In this initial proposal, the federal government suggested that provincial participation could be achieved by having nominations of potential appointees submitted to a revised Canadian Senate for adoption.[120]

Given that the federal government had previously refused to consider any sort of substantive reforms to the Supreme Court's appointments process, its first constitutional offer appears particularly notable: the government not only acknowledged, but demonstrated willingness to accommodate concerns over the court's lack of federalist

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Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* , Third ed. (Toronto: University of Toronto Press, 2004), 75.

[116] Canada. Prime Minister., *Federalism for the Future: A Statement of Policy by the Government of Canada* (Ottawa: Queen's Printer, 1968).

[117] *Federalism for the Future: A Statement of Policy by the Government of Canada* (Ottawa: Queen's Printer, 1968), 26.

[118] "The Constitution and the People of Canada: An Approach to the Objectives of Confederation [1968]," in *Canada's Constitution Act 1982 & Amendments: A Documentary History*, ed. Anne F. Bayefsky (Toronto; London: McGraw-Hill Ryerson, 1989), 88.

[119] "The Constitution and the People of Canada: An Approach to the Objectives of Confederation [1968]," in *Canada's Constitution Act 1982 & Amendments: A Documentary History*, ed. Anne F. Bayefsky (Toronto; London: McGraw-Hill Ryerson, 1989), 89.

[120] Under the federal government's proposal, the Senate would be reformed so that a proportion of its members would be selected by the provinces (with or without the approval of their legislatures). In addition to changes to the Supreme Court's appointment system, the federal government proposed that the number of judges remain at nine, and that the court and its jurisdiction be placed in the constitution.

features. However, while the federal government's vision for the Supreme Court was well received, other components of its proposal, particularly the entrenchment of a bill of rights and official bilingualism, gained little favour amongst provincial leaders. Arguably more problematic for negotiations, however, was that provincial leaders appeared more concerned with economic issues, like the governments' taxing and spending powers, than the more nebulous effort of nation building via constitutional reform. Consequently, after some three years of negotiations, and a change in Liberal leadership that placed Pierre Elliot-Trudeau as prime minister (1968-1979, 1980-1984), little progress towards an agreement had been made.

However, the electoral victory of Quebec's Liberal Party, led by Robert Bourassa (1970-1976; 1985-1994), over the Union Nationale in May 1970, provided the stalled negotiation process a much-needed boost of energy. On 17 June, Trudeau and his ten provincial counterparts emerged from a closed-door session with the text of a new constitutional agreement, the Victoria Charter. While some earlier federal proposals, such as a reformed Senate, had fallen to the wayside, a bill of rights containing democratic and language rights, an amending formula, and reforms to the Supreme Court were included in the reform package.[121]

Under the Victoria Charter, the Supreme Court would have been entrenched in the constitution. However, with the federal government's original proposal for Senate reform now dropped, a new Supreme Court appointments procedure was struck. Under the process, the federal attorney general was required to gain agreement on any judicial nominee from the attorney general of the province in which the nominee resided. In the case that agreement could not be achieved, one of two types of nominating councils would be formed at the discretion of the provincial attorney general: the first council would have included the federal attorney general (or his representative) and all provincial attorneys general (or their representatives), for a total of eleven committee members; the second council choice would be limited to the federal attorney general (or his representative), the provincial attorney general (or his representative), and a chair selected by the two attorneys general, or by default, a person nominated by the chief

[121] The full text of the Victoria Charter is included in Paul W. Fox, ed. *Politics: Canada*, 4th ed. (Toronto; New York: McGraw-Hill Ryerson, 1977).

justice (or senior judge) of the province involved. The Victoria Charter also recognized the unique legal interests of Quebec: first, it guaranteed that three of the court's nine members would come from the province; and, second, it set out that in cases involving the civil law exclusively, a panel of five judges, at least three of whom were judges trained in civil law, would sit. In instances where this was not possible, the court would have the authority to name ad hoc judges from among the civilian judges serving on the Federal Court or on the Court of Appeal of Quebec.

However, while the Victoria Charter was years in the making, its public life was exceptionally short: within five days of the charter's announcement, Bourassa's government declared it was rejecting the deal. Strong opposition mobilized in Quebec almost immediately, with the Corporation of Quebec Teachers, the Confederation of National Trade Unions, and the Federation of St-Jean-Baptiste Societies all calling for its rejection. With René Lévesque's sovereigntist Parti Québécois – now viewed as Bourassa's main political opposition – also rejecting the charter, the pressure to walk away from the constitutional package was considerable, and its final rebuff by the Bourassa government hardly surprising.[122]

The Victoria round of constitutional negotiations, though ultimately a failure, reveals at least two things of note for our purposes. The first point concerns the understood criteria required for securing a constitutional package: without its own domestic amending formula, Canada's constitution at this time could technically be amended by a simple act of the British Parliament; however, with the Victoria Charter, the country's political elites operated with a view that unanimous consent, or at the very least Quebec's consent, was required before any amendment package could be forwarded to England. When Quebec rejected the Victoria Charter all parties considered the deal to be dead. Second, though many political leaders viewed the Victoria Charter as flawed in some respect, and in the case of Quebec so flawed that it could not be accepted, the proposed reforms to the Supreme Court were not the cause of consternation. While Peter Russell has pointed to the fact that the section on provincial participation in appointments to the Supreme Court was the lengthiest portion of the Victoria Charter as demonstration

[122] Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 90-91.

of provincial distrust of the court,[123] it also reveals a general level of consensus on the issue. A detailed process for Supreme Court appointments could be included in the Victoria Charter for the very reason that all parties were able to agree on such details. More simply, it was an acceptable reform in an unacceptable reform package.

Constitutional Patriation (1978-1982)

Following the Victoria Charter's failure, constitutional reform fell off the political agenda for several years. It was not until the Parti Québécois – a party whose platform included Quebec independence – won the provincial election in 1976 that interest in constitutional negotiations once again gained traction. In 1978, the Trudeau government offered a new position paper on reform, *A Time for Action: Toward the Renewal of the Canadian Federation*. In contrast to the Victoria Charter, which the federal government had approached as a single comprehensive package, in this new round of negotiations, the Liberals sought reform in two phases. In the first, the government proposed to unilaterally amend the constitution to include a statement of fundamental objectives, a restructuring of federal institutions, including the Supreme Court and Senate, and a charter of rights that would apply only at the federal level. The proposed second phase would include matters requiring discussion between both the federal government and the provinces, most importantly the constitutional division of powers.[124]

Soon after its position paper was released, the federal government introduced Bill C-60, The Constitutional Amendment Bill, which would install the Liberal's phase one plans. For the Supreme Court, the changes proposed under the Victoria Charter acted as the government's starting point. An important consideration in choosing the Victoria procedure, according to Minister of Justice Otto Lang, was the fact that it had already been agreed to in principle by all governments.[125] There were, however, important differences between the reforms offered in Bill C-60 and the Victoria Charter. The nominating councils proposed in Victoria were continued; however, in this new process,

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[123] "The Supreme Court's Interpretation of the Constitution," in *Politics Canada*, ed. Paul W. Fox (Toronto; New York: McGraw-Hill Ryerson, 1982), 609.
[124] Canada. Prime Minister., "A Time for Action: Toward the Renewal of the Canadian Federation," (Ottawa: Government of Canada, 1978), 25.
[125] Canada. Minister of Justice., *Constitutional Reform: The Supreme Court of Canada* (Ottawa: Canadian Unity Information Office, 1978), 4.

Supreme Court nominations would additionally be ratified by a reformed Senate, to be known as the House of the Federation.[126] Further, Bill C-60 proposed to expand the court from nine judges to eleven in response to concerns over regional representation. Though an informal system to appoint judges from Canada's various regions had been in place for decades, Lang acknowledged that with British Columbia having not been represented on the court since 1963, the issue needed to be addressed.[127] In expanding the bench to eleven members, the complement of Quebec judges would increase from three to four, and in recognition of previous regional shortfalls, at least one member of the court would come from each of the four additionally recognized regions (Atlantic Canada, Ontario, the western provinces exclusive of British Columbia, and British Columbia). Finally, like in the Victoria Charter, Bill C-60 had the Quebec members of the bench charged with deciding civil law issues. However, in cases that addressed a mixture of common and civil law issues, a full panel would sit, with the civil law judges alone deciding the civil law issues arising from any particular case.[128]

Not surprisingly, the provinces rejected the validity of Trudeau's two-phase approach and, indeed, in a reference opinion the following year, the Supreme Court affirmed the basis of the provinces' view.[129] In 1978, Trudeau agreed to return to a one-phase approach based on cooperation with the provinces. Quebec's governing Parti Québécois, however, proved less interested in striking a constitutional deal than in preparing for the province's upcoming referendum on sovereignty, scheduled for 1980. Instead of setting out Quebec's priorities for achieving a constitutional reform package, the government's position paper detailed the objective of sovereignty-association, which

[126] The House of Federation was to replace the Senate and would be jointly elected by the House of Commons and provincial legislatures. Ratification of Supreme Court nominees by the House of Federation would thus guarantee that all regions of the country could participate in the selection of the court's judges. Bill C-60 also set out stricter timelines for the selection of judges to protect against the process being purposely dragged on. It was estimated that the proposed process would normally be completed within two to three months.
[127] Canada. Minister of Justice., *Constitutional Reform: The Supreme Court of Canada*, 5-6.
[128] With the number of Quebec judges expanded to four, the possibility of split decisions did exist under this proposal. In such cases, the decision of the Quebec Court of Appeal would have prevailed.
[129] *Reference Re Authority of Parliament in Relation to the Upper House*, 1 S.C.R. 54(1980). In this reference opinion, the court held that the Senate, as an integral institution of the federal system, could not be amended unilaterally.

would be the basis for future negotiations with Canada in the event of a successful referendum.[130]

By this time, the constitutional clock was quickly ticking down: in May 1979, Trudeau's Liberal government lost the federal election to Joe Clark's Progressive Conservative Party, which formed a minority government despite coming second in the popular vote. The Liberals' unpopularity had meant that the party's electoral loss had been anticipated for some time, and in the election fall out Trudeau resigned as party leader. This would likely have spelled the end of a Trudeau-led constitutional package had it not been for a quick and dramatic shift in political events: Clark's minority government fell within nine months of taking power, and the Liberals, capitalizing on the opportunity, returned to office with a majority government in February 1980, with Trudeau once again party leader. Soon after, in May 1980, Levesque's Quebec government suffered a decisive political defeat – losing the province's first referendum on sovereignty by nearly 60% of the vote.

Returning to the negotiating table with a promise to Quebecers to renew the constitution, Trudeau and his provincial counterparts entered into their third round of mega constitutional politics. However, as in previous iterations, negotiations were slow to progress and considerable gaps remained between parties. On the point of the Supreme Court, however, general consensus continued. A July 1980 report by the Continuing Committee of Ministers on the Constitution noted that, on the Supreme Court, federal and provincial governments were in 'agreement' or 'near agreement' on all issues.[131] As in previous efforts, all parties acknowledged that the court and its jurisdictions should be entrenched in the constitution. Arising from the country's two systems of law, there was also support for the principle of dualism to be reflected in the composition of the court: near consensus had been reached on expanding the court's bench to eleven members, with five being appointed from Quebec.[132] General support also existed for alternating

[130] Québec. Executive Council., *Québec-Canada, a New Deal: The Québec Government Proposal for a New Partnership between Equals, Sovereignty Association* (Québec: Éditeur officiel, 1979).
[131] Continuing Committee of Ministers on the Constitution, "Report on the Supreme Court [July 1980]," in *Canada's Constitution Act 1982 & Amendments: A Documentary History*, ed. Anne F. Bayefsky (Toronto; London: McGraw-Hill Ryerson, 1989).
[132] Alberta and Nova Scotia reserved their position on the issue, while Saskatchewan expressed some concern. British Columbia was the only province in opposition and instead proposed that the court be increased to eleven members with four being appointed from Quebec.

the post of chief justice between civil law and common law appointees every seven years.[133] On the issue of appointments to the Supreme Court, a two-step procedure similar to that outlined in the Victoria Charter was proposed. First, when a vacancy on the court appeared, the federal minister of justice would consult with all provincial attorneys general, with the provinces having the option of submitting names. The second step would require the federal minister of justice and the attorney general of the province from which the candidate was selected to agree on the nominee. Some disagreement arose on the matter of the deadlock-breaking mechanism in cases when agreement between the two ministers proved difficult. Of the three options under consideration, the most popular, proposed by Manitoba, would have had the chief justice of the Supreme Court, the federal minister of justice, and the relevant provincial attorney general constitute a committee that would decide on a nominee by a majority decision. Saskatchewan, Newfoundland and Labrador, Ontario, Alberta, Prince Edward Island, Manitoba, Quebec, Nova Scotia and the federal government all supported this mechanism. Saskatchewan and New Brunswick also expressed support for the Victoria Charter's formulation, but with shorter time periods for decision-making. Additionally, Quebec and New Brunswick, reasoning that any disagreement should be resolved politically, also supported having no deadlock mechanism. British Columbia reserved its opinion on this later position. Thus, while there was not unanimity on reforms to Supreme Court appointments by this point, certainly there was general consensus on how reforms should take shape, with no party so far apart that agreement appeared unachievable.

On the whole, however, deep divisions between parties remained on key components of the constitutional package, particularly with regards to the preamble, language rights, and natural resources and offshore resources.[134] Following a failed first ministers conference in September 1980, and a final agreement nowhere in sight, Trudeau declared his intention to unilaterally repatriate the constitution, presenting a resolution

[133] On the first point, British Columbia reserved its position, while Manitoba expressed opposition. On the later point, Alberta and Saskatchewan reserved on the issue, while Manitoba again expressed opposition.
[134] Michael B. Stein, *Canadian Constitutional Renewal, 1968-1981: A Case Study in Integrative Bargaining* (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1989), 27.

before Parliament that included three major items: an amending formula, a charter of rights (including linguistic rights), and equalization.

The provinces (with the notable exceptions of Ontario and New Brunswick) balked at the federal government's actions. In an effort to halt Trudeau's new constitutional agenda, Manitoba, Quebec, and Newfoundland and Labrador referred to their respective courts of appeal reference questions on whether the federal government had the constitutional authority to undertake its proposed actions unilaterally. With the provincial courts splitting two to one in favour of the federal government, the reference question proceeded to the Supreme Court. Presenting its opinion in September 1980, the court, by seven justices to two, held that the federal government's proposed constitutional package did not require provincial consent and was therefore technically legal. However, another majority of six judges also found that by constitutional convention, a 'substantial degree' of provincial consent was required.[135] The rules of the game for constitutional bargaining had once again been changed. While the Supreme Court's reference opinion provided no clear victor, it did effectively push the governments back to the negotiating table. In contrast to previous constitutional efforts, however, it was now understood that unanimity was no longer the operating threshold for constitutional reform.

In November 1981, the provinces and federal government returned for what proved to be their last conference of this constitutional round. By Howard Leeson's account there remained three main issues that divided the majority of governments: the amending formula, the Charter of Rights and Freedoms, and jurisdiction over natural resources.[136] Finally, in the evening following the third day of intensive first ministers meetings, seven of the eight previously dissentient provinces were able to strike a deal acceptable to the federal government, Ontario and New Brunswick. While the deal proved a remarkable achievement of elite compromise, its cost, by any measure a significant one, was that Quebec was left outside the constitutional fold. While Quebec's rejection of the Victoria Charter had immediately spelled its end, in this round, the

[135] *Reference Re a Resolution to Amend the Constitution*, 1 S.C.R. 753(1981).
[136] Howard A. Leeson, *The Patriation Minutes* (Edmonton: Law Centre, University of Alberta, 2011), 13-14.

province's objections were by themselves not enough to scuttle constitutional reforms. A 'substantial degree' of provincial consent, it seemed, did not have to include Quebec.[137]

The constitution's new amending formula and the Canadian Charter of Rights and Freedoms will be detailed in the next section, as their impact on future reform attempts is significant. For now, one important development, or lack thereof, will be considered: the absence of reforms to the Supreme Court in the Constitution Act, 1982 (CA, 1982). First it should be noted that the Supreme Court was not completely left out of this constitutional deal: much to the puzzlement of many, while the Supreme Court itself was not entrenched as part of this package, the new constitutional amendment formulas did provide the process by which future reforms to the court would follow. Beyond this, however, reforms to the Supreme Court were not included in the final agreement. This certainly appears as a bit of a puzzle – after all, constitutional entrenchment of the Supreme Court and a reformed appointments process were some of the least controversial proposals throughout the various rounds of constitutional negotiations.

There appears to be no single, straightforward explanation for this outcome. Entering the final four-day conference in November 1981, the federal government and the eight opposing provinces were still far apart, and there appeared relatively little optimism that a deal would be struck.[138] These final negotiations, then, focused on what still divided parties, particularly the Charter of Rights and Freedoms, minority language education rights, the amendment formula, and control over natural resources. It is interesting to note that on the third and final day of full meetings, Saskatchewan proposed a constitutional package, aimed at achieving a compromise between the divided parties, which did not include reforms to the Supreme Court.[139] In his description of the events that led to the final package later on in that third evening, Howard Leeson makes no note of the Supreme Court, and by this point, it appears to have fallen off key negotiators' agendas.[140] In the hurly-burly of this evening, where proposals on contentious items were

[137] The Quebec government contested the agreement, arguing that it held a constitutional veto and therefore the Constitution Act, 1982 could not be entrenched without its consent. It referred a reference question on the matter to both the Quebec Court of Appeal and the Supreme Court of Canada. Both courts held that Quebec held no such veto. See *Reference Re Amendment to the Canadian Constitution*, 2 S.C.R. 793 (1982).
[138] See for example, *The Patriation Minutes*.
[139] *The Patriation Minutes*, 48.
[140] *The Patriation Minutes*.

traded back and forth, it seems that some issues, such as the Supreme Court and the Senate, were pushed aside in the effort to strike a final deal. The absence of the Supreme Court from this package, then, seems to highlight one of the effects that time constraints can have on the process of constitutional modification: with an understanding that a deal had to be struck, lest Trudeau move forward with a national referendum on the constitution, political actors focused on their achievable 'must have' constitutional provisions, leaving other issues, such as the Supreme Court, to one side. Ultimately, however, this view can only be a tentative one. The observations of Saskatchewan's delegation on the events of the four day-conference seem particularly apt on this point: "…it [the conference] took on the characteristics of the aurora borealis on a clear winter's night on the prairies, as positions shifted and danced through the conference room, each displaying a multitude of shades and hues. In this kind of atmosphere, observations differ and conclusions are difficult."[141]

Appointment Controversy and Informal Reform (1949-1980)

While constitutional negotiations provided a venue for governments to propose substantive reforms to the Supreme Court, during this same period, criticism of the federal government's judicial appointments, and in particular concerns over patronage, continued – a problem only exacerbated by the Liberals' long time in power. While the influence of patronage in Supreme Court appointments process had diminished greatly by the 1960s, concerns over the other federal courts remained, and were reinforced by appointment scandals.

As previously detailed, 1949 marked the Supreme Court's first year as Canada's final court of appeal. The federal Liberals, by contrast, had by this time been in power for some fourteen years, and the effects of the party's dominance on the courts had not gone unnoticed. Debating in 1951 on whether to raise the salaries of federal court judges, Social Credit member of Parliament, Ernest George Hansell, observed that Canada had come to the point where "…the main qualification for judges seems to be that they must

[141] Romanow, Leeson, and Whyte, *Canada-- Notwithstanding: The Making of the Constitution 1976-1982*, 193.

have been a defeated Liberal candidate."[142] A similar view was expressed by Co-operative Commonwealth Federation (CCF) member, Angus MacInnis, who referred to the state of the current federal bench as a place not only for "political retirement," but of "political refuge" that needed to end.[143] Similarly, in an address given in 1952 by the president of the CBA, J. D. Clark, the influence of political affiliation was presented as an important reason for why the bar's participation was needed in the selection of judges.[144] The Progressive Conservatives, serving as the official opposition at this time, were somewhat less harsh in their criticism of judicial appointments.[145] Noting that the system was not "entirely without merit," MP Donald Methuen Fleming observed that in comparison to the British system, which had the Lord Chancellor charged with making judicial selections, Canada's minister of justice combined the tasks of both the Lord Chancellor and the attorney general. The blend of these two functions, he reasoned, meant that political considerations would inevitably be a part of judicial appointments.[146] However, it was the Liberal Party's long time in office that Fleming argued aggravated this particular weakness of the system:

> Much of the criticism that exists today – and I hope the Minister of Justice is aware that there is a good deal of criticism of the system – unquestionably arises out of the fact that we have had a long period of government under one particular party. It has gone on now for something like seventeen years. When you see appointments being made, with a few conspicuous exceptions, drawn from the one political party that is represented in the government for seventeen years, then you can see the accumulated errors of the present system. When governments change every six or eight years you do not find the accumulated effect of all the errors of the present system so evident as you do in a case where the government holds office for a longer period of years. If the political appointments, as under the present administration, are predominantly of the political stripe represented by the government, then you have exposed to public view and criticism the inherent errors and shortcomings of the present system.[147]

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[142] Ernest George Hansell, House of Commons, *Debates (Hansard)* (26 June 1951, 21st Parliament, 4th Session): 4694.
[143] Angus MacInnis, House of Commons, ibid.: 4703.
[144] Gilbert R. Schmitt, "Canadian Politicians and the Bench," *Saturday Night*, 19 July 1952, 30.
[145] The Conservative Party changed its name to the Progressive Conservative Party in December 1942.
[146] Donald Methuen Fleming, House of Commons, *Debates (Hansard)* (29 May 1952, 21st Parliament, 6th Session): 2705.
[147] *Debates (Hansard)* (29 May 1952, 21st Parliament, 6th Session): 2705-6.
These views were also shared by some legal academics. See, for example, Schmitt, "Canadian Politicians and the Bench."

The increasing controversy surrounding patronage appointments was dramatically illustrated at the Supreme Court level by the appointment of Douglas Abbott in 1954. At the time of his appointment, Abbot was the minister of finance in Prime Minister Louis St. Laurent's cabinet, and had been a Liberal member of Parliament for over nine years. Criticism of the appointment stemmed from a number of concerns, including his long absence from active legal practice, and the fact that his appointment would upset the English-French, Protestant-Catholic balance of judges on the court (in favour of English-speaking Protestants).[148] The overt patronage of the appointment, however, appears to have been the most serious concern. A nomination directly from cabinet to the Supreme Court had not occurred since 1911, and by Snell and Vaughan's account, the shock exhibited by many observers illustrated the shifting public expectations regarding judicial qualifications.[149] Following the appointment, a convention that party interests should not override the principle of meritocracy in the selection of Supreme Court justices appeared to take hold: Abbot would be the last Supreme Court justice appointed directly from cabinet. This move away from appointing sitting politicians to the bench helps highlight the role of incremental informal change in the development of the Supreme Court's appointments process. With governments of all stripes interested in maintaining public confidence in the judiciary, an action in clear discord with normative expectations, in this case the appointment of a sitting politician, resulted in informal adjustments made in order to maintain a legitimate appointments process.

Despite the perceived problems that the Liberals' long hold on power brought to federal appointments, when PC leader John Diefenbaker – who had criticized the state of judicial appointments while in opposition[150] - defeated the Liberals in 1957, this change in party meant little for the influence of patronage in judicial appointments. In its first three years, the new government was able to draw from a large pool of party talent, thus

[148] Harvey Hickey, "Harris New Finance Minister; Campney Takes Defense Post," *The Globe and Mail*, 2 July 1954.
[149] Snell and Vaughan, *The Supreme Court of Canada: History of the Institution*, 199-200.
[150] John Diefenbaker, House of Commons, *Debates (Hansard)* (25 April 1949, 21st Parliament, 1st Session).

avoiding major criticism; however, as noted by W. H. Angus, once the best qualified of the party's supporters were appointed, the government fell into the "same old rut."[151]

In fact, it was the Liberal Party that would finally initiate informal changes to the federal judicial appointments system, though these reforms were undertaken in less than ideal circumstances. Soon after the party's return to government in 1963, a controversy surrounding the alleged misdeeds of two judges, both affiliated and appointed by the Liberals, brought unprecedented public attention to and criticism of patronage appointments.[152] Tagging onto these highly publicized controversies, the CBA renewed calls for its participation in the selection of judges,[153] and the Canadian Association of Law Teachers (CALT) passed a number of resolutions directed at improving the judicial appointments system.[154] Finally, in 1965, and nearly fifty years after the CBA passed its first resolution on the matter, Minister of Justice Guy Favreau acknowledged that bar associations could indeed provide a valuable service by assessing judicial candidates.[155] At its 1966 meeting, the CBA established a judiciary committee for this purpose, and in 1967, newly minted justice minister, and soon to be prime minister, Pierre Elliot Trudeau, began consulting with the CBA on judicial appointments, though on a strictly informal basis.[156] In explaining the new consultations, Trudeau noted his admiration for the experience of the American Bar Association in the United States, which had had a similar standing committee on the federal judiciary since 1946.[157]

In terms of the political context that situated these informal changes, it should be noted that following both the 1963 and 1965 federal elections, Pearson's Liberal Party formed minority governments that relied on the support of the New Democratic (formerly

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[151] Angus, "Judicial Selection in Canada: The Historical Perspective," 247.
[152] Justices Adrien Meunier of the Quebec Superior Court and Leo Landreville of the Ontario Supreme Court faced legal charges; both would eventually resign. See Editorial, "The Landreville Case," *The Globe and Mail*, 24 November 1965; Albert Warson, "Lawyer Urges Disclosure of Report on Landreville," ibid., 20 November; Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2005), 318.
[153] Ralph Hyman, "Canadian Bar Association Resolution - Role Sought in Judicial Selections," *The Globe and Mail*, 29 August 1966.
[154] William H. Angus, "Wanted - a New Method of Appointing Judges," *Chitty's Law Journal* 13, no. 9 (1965): 250.
[155] "Judicial Selection in Canada: The Historical Perspective," 251.
[156] The process of consulting with the CBA was continued until 1988 when reforms to the federal judicial appointment system were undertaken by Brian Mulroney's Conservative government.
[157] Ralph Hyman, "Minister Consults Bar on Appointing New Judges," *The Globe and Mail* 5 September 1967.

the CCF) and Social Credit parties to govern. In a comparatively weak political position, the informal changes brought in by Favreau and Trudeau were almost certainly an effort to, at least in part, minimize the political costs associated with the judges' scandal. While the scandal and the Liberals' minority government status are unlikely to be the only factors explaining why changes were made in this particular instance, they undoubtedly contributed to their timing.

It is also worth noting, however, that these types of informal changes to the appointments process continued even after the Liberal Party formed a majority government. Assuming the Liberal leadership in 1968, Pierre Elliot Trudeau was able to lead the party to a majority government that same year. New minister of justice, John Turner (1968-1972), entered the position promising to consult broadly and to appoint judges based on merit. His appointments were highly praised by the CBA, with a number of his appointees known to be affiliated with other political parties.[158] Turner would later be succeeded by Otto Lang (1972-1975) who moved to create a more formalized system of judicial appointments through the creation of a Special Advisor to the Minister of Justice, a position mandated to obtain and receive recommendations and information on potential judicial appointees. Lang also began the tradition of writing to officials of the CBA, provincial law societies, law school deans, and members of the judiciary in order to obtain a larger pool of potential candidates.[159] While this series of small changes by Liberal ministers of justice did begin under the strain of political scandal and minority government, they were continued after the pressures of both had receded, and altogether they contributed to a more formalized and open process of consultation and judicial selection – moves generally credited with elevating the quality of federal judicial appointees in Canada. Like the appointment of Abbott directly from cabinet in 1954, these informal changes to the appointments process highlight the incremental changes that were undertaken to address issues concerning public expectations and legitimacy.

[158] Ed Ratushny, "Judicial Appointments: The Lang Legacy," *Advocates' Quarterly* 1(1977): 7.
[159] "Judicial Appointments: The Lang Legacy," *Advocates' Quarterly* 1(1977): 8.

The Changing Role of the Supreme Court

While minor changes to the federal judicial appointments process were being undertaken in the background of ongoing constitutional negotiations, importantly, the Supreme Court's own role in law- and policy-making was also evolving thanks to both statutory and constitutional reforms. Until the 1970s, almost all cases heard by the court were appeals of right and thus ones it was obligated to consider. In 1970-71, for example, 83% of cases heard by the Supreme Court fell under such appeals,[160] and about half of the court's agenda in the early 1970s focused on private economic disputes.[161] In 1974, an amendment to the Supreme Court Act eliminated the appeal as of right in civil cases involving more than $10,000. Like the creation of the Federal Court of Appeal in 1970, the amendment's intent was to relieve the court from hearing a large number of routine appeals. The effect of this change on the distribution of the court's docket was significant. In comparison to 1974-75, when about seventy cases came before the court as of right, this number dropped to thirty-two in the following year, and by 1980-81, 74% of the cases heard by the court were by leave.[162]

The most important change to the Supreme Court's role, however, unquestionably came with the entrenchment of the Charter of Rights and Freedoms in 1982. While a significant body of literature documenting the changes to the Supreme Court's role in law- and policy making post-Charter already exists,[163] a brief description of this transformation is nonetheless useful.

By the time of the Charter's entrenchment, Canada had already had a statutory bill of rights for some years. Passed in 1960, by Diefenbaker's Progressive Conservative government, the bill's impact had been limited by its non-constitutional status and the

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[160] Ian Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance," *Supreme Court Law Review* 3(1981): 497.
[161] Donald R. Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008), 58.
[162] Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance," 497.
[163] Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1996); Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*; Knopff and Morton, *The Charter Revolution and the Court Party*; Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Don Mills, Ont.: Oxford University Press, 2001); Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination*.

fact that it only applied to federal laws.[164] Indeed, between 1960-1981, only thirty-four bill of rights cases reached the Supreme Court, and of these only five of were successful.[165] In contrast, the constitutional reforms entrenched in 1982 – particularly, section 52(1), recognizing constitutional supremacy, and the explicit provisions for judicial enforcement of guaranteed rights in section 24(1) – meant that judicial rights review became a major component of Canada's constitutional order and helped to transform the Supreme Court from a body concerned primarily with resolving private disputes between individuals and business to one of public law. The Charter correspondingly contributed to a transformative change in the court's docket: before 1984 only 7% of the court's decisions involved constitutional interpretation, whereas between 1984-2003, this number increased to 25%, with about 84% of these cases involving interpretation of the Charter.[166] The Supreme Court's ability to mobilize the power opened up to it by the Charter has led one judicial politics scholar, Christopher Manfredi, to conclude that judicial, rather than constitutional, supremacy, is now the dominant feature of Canadian politics.[167]

Appointment Controversy and Informal Reform (1980-1988)

While the Supreme Court's role in Canadian governance was undergoing a monumental transformation, by the 1980s it was generally acknowledged that patronage was no longer a major factor in Supreme Court appointments.[168] The same, however, could not be said for other federal courts. The prevalence of Liberal patronage appointments to the federal bench in Saskatchewan, for example, was considered so bad by the Conservative premier of the time, Grant Devine, that in 1982 the province began passing orders in council that eventually reduced the number of judicial spots on the Court of Appeal from seven to five and the Court of Queen's bench from thirty to twenty-four. The perceived patronage problems affecting the federal bench were accentuated further in June 1984, when in his final month in office, Trudeau made two hundred and

[164] Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (Toronto: McClelland and Stewart, 1975).
[165] Russell, *The Judiciary in Canada: The Third Branch of Government*, 343.
[166] Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination*, 66.
[167] Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*.
[168] Canadian Bar Association. Committee on the Appointment of Judges in Canada., "Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada," (Ottawa: Canadian Bar Foundation, 1985).

twenty-five order-in-council appointments, six of them to the judiciary, and three of these to former ministers in Trudeau's cabinet.[169] Though patronage appointments by outgoing prime ministers are not unusual in Canada, the sheer number of Trudeau's appointees meant that public outrage quickly followed. Incoming Liberal leader, John Turner, had the opportunity to cancel these appointments upon assuming power; however, a prior agreement with Trudeau meant that the former prime minister's appointments, as well as about seventy of Turner's own, were allowed to stand.

These controversial appointments became part of the campaign discourse of the 1984 federal election, with a turning point in the campaign coming during the televised leaders debate when Progressive Conservative leader Brian Mulroney attacked Turner for saying that he had 'no option' but to accede to Trudeau's appointments. Thus, when Mulroney's PCs won a landslide victory in the fall of 1984, they did so with a stated commitment to eliminate judicial patronage.[170] As part of this commitment, in September 1985, Mulroney (1984-1993) requested a review of the federal appointments process. In the ensuing report, released after the Conservative's second electoral victory in 1988, it was carefully noted that while the old system of appointments had served Canada well, it "suffered from an air of secretiveness, which led many Canadians to suspect that judges could be selected on grounds other than those of professional competence and overall merit."[171] Thus, in order to reinforce the public's confidence in the judiciary and judicial system, the report proposed to put in place a "modern" appointments system, dedicated to seeking out "candidates of merit." Under this new system for federal judicial appointments, the minister of justice was no longer responsible for identifying and screening candidates for judicial office, but instead would select from a list of persons who had already been screened by committees. These permanent committees, established in each province and territory, were to consist of five members representing the bench,

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[169] F. L. Morton, "Judicial Recruitment and Selection," in *Law, Politics and the Judicial Process in Canada*, ed. F. L. Morton (Calgary, AB: University of Calgary Press, 2002), 122; Jeffrey Simpson, *Spoils of Power: The Politics of Patronage* (Toronto: Collins, 1988), 352.

[170] Despite the Mulroney government's election pledge to reduce patronage, it is estimated that nearly half of the federal judicial appointments made between 1984 and 1988 had some connection to the Conservative Party. See Peter H. Russell and Jacob S. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees," *The University of Toronto Law Journal* 41, no. 1 (1991).

[171] Canada. Department of Justice., *A New Judicial Appointments Process* (Ottawa: Communications and Public Affairs, Department of Justice, 1988), Foreward.

the bar, and the general public,[172] and were responsible for assessing all applicants as either 'qualified' or 'not qualified.'[173] While the minister of justice retained the right to recommend an appointee regardless of a negative assessment, the report anticipated that this would be exceptional, and the proposal was implemented by the Mulroney government soon after.[174] Though a recent study by Hausegger *et al.* found that political connections still play a significant role in federal judicial appointments, the reforms introduced in 1988 appear to have had some positive effect: from 1989 to 2003, 17.2% of judges appointed had major connections to the party in power, whereas this number was estimated at 24.2% between 1984 and 1988.[175]

Appointments to the Supreme Court were not the focus of the report or subject to the new process. As will be discussed in the next section, with the election of the Progressive Conservative Party, a new round of mega constitutional politics had begun, and reform to the Supreme Court's appointments process was once again on the agenda. Thus, the 1988 report simply made note of the appointments process that had already been set out for the Supreme Court in the Meech Lake Accord.[176] This new round of mega constitutional politics, and its consequences for the Supreme Court, will be the focus of this chapter's next section.

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[172] Though the report recommend five members, the original committees consisted of eight members: one representative of the provincial or territorial law society; one representative of the provincial or territorial branch of the CBA; one representative of the provincial or territorial attorney general; one representative of the chief justice of the province or of the senior judge of the territory; three representatives of the federal minister of justice (two of whom must be non-lawyers); and an ex officio member from the office of the commissioner of judicial affairs. In 2006, the Conservative government of Stephen Harper added a federally appointed police representative to the committee and made the judicial representative the committee's non-voting chair.

[173] In 1991, the rating system was amended to 'highly recommended,' 'recommended,' and 'unable to recommend.' In 2006, the Conservative government revised the system so that it went back to its original two-tier ranking.

[174] The role of the Commissioner for Federal Judicial Affairs, an office established in 1977 to act as a personnel administrator for the federal courts, was expanded and under these reforms became responsible for soliciting and maintaining records for all those interested in appointment to a federal judicial position.

[175] Lori Hausegger *et al.*, "Exploring the Links between Party and Appointment: Canadian Federal Judicial Appointments from 1989 to 2003," *Canadian Journal of Political Science/Revue canadienne de science politique* 43, no. 03 (2010): 643.

[176] Canada. Department of Justice., *A New Judicial Appointments Process*, 9.

The Meech Lake Accord (1987-1990)

Following the passage of the CA, 1982, constitutional politics did, for however brief a moment, pause. In the 1984 federal election, discussion about the constitution was not a dominant part of campaigning, though, Mulroney did pledge to have Quebec sign onto the new constitution with "honour and enthusiasm" if he was elected.[177] Mulroney's constitutional pledge was given a further boost at the end of 1985 with the election win of Robert Bourassa's Liberal Party in Quebec, who upon returning to office, announced his intention to reach a constitutional agreement within two years.[178] Quebec's return to the constitutional fray would be informed by the Liberals' policy statement, *Mastering Our Future*, which had been passed earlier in 1985. Importantly, the document set out five minimum conditions that would have to be met if Quebec were to sign on to the constitution: (1) a full Quebec veto for constitutional changes; (2) the recognition of Quebec as a 'distinct society'; (3) a provincial role in making appointments to the Supreme Court of Canada; (4) a shift to the provinces in power over immigration; and (5) limits on the federal spending power.[179]

In considering this new round of constitutional politics, it is important to note that the rules of the game had changed significantly from those faced by Trudeau in previous efforts. The amending formula that had been put in place in 1982 was not a single procedure, but rather a series of formulas that each required a different level of government agreement. As has already been mentioned, while the Supreme Court was not explicitly entrenched in the constitution in 1982, the amending formula for its future constitutional modification had been. Under section 41(d), any change to the composition of the Supreme Court would require the unanimous consent of the Senate, House of Commons, and the legislative assemblies of each province, while section 42.1(d) required that all other matters related to the Supreme Court be passed by the legislative assemblies of at least two-thirds of the provinces holding at least 50% of the country's total population (often referred to as the 7/50 formula). Further, the new amending formula set a timeline for constitutional reform: under section 39.2, following the adoption of a

[177] Graham Fraser, "Mulroney Willing to Reopen Constitution Talks with PQ," *The Globe and Mail*, 7 August 1984.
[178] "Bourassa Cracks Smile as Team Cheers," *The Globe and Mail*, 13 December 1985.
[179] Québec Liberal Party. Policy Commission., *Mastering Our Future: Working Paper* (Montreal: Québec Liberal Party, 1985), Appendix, 13-15.

resolution initiating the amendment process, governments would have three years to ratify the resolution in their respective legislatures or the proposed reform package would expire. Thus, while changes to the Supreme Court's appointments process only required the 7/50 standard, the entrenchment of the court's membership, including a guarantee for Quebec representation on the bench, required the unanimous consent of both the federal Parliament and the provinces. While these different amendment standards lend themselves to a two-pronged approach to constitutional reform, the five conditions set out by Quebec meant that reforms would be approached as a single package – thus, complete unanimity would be required for Meech Lake to pass.

After months of consultations and negotiations with the other provinces, in the fall of 1986, Quebec presented a seven-part constitutional proposal. On the Supreme Court, the reforms proposed were in keeping with previous efforts, and had much in common with the 1980 working proposal of the Continuing Committee of Ministers on the Constitution. The province called for the court to be entrenched in the constitution, but in contrast to the consensus reached in 1980, which would have had the court's bench increased to eleven members, under this proposal, the court remained at nine, with three of the court's seats guaranteed to Quebec. As in 1980, the chief justice would be appointed for a seven-year term that would alternate between Quebec and the other provinces. As will be recalled, in previous efforts the structure of the deadlocking mechanism had been a key source of division. Under Quebec's proposal, vacancies arising in the province would be filled by the prime minister with the consent of the premier of Quebec. Should agreement not be achieved, a process was proposed where a "college," consisting of the federal attorney general, the Quebec attorney general, and the chief justice of Quebec (presiding), would recommend a nominee.[180]

As in previous constitutional rounds, consensus on the constitutional entrenchment of the court, Quebec's representation on the bench, and some form of provincial participation in the selection of judges was achieved early on in negotiations.[181] The relative harmony surrounding reforms to the Supreme Court can also be seen in the federal government's strategy entering into the final set of negotiations in

[180] Patrick Monahan, *Meech Lake: The inside Story* (Toronto; Buffalo: University of Toronto Press, 1991), 322-23.
[181] *Meech Lake: The inside Story*, 78.

April 1987: the Supreme Court was placed first on the agenda for the very reason that it was viewed as the least contentious.[182] When the eleven first ministers finally emerged from heavy negotiations on 30 April 1987, the Meech Lake Accord had been struck. While Quebec's five conditions were met in this final agreement, with the exception of the proposed Quebec distinct society clause, these reforms were now extended to all the provinces.

For the Supreme Court, the accord would have constitutionally entrenched the institution and its composition, including that three of its nine members must come from Quebec. In comparison to previous proposals, there were no regionally guaranteed seats other than Quebec's, nor was there a type of special Quebec-dominated panel guaranteed for the consideration of civil law cases. In terms of judicial appointments, while the Quebec proposal had called for Quebec nominees to be selected based on consensus between the federal and Quebec attorneys general, this process was expanded to include full provincial participation. The power to appoint would remain with the governor general in council (in practice the minister of justice and the prime minister); however, the federal government's power over appointments would be constrained by the requirement that justices be selected from a list of candidates submitted by the provinces. In the case of the three judges from Quebec, the federal government would select an appointee whose name was submitted by the Quebec government. However, in contrast to Quebec's proposal and previous efforts, the Meech Lake process did not include a deadlock breaking mechanism, nor did it stipulate limits on how long the appointment process would be permitted to take from beginning to end.[183]

While the proposed reforms to the Supreme Court were generally greeted with approval, some criticism from legal groups did emerge with respect to the procedural components of the selection process. Both the CBA and CALT held that the involvement of the provinces would add an unwelcome influx of political partisanship and advocated the creation of independent councils to review recommended nominees.[184] While both

[182] *Meech Lake: The inside Story*, 92.
[183] For discussion on the virtues and vices of the proposed process see Peter H. Russell, "Meech Lake and the Supreme Court," in *Competing Constitutional Visions: The Meech Lake Accord*, ed. Katherine E. Swinton and Carol J. Rogerson (Toronto: Carswell, 1988).
[184] "General Introduction," in *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord*, ed. Michael D. Behiels (Ottawa: University of Ottawa Press, 1989).

groups' proposals centered on an interest in protecting judicial independence and limiting political patronage, CALT's brief to the special parliamentary committee on the Meech Lake Accord also noted that the accord's provisions failed to reflect "the new and predominant role" of the Supreme Court since the entrenchment of the Charter.[185] Because the Charter allowed the Supreme Court to arbitrate conflicts between the individual and the state, CALT noted, "it is ironic that the Meech Lake Accord makes no provision for public input or accountability in the appointment of future judges to the Supreme Court of Canada, but treats such appointments as the exclusive concern of the federal and provincial governments."[186]

Though the views of the CBA and CALT provide some insight into the preferences of the legal community, the success of the Meech Lake Accord ultimately hinged on federal and provincial executives. While both Ottawa and Quebec quickly ratified the accord, thus beginning its three-year countdown to expiration, the process dragged on, with a number of provincial leaders eventually challenging even relatively non-contentious items, such as the Supreme Court. Importantly, provincial elections in Manitoba, New Brunswick, and Newfoundland and Labrador brought new leaders to office, with none taking their province's support of the accord as settled.[187]

A number of weaknesses in Meech Lake, both in its process and form, have been pointed to in explaining its ultimate failure.[188] One critical event occurring towards the end of this constitutional round, however, is worth particular mention. While by the end of 1988, Manitoba and New Brunswick had yet to endorse the accord, there nonetheless remained some optimism that Meech Lake would be ratified. However, any remaining momentum decidedly ground to a halt with the release of the Supreme Court's long-awaited decision in the 'Quebec signs' case on 15 December 1988.[189] By way of

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[185] Canadian Association of Law Teachers, "Democratizing Our Legal System: The Case for Judicial Nominating Councils," ibid., 394.
[186] Ibid.
[187] When the Liberal Party, led by Clyde Wells, won the Newfoundland and Labrador provincial election in 1989, the province had already ratified the accord. Shortly after the Liberals formed government, however, the legislature rescinded its ratification.
[188] While this chapter is only able to provide a cursory review of the Meech Lake Accord, a number of sources provide in-depth analysis. See in particular Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas & McIntyre, 1990); Monahan, *Meech Lake: The inside Story*; Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*
[189] *Ford v. Quebec (Attorney General)*, 2 S.C.R. 712 (1988).

background, in 1977 Quebec's PQ government had passed legislation prohibiting the use of any language other than French on commercial signs in the province. Following the enactment of the Charter, a number of individuals and corporations challenged the constitutionality of the law, arguing that it was a violation of their freedom of expression as protected under both the Canadian Charter (section 2(b)) and Quebec's own Charter of Human Rights and Freedoms (section 3). In its unanimous decision, the court ruled that the signs law was indeed unconstitutional. While Quebec could require the use of French and its marked predominance on commercial signs, the court concluded that the outright ban of other languages on commercial signs was impermissible. The court's decision left Premier Bourassa under immense political pressure to take action, and three days later, he announced that Quebec would invoke the notwithstanding clause (section 33) of the Canadian Charter and reinstate the French-only law for exterior commercial signs.[190] During the press conference for this announcement, Bourassa hinted that the use of the notwithstanding clause would have been unnecessary had the Meech Lake Accord already been enacted, a revelation that played into the hands of many of Meech's critics in English-speaking Canada. By Patrick Monahan's account, Bourassa's use of the notwithstanding clause had for many given meaning to Meech's distinct society clause, and following the decision the accord "had essentially no hope of being ratified."[191]

While New Brunswick would eventually ratify Meech Lake (and a companion resolution that included a number of add-ons, territorial nominations for Supreme Court judges among them),[192] the criticisms launched by Liberal Newfoundland and Labrador premier, Clyde Wells, proved much more difficult to address. Like New Brunswick, Wells proposed a package of amendments to the Meech Lake Accord, however, Newfoundland and Labrador's proposals were by comparison both comprehensive and polarizing. Under the province's proposal, Supreme Court appointments would be restructured to allow provincial participation in the selection of Supreme Court judges via a reformed Senate tasked with approving judicial appointments – a similar process to that

[190] Section 33 provides that the federal Parliament and provincial legislatures may expressly declare in a legislative act that the act, or a provision in the act, will operate notwithstanding a provision included in section 2 (fundamental freedoms) or sections 7 to 15 (legal rights and equality rights) of the Charter. A section 33 declaration expires after five years, but may be renewed.
[191] Monahan, *Meech Lake: The inside Story*, 165.
[192] The final communiqué of the first ministers' meeting of 9 June 1990 presents these add-ons. The communiqué is included as Appendix 4 in Monahan's *Meech Lake the Inside Story*.

proposed by the federal Liberals in 1968 in *Federalism for the Future*, and Bill C-60 in 1978.[193] While Wells's proposal on the Supreme Court was a departure from previous agreements, it was other items – such as removing the provincial veto over Senate reform, increasing the requirements provinces needed in order to opt out of national shared-cost programs with compensation, and the inclusion of a 'Canada clause' – that were far more divisive and almost certainly would never have been accepted by Quebec.[194] As the end of the three-year time limit on the accord approached, both Manitoba and Newfoundland remained holdouts, and the accord expired with neither province ratifying.[195]

While the Meech Lake Accord did fail, a provincial role in nominations of Supreme Court judges was unquestionably one of the least controversial and most widely accepted of Quebec's five constitutional demands. For non-governmental actors who objected, concerns did not focus on the illegitimacy of enhanced provincial participation, but on the fact that this expansion did not include other interested members of the legal community, such as the Canadian Judicial Council and representatives of the bar. For the CBA and CALT, greater consultation would have served to protect against patronage and any further politicization of the process. While CALT's submission to the special parliamentary committee on Meech Lake did note the new and more predominant role of the court since the enactment of the Charter, for the key political actors in this round of

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[193] Newfoundland and Labrador and Clyde K. Wells, *Proposal for a Revised Constitutional Accord* (St. John's: Government of Newfoundland and Labrador, 1990); Clyde K. Wells, "Canadians Are Rejecting the Dismantling of Federalism," *The Globe and Mail*, 14 April 1990.
Civil law judges would be appointed subject to the approval of the senators from Quebec, while common law judges would be appointed subject to approval of senators from the common law provinces.

[194] Monahan, *Meech Lake: The inside Story*, 206.

[195] Manitoba's story of constitutional ratification is a unique and important one. In June 1990, the month of the accord's expiration, a final first ministers meeting was held to see if the concerns of the remaining holdouts, Manitoba, Newfoundland and Labrador, and to a lesser extent New Brunswick, could be addressed. While the constitutional communiqué signed by the premiers and prime minister on 9 June was supported by all three party leaders in Manitoba, in order to meet the Meech Lake Accord's 23 June ratification deadline, public hearings and debate would need to be expedited, a procedure requiring the unanimous consent of the legislative assembly. Elijah Harper, the only Aboriginal member in the Manitoba legislature recorded the lone 'no' vote on this measure. Harper's opposition to the accord was prompted in large part because Aboriginal peoples had been insufficiently consulted over the course of this round of constitutional negotiations. When it became clear that Meech Lake would not pass in Manitoba, Wells chose not to put it to a vote in Newfoundland and Labrador. While Wells himself appeared opposed to the package, it should also be noted that he had committed to a free vote in the legislature. For a fuller description of the events leading up to Harper's vote, see Pauline Comeau, *Elijah: No Ordinary Hero* (Vancouver: Douglas & McIntyre, 1993).

constitutional politics – the executives of Canada's federal and provincial governments – the court's expanded judicial role did not necessitate a different approach for judicial appointments. This view is hardly a surprising one – after all, the provinces were looking to expand their powers and influence, not diffuse it amongst an increasing number of interested political actors. Given their influence over the constitutional process, then, the views of the final provincial holdouts are of particular interest. While Newfoundland and Labrador's demands for changes to Meech Lake included a different process for Supreme Court appointments, Wells' proposal on the Supreme Court was not out of sync with the principle of provincial participation accepted by the other actors, but instead operationalized this principle in a different way. Rather, it was the divisive nature of other reforms put forward by Wells, such as Senate reform, which meant disagreements could not be resolved prior to the accord's expiration.

The newly installed amendment formula, then, clearly had a number of the important effects on the Meech Lake process. Though most of the reforms proposed in the accord only required the 7/50 formula, because items such as changes to the composition of the Supreme Court, were included, the accord required unanimous consent to be ratified. While Meech Lake did achieve what can be considered a 'substantial degree' of provincial consent, the standard followed for Canada's 1982 reforms, the all or nothing approach of this constitutional round meant that if any key actor made incompatible and intractable demands, the entire project was almost certain to fail. The three-year time limit added an additional constraint that could be used by holdouts as a means of scuttling the agreement. Taken alone, Newfoundland and Labrador's opposition to the proposed Supreme Court's appointments process would not have proved fatal to court reform; after all, this particular change was subject to the 7/50 formula. However, the all or nothing approach and unanimity standard of Meech Lake meant that nearly any small challenge or political hiccup would be enough to derail the entire project. As with the Victoria Charter, reforms to the Supreme Court were comparatively well received, but were part of a modification process requiring an exceptionally high threshold for success.

The Charlottetown Accord (1990-1992)

For Quebec, the next round of constitutional politics began almost immediately: while Bourassa stated that Quebec would not take part in further discussions with the rest of Canada, two constitutional forums were commissioned by the province soon after Meech Lake's failure. The first, undertaken by the Liberal Party's constitutional reform committee, produced the Allaire Report (named after its chair, Jean Allaire), whose recommendations focused on areas where jurisdictional powers could be devolved to the province.[196] The other, established by the National Assembly, was a thirty-six member bi-partisan committee, known as the Bélanger-Campeau Commission (the Commission on the Political and Constitutional Future of Quebec), which reported its recommendations in March 1991.[197] Of the most immediate political impact of the report was its call for a provincial referendum on Quebec's secession from Canada.[198] The Liberal government accepted the recommendation and soon after passed Bill 150, which authorized that a referendum on Quebec sovereignty be held by 26 October 1992 unless an acceptable federal proposal on constitutional reform was received beforehand.[199]

Facing the countdown to Quebec's coming referendum, the Mulroney government presented its approach for a new round of constitutional politics in its throne speech of May 1991. Importantly, while the federal government would present its own set of tentative proposals, these would be forwarded to a special joint Parliamentary committee mandated to consult with Canadians. In addition, by the autumn of 1991, the other provinces and territories had established their own processes for constitutional review, and the federal government had set up a parallel process for consultations with Aboriginal peoples.[200] Whereas the Meech Lake process had been criticized for its closed and elite-based nature, in this new round, interested Canadians would be consulted to the point of near exhaustion.

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[196] Parti liberal du Québec. Commission constitutionnelle., "A Quebec Free to Choose," (Québec: Parti liberal du Québec, 1991).
[197] Thirty-two of the thirty-six members signed off on the entire report.
[198] Rheal Seguin and Estanislao Oziewicz, "Quebec Panel Gives Canada 18 Months, Members Vote Today on Proposal for 1992 Sovereignty Referendum," *The Globe and Mail*, 21 March 1991.
[199] Rheal Seguin, "Sovereignty Threat Real, Bourassa Warns," *The Globe and Mail*, 21 June 1991.
[200] Organizations representing the different groups of Aboriginal peoples included, the Assembly of First Nations, the Native Council of Canada, the Métis National Council, and the Inuit Tapirisat of Canada.

In September 1991, the federal government tabled its proposals in a report entitled, *Shaping Canada's Future Together*. The report kept the key elements from Meech Lake, but also contained several new additions, including Aboriginal self-government, a directly-elected Senate, and enhanced economic powers for the federal government. In contrast to the Meech Lake Accord experience, where there had been little room for major changes and the entire package had required unanimity, the twenty-eight recommendations now presented by the federal government were of a tentative nature, and proposals were split between those requiring the 7/50 rule and those requiring unanimity.

While the federal government declared itself willing to proceed with the entrenchment of the Supreme Court and its composition – reforms requiring unanimity – the move would be contingent on the provinces' agreement.[201] On judicial appointments, which required the less onerous 7/50 standard, the federal government proposed a detailed process that, compared to Meech Lake, left it with considerably more discretion over judicial selection. With this new proposal, provincial and territorial ministers of justice would each be requested to submit a list of five nominees within ninety days to the federal minister of justice when a vacancy on the court arose. If names were not submitted within this time period, the federal government would be permitted to proceed on its own to fill the vacancy. While the proposed appointments system would provide provincial and territorial participation in the nomination of Supreme Court judges, quite clearly, the provinces' influence under this proposal would be considerably reduced when compared to previous federal offers. With the Meech Lake process, for example, Quebec would have been able to nominate only one nominee when a vacancy from the province arose. Moreover, with the ninety-day time limit, any delays would have been resolved in the federal government's favour.

The proposals set out by the Mulroney government in, *Shaping Canada's Future Together*, were immediately referred to a special committee of senators and members of Parliament, whose membership included the three major federal political parties. This joint committee received some 3,000 submissions and listened to testimony from

[201] Canada. Privy Council Office., *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, 1991), 25.

approximately seven hundred individuals. Released in February 1992, the eventual Beaudoin-Dobbie report, *A Renewed Canada*, called for changes to every component of the federal government's initial proposal.

Concerning the Supreme Court, while there was agreement amongst all those consulted that the court and its composition should be entrenched in the constitution, differing views emerged regarding the judicial appointments process. In its report, the committee supported the federal government's proposal to have the provincial and territorial governments submit lists of five candidates to the federal government to choose from; however, it provided an alternative measure in the case that names were not submitted within ninety days: the chief justice of the Supreme Court would appoint, on a temporary basis, an ad hoc justice from amongst the federal court or provincial superior courts to hear cases until the position was permanently filled.[202]

Negotiations with representatives of the provinces (minus Quebec), territories, and Aboriginal peoples, began in March 1992 and continued into June. While discussions were marred significantly by disagreement over Senate reform, consensus amongst first ministers (again, minus Quebec) was finally achieved in early July. Known as the "Pearson accord," the agreement struck on 7 July stood as the rest of Canada's offer to Quebec; however, Bourassa expressed concerns about the deal, including the Senate, division of powers, and Aboriginal rights, almost as soon as it was announced.[203]

Faced with mounting political pressures under a quickly contracting timeline, Bourassa returned to the constitutional negotiating table. The Pearson accord paved way for an intensive four days of constitutional negotiations with the provinces and federal government in August, with a final meeting taking place in Charlottetown on 28 August to finalize a consensus report on the constitution. Importantly, this final agreement, to be known as the Charlottetown Accord, restructured reforms to the Senate and guaranteed that Quebec's representation in the House of Commons would never fall below 25%, changes made in large part so that the province would sign on to the accord.

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[202] Canada. Parliament. Special Joint Committee on a Renewed Canada., *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa: The Joint Committee: Canada Communication Group - Publishing, 1992), 60.
[203] Andre Picard, "Bourassa Leaves Door Open, Warns Current Package Will Be a Hard Sell in Quebec," *The Globe and Mail*, 10 July 1992.

On the Supreme Court, the Charlottetown Accord essentially adopted the recommendations set out in the Beaudoin-Dobbie report. As before, both the Supreme Court and its composition, including a minimum of three members from the Quebec bar, would be entrenched in the constitution. On the method of appointment, which fell under the 7/50 formula, all provinces, with the exception of Newfoundland and Labrador, agreed to a system of federal appointments from lists of five candidates submitted by each of the provinces and territories.[204] Like in the Meech Lake Accord, no deadlock breaking mechanism was included; however, as was suggested in the Beaudoin-Dobbie report, the chief justice would be given the authority to make interim appointments drawn from the superior courts should the vacancy not be filled within ninety days. In the August consensus report, it was also noted that Aboriginal peoples should be participants in the selection of Supreme Court judges. While details were to be left for a future agreement, it was acknowledged that both the provinces and territories, and the federal government, should consult Aboriginal peoples when considering judicial nominees.[205]

In addition to achieving agreement on the accord, it was confirmed in Charlottetown that a federally-sponsored referendum would be held to coincide with the one already scheduled in Quebec. In contrast to Meech Lake, which had dragged on to its eventual expiration, the referendum on the Charlottetown Accord was scheduled for less than two months later. While the events of the referendum campaign have been detailed elsewhere,[206] the referendum results were quite clear: on 26 October 1992, just 45% of

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[204]As in the Meech Lake round, Newfoundland and Labrador premier Clyde Wells called for Supreme Court nominees to be appointed by the federal government and confirmed by a reformed Senate. In responding to the federal government's proposal in *Shaping Canada's Future Together*, he noted that due to the regional breakdown of the court, permitting the provinces to submit lists of nominees only provided real influence to Ontario and Quebec. See Newfoundland and Labrador and Clyde K. Wells, "Commentary on the Federal Government's Proposals "Shaping Canada's Future Together" to the Newfoundland and Labrador Committee on the Constitution," (St. John's 1991), 13-14.

Over the course of negotiations, Saskatchewan, Nova Scotia, and the Métis National Council noted their support for Senate ratification in addition to provincial and territorial nominations. However, because the Supreme Court's appointments process fell under the 7/50 constitutional formula, there was still enough support to move forward with the provincial/territorial lists process. See Continuing Committee on the Constitution (Group 2), "Progress Report on the Continuing Committee on the Constitution Meetings of April 15-16 and 22-23, 1992," (Ottawa 1992), 6.

[205] "Consensus Report on the Constitution," (Charlottetown 1992).

[206] Richard Johnston *et al.*, *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Montreal: McGill-Queen's University Press, 1996).

Canadians voted in favour of the accord, with this number dropping to 42% in Quebec.[207] The referendum was lost, and with it, came the end of the Mulroney government's efforts to bring Quebec into the constitutional fold.

The process leading to the Charlottetown Accord saw an unprecedented level of participation amongst interested groups and citizens.[208] It also welcomed new members to the negotiating table, and the impact of the territories and Aboriginal peoples' participation is reflected in the accord's proposed reforms to the Supreme Court's judicial appointments process. It was also the first time that citizens were asked to be the final arbiters of their own constitution. With the extensive consultations and public forums leading up to the Charlottetown agreement, it is no surprise that the final constitutional package was physically the largest since Canada's original BNA Act, 1867. While its sheer size meant that there was something to like for nearly everyone, the obverse was that there was also something objectionable for nearly everyone as well.[209]

As in previous attempts, the Supreme Court remained one of the least controversial items on the constitutional agenda. Russell observes that at the time, few people had a real sense of the court's power, and proposals concerning the Supreme Court were able to "…slip through on the coattails of more contentious items."[210] Even in Newfoundland and Labrador – the only province to offer real resistance to the appointments process proposed in the Meech Lake and Charlottetown accords – this

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[207] It is not altogether clear what threshold was needed in order for the referendum to have been declared a positive endorsement of the Charlottetown Accord. However, early in the campaign, the federal government did state that each province had to deliver a majority for any government to be morally bound. There also seemed to be an understanding that a double majority would be required: without Quebec, the deal would not go forward. See *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Montreal: McGill-Queen's University Press, 1996), 60.

[208] This chapter has not focused on the role of interest groups during these constitutional efforts because, with few exceptions such as the CBA and CALT, their focus was not on reforms to the Supreme Court. This is not, however, to imply that different groups did not play an important role in constitutional politics. In particular, groups' influence on and then protection of the Charter of Rights and Freedoms is well documented. See Alan C. Cairns and Douglas E. Williams, *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto, Ont.: McClelland & Stewart, 1991); Alexandra Z. Dobrowolsky, *The Politics of Pragmatism: Women, Representation, and Constitutionalism in Canada* (Don Mills, Ont.: Oxford University Press, 2000); Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*; Christopher P. Manfredi, *Feminsit Activism in the Supreme Court* (Vancouver: UBC Press, 2004).

[209] Johnston *et al.* found that Quebec's guarantee of 25% of the seats in the House of Commons was particularly unpopular amongst voters outside of Quebec. For further details see Johnston *et al.*, *The Challenge of Direct Democracy: The 1992 Canadian Referendum*, chapter 11.

[210] Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 184.

resistance does not appear to have extended beyond the political executive. In the final report of the province's constitutional committee it was noted: "Only a few presenters offered comments on this [judicial appointments to the Supreme Court] proposal. There did not appear to be major concern over the present arrangements…The Committee recommends that the present system be maintained because it appears to be operating well."[211] For a final time during this period's constitutional efforts, proposed changes to the Supreme Court were acceptable reforms in an unacceptable package – only in this instance, it was the electorate who in the end determined the package's fate.

Analysis

Despite examples of different political actors having very clear interests in reforming the Supreme Court's appointments process, it remained formally unaltered throughout both these time periods. The system, however, did not remain static and underwent a number of informal changes that took place incrementally over time. The historical analysis included in this chapter serves to provide a clearer understanding of why this might be the case.

As already outlined, the theory tested here anticipates that an attempt to reform the judicial appointments process is more likely to occur when the following background factors are present: 1) a series of decisions by the court that attracts the attention of a set of political actors, and/or 2) an appointment(s) to the court that garners the attention of a set of political actors; and when either an 'aversive' trigger or a 'threat to political stability' trigger is initiated. For informal reform, it is anticipated that the same background factors, triggering mechanisms, and institutional rules that structure formal reforms remain at play. It is hypothesized that actors will choose informal over formal reforms for two possible (sometimes interacting) reasons: (1) out of an interest to maintain formal control over the appointments process, and/or (2) because institutional rules create great enough barriers that formal reform is impractical. We can now turn to how the Judicial Politics Trigger model performs in the Canadian case.

Taking stock of the second time period (1949-1992) in comparison to the first (1875-1949), an increased interest in reforming the Supreme Court's appointments

[211] The Newfoundland and Labrador Constitution Committee, "Final Report," (St. John's 1992), 26.

process can clearly be discerned. Concerns over the influence of patronage were aggravated further by the Liberal Party's long time in federal office, and were repeatedly articulated by federal opposition parties and the Canadian legal community. Despite continued calls for change by the CBA, it was not until two scandals concerning Liberal-appointed federal court judges prompted an 'aversive' trigger that reforms to the appointments process were undertaken. Patronage appointments again became an 'aversive' trigger for informal reform in the 1980s, when the sheer scope of Trudeau's executive appointments, as outgoing prime minister, meant that the issue became a point of debate during the 1984 federal election. Incoming Prime Minister Brian Mulroney's election promise to address patronage appointments eventually led to the introduction of federal judicial commissions in 1988, changes that are credited with creating a more accountable and less patronage-based appointments system. But here again, while these changes are now well established, the judicial advisory committees that were introduced by Mulroney have never been formally entrenched in legislation and continue at the discretion of the government of the day. Notably, because the Supreme Court's appointments system was under review as part of ongoing constitutional negotiations at the time, it was not part of the reforms undertaken in 1988.

That said, the importance of ideational factors, and particularly the influence of public expectations on the judicial appointments process, is also apparent. While the Supreme Court's junior status to the JCPC in our first period meant that criticism regarding patronage appointments gained little traction, this began to change after 1949. Douglas Abbott's appointment from the federal cabinet directly to the Supreme Court in 1954 attracted significant public criticism and seemed to confirm that normative expectations concerning the qualifications of the country's most senior judges had evolved. It should also be considered that the changes to the federal appointments process by the Liberals in the 1960s continued long after the political pressures of scandal and minority government had receded.

Looking to how these examples of informal reform fit with the JPT model, attention to the issue of judicial appointments was heightened by controversial court appointments in all three cases. In the instance of Douglas Abbott's appointment, the controversy did not stem from the process itself, but rather the informal criteria used to

evaluate candidates, specifically whether sitting cabinet ministers should be appointed to the bench. By simply adjusting these informal criteria for future appointments, the government could avoid similar criticism and could easily retain formal control with few political costs. Looking at the judges scandal faced by Pearson's Liberals, we can see how institutional rules and political context made the decision to implement informal changes the preferable choice. Because this scandal occurred prior to 1982 and the entrenchment of Canada's constitutional amending formulas, a formal change to the appointments system would have only required the amendment of the Supreme Court Act. However, with a minority government, the Liberals were in a relatively weak political position. Consequently, legislating on more contentious items, like the Supreme Court, would not have been approached lightly and the prospect of devolving appointments powers continued to be unappealing. In contrast to the informal reforms triggered by the judges scandal, by 1988 the institutional rules governing appointments reform to the Supreme Court had changed and required constitutional amendment to be implemented. Consequently, the new appointments procedures introduced by the Mulroney government for other federal courts did not extend to the Supreme Court.

However, the most comprehensive attempts to reform the Supreme Court's appointments process came at the level of constitutional negotiations. With the disintegration of cooperative federalism in the 1960s, the role of the Supreme Court as an adjudicator of division of power disputes became one of greater political consequence. Importantly, the court's jurisprudence during this period came down decidedly on the side of the federal government, an unwelcomed development for the provinces, and unsurprisingly, one that brought new attention to the issue of the court's appointments process. Furthermore, there is no question that the court's continued legislative status and centralized appointments process meant that there were strong justifications for its reform. Thus, while the forum of mega constitutional politics created the opportunity for major reforms to the Supreme Court, ideational factors clearly informed the shape of reform efforts during this second time period.

For formal reform efforts, struggling intergovernmental relations appear to be the driving force. Consistent with the 'threat to political stability' trigger, federal politicians believed that the constitutional status quo would result in continued federal-provincial

discord and the possible secession of Quebec. In response, strategic actions were taken: the federal government was willing to concede some of its power over the selection of Supreme Court justices in order to achieve a final constitutional package that it believed would increase the likelihood of a stable federation in the longer term. However, while reforms to the Supreme Court's appointments process were included in all rounds of constitutional negotiations during this period, and both the federal government and provinces agreed on several different processes that would have given the provinces significantly greater influence over the selection of judges, the issue was never one of the most important for the federal or provincial governments. This point is especially highlighted by the constitutional agreement struck in 1981 that omitted the entrenchment of and reforms to the court almost entirely.

However, while mega constitutional politics provided the opportunity for substantive reforms to the Supreme Court's appointments system, the nature of these types of negotiations, most particularly the high threshold needed for their ratification, meant that despite strong provincial desires to formalize their participation in the selection process of the court's justices, and agreement to this by the federal government during every round of constitutional negotiations of this period, all attempts to formally reform the Supreme Court's appointments process ended in failure. Thus, while the predicted background factors (judicial decisions) and the 'threat to political stability' trigger were present, the high threshold required by the institutional rules in place meant that these proposed reforms ultimately failed to be ratified.

Moving forward, the consequences of the constitutional politics of this second period will be explored further in the next chapter, which focuses on efforts to reform the Supreme Court's appointments process between 1993-2011. As will be seen, it is the legacy of the constitutional modifications undertaken in this second time period that helped to shape the reforms and political actors at play in the third: without the advantaged position that comes with constitutional politics in Canada, the provinces have become secondary players, and the court's role in a post-Charter of Rights and Freedoms universe has become a key argument used in favour of reforms. In addition, incremental changes to judicial selection have also continued, and as will be seen, have greatly

influenced the types of justices now selected to the bench. It is to this third period that we now turn.

The Supreme Court of Canada (1993-2011)

Period 3: The Supreme Court, the Charter, and Political Accountability (1993-2011)

Following the failure of the Charlottetown Accord, politicians and citizens alike experienced what might be aptly termed constitutional fatigue. Responding to the mood of the electorate, Liberal Party leader Jean Chrétien entered the 1993 federal election promising to set constitutional reform aside, and during his ten years as prime minister (1993-2003), did just that.[212] However, while reforms to the Supreme Court's judicial selection system were off the table, they were by no means out of mind: the media, politicians, and even Supreme Court justices during this period made calls for a more transparent judicial selection process.[213] The need for reform was also expressed by an increasing number of academics – most often framing their recommendations in post-Charter terms.[214] Interestingly, while the second time period (1949-1992) examined in the

[212] One exception, however, is arguably Chrétien's decision to refer questions to the SCC regarding Quebec's constitutional right to secession, *Reference Re Secession of Quebec*, 2 S.C.R. 217 (1998)., and the resulting *Clarity Act* (2000).

[213] After announcing his retirement from the SCC in 1997, Justice La Forest stated his preference for SCC nominees to be publicly vetted before appointment. See, Canadian Press, "La Forest Favours U.S.-Style Public Review for Supreme Court Judges," *The Globe and Mail*, 3 September 1997.

[214] Alan C. Cairns, "Who Should Judges Be? Canadian Debates About the Composition of the Final Court of Appeal," in *North American and Comparative Federalism: Essays for the 1990s*, ed. Harry N. Scheiber and Martha Derthick (Berkeley, Calif.: University of California, Berkeley, Institute of Governmental Studies Press, 1992); Sujit Choudry, "The Supreme Court Appointment Process: Improved Federal-Provincial Relations Vs. Democratic Renewal?," in *Democracy and Federalism Series* (Kingston: IIGR, School of Policy Studies, Queen's University, 2005); Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995); Sébastien Grammond, "Transparence et imputabilité dans le processus de nomination des juges de la Cour suprême du Canada," *Revue generale de droit* 36(2006); Peter W. Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada," *Osgoode Hall Law Journal* 44(2006); Patrick Monahan and Peter W. Hogg, "We Need an Open Parliamentary Review of Court Appointments," *National Post* 24 April 2004; Rainer Knopff, "The Politics of Reforming Judicial Appointments," *University of New Brunswick Law Journal* 58(2008); Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada," *The Journal of Appellate Practice and Process* 7, no. 1 (2005); Christopher P. Manfredi, "The Case for Vetting the Supremes," *National Post*, 3 July 2003; Patrick Monahan, "A Very Judicious Process; Requiring Supreme Court Nominees to Appear before a Parliamentary Committee Shines a Much Needed Spotlight, Says Law Dean Patrick Monahan," *The Globe and Mail*, 22 February 2006; Monahan and Hogg, "We Need an Open Parliamentary Review of Court Appointments; F. L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, ed. Kate Malleson and Peter H. Russell (Toronto: University of Toronto Press, 2006); Daniel Nadler, "An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter," *Constitutional Forum* 15(2006); Ian Peach, "Legitimacy on Trial: The Appointment of Supreme Court Judges in Canada," *Optimum Online: The Journal of Public Sector Management* 35, no. 1 (2005), www.optimumonline.ca; Russell, "A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada; Lorne Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability," *University of New Brunswick Law Journal* 58(2008); "Don't Leash Our Judges. Light Needs to Be Thrown on the Process of Appointing the Members of the Supreme Court, but U.S.-Style Hearings Are Not the Answer," *The Globe and Mail* 4 Febraury 2004; Jacob S. Ziegel, "Merit Selection

previous chapter was dominated by reform efforts that, if successful, would have greatly increased the influence of the provinces, during this third period, the provincial demands were largely relegated to background noise.

Following the Liberals' victory in 1993, the Chrétien government waited four years before the retirement of Justice La Forest provided its first opportunity to make a Supreme Court appointment. The selection came at a critical time for the government, as the court was scheduled to begin hearings on whether Quebec had the constitutional authority to secede unilaterally.[215] Chrétien's nominee, Michel Bastarache, was known to be well connected to the prime minister. A former partner in the prime minister's old law firm and an advisor to the federal Liberal Party during the 1993 election, Bastarache had a resume that did not go without notice or criticism.[216] In addition, concerns regarding whether certain interest groups were privately asserting influence on the selection process were also brought to light.[217] Altogether, while Bastarache's legal qualifications were never in question, his appointment – the first in nearly five years – garnered critiques from all corners in terms of the lack of transparency the process itself provided.[218]

However, while Chrétien defended the formal status quo, he also supported, both as minister of justice (1980-1982) in Trudeau's cabinet and his own time as prime minister, the continued diversification of the judiciary, particularly in regards to the representation of women. Throughout much of the Supreme Court's history, its justices had been overwhelmingly middle-aged, upper-middle class males of French or British background with at least a formal connection to Catholicism or Protestantism. Of the six

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and Democratization of Appointments to the Supreme Court of Canada," in *Judicial Power and Canadian Democracy* ed. Paul Howe and Peter H. Russell (Montreal: McGill-Queen's University Press, 2001); "A Supreme Democratic Deficit," *National Post*, 12 August 2002; "Disrobe This Process: Let's Update Our 19th-Century System for Appointing Supreme Court Judges and Make It Transparent," *The Globe and Mail* 27 November 2003.

[215] *Reference Re Secession of Quebec*.

[216] William Thorsell, "What to Look for, and Guard against, in a Supreme Court Judge," *The Globe and Mail*, 20 December 1997.

[217] F. L. Morton, "To Bring Judicial Appointments out of the Closet," ibid., 22 September.

[218] Editorial, "Nice Judge. Too Bad How He Got There," ibid., 3 October; "A Supreme Court for a New Age," *The Globe and Mail*, 28 August 1997; "Supreme Chance for Ottawa," *The Gazette*, 31 August 1997; Malcolm Bernard, "Selection of Top-Court Judges Should Be More Open: Experts," ibid., 2 September; Paul Schratz, "Public Should Have a Say in Judge Selection: The Bunch We've Got Now Is a Swell Lot and Well Intentioned. Trouble Is . . . They Seem to Think It's Their Job to Right All of Canada's Wrongs," *Calgary Herald*, 4 September 1997; Jeffrey Simpson, "Needed: A Better Way to Make Supreme Court Appointments," *The Globe and Mail*, 29 August 1997; Rosemary Speirs, "Filling Supreme Court Vacancy Fraught with Peril," *The Toronto Star*, 11 September 1997.

Supreme Court appointments made by the Chrétien government, two were women, and a sitting justice, Beverley McLachlin, was elevated to the position of chief justice. While these numbers may not sound particularly impressive, the court is, by comparison, a leader in relative gender parity: by 2003, more women had served on the Supreme Court of Canada than on the highest courts of Australia, the United Kingdom and the United States combined.[219] Though this is a subtle change, it is an important one insofar as the court's composition affects its decision-making. For Canada's Supreme Court, for example, a justice's gender has been found to impact the resolution of civil rights and liberties disputes.[220] Thus, while no formal reforms to the appointments process were put forward during Chrétien's time as prime minister, incremental informal changes to the criteria used in selecting justices continued during his tenure.[221]

While criticisms of the appointments process came from all corners in the immediate years following the end of mega constitutional politics, it was the Reform Party (1989-2000) that was especially vocal on the issue of judicial selection reform.[222] In contrast to political leaders who participated in earlier rounds of constitutional politics, party leader Preston Manning framed his party's interest in reforms within a post-Charter universe, arguing that the policy-making role of the court since the Charter's enactment ran contrary to democratic government, where "policy must be made by persons who are elected by and accountable to the people."[223] In an interview conducted in 2010, Manning

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[219] Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination*, 7.
[220] C. L. Ostberg and Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007); Songer *et al*. *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 2012).
[221] It should be noted that Mulroney's Conservative government also appointed two women to the Supreme Court. By this period, the importance of striking a Catholic/Protestant balance had clearly diminished. For example, five justices with a formal connection to Judaism have been appointed since 1970.
[222] The Reform Party was originally founded as a Western Canada-based conservative and populist protest party.
[223] E. Preston Manning, "A "B" for Prof. Russell," *Policy Options*, April 1999, 16.
The Reform Party included reform of the SCC's judicial selection process as part of its New Canada Act (1998). Speaking in the House of Commons in June 1998, Reform Party MP Paul Forseth set out the party's preferences as: (a) supporting "more stringent and more public ratification procedures for Supreme Court Justices in light of the powers our legislators are handing the courts. We believe that an elected Senate should ratify all appointments to the Supreme Court of Canada and all Courts where the judges are appointed by the federal government; (b) supporting efforts to "secure adequate regional representation on the Supreme Court, and that nominations should be made by provincial legislatures, not provincial governments; and (c) supporting "the appointment of judges at the Supreme Court of Canada level for fixed, non-renewable terms of ten years." See Paul Forseth, House of Commons, *Debates (Hansard)* (8 Febraury 1998, 36th Parliament, 1st Session).

noted that the secrecy surrounding the appointments process was particularly worrisome, an issue made all the more relevant given the increasingly political role Supreme Court judges were playing. Explaining why the Reform Party advocated reform of the Supreme Court's appointments process, Manning noted:

> If judges were going to get more involved in what we considered political decision making then that gave us, as legislators, an even greater interest in knowing how they came to be in those positions. There is a great quote from Edmund Burke that goes along these lines: "If we are to give people the freedom to do as they please, we best first inquire what it may please them to do." I think half our concerns came out of not being able to get a handle on how the appointments process was working.[224]

The Reform Party's calls for reform carried over with its transformation into the Canadian Alliance Party in 2000, and finally its merger with the Progressive Conservative Party in 2003. Speaking in 2004, the Conservative Party's justice critic and future attorney general (2006-2007), Vic Toews, illustrated this consistent stance: "This Liberal government has allowed judges to become the most powerful force in setting social policy in Canada. Whether it is by allowing convicted [murderers] to vote or by changing fundamental institutions like marriage, this government has substituted the supremacy of an elected Parliament with unelected judges."[225] Speaking in 2007, Toews noted that the introduction of the Charter was the primary, if not the only reason why changes to the judicial selection process were necessary. "Judges," he explained, "are more and more involved in policy decisions as opposed to straight legal decisions and therefore this process [judicial selection reform] was a natural outcome of this expanded role of the judiciary in policy or political matters."[226]

The other federal opposition parties also supported changes to the system of judicial appointments. In 2003, Bloc Québécois justice critic Richard Marceau presented a motion to the House of Commons calling for the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (JUST) to study the process of judicial appointments for the federal courts. Explaining why a study of judicial selection was warranted, Marceau stated:

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[224] E. Preston Manning, "Interview with the Author," (14 September 2010).
[225] Vic Toews, House of Commons, *Debates (Hansard)* (23 Febraury 2004, 37th Parliament, 3rd Session).
[226] Vic Toews, "Interview with the Author," (27 February 2007).

> As the honourable members know, there is an old principle in English law, in the common law, that justice must not only be done, it must be seen to be done. The purpose of this principle, the very foundation of our justice system, is to maintain the highest possible level of public confidence in the judiciary. The current process of appointing judges, however, is in direct conflict with this principle, and clouds the image of justice.[227]

Paul Harold Macklin, Parliamentary secretary to the minister of justice, responded to Marceau's call by declaring such a venture unnecessary, noting that "[t]he appointments process has been highly successful in producing judges of the greatest quality and distinction. Indeed, Canadians are envied around the world for the quality, commitment and independence of their judiciary."[228]

The Liberal Party, the Democratic Deficit, and the Supreme Court

With the Chrétien government uninterested in review of the judicial selection process, the opportunity for reform did not emerge until a change in Liberal Party leadership. When considering this leadership change, it is important to note the political circumstances that new party leader, Paul Martin (2003-2006), faced. Martin had long been tapped as the next leader of the Liberals,[229] and as early as 2002, had presented some of the key policy initiatives of his future government, known as his 'democratic deficit' plan, which included the reform of senior government appointments.[230] The political fortunes of the Liberal government, however, changed dramatically in February 2004, just two months after Martin became party leader. Auditor General Sheila Fraser released a report detailing the misuse and misdirection by party loyalists of a federal sponsorship program that had been intended to raise the federal government's profile in

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[227] Richard Marceau, House of Commons, *Debates (Hansard)* (6 May 2003, 37th Parliament, 2nd Session). Translated from French by the Parliament of Canada.

[228] Paul Harold Macklin, House of Commons, *Debates (Hansard)* (6 May 2003, 37th Parliament, 2nd Session).

[229] Martin ran unsuccessfully for the Liberal Party leadership in 1990, losing to Chrétien. While Martin held the key role of finance minister during the majority of the Liberals' ten previous years in government, the animosity between the two men, as well as Martin's leadership ambitions, were well understood.

[230] The basis of Martin's democratic deficit plan was originally presented in a 2002 speech at Osgoode Hall. See Paul Martin, ""The Democratic Deficit." Speech Given at Osgoode Hall, York University, Toronto, October 21, 2002," *Policy Options* (December 2002 – January 2003); Canada. Privy Council Office., "Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform," (Ottawa: Queen's Printer, 2004). For analysis of the Martin plan, see Peter Aucoin and Lori Turnbull, "The Democratic Deficit: Paul Martin and Parliamentary Reform," *Canadian Public Administration* 46, no. 4 (2003).

Quebec (between 1996-2004). The ensuing political fallout and royal commission (the Gomery Commission) dominated close to Martin's entire tenure as prime minister, and the sponsorship scandal is considered one of the key reasons why the Liberals were reduced to a minority government following the June 2004 election, and then defeated in the election of January 2006.[231] Consequently, all of Martin's policy initiatives, including reforms to the Supreme Court, were pursued under conditions of constant electoral threat.

Upon entering office in December 2003, Martin affirmed that reforms to the Supreme Court's appointments system would be a component of his democratic deficit plan, and requested that the JUST Committee consult on how best to implement prior review of appointments of Supreme Court justices.[232] Before the JUST Committee's study could begin, however, two Supreme Court justices, Louise Arbour (in February) and Frank Iacobucci (in March), unexpectedly announced their retirements effective June 2004. Given this contracted time period, the Liberal government chose to employ an ad-hoc process that had Minister of Justice Irwin Cotler appear before a public committee (composed of three Liberal MPs, two Conservative MPs, one Bloc Québécois MP, one NDP MP, and two representatives from the Canadian Judicial Council and the Law Society of Upper Canada) following the announcement of the government's two nominees, justices Rosalie Silberman Abella and Louise Charon. Members of the committee had the opportunity to question the minister regarding the selection process, as well as the qualifications of the two appointees. While the committee endorsed the government's appointments, opposition MPs, on the whole, found the form of consultations to be inadequate.[233] Nonetheless, the televised meeting did provide the most public review of any judicial selection to that point.[234]

During this same period, the JUST Committee was undertaking its study on Supreme Court appointments. Over the thirteen meetings held from March to May 2004,

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[231] Elisabeth Gidengil *et al.*, *Dominance & Decline: Making Sense of Recent Canadian Elections* (Toronto: University of Toronto Press, 2012); Elisabeth Gidengil *et al.*, "Back to the Future? Making Sense of the 2004 Canadian Election Outside Quebec," *Canadian Journal of Political Science/Revue canadienne de science politique* 39, no. 01 (2006).

[232] Canada. Prime Minister, "Prime Minister Martin Announces New Government Will Be Guided by a New Approach," (Ottawa: Office of the Prime Minister, 12 December 2003).

[233] Kim Luman and Brian Laghi, "Commons Panel to Accept Judges, but wants Stronger Vetting Process " *The Globe and Mail*, 26 August 2004.

[234] This process is detailed in greater detail in Irwin Cotler, "The Supreme Court Appointment Process: Chronology, Context and Reform," *University of New Brunswick Law Journal* 58(2008).

the committee heard from a range of witnesses including, the minister of justice, a former Supreme Court justice, legal academics, and bar associations. While the participation of members of Parliament in the review of Supreme Court nominees was overwhelmingly supported by witnesses and committee members alike, views differed on what form this participation should take.

The CBA's recommendations, which were supported by the Barreau de Quebéc and former Supreme Court justice, Claire L'Heureux-Dubé, took a similar form to its 1986 Meech Lake proposal that had called for the creation of an advisory committee to review Supreme Court candidates; however, in this new set of recommendations, the CBA suggested the addition of four members of Parliament to the committee.[235] Notably, legal associations were firmly opposed to any public review of Supreme Court nominees, viewing it as a potential threat to judicial independence. William Johnson, president of the CBA, explained that the bar was "strongly opposed to any system that would subject candidates to Parliamentary interrogation on their beliefs, preferences, or judicial opinions in a vacuum."[236]

The JUST Committee presented its own recommendations in the May 2004 report, *Improving the Supreme Court of Canada Appointments Process*. Though every opposition party included a dissenting report, all were in agreement that "…whatever the quality of judgments produced by the Supreme Court, the process by which Justices are appointed to that body is secretive or, at the very least, unknown to Canadians. This could lead to the perception that appointments may be based upon improper criteria."[237] Parties agreed that changes, particularly a more significant role for MPs and other actors, were

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[235] The committee would also include members from the federal minister of justice, the relevant provincial minister(s) of justice, the chief justice, the law society or societies of the relevant jurisdiction, and the CBA.
[236] Canada. House of Commons. Standing Committee on Justice Human Rights Public Safety and Emergency Preparedness, "Evidence," (Ottawa Public Works and Government Services, 2004).
The Canadian Association of Law Teachers published a report on the Supreme Court appointments process in June 2005. Like the CBA, its primary concern was that any changes to the appointments process respect the principle of judicial independence. The CALT recommended a depoliticization of the relationship between the executive and judicial powers via the creation of an independent commission that had the powers to assess and recommend judicial candidates. See Beverley Baines *et al.*, "Canadian Association of Law Teachers Report on Supreme Court Appointments," (Canadian Association of Law Teachers 2005).
[237] Canada. House of Commons. Standing Committee on Justice Human Rights Public Safety and Emergency Preparedness, "Improving the Supreme Court of Canada Appointments Process," (Ottawa: Speaker of the House of Commons, May 2004), 4.

called for. The main point of division concerned how a more developed role for MPs should be operationalized.

Writing for the majority, the Liberal members recommended that an advisory committee – composed of representatives from each party with official standing in the House of Commons, representation from the provinces, members of the judiciary and the legal profession, and lay members – be established to replace the private consultations undertaken by the minister of justice. Under this process, the advisory committee would provide the minister with a short list of candidates from which a Supreme Court judge would be selected. Following the appointment, either the chair of the advisory committee and/or the minister of justice would appear before the JUST Committee to explain the process followed to select the new justice, as well as his or her qualifications.

Members from the Bloc Québécois agreed that there should be a role for MPs in judicial appointments; however, the party was critical of the Liberals' failure to include a more substantial role for the provinces in the selection process. In its dissenting report, the BQ cited approvingly the recommendation made in the Quebec Liberal Party's 2001 report, *A Project for Quebec –Affirmation, Autonomy and Leadership*, which called for the provinces to submit lists of Supreme Court candidates to the federal government, a recommendation well in keeping with the constitutional proposals of the second time period. Under the BQ's proposal, after the provinces had submitted their lists, an advisory committee, similar in composition to that recommended by the Liberals, would evaluate the proposed nominees.

The Conservative Party's dissenting report departed most significantly from the recommendations of the others. Like the BQ, the Conservatives noted the importance of having the provinces and territories' participate in the compilation of potential Supreme Court nominees. While the Conservatives did call for the creation of an advisory committee to review candidates, the party also recommended a process for the public review of nominated short lists and parliamentary ratification of judicial nominees.

The NDP, save for calling for greater specification in the composition of the proposed advisory committee and that the minister of justice appear before the JUST Committee prior to an appointment, rather than after, supported the recommendations of the Liberal Party. However, the NDP's dissenting report also noted the unclear

constitutional parameters within which the Supreme Court's appointments process operated. As will be recalled from the previous chapter, section 42(d) of the CA, 1982, requires that any substantial changes to the Supreme Court be made using the 7/50 formula. While the types of reforms requiring a constitutional amendment are unspecified, the NDP's recommendations were presented with the assumption that reforms, such as binding parliamentary confirmation hearings or a parliamentary veto, would be unconstitutional.[238] Thus, it was the NDP's implied view that the bulk of the Conservatives' recommendations were, in fact, unconstitutional. This point on constitutional ambiguity will be given fuller consideration later on.

The Liberal government presented its own process for reform of the judicial appointments system in April 2005, which was, in large part, what had been proposed in the JUST Committee's majority report.[239] Under the Liberals' reformed process, when a vacancy on the Supreme Court arose, the minister of justice would engage in a consultation process, including meetings with the chief justice of the Supreme Court, the chief justices of the province or region from which the vacancy would be filled, the provincial attorneys general, the president of the CBA, and representatives of the provincial law societies. Additionally, recommendations from the public would be invited. Following these initial consultations, a list of five to eight candidates would be prepared and forwarded to an advisory committee composed of members of Parliament from each of the elected political parties, a nominee of the relevant provincial attorneys-general, a nominee of the relevant provincial law societies, and two lay members chosen by the minister of justice. At this second stage, the advisory committee would be charged with assessing the candidates and providing the minister with a short list of three candidates. From this list, the minister of justice and prime minister would then select their nominee, and following the appointment, the minister of justice would appear before the JUST Committee to explain the process and the qualifications of the candidate selected.[240] Summarizing the new process, Minister Cotler noted, "We have embarked

[238] "Improving the Supreme Court of Canada Appointments Process," (Ottawa: Speaker of the House of Commons, May 2004), 21.
[239] Canada. Minister of Justice, "Proposal to Reform the Supreme Court of Canada Appointments Process," (Ottawa: Department of Justice Canada, April 2005).
[240] Irwin Cotler, "The Constitutional Revolution, the Courts, and the Pursuit of Justice," Department of Justice, http://www.justice.gc.ca/eng/news-nouv/spe-disc/2005/doc_31602.html.

upon a fair, balanced and inclusive appointments process that is based on the overriding principle of merit, while ensuring greater transparency, increased public involvement and meaningful Parliamentary input."[241]

Interestingly, this new process was not Prime Minister Martin's own first choice. Mindful of the Supreme Court's increased powers since the entrenchment of the Charter, but committed to not using the notwithstanding clause (section 33), Martin saw a reformed selection process, particularly one that had judicial nominees vetted by a parliamentary committee, as a desirable check on the court. However, with a caucus cool to the idea of publicly vetting Supreme Court nominees, the prime minister was faced with the rather unusual situation of having his own members reluctant to have their powers increased. Reflecting on this situation, Martin offered the following thoughts:

> I was arguing for the rights of Parliament to review judicial appointments because of the democratic deficit, and the majority of parliamentarians were not in favour of these reforms. And because we were under constant electoral pressure, I did not have time to convince Parliament to get onside. I basically said to myself, well, if you believe in the democratic deficit and you cannot convince Parliament on this issue, it is better not to push it… Now the other reason my own party was against my preferred reforms – and I do not mean for this to sound partisan – was that they felt the Conservatives, who were ideologically-driven on many issues, would abuse the process. They were very worried that a 'Bork' type thing would happen. And I must say that the Conservatives gave every indication that they would abuse the process.[242]

Thus, Martin chose to accept the views of his colleagues and limited reforms to a parliamentary advisory committee. Ultimately, however, this concession by Martin proved unnecessary. In August 2005, Supreme Court Justice John Major announced his retirement effective 25 December. The Liberal government began the judicial selection process under the newly revised process; however, not long after the advisory committee had submitted its three recommended nominees,[243] the Conservatives defeated the

[241] Canada. Minister of Justice, "New Supreme Court of Canada Appointments Process Launched," Department of Justice, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31586.html.
[242] Paul Martin, "Interview with the Author," (12 October 2010).
[243] The nine members of the committee included, the justice critics in the House of Commons, a Liberal MP, two lawyers, a judge and two "lay" members – Métis legal activist Chester Cunningham, and Barbara Pollock, a University of Regina vice-president.

Liberals in the January 2006 federal election.[244] The new Conservative minority government, led by Stephen Harper, chose to adopt the work already completed by the Liberals, but made one further addition to the process – a public hearing of the recommended Supreme Court nominee before a twelve member parliamentary committee.[245] Notably, members of the committee were not asked to issue a formal report or vote for the nominee, rather each member was asked to communicate his or her views individually to the minister of justice. While the addition of the public review of the government's judicial nominee was criticized by both Supreme Court's Chief Justice Beverley McLachlin and the CBA, following the committee's review of Justice Marshall Rothstein, the media seemed more focused on the dry television the committee process had produced.[246] As *Globe and Mail* columnist John Ibbitson noted, "The whole thing was quite dull, and therefore quite successful."[247]

The Conservative Government (2006-) and the Challenges of Informal Reform

The 2006 appointment of Justice Rothstein was unusual insofar as it was overseen by two different governments, with the second adding new components mid-process. The permanency of this new process was next tested in 2008 when Justice Michel Bastarache announced his retirement from the Supreme Court that April. Minister of Justice Rob Nicholson quickly announced that the court's new justice would be selected following the 2006 process. However, the members of the selection panel were changed: rather than the nine-member panel assembled by Minister Cotler, Nicholson's committee would be composed exclusively of members of Parliament – two from the government caucus and one member each from the Liberals, BQ, and NDP.[248]

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[244] Minister of Justice Irwin Cotler chose to not announce the government's appointment prior to the election being called. This same courtesy would not be extended by the Harper government in 2008.
[245] For a detailed account of the process followed in the selection of Justice Rothstein, see Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada."
[246] Sandra Cordon, "McLachlin Backs Appointment Process; Tinkering Could Erode Confidence in Supreme Court, Chief Justice Says," *The Globe and Mail*, 4 February 2006; Brian Tabor, "The Bar, Not Politicians, Should Be Hosting the Meet the Judge Show," *The Globe and Mail*, 24 February 2006.
[247] John Ibbitson, "What's the Verdict? Grilling Judges Is Innocent," ibid., 28 February.
A fuller summary of the media reactions to Justice Rothstein's appointment is available in Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination*, 17-20.
[248] Canada. Department of Justice, "News Release: Minister of Justice Announces Selection Process for the Supreme Court of Canada," Department of Justice, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32258.html.

As the months following Bastarache's announcement passed, the committee appeared hindered by partisanship, with opposition MPs opposing the government's selection of two cabinet ministers to the panel. By September, the committee had yet to finalize its list of three recommended nominees. On 5 September, just two days before the government dissolved Parliament for an October election, Harper announced, without receiving the committee's list, the nomination of Nova Scotia Court of Appeal Justice Thomas Cromwell to the Supreme Court.[249] While the move meant that the government bypassed a key component of the 2006 process, the Conservatives indicated that they would pick up the process following a successful election outcome.

The 2008 election saw the Conservatives elect sixteen more MPs than its 2006 effort; however, the gain was still not enough for the party to form a majority government. Nonetheless, with the official opposition relatively weak,[250] and no one seemingly interested in another election right away, the Conservative government chose to make several controversial policy announcements soon after Parliament opened, including: the suspension of the right of federal civil servants to strike until 2011; the suspension of the right of female federal government employees to seek legal remedy on pay equity issues; and, the elimination of political parties' $1.95 per vote electoral subsidy. These announcements were quickly condemned by opposition parties, and within days, the Liberals, NDP, and BQ had announced a formal accord to form a Liberal-led coalition government. In a move to avoid a vote of no confidence and maintain his hold on power, Prime Minister Harper met with the governor general on 4 December and successfully requested that Parliament be prorogued. With Parliament's prorogation, the immediate threat of the opposition parties forming a coalition government was thus avoided.[251]

During this exceptional moment of parliamentary politics, the question of Justice Cromwell's appointment to the Supreme Court still remained. Following the election, the Conservative government had anticipated that Cromwell would sit before an all-party

[249] Tracey Tyler, "N.S. Judge Named to Top Court; Harper Nomination Bypasses All-Party Committee Just Two Days Ahead of an Expected Election Call," *Toronto Star*, 6 September 2008.
[250] Following its poor election result, Liberal Party leader Stéphane Dion announced he would step down once a new leader had been selected in the spring.
[251] For a detailed account of the events leading to the 2008 prorogation, see Michael Valpy, "The 'Crisis': A Narrative," in *Parliamentary Democracy in Crisis*, ed. Peter H. Russell and Lorne Sossin (Toronto; Buffalo: University of Toronto Press, 2009).

parliamentary review committee.[252] However, with Parliament still prorogued, Harper announced Justice Cromwell's appointment to the bench on 22 December 2008, thus bypassing the process followed in 2006 in its entirety.[253]

While by anyone's account the 40th Parliament had gotten off to a rocky start for the Conservatives, federal politics soon returned to relative, albeit an especially partisan, normalcy, and no Supreme Court retirements were announced over the next few years. The challenges of governing with a minority government, however, eventually came to a head for the Conservative Party, and on 25 March 2011, the opposition parties passed a motion finding the Conservatives in contempt of Parliament and expressing non-confidence in the government.

Despite losing the confidence of the opposition parties, in the ensuing May election, Stephen Harper finally obtained his much-sought majority, winning 166 of 308 seats. Less than two weeks after the election, Supreme Court justices, Ian Binnie and Louise Charron, both of Ontario, announced their retirements. As in 2008, the Conservative government declared its intention to follow the process set out in 2006, and by August, the five member selection panel (three Conservative MPs, one NDP MP, and one Liberal MP) had been assembled.[254] Given the vacancy of two Ontario seats, the committee was tasked with compiling a list of six recommended appointees, two of whom would be selected by the government. Again, the progress of the committee was slow: it did not submit its list of recommendations until 6 October, and in the meantime, the Supreme Court was forced to begin its fall session with only seven members. Finally, on 17 October, Prime Minister Harper announced his nomination of Andromache Karakatsanis and Michael Moldaver. Their appearance before a parliamentary committee was scheduled to follow just two days later.

The nominations, while generally lauded, were not without some criticism. Both the Barreau du Québec and the NDP (now the official opposition) criticized Justice Moldaver's lack of French skills, and during the parliamentary committee's review of the

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[252] Janice Tibbetts, "Vetting of Cromwell on Agenda," *Ottawa Citizen*, 8 November 2008.
[253] Canada. Prime Minister, "Prime Minister Harper Announces Appointment of Thomas Cromwell to Supreme Court of Canada," (Ottawa: Office of the Prime Minister, 22 December 2008).
[254] Canada. Department of Justice, "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel," http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32624.html.

nominees, NDP members chose to focus on the issue of bilingualism.[255] In terms of the actual appointments process, a number of academics criticized the Conservative government's move to a five-member all-parliamentary review committee, which removed the added filter of non-partisan, public-interest expertise.[256] Nonetheless, despite some criticisms, the selection process in these two latest appointments did proceed as expected, and does suggest that the 2006 appointments process will continue to be used in the future, despite the absence of any formal legislation setting out these reforms.[257]

Where did the provinces go?

In comparison to the second time period (1949-1992), there was notably little involvement by the provinces in reform discussions, and the process that has now emerged gives no special place to the provinces in the production of a shortlist of judicial nominees. This limited role stands in marked contrast to the reforms considered during the constitutional negotiations of the second period, and have developed despite provincial efforts to increase their role in the appointments process.

In 1999, for example, Ontario's Progressive Conservative government called for a provincial say in the appointment of Supreme Court justices.[258] In a letter to federal Minister of Justice Anne McLellan, Ontario Intergovernmental Affairs Minister Norm Sterling wrote that recent "decisions of the Supreme Court of Canada have increasingly

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[255] "Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices (Transcript)," http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32665.html; The Canadian Press, "Quebec Law Group Questions Supreme Court Pick," CTV.ca, http://www.ctv.ca/CTVNews/Canada/20111018/quebec-bar-supreme-court-judges-111018/.

In the previous Parliament, NDP MP Yvon Godin had introduced Bill C-232, "An act to amend the Supreme Court Act (understanding the official languages)," which would have required all Supreme Court justices to understand both French and English without the aid of an interpreter. Though the Conservative minority government opposed the bill, it was passed by the House of Commons; however, when Parliament was dissolved for the 2011 election, the bill had only made it to second reading in the Senate. Another important development for understanding the NDP's defense of a bilingual bench is the fact that the 2011 election had the party win an historic fifty-nine of Quebec's seventy-five seats.

[256] Lorne Sossin, "Picking Canada's Judges Injudiciously," *The Globe and Mail*, 18 October 2011; Jacob S. Ziegel, "The Law Is Too Important to Leave to Politicians," University of Toronto, Faculty of Law, http://utorontolaw.typepad.com/faculty_blog/2011/05/prof-jacob-ziegel-the-law-is-too-important-to-leave-to-politicians.html.

[257] On the importance of constitutional conventions in Canada, see Andrew David Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto; Oxford: Oxford University Press, 1991).

[258] Alberta, British Columbia, and Manitoba publicly noted their support of the letter sent by Minister Sterling.

shifted toward determining social and economic policy…[d]ecisions that have such effects are not in accordance with the public's understanding of the respective roles of the legislators and the judiciary in our parliamentary and legal systems."[259] This letter followed two particularly controversial decisions made by the court that year: *M v. H*,[260] which ruled that family law must include same-sex couples; and *R. v. Marshall*,[261] which recognized certain fishing rights of Aboriginal peoples in Canada. The response by McLellan was simply to note that the provinces were already consulted during the selection process.[262]

Further, the principle of provincial participation was endorsed by all provinces in 2004. The Council of the Federation (COF) agreed to form a committee of ministers to "develop new models for selecting individuals to serve in key national institutions such as the Senate of Canada and Supreme Court of Canada, to ensure that provincial and territorial interests are adequately reflected and accommodated."[263] To date, however, the COF has not put forward a new model, nor issued a formal response to the most recent changes to Supreme Court appointments process.

How can we account for the marked difference in the provinces' role in reform between the second and third time periods? In both periods, political actors mobilized, at least in part, in reaction to a series of controversial Supreme Court decisions. While the entrenchment of the Charter meant that the types of cases heard by the court changed between these two periods, this should not have necessarily resulted in less interest concerning Supreme Court appointments from the provinces. After all, when the Charter was enacted, many critics, including the provinces, anticipated that it would prove to be a nationalizing instrument – homogenizing public policy and limiting federal diversity.[264]

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[259] John Ibbitson and Steven Chase, "Ontario Joins Alberta: Rein in Top Court Give Provinces a Say in Picking Judges, Sterling Asks in Letter to Mclellan," *The Globe and Mail*, 25 October 1999.
[260] *M. v. H.*, 2 S.C.R. 3 (1999).
[261] *R. v. Marshall*, 3 S.C.R. 456 (1999); *R. v. Marshall*, 3 S.C.R. 533 (1999).
[262] Brian Laghi and Kim Lunman, "Justice Minister Defends Process of Nominating Supreme Court Judges Provinces' Advice Sought in Judicial Appointments, McLellan Says," *The Globe and Mail*, 26 October 1999.
[263] Council of the Federation, "Report and Decisions," Council of the Federation, http://www.councilofthefederation.ca/newsroom/newsroom_2004.html. (Vancouver: Council of the Federation, 24 February 2004).
[264] See for example, Alan C. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal; Buffalo: McGill-Queen's University Press, 1992); Peter W. Hogg, "Federalism Fights the Charter," in *Federalism and Political Community: Essays in Honour of Donald Smiley*, ed. David P.

Rather, what seems particularly remarkable about this third time period is the degree to which provincial calls for reform were marginalized.

What explains this difference? While the anticipated background factors leading to reform were present in both periods, differences in the political triggers (or lack thereof) existed. The absence of a catalyzing political trigger in this third period can be accounted for, in large part, by the choices of federal political leaders. For example, while the 1995 Quebec referendum – which saw Quebec sovereigntists come within less than a percentage point of victory – appears a very clear opportunity for the 'threat to political stability' trigger to come into play, the mega constitutional politics of the second time period did not resume.[265] It was the federal government's approach to federal-Quebec relations in the wake of the referendum that closed the door on constitutional reform. Rather than engage in a new round of constitutional politics in an effort to bring Quebec into the constitutional fold, the federal government focused on a 'Plan B' strategy that involved clarifying the process and implications of Quebec secession and challenging sovereigntists' assumptions on these matters.[266] Thus, whereas in the second period, the 'threat to political stability' trigger created space for the provinces to play a major role in constitutional agenda setting, the third time period had no clear trigger that facilitated court reforms favouring the provinces. No longer capable of placing judicial selection reform on the political agenda, the provinces' preferences became part of the larger background noise, along with other interested actors including the media, academics, legal interest groups, and federal opposition parties.

Shugarman, Reginald Whitaker, and Donald V. Smiley (Peterborough, Ont.: Broadview Press, 1989); Knopff and Morton, *The Charter Revolution and the Court Party*; Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal; Buffalo: McGill-Queen's University Press, 1995); Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal; Buffalo: McGill-Queen's University Press, 1996). But see Jeremy A. Clarke, "Beyond the Democratic Dialogue, and Towards a Federalist One: Provincial Arguments and Supreme Court Responses in Charter Litigation," *Canadian Journal of Political Science/Revue canadienne de science politique* 39, no. 2 (2006); James B. Kelly, "Reconciling Rights and Federalism During Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999," ibid.34, no. 02 (2001).

[265] Indeed in an effort to swing the vote to the federalist side on the eve of the referendum, Prime Minister Chrétien committed to recognizing Quebec as a "distinct society" and to not undertake any constitutional changes affecting Quebecers without their consent.

[266] 'Plan B' initiatives included the *Secession Reference* (1998) and the ensuing Clarity Act, 2000.

Analysis

Despite numerous and sustained calls for judicial appointments reform during this third time period, the changes initiated by the Martin government and continued by the Harper Conservatives did not formally displace any of the existing rules governing appointments to the Supreme Court. Save for a few technical requirements set out in the Supreme Court Act, the prime minister remains free to appoint any person he or she may consider most appropriate. Why, then, did the Supreme Court's appointments system remain formally unmodified?

As anticipated with the Judicial Politics Trigger model, a series of notable Supreme Court decisions and judicial appointments created interest in reform. However, in contrast to previous time periods, these interests focused on the court's role in a post-Charter universe. While the extent to which the Charter of Rights and Freedoms has moved Canada from a country governed under "constitutional supremacy" to one of "judicial supremacy" remains a point of contention, it is clear that the Charter's introduction has fundamentally altered and expanded the role of the Supreme Court. Calls to reform the court's appointments system, however, garnered little reaction from the federal government early on in this time period. This is by no means surprising. Under the political conditions faced during Prime Minister Chrétien's tenure – in which his political power could be viewed as reasonably secure – there existed little political incentive to formally reform the judicial appointments process. The federal government's relative political security is useful for understanding its approach with the provinces. While provincial leaders continued to seek reforms to the judicial selection process during this third time period, these calls were never taken up by the federal government. Nonetheless, despite the impasse imposed by the Liberals during Chrétien's tenure, small informal changes to the process can still observed – in particular, the continued slow diversification of the court's bench.

In addition to the provinces, calls for judicial appointments reform were taken up by federal opposition parties, the media, and academics. While the convergence of political views on reforming the court's appointments system during this period can be traced to the entrenchment of the Charter, efforts by federal parties in particular can also be understood as part of a larger push for government accountability that has become one

of, if not the, dominant political ideas in Canada today.[267] Paul Martin's commitment to review appointments to the Supreme Court was part of a larger, more general promise to reform appointments to other key positions, including heads of crown corporations and agencies.[268] Likewise, in the Conservative's 2006 election platform, accountability was one of its key policy planks and included establishing a public appointments commission that would oversee appointments to government boards, commissions, and agencies.[269] Following the party's election, the public appointments commission was a highlight of the Conservative's Federal Accountability Act, legislation created in response to the sponsorship scandal. However, when a parliamentary committee voted against Harper's choice for commission chair, the entire initiative was scrapped.[270] Thus, while actual reforms to address government accountability have been few, the Supreme Court's appointments system was part of a larger overarching narrative concerning government accountability.

Despite their lack of legislative formality, the changes to the Supreme Court's appointments process introduced by the governments of Martin and Harper are certainly the most significant changes to the appointments process in the court's history. The question might reasonably be asked why these changes took the form of informal rather than formal reform? The Judicial Politics Trigger model anticipates that actors will choose informal over formal reforms for two possible (sometimes interacting) reasons: (1) out of an interest to maintain formal control over the appointments process, and/or (2) because institutional rules create great enough barriers that formal reform is impractical. The Chrétien regime remained uninterested in formal reforms, noting that the system in place resulted in the selection of excellent appointees. In this instance, then, an interest in maintaining formal control over the appointments process appeared a determining factor. For the Martin and Harper governments, which both expressed interest in reforming the judicial appointments process, the institutional rules in place help us to understand the absence of formal reforms. As the NDP's dissenting position in the JUST Committee's

[267] Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability."
[268] Canada. Privy Council Office, "Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform."
[269] Conservative Party of Canada, "Stand up for Canada, Federal Election Platform," (2006).
[270] Kady O'Malley, "Did They Have a Choice? A Look at the Conservatives' Recent Patronage Appointments," http://www.macleans.ca/canada/features/article.jsp?content=20070207_175153_6228.

2004 report highlights, the constitutional status of the Supreme Court, including its appointments process, remains unclear, and this ambiguity has almost certainly reduced the likelihood that a government will attempt to formally amend the process via legislation, lest it provide fodder for a constitutional challenge. In addition to this constitutional ambiguity, between 2004 and 2011 Canada experienced three consecutive minority governments, which meant that had legislation on judicial appointments been presented, the support of at least one opposition party would have been needed, a requirement that could hardly be guaranteed. Further, the Harper government's experience during the appointment process of Justice Cromwell in 2008 illustrates well why a government would want to retain formal authority over Supreme Court appointments. Consequently, without a major political trigger, the strenuous institutional rules required for reform make the formal modification of the Supreme Court's appointments system unlikely.

Altogether, the federal government's ability to modify the appointments process without formally displacing any of its own powers over judicial selection is key to understanding the Supreme Court appointments system, and is very much a product of the initial choices made by Canada's constitutional framers and later governments' failures to entrench the Supreme Court's appointments system in the constitution. In understanding the development of incremental changes in this third time period, what appears critical is that all parties acknowledged that the Supreme Court's work post-Charter had changed the institution, and as a consequence the appointments process should be adjusted accordingly. Between the two later time periods considered for the Canadian case, an ideational shift can thus be observed in terms of the key reasons articulated in favour of judicial selection reform: whereas in the second time period, principles of federalism drove reform discussions, in this third period, concerns relating to the principles of public transparency and political accountability became dominant. The gradual evolution of the informal criteria used to select Supreme Court justices and changes to the consultation process seem to reflect a desire on the part of political actors' to maintain public confidence in the judiciary.

The High Court of Australia

Introduction

As with its Canadian counterpart, the High Court of Australia has seen its profile rise considerably in the past few decades. Interest in the court's appointments process has received greater attention as well, with state governments, legal groups, academics, and the media all suggesting ways for improvement. However, in contrast to Canada, which has moved toward a system of judicial appointments that (when followed) provides some checks on executive power, recent reform efforts in Australia have left the High Court largely untouched. While until recently the countries' respective appointments processes have followed a remarkably similar trajectory, these latest developments have set the two courts apart.

The evolution of the High Court's system of judicial appointments will be divided into three time periods: 1903-1949, 1949-1987, and 1987-2011. As in the previous chapter on Canada's Supreme Court, close attention is paid to political context and the characteristics of the court during each period. In particular, the relationship between the court's decision-making, judicial appointments, and reform efforts during each period are highlighted.

The chapter thus begins with a brief review of the High Court's place in the constitutional debates of the 1890s. Starting our analysis at the court's founding allows us to consider how the initial choices of Australia's constitutional framers have influenced later debates surrounding reform. As will be seen, adoption of the British judicial appointments system, in combination with a high threshold for constitutional amendments, has influenced how later reform efforts have developed, most importantly by placing control over both appointments and reform of the process with the commonwealth government. In addition to the importance of these institutional rules, informal reforms have also played a critical role in the development of the High Court's judicial appointments system. Regardless of position or political preferences, political elites in Australia have demonstrated a commitment to maintaining confidence in the judicial appointments system, insisting in particular that judicial appointments be merit-based. Over time, issues such as state participation, representation, and consultation, have also emerged as criteria seen as necessary for maintaining confidence in the appointments system. While the political contexts in which these issues have developed vary, the work

of the High Court appears to consistently be a background factor moving discussions of reform forward.

As this chapter argues, these normative expectations play a critical role in understanding reforms to the High Court's appointments process, as they help to frame the actions of both the actors making High Court appointments and those seeking reforms. In response, different commonwealth governments have at times accommodated, both through formal and informal means, these new criteria. However, while additional consultation requirements have been layered onto the appointments process over time to address shifts in normative expectations, these relatively small changes have not acted to displace the system's formal rules or power structure. Importantly, the commonwealth government's control over both judicial appointments and constitutional amendments, have meant that the commonwealth's ultimate authority over the selection of judges has never been seriously threatened.

Foundations: The Constitutional Debates (1890-1900)

The history of the Australian federation has been well documented and need not be examined in detail here.[271] It is worth noting, however, that during the constitutional conventions of the 1890s, which would come to form Australia's constitution, it was clearly understood and accepted that the country would inherit many of the institutions and conventions of Britain's Westminster-style of parliamentary government, while also adopting a federal system. In trying to form a system of government that included both the requirements of monarchy and the practicalities of federalism, the Australian framers looked in particular to the constitutions of the United States, Canada, and Switzerland for guidance. While Canada's British North America Act, 1867, with its combination of parliamentary government and federalism, was the most obvious choice, the Australian framers were put off by its centralist features, particularly the federal government's powers of reservation and disallowance. Instead, the United States' constitution, which followed a notion of co-ordinate federalism, proved the most influential model for

[271] For just a few examples, see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge, UK; New York: Cambridge University Press, 2009); L. F. Crisp, *Australian National Government*, 5th ed. (Melbourne, Australia: Longman Cheshire, 1983); J. A. La Nauze, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1972).

Australian drafters. Given this mixture of British and American influences on its political institutions, some scholars have described Australia as having a "Washminster" system.[272]

Because Australia was to be a federation in keeping with the American model, there was little question that judicial review would be part of the High Court's role. According to Edmund Barton, who would go on to become Australia's first prime minister, the court would be a "continuous tribunal of arbitration" and one of "the strongest guarantees for the continuance and indestructibility of the Federation."[273] During constitutional debates, the framers viewed judicial review as an important tool for keeping both levels of government within their jurisdictional boundaries, and indeed from its beginning, the court decided constitutional cases as a matter of course.

Given the potentially considerable powers that judicial review would entrust to the court, there was unsurprisingly some concern amongst delegates, and the anticipated political role of the High Court did at times come to the fore. Delegate Patrick Glyn, for example, proposed that the High Court consist of a chief justice, as well as the chief justices of the respective states, until such time as parliament provided otherwise.[274] In part, Glyn's proposal stemmed from his understanding of the American case and the inherently political nature of judicial appointments and constitutional interpretation as experienced there.[275] To balance this, he argued that the High Court should be reflective of the federal nature of the constitution with state representation on the court's bench. Despite Glyn's concerns of a centralized bias amongst a federally appointed High Court, his proposal was defeated by a vote of 29 to 9.[276] On the issue of the bench's number, delegate Richard O'Connor warned that the true threat was not that the judicial

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[272] Elaine Thompson, "The 'Washminster' Mutation," in *Responsible Government in Australia*, ed. Patrick Moray Weller and Dean Jaensch (Richmond, Vic.: Drummond Pub. on behalf of the Australasian Political Studies Association, 1980).

[273] Australia, "Official Report of the National Australasian Convention Debates Adelaide, March 22 to May 5, 1897" (Adelaide, 1897), 25.

[274] "Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20th January to 17th March, 1898" (Melbourne, 1898), 265.

[275] "Official Report of the National Australasian Convention Debates Adelaide, March 22 to May 5, 1897," 944.

[276] "Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20th January to 17th March, 1898," 285. Though Galligan, refers to this proposal as a "penny-pinching scheme," having more to do with financial interests than federalist concerns. See Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (St. Lucia; New York: University of Queensland Press, 1987), 60.

appointment process might be manipulated, but rather that the number of justices on the court would be allowed to dwindle. Thus the minimum number of three justices was proposed and accepted.[277] It was the status of the Judicial Committee of the Privy Council (JCPC or Judicial Committee), however, that proved to be the most divisive issue among delegates. While a majority preferred that the High Court be Australia's highest and final court of appeal, a vocal minority remained supportive of the JCPC.[278] The majority's desire to have the High Court as Australia's final court of appeal, however, was not enough and, like in Canada, the proposed restrictions on appeals to the JCPC were removed before the British Parliament would agree to formally enact the constitution in 1900.

It is important to note that despite these examples of concern over the High Court, the judiciary was by no means one of the most contested or important topics of the constitutional debates. The judiciary committee of the 1897 convention was the smallest of the three committees and, according to Brian Galligan, carried out its work with the least trouble.[279] Nonetheless, it is clear that the political importance of the High Court was, if not well understood, then acknowledged by convention delegates, and concerns regarding composition, appointment, and jurisdiction did arise.

When the court was eventually founded in 1903, its jurisdiction and method of appointment were, in their final form, remarkably similar to that of Canada's Supreme Court. The framework for Australia's federal judiciary, including the High Court, is set out in chapter three of its constitution. The power to appoint justices of the High Court and other federal courts is described in Section 72 and bestows the power to the Governor General in Council. As in Canada, such appointments are, in practice, made by the cabinet on the recommendation of the attorney general and prime minister. As will be discussed later in the chapter, the only statutory requirement concerning appointments to the High Court is that the attorney general consult with the state attorneys general before an appointment is made.[280] Formal criteria for High Court appointments are also few. Since a successful constitutional referendum in 1977, High Court appointees must be less

[277] Australia, "Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20th January to 17th March, 1898," 286.
[278] Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 56.
[279] *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 55.
[280] This provision is located in Section 6 of the *High Court of Australia Act 1979*.

than 70 years of age, and via section 7 of the High Court Act 1979, must have been either a judge of a court created by Parliament, state or territory, or been enrolled as a barrister, solicitor, or legal practitioner of the High Court or supreme court of a state or territory for not less than five years.

With the court's constitutional founding and formal appointments process set out, we can now turn to the topic of judicial appointments during the early years of the court.

Period 1: The High Court's Early Years (1903-1949)

The High Court was intended to be an important political institution from its establishment; however, its position was further enhanced by the appointment of three prominent constitutional framers, Samuel Griffith, Edmund Barton, and Richard Edward O'Connor, as its founding members. As Galligan notes, this meant that the High Court did not "…serve a long apprenticeship to the more august imperial tribunal of the JCPC as the Canadian Supreme Court had done."[281] Yet despite the High Court's auspicious start, it was not without detractors, most significant among them, the Australian Labor Party.

The Labor Party was formed in the late 19th century with the purpose of representing the interests of the labour movement.[282] In the years since, Labor, along with the Liberal Party of Australia, have become the dominant forces in Australia's party system.[283] At the time the constitution was being drafted, however, Labor had yet to gain prominence at the federal level. Consequently, in the early years following federation, the party was confronted with a constitutional framework it viewed as ill-suited to its governing ambitions. In response, Labor began calling for constitutional change as early as 1908, including the abolition of federalism. The party's frustrations with the constitution were famously expressed by future Labor prime minister, Gough Whitlam, in 1957 as "the Constitution versus Labor."[284]

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[281] Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 80.
[282] John Faulkner and Stuart Macintyre, *True Believers: The Story of the Federal Parliamentary Labor Party* (Crows Nest, NSW: Allen & Unwin, 2001).
[283] Since Labor's formation, Australian party politics has been organized around the opposition between Labor and "non-Labor." With its founding in 1944, this non-Labor role has been filled by the Liberal Party.
[284] Gough Whitlam, *On Australia's Constitution* (Camberwell, Australia: Widescope, 1977).

With its power of judicial review, the High Court also became a source of frustration for the Labor Party. In its first two decades, the court's decisions consistently sided with the monopolists and cartels that Labor desired to regulate.[285] In doing so, the court drew from American constitutional theory, relying on implied immunities and prohibitions to restrict the reach of federal powers.[286] While such accommodation to state sensitivities roused little political response in the first few years of federation, as the Labor Party emerged as a strong force at the national level – eventually forming a majority government in 1910 – decisions by the High Court came under increased political scrutiny.

According to Galligan, this early tension between the Labor Party and the High Court's federalism jurisprudence led to two notable developments for the court. First, the importance of judicial appointments became apparent for Labor early on. Following the death of Justice Richard O'Connor in 1912, the Labor government chose to expand the number of judges on the bench from five to seven, opening space for three new appointments. While the expansion of the bench was not by itself particularly contentious, the political costs of the appointments were significant. In particular, the selection of Albert Bathurst Piddington proved extremely controversial. Before his nomination, Piddington had been asked about his views on the federal division of powers by a Labor adviser and in reply, Piddington had identified himself as sympathetic to the commonwealth government's supremacy. This exchange eventually became public knowledge and unsurprisingly aroused a great deal of criticism, with the New South Wales and Victorian bar associations choosing to withhold congratulations for both Piddington and another nominee on their appointments. Under intense criticism, Piddington eventually resigned before taking his seat on the court.

This early experience is telling in terms how appointments were evaluated by the legal establishment and opposition parties. While judicial nominees could have political connections, the overriding criterion for making a selection was to be merit. Thus while it might be acceptable to appoint a candidate believed to be sympathetic to the government's own legal or political philosophy, such considerations could not appear to

[285] Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 90.
[286] "Victorian Bar Association Criticises Appointments," *Barrier Miner* 1930, 1-9.

have played a determinative role. For example, when the governing Liberal Party appointed its attorney general, Garfield Barwick, to the High Court in 1964, the appointment was generally praised because no one could dispute the legal expertise and accomplishments Barwick brought to the role. Following the political fallout of the Piddington appointment, Labor also fell in line with this view on what constituted a meritorious appointment, committing itself to choosing technical, allegedly apolitical experts to the High Court.[287] However, despite taking an apolitical tack, High Court appointments by Labor governments continued to receive occasional criticism. In 1930, the Scullin Labor government endured much public disapproval for its appointments of H. V. Evatt and Edward McTiernan, both Labor politicians. The controversy was such that the Bar of Victoria unanimously passed a resolution stating the appointments raised "the gravest apprehension for the future administration of justice."[288]

In part, the controversy over Labor's early appointments can be explained by the traditional makeup of Australia's legal community. Writing in 1967, Geoffrey Sawer observed that non-Labor parties did not face the same problem of being perceived as making deliberately "political" appointments to the bench. Instead they were equipped with a ready-made group to select from whose "professional eminence single[d] them out for judicial preferment," and who were "nearly all as a matter of course supporters of non-Labor parties or apolitical men with middle-of-the-road or conservative temperaments."[289] A narrower set of appointment criteria that favoured senior barristers, then, placed fewer political constraints on the Liberal Party in comparison to Labor.

Altogether, these early Labor experiences help to highlight that normative expectations concerning what constitutes an appropriate appointment – i.e. one based on merit – were a constraining factor in selecting High Court nominees. For Labor this was particularly challenging given that the ranks of the senior legal profession had a paucity of members sympathetic to its own political views, but it appears a criterion it nonetheless attempted to respect.

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[287] *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 94.
[288] "Bar Opposes High Court Appointments," *The Register News-Pictorial*, 23 December 1930.
[289] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne: Melbourne University Press, 1967), 64.

The second important change that paralleled the rise of the Labor Party was the High Court's own method of constitutional interpretation. As previously noted, the court's original bench of Griffith, Barton, and O'Connor approached federalism cases through a doctrine of immunities, a rationale that treated both the commonwealth and the states as sovereign within their respective fields. However, by the time of the departure of the court's last original member in 1920, this dual federalism approach had been dropped and the techniques and public rhetoric of "strict and complete legalism" introduced. As practiced in Australia, legalism is a method of judicial review that approaches adjudication by interpreting the constitution through a reading of the "natural sense or plain meaning of its provisions."[290] With legalism, neither the context of the case, nor its consequences, are made part of the decision-making process; instead, the technicalities of the challenged law and constitution are meant to drive judicial deliberations.

The pivotal case articulating this approach to judicial interpretation came in 1920 with *Engineers*.[291] While the details of the case are not essential for our current purposes, its key constitutional question concerned whether the commonwealth's power to make laws with respect to conciliation and arbitration of industrial disputes could be binding on the states. In making its decision, the court's majority sided with the federal government, finding that it was a valid exercise of its power. Turning away from the immunities doctrine, the majority held that the meaning of the constitution must be read "naturally" and in "the light of circumstances in which it was made."[292] In doing so the High Court arguably adopted an approach to judicial review that was more difficult for critics to censure for being overtly political, and thus distanced itself from some of the political divisiveness that often accompanies division of power cases. Of course, to what, if any, extent legalism is actually apolitical is a contested issue within Australia's legal profession. While legalism has come under increasing scrutiny since the 1980s, at the time of *Engineers*, it worked to help guard the legitimacy of the court.

The High Court's decision in *Engineers* had important consequences not only in terms of how the court approached future cases, but also for the commonwealth's jurisdictional powers. A literal reading of the constitution, combined with the view that

[290] Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 31.
[291] *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd*, 28 CLR 129 (1920).
[292] Ibid., 152.

its terms should be interpreted broadly and regardless of impact to the states, resulted in an expansive interpretation of the commonwealth's powers. To be clear, this is not to claim that the court alone was responsible for moving Australia towards a more centralized federation.[293] Nonetheless, while taking measure of the causal contribution of the court is difficult, scholars of Australian federalism generally agree that the High Court was an important contributor to the centralization of the Australian federation. The court's development as a centripetal force is an especially important one for the purposes of this study, as it contributed to the states' frustrations both with it and the process of judicial selection.

From the *Engineers* case in 1920 until the *Uniform Tax* case in 1942,[294] the High Court was fairly consistent in expanding the powers of the commonwealth. Despite a number of important judicial decisions going against the Labor government later in the decade, the 1940s, as a whole, ushered in a period of "coercive federalism,"[295] where financial domination by the commonwealth led to growing incursions into the states' jurisdictions. To better understand this development, it is important to note that Australia has long faced a considerable vertical fiscal imbalance, with the states' jurisdiction over important services such as education and healthcare far exceeding their fiscal capacity. This imbalance came to a head in 1942 when the Curtin Labor government (1941-1945) brought in a uniform income tax to be collected by the commonwealth. With this policy, the federal government proposed to transfer funds to the states under section 96 of the constitution, but only if the states vacated the income tax field. The constitutionality of this policy was quickly challenged by a number of the states. In a critical decision for federal-state relations, the High Court held that the scheme was indeed valid, a decision that was substantively upheld by the court again in 1957.[296]

The commonwealth's push into state jurisdiction would not be completely without boundaries. Entering into the post-war environment, the High Court began to strike down many of the Chifley Labor government's (1945-1949) attempts to nationalize services,

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[293] Bruce W. Hodgins *et al.*, eds., *Federalism in Canada and Australia: Historical Perspectives, 1920-1988* (Peterborough, Ont: Frost Centre for Canadian Heritage and Development Studies, Trent University, 1989).
[294] *South Australia v. Commonwealth*, 65 CLR 373 (1942).
[295] Russell L. Mathews, "Innovations and Developments in Australian Federalism," *Publius: The Journal of Federalism* 7, no. 3 (1977).
[296] *Victoria v. Commonwealth*, 99 CLR 575 (1957).

including banking[297] and airlines,[298] forcing the party to withdraw its nationalization plank and moderate its plans for a state-run welfare system. Labor's frustrations with the High Court stemming from these decisions led some members of government to push for a "High Court Reconstruction Plan" in 1945, which would have increased the membership of the bench from six to nine. Despite a motion for a nine judge bench being passed by a majority of cabinet, Attorney General H. V. Evatt was able to sway members to amend their proposal, thus making sure that the bench would only increase by one member, bringing it back up to its previous seven.[299] The appointment of Sir William Webb – a judge with over twenty years of experience – to the new seat in 1946, demonstrated Labor's continued commitment to appointments based on technical qualification, though the incident also highlights the party's considerable frustrations with the court. In the aftermath of these High Court decisions and struggling to deliver on its policy promises, the Labor government was defeated in the December 1949 election, a loss that would keep the party in opposition for the next twenty-three years.

As will be discussed in the next section, the court's development as a centralizing force was an important contributor to the states' frustrations both with it and the process of judicial selection. However, for now it is worth taking stock of the High Court's development and its method of judicial appointment up until Labor's defeat in 1949. Looking back to the constitutional debates of the 1890s and the court's first two decades, there is little question that the High Court was anticipated to, and did, play an important role in Australian governance. Despite this, relatively little concern focused on the judicial appointments process to the High Court. While brief consideration was given to the composition of the bench and whether state representation should be included, it was widely understood that Australia would inherit the British judicial appointments system. During this time, controversy over judicial appointments stemmed not from the process itself, but particular controversial appointments. Early on, it became accepted convention that High Court appointees be selected firstly based on merit. While at times decisions that went against the Labor government made the balance between this convention and

[297] "Innovations and Developments in Australian Federalism."
[298] "Sir William Webb," *Cairns Post*, 13 April 1946.
[299] As part of austerity efforts during the Depression, a seat on the High Court was not filled in 1931, decreasing the bench from seven to six.

political interests especially challenging, no serious consideration was given to judicial appointments reform during this time period.

Period 2: The High Court and the Challenges of Federalism (1949-1987)

While commonwealth-state issues did not produce the same intensity of discord following the electoral defeat of Labor in 1949 – in part due to the unprecedented growth and prosperity of Australia in the 1950s and 1960s – tensions did reassert themselves as state budgets became increasingly strained during this second time period. The Liberal governments under Sir Robert Menzies (1949-1966) and John Gorton (1968-71), while less aggressive in their federal policies toward the states, nonetheless allowed for a gradual increase in commonwealth responsibilities, a development achieved in large part through increased conditional funding to the states. Between 1959-1972, for example, conditional grants to the states quadrupled, while general revenue grants increased by less than 200%.[300] Though funding to the states did grow over this period, their financial position in comparison to the federal government was weakened. Between 1960 and 1970, the proportion of personal income tax received by the states fell from 75% to 58%.[301] Thus, by the end of the 1960s, disputes over public finances had become particularly acrimonious, with the states articulating an increasing dissatisfaction with their dependent financial status; a view only aggravated by unfavourable High Court decisions on state stamp duties.[302]

Australian Constitutional Conventions

It is under these conditions that in 1969 the government of Victoria suggested a constitutional convention for the states be convened, the first major review of the constitution since the 1890s.[303] By 1972, a steering committee of state attorneys general

[300] Russell L. Mathews and W. R. C. Jay, *Federal Finance: Intergovernmental Financial Relations in Australia since Federation* (Melbourne: Nelson, 1972), 239.
[301] Jeffrey Scott, "Australian Federalism Renewed," in *Australian Federalism: Future Tense*, ed. Allan Patience and Jeffrey Scott (Melbourne; New York: Oxford University Press, 1983), 6-7.
[302] *Western Australia v. Hamersely Iron Pty. Ltd.*, 120 CLR 42(1969); *Western Australia v. Chamberlain Industries Pty Ltd.*, 121 CLR 1(1970).
[303] Reviews had, however, been initiated by the federal government in the past, including, the Royal Commission on the Constitution in 1927, and the Joint Committee on Constitutional Review, which reported for the last time in 1959.

had met to consider the convention's agenda, with the commonwealth joining the group later on that same year. The work of the convention would eventually span well over a decade, meeting six times in total between 1973 and 1985.[304]

The early work of the convention was complicated, however, by the federal Labor Party's election victory in December 1972. Before the first meeting of the convention had even assembled in September 1973, a number of Prime Minister Gough Whitlam's policies, including a proposal to eliminate appeals to the JCPC, had already aggravated the states.[305] While Labor's "new federalism" approach did acknowledge the existence of Australia's vertical fiscal imbalance insofar as it provided more federal funds to the states, these transfers came in the form of conditional grants that, in practice, actually expanded the federal government's influence across a wide range of policy areas, including health, education, and welfare.[306] To compare, while the previous Liberal government had increased conditional funding from 21% to 32% of total commonwealth grants between 1949 and 1972, from 1972 to 1975, Labor increased these grants from 32% to approximately 50%.[307]

While the High Court was by no means the sole or even primary concern of the states in initiating discussions on constitutional reform, the court's role in commonwealth-state relations did mean that the appointments process was on the agenda from the first meeting of the convention in September 1973, with the Victorian delegation arguing that appointments should allow for state participation.[308] This view is summarized well in the opening remarks of New South Wales premier, Robert Askin, who noted:

> Through the passage of time the High Court, in the exercise of its judicial function, has altered the power balance between the States and the

[304] These plenary sessions were attended by delegates from commonwealth, state and territory parliaments, local government representatives, as well as observers from the general public.
[305] In 1973, state premiers called for the British prime minister to not allow appeals to the JCPC to be discontinued. See John O'Hara, "Doubts and Fears: The Premiers and the High Court," *The Sydney Morning Herald*, 4 June 1973.
[306] While there is general consensus amongst scholars that the federal government was able to further expand its powers during this period, in contrast, Campbell Sharman argues that this generalization has been exaggerated. See Campbell Sharman, "A Political Science Perspective," in *Australian Federalism*, ed. Brian Galligan (Melbourne, Australia: Longman Cheshire, 1989).
[307] Scott, "Australian Federalism Renewed," 7.
[308] Australia. Constitutional Convention. Judicature Sub-Committee, *Second Report to Standing Committee, May 1985* (Brisbane: Government Printer for the Convention, 1985), 29.

> Commonwealth. Although the bulk of legislative powers and, as a corollary, responsibility for the great range of community services still rests with the States, the bulk of financial resources required to maintain proper standards in existing services and to initiate new ones is in Commonwealth control.[309]

Following this meeting, four standing committees were established to consider recommendations and prepare reports to the executive committee. In the interim, the New South Wales Legislative Assembly struck a select committee to consider the High Court's appointment process in order to propose recommendations that would "ensure that such appointments are made in a more equitable and acceptable manner."[310] However, by the time the committee released its report in September 1975, political disagreement on a number of issues had reached a critical level, with four state Liberal governments and the federal opposition choosing to boycott the second constitutional meeting scheduled for that same month. The convention's work was further complicated by the federal Labor government's unexpected fall in November 1975. Consequently, the impact of the report by the New South Wales select committee appears minimal. Nonetheless, the report is an excellent means for understanding the states' view on the High Court and their reasoning for seeking judicial appointments reform.

New South Wales Select Committee on High Court Appointments (1975)

In setting out the reasons for why reforms to the High Court appointments system were needed, the New South Wales committee highlighted problems that in both principle and practice made a federally dominated selection process unacceptable. The report argues that the historical lack of state participation had allowed for an "artificial situation" to arise whereby the states whose laws were being interpreted did not have a say in the appointment of what was, in effect, their own appellate court.[311] Thus, the judicial appointments system suffered from a perceived legitimacy problem that by the

[309] Quoted in J. E. Richardson, "The Australian Constitutional Convention, Sydney, 1973," *The Australian Quarterly* 45, no. 4 (1973): 92.
[310] New South Wales, "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia," (Government Printer, 1975), 7.
[311] "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia," (Government Printer, 1975), 13.

report's account could only be remedied by the inclusion of the states in the selection of High Court justices.

The report's primary concern, however, centered on the effects of the High Court's constitutional cases and the role played by the judicial appointments process. On this point, the report is quite clear. After providing a summary of constitutional cases that had gone against the states, it concludes, "there now exists a strong case for the view that the High Court's decisions especially in taxation have been shown to have almost destroyed the independence of the states and with it, federalism."[312] The overwhelming number of judges appointed from New South Wales and Victoria is presented as a contributing factor to the court's centralist leanings. (This regional imbalance, in fact, still holds true: a High Court justice has never been appointed from either South Australia or Tasmania.) These underrepresented states, the report notes, "tend to be more distrustful of the central government, as well as the larger States."[313] Had there been more appointments from these smaller states, the reasoning follows, the High Court would have been less likely to take a centralist tack.

In considering possible reforms to the system of judicial appointments, the committee held that any proposal must meet two basic criteria: 1) practicality, and 2) an increased say for the states.[314] The criterion of "practicality" is an especially interesting one. The report makes clear that however attractive a proposal may be in principle, it must be avoided if it is unlikely to be adopted. The report signals its agreement with the submission of Professor Leslie Katz of the University of Sydney, who argued that the committee cannot canvas methods of judicial appointment as though it were still in the 1890s. Katz goes on to say:

> The inertia created by almost seventy-five years of operation of the present Constitution would be impossible to overcome unless there were some real threat of the break-up of the federation and there is not. Therefore, any recommendation for change, if it is to be acceptable to

[312] "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia," 16.
[313] "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia," 17.
[314] "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia," 16.

> the electorate, must not represent a radical departure from the recent method of High Court appointments.[315]

Importantly, in order to modify the High Court's appointments process via constitutional amendment, the Australian states faced the doubly challenging prospect of needing both the agreement of the commonwealth, as well as a successful national referendum, which required a majority of votes both overall and in four of the six states.[316] That a referendum vote requires the approval of both the commonwealth's lower and upper houses provides a clear tactical advantage to the federal government. While the states must first obtain the federal government's consent for a constitutional amendment to move forward, this same requirement does not apply to the commonwealth.[317] This advantage is highlighted by the fact that during this period of constitutional discussion, the Whitlam government put forward four referenda issues in May 1974 (simultaneous elections for both federal houses; mode of constitutional alteration; democratic elections; and commonwealth powers for local government finance) that were opposed by all non-Labor governments. While all four proposals failed, the fact that they could be put forward at all is telling in terms of the states' control over the constitutional agenda.

Thus, while the judicial appointments process proposed in Canada's 1971 Victoria Charter was viewed favourably in the committee's report, it was ultimately dismissed because a process in which the states had the dominant role in judicial appointments was viewed as an almost certain non-starter for the commonwealth.[318] In his submission to the committee, the president of the New South Wales Bar Association, and former commonwealth attorney general, T.E.F. Hughes, presented the challenge for the states bluntly, "[n]o government in Canberra, whatever its political colour, will be

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[315] Ibid.
[316] Detailed in chapter eight of Australia's constitution, the double-majority referendum threshold has proven particularly difficult to meet: while forty-four referendums have been held, only eight have been successful.
[317] This is set out in section 128 of the constitution.
[318] New South Wales, "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia," 19.

disposed to surrender control or to permit any diminution of its control over federal judicial appointments."[319]

With this criterion of practicality in mind, the report ultimately recommended that High Court appointments continue to be made by the Governor General on the advice of cabinet. Added to this basic form was the requirement that appointments only be made after the recommendation of a majority of a proposed High Court Appointments Commission, which would be constituted by the attorneys general of all the states and the commonwealth attorney general. With this additional step of consultation, the states would be granted some say into High Court appointments; however, because the recommendation of the attorneys general would only be an advisory one, a constitutional amendment would not be required. While the format of a High Court Appointments Commission was not picked up in the final debates leading to reform in 1979, this ethos of practicality was. As will be seen, the states – well aware of their disadvantaged negotiating position – approached reforms with an eye to what was achievable, rather than ideal.

Pragmatic Change and the High Court (1979)

The timing of the release of New South Wales report meant that it was not considered by the Labor government prior to its dismissal in November 1975. The events leading up to this critical moment in Australia's political history, in which the Governor General removed the governing Labor Party and installed the opposition Liberals in its stead, are intricate and have been addressed in great detail elsewhere.[320] However, it is worth noting that the appointment of Attorney General Lionel Murphy to the High Court in February 1975 did play a role in these dramatic events. In contrast to Garfield Barwick, whose appointment to the bench while commonwealth attorney general generated relatively little controversy in 1964, Murphy's selection was condemned by the opposition and members of the media as being overtly and unacceptably political. Thus,

[319] "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia," 17.
[320] Jenny Hocking, *Gough: A Moment in History* (Carlton, Vic.: Melbourne University Press, 2008); Paul Kelly, *The Dismissal: Australia's Most Sensational Power Struggle, the Dramatic Fall of Gough Whitlam* (London; Sydney: Angus & Robertson, 1983); *November 1975: The inside Story of Australia's Greatest Political Crisis* (St Leonards, NSW, Australia: Allen & Unwin, 1995); Gough Whitlam, *The Truth of the Matter* (Harmondsworth; New York: Penguin, 1979).

as Malcolm Fraser's Liberal Party (1975-1983) assumed power, attention surrounding the High Court's appointments process was notably heightened. More importantly for the states' interests in judicial appointments reform, the Liberal Party entered government with an explicit commitment to the preservation of federalism.

Campbell Sharman notes that this openness to renewed commonwealth-state relations was both a reflection of the issues at play at the time and a means of repayment for political debts. The Liberal Party had relied heavily on its political allies at the state-level during the time of the previous Labor government and entered power "acutely aware of their political obligations to the states."[321] This change in government proved an important 'aversive' trigger and a welcome turn for the states' efforts in reforming the appointments process for the High Court. Meeting as a council of states soon after the dismissal of the Labor government, the four non-Labor state governments of New South Wales, Victoria, Queensland and Western Australia requested that they be consulted in all future judicial appointments.[322] Soon after, the issue of appointment reform was debated at the fourth plenary session of the Australian constitutional convention in 1978.

Similar to the report produced by New South Wales in 1975, delegates of the 1978 convention took a practical approach to reform. While the original motion proposed by Victoria during these debates called for a constitutional amendment guaranteeing state participation in the appointment of High Court justices, discussion quickly moved toward finding a more achievable approach to reform.[323] The convention debates are also similar to the 1975 report insofar as they make positive references to Canada's ongoing constitutional negotiations. On this point, a number of delegates make reference to and detail the Government of Canada's constitutional statement, *A Time for Action: Toward the Renewal of the Federation* (1978) and its accompanying draft bill, C-60. However, just as the 1975 report spoke positively of, but ultimately dismissed, the proposals set out in the Victoria Charter, debate moved away from this latest Canadian design in the interest of consensus. Instead, Western Australia proposed a motion that read as follows: "That it is desirable that a method of consultation be developed between the

[321] Campbell Sharman, "Fraser, the States and Federalism," in *Australian Federalism: Future Tense*, ed. Allan Patience and Jeffrey Scott (Melbourne; New York: Oxford University Press, 1983), 188-89.
[322] Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 195.
[323] Australia, "Official Record of Debates of the Australian Constitutional Convention Held at Parliament House Perth" (Perth, 26-28 July 1978), 165-67.

Commonwealth and States in relation to appointment of justices of the High Court of Australia."[324] In putting forward this motion, its sponsor noted that the amendment should not be looked at as a compromise, but "the best method of ensuring meaningful Commonwealth-States consultation."[325] Rather than seeing the motion's generality as a weakness, he believed it would allow for the particular method to be, "… settled by the passage of time to cover the various contingencies which may arise."[326] While a New South Wales delegate did put forward the proposal set out in the state's report, it was ultimately the former motion that was agreed to by both state and commonwealth delegates.

The principle of the motion was tested less than a year later with the retirement of High Court Justice Kenneth Jacobs in March 1978. Commonwealth Attorney General Peter Durack upheld his commitment to consult with the states before a judicial selection was made, and later in the year the consultation process was formally installed as part of the High Court of Australia Act 1979.[327]

While the states, in this instance, succeeded in formally guaranteeing their participation in the High Court's appointments process, it has only been on rare occasion that this obligation to consult has resulted in any meaningful constraints placed on the commonwealth's final choice. One notable exception occurred with the selection of Chief Justice Garfield Barwick's replacement in 1981. In the lead up to Justice Barwick's retirement, it became well known that sitting cabinet minister Bob Ellicott was interested in the position. While this scenario was predictably opposed by the federal Labor Party, it was also opposed by a number of non-Labor state governments, including Queensland, Western Australia, and Tasmania, as a result of Ellicot's past centralist stances as federal solicitor general and attorney general.[328] Ellicot was eventually passed over in favour of the non-contentious elevation of sitting justice, Harry Gibbs to the chief justice post. The following year, the appointment of Daryl Dawson to the High Court was reportedly

[324] "Official Record of Debates of the Australian Constitutional Convention Held at Parliament House Perth" (Perth, 26-28 July 1978), 167.
[325] Ibid.
[326] Ibid.
[327] Section 6 states: "Where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment."
[328] Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 198.

supported by five out of six states.[329] Despite these early examples of state participation, in general, the states have not viewed their role in the appointments process as an adequately influential one. The commonwealth, however, has proved unwilling to expand the selection powers of the states beyond the changes made in 1979 – a position that is illustrated clearly by the final meetings of the constitutional convention.

At the constitutional convention meeting in July 1983, Queensland put forward a motion for a constitutional amendment that would require High Court nominees to be appointed only after obtaining the concurrence of at least the majority of the state governments.[330] The motion was referred to the Judicature Sub-Committee, which later issued a report in May 1985. The report notes that while a majority of the committee's members viewed the 1979 changes to be inadequate, there was no consensus amongst delegates on the best approach to take. In particular, the practical challenges of obtaining a constitutional amendment meant that many delegates viewed Queensland's proposal skeptically.[331] As a result, the report failed to put forward any specific recommendations for reform of the High Court appointments process.

During the final plenary session of the convention in 1985, Queensland again presented its motion for greater state consultation. While Queensland's amendment was ultimately defeated, the vote was relatively close with twenty-nine voting in favour and thirty-eight voting against. The commonwealth's position is well-illustrated by examining the breakdown of this vote. While a majority of state delegates voted in favour (29 versus 26), all twelve commonwealth delegates, which included members of the Liberal and Labor parties, voted against the amendment.[332] A clear voting pattern can thus be discerned: while there was a split amongst parties at the state level, all federal delegates, regardless of party, voted against the proposal. This result conforms to the expectations of many state delegates – that the federal government (regardless of party) would be unwilling to concede meaningful power over High Court appointments via constitutional

[329] *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, 199.
[330] Australia. Constitutional Convention. Judicature Sub-Committee, *Second Report to Standing Committee, May 1985,* 33.
[331] *Second Report to Standing Committee, May 1985,* 9.
[332] All Labor delegates, both state and federal, voted against the motion, while those voting in favour were made up almost entirely of state Liberal delegates, with the addition of a number of state National Country Party members and independents. The breakdown of this vote is provided on page xli of the minutes of the constitutional convention (31 July 1985, Brisbane).

amendment.[333] This stands in considerable contrast to the Canadian example of the same time period, where both Liberal and Progressive Conservative governments were, at points, willing to devolve considerable powers to the provinces over Supreme Court appointments in exchange for the success of a larger constitutional package.

Period 3: The Mason Court and Beyond (1987-2011)

The end of this series of constitutional efforts coincided with the beginning of a new era for the High Court. Few would contest that Sir Anthony Mason's time as chief justice (1987-1995) was the most publicly visible and politically contentious period of the High Court's history to date. While an exhaustive review of the Mason court's jurisprudence is not required for our current purposes, importantly its work can be distinguished from that of its predecessors by having addressed questions concerning rights and freedoms, citizenship, representative and responsible government, indigenous culture and politics, and separation of powers to an unprecedented extent.[334] Also important was how the court approached its work. As put by Fiona Wheeler and John Williams, the Mason court was an agent of change both for the fact that it changed the law, but more significantly, because of the way it approached its task.[335] Whether assigned with the descriptor of "realist"[336] or "activist," the combination of cases of political consequence, and a new approach to legal reasoning, distinguished the Mason court from its predecessors. Consequently, a number of the court's decisions occupied the

[333] In 1985, Labor Prime Minister Robert Hawke made a final attempt at constitutional reform. However, in contrast to the preceding constitutional convention, whose delegates were made up of municipal, state, and federal politicians, the commission was an expert body appointed by the Labor government – a factor that led the non-Labor opposition to view it as a partisan initiative. The commission's fate was sealed with the government's decision to put forward four of the commission's proposals to referendum prior to the release of its final report. All four proposals were defeated by record margins, leaving the rest of the commission's work politically soured.

[334] Recent empirical analysis of the Mason period has also confirmed that the court was discernibly more receptive to civil rights and liberty cases. See Jason L. Pierce, David L. Weiden, and Rebecca D. Wood, "The Changing Role of the High Court of Australia" (paper presented at the IPSA Bologna, Italy, March 2010).

[335] Fiona Wheeler and John Williams, "'Restrained Activism' in the High Court of Australia," in *Judicial Activism in Common Law Supreme Courts*, ed. Brice Dickson (Oxford: Oxford University Press, 2007), 20.

[336] Sir Anthony Mason has spoken publicly on numerous occasions regarding the role of Australia's courts. In one such address he noted that Australia had moved away from Dixonian legalism and towards a "species of legal realism." See "The Role of the Courts at the Turn of the Century," *Journal of Judicial Administration* 3(1993): 164.

state and commonwealth governments like few others, a development that brought ever-increasing attention to the nature of judicial appointments and the make-up of the court.

Before the work of the Mason court could begin, however, its bench had to be set. Having not had the opportunity to fill a High Court seat since its election victory in 1983, the death of Justice Lionel Murphy and the retirement of Chief Justice Harry Gibbs in 1986 meant that the Labor government of Robert Hawke (1983-1991) had an exceptional opportunity to shape the composition of the court. John Toohey and Mary Gaudron were selected to fill the vacancies, while Sir Anthony Mason was elevated to the position of chief justice. Though Toohey's appointment was met with general praise, the appointment of Gaudron, the first women appointed to the High Court, was greeted with some controversy. The question of tokenism was quickly squashed by Hawke; however, Gaudron's close connections to the Labor party and friendship with the late Justice Lionel Murphy were considered contentious, with the opposition reacting with calls for the new justices to sever all political connections.[337] As in the past, the main concerns voiced about the appointments did not have to do with the process, but the particular selections made.[338] The appointment of Justice Michael McHugh one year later was well received,[339] and completed the bench that would sit until Chief Justice Mason's retirement in 1995.

Despite some speculation that the court would enter a period of comparative calm after the challenges brought by legal actions and a parliamentary inquiry against Justice Murphy prior to his death,[340] it instead entered into a period of unprecedented publicity. On this point, the events of 1992 provide a useful window into the work of the Mason court as a number of cases during this year received especially extensive attention.[341] The first is likely the most well-known case the High Court has ever decided, *Mabo v Queensland (No. 2)*.[342] Here, the court was asked to determine whether the common law

[337] Mike Steketee, "Gaudron Not a Token, Hawke Says," *The Sydney Morning Herald*, 10 December 1986.
[338] Rod Frail, "Keep Mates Off High Court, Labor Advised," ibid., 8 December; David McKnight, "A Career of Firsts and Controversy," ibid., 9 December; John Slee, "Politics and the High Court," ibid; Staff, "The High Court Appointments," ibid.
[339] Verge Blunder, "Mchugh Makes High Court at 53," ibid., 14 December 1988; Yvonne Preston, "Against the Odds," ibid., 17 December.
[340] Verge Blunder, "After Troubled Years, High Court Enters Calmer Waters," ibid., 9 December 1986.
[341] Wheeler and Williams, "Judicial Activism in Common Law Supreme Courts," 33.
[342] *Mabo v. Queensland (No. 2)*, 175 CLR 1(1992).

of Australia recognized the native title of land inhabited by the Meriam people. In a 6 to 1 decision, the Mason court rejected the notion that Australia had been *terra nullius* when colonized by the British and declared that the Meriam people were "entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands."[343] The decision was an historic legal victory for Australia's indigenous peoples. As Peter Russell notes, "*Mabo* is one of those judicial decisions whose political life has been and will continue to be enormous and far more important than its strictly legal significance."[344] For those who disagreed with the decision's outcome, much criticism was laid on the court.[345]

Just a few months following *Mabo (No. 2)*, the High Court released its decision in the *Australian Capital Television* case.[346] At issue here was whether portions of the Political Broadcasts and Political Disclosures Act 1991 that prohibited the broadcast of political materials on electronic media during the period leading up to a state or federal election were valid. The court struck down the sections, finding that they contravened an implied right to freedom of political communication in the Australian constitution. Significantly, this case marked a new trend towards recognizing implied fundamental guarantees in the Australian constitution.[347]

While these two prominent cases represent only a select sample of the cases heard during that year, they do highlight the High Court's willingness to enter into issues of important public interest, using legal reasoning that challenged Australia's legalist history. Such decisions brought considerable attention to the court, and in the case of *Mabo (No. 2)*, a level of controversy that had never been experienced before.[348]

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[343] *Mabo v. Queensland (No. 2)*, 175 CLR 1, 217 (1992).
[344] Peter H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto; Buffalo: University of Toronto Press, 2005), 247.
[345] *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto; Buffalo: University of Toronto Press, 2005), 279-314.
[346] *Australian Capital Television v. Commonwealth*, 177 CLR 106(1992).
[347] Adrienne Stone, "Implied Constitutional Rights," in *The Oxford Companion to the High Court of Australia*, ed. Michael Coper, George Williams, and Anthony Blackshield (Melbourne; Oxford: Oxford University Press, 2007).
[348] Jack Waterford, "The Role of the Chief Justice: A Media View," in *Courts of Final Jurisdiction: The Mason Court in Australia*, ed. Cheryl Saunders (Annandale: The Federation Press, 1996).

A Federally led Attempt at Reform (1993)

In the year following these particularly notable decisions, the Labor government of Paul Keating (1991-1996) showed some interest in reforming the federal judicial appointments system. Soon after being appointed attorney general in 1993, Michael Lavarch released a discussion paper on judicial appointments reform that focused on the desirability of a more representative bench and making the selection process more transparent and comprehensive.[349] While not recommending a particular set of reforms, the discussion paper covers in detail reasons why changes might be warranted. In particular, while acknowledging that the standard of judges in Australia continued to be high, the paper noted, "the fact that men of Anglo-Saxon or Celtic background hold nearly 90% of all federal judicial offices indicates some bias in the selection process…".[350] Looking at the types of selection processes used in other countries (election, appointment, or a mixed method), the paper discusses in-depth the potential advantages and disadvantages of an advisory commission, and the measures that would have to be taken were a commission created.[351] Following the discussion paper's circulation, Lavarch presented a proposal for creating a federal judicial commission to cabinet. However, the proposal was rejected by a majority of cabinet ministers leaving judicial appointments reform, in most respects, dead in the water.

Given the hypothesized connection between judicial decision-making and reform to the judicial appointments system, the fact that Lavarch's cabinet proposal followed closely after this series of controversial decisions is an interesting development. Timing alone, however, is not adequate to establish any sort of causal relationship between the two events. In fact, in interviewing Mr. Lavarch for this project, he explained that his interest in introducing reforms did not form as a reaction to the Mason court, but rather because of his previous experience as the chair of the House of Representatives' Legal and Constitutional Affairs Committee, and particularly the committee's inquiry into the equal opportunity and status of Australian women.[352] Having become more aware of the

[349] Australia, *Judicial Appointments: Procedure and Criteria* (Canberra: Attorney-General's Dept., 1993).
[350] *Judicial Appointments: Procedure and Criteria* (Canberra: Attorney-General's Dept., 1993), 3.
[351] In a 1994 report, the Australian Law Reform Commission also supported the creation of a type of law reform commission for judicial appointments. See Australian Law Reform Commission, "Equality before the Law: Women's Equality (Report 69)," (Canberra1994).
[352] Michael Lavarch, "Interview with the Author," (25 March 2011).

paucity of women in senior decision-making roles, and as a subset of this the judiciary, Lavarch sought to reform the judicial appointments system as a means of opening up the pool of potential candidates and facilitating the selection of women judges. In addition, Lavarch also noted his desire for greater transparency in the appointments process as a reason for pursuing reform. A more transparent system, he believed, would buttress support in the impartiality of the judiciary and diminish the likelihood of inappropriate appointments being made based on political/party considerations. Thus in putting forward reforms, Lavarch sought to address at least two normative expectations that he believed affected confidence in the judicial appointments process, representation and transparency.

While Labor's discussion paper did not specify which federal courts should be part of any future reforms, in Lavarch's presentation to cabinet, the High Court was specifically left out because of the perceived unlikelihood that such a proposal would be accepted. The cabinet nonetheless rejected the initiative, in large part out of a concern that the reforms would set an unwelcome precedent for other cabinet appointments. Lavarch noted:

> The concern being expressed, really, was that if you started doing this for judges, there would be an expectation that you would have do it for a whole range of other appointments and that the cabinet and the executive should be reluctant to give away a fairly freehand in terms of the making of appointments to statutory authorities, boards, commissions of inquiries or reserve bank boards – the many hundreds of appointments that go through a cabinet in a year.[353]

This concern for setting an unwanted precedent is particularly interesting when compared to the reasoning advanced for judicial reform a decade or so later. As will be explored further on in this chapter, while at this time members of the Labor government were resistant to the proposition of constraining the executive's influence over senior appointments, in 2007, a newly minted Labor government began introducing reforms with just such a stated purpose.

Thus, during this period when considerable public and political attention was directed at the High Court, the attorney general's interest in reform of the judicial appointments process did not come as a reaction to the court's work, but rather the

[353] Ibid.

minister himself had entered the position with an existing interest in women's representation on the bench. Importantly, for our current purposes, this interest in reform did not extend to the High Court due to practical and political concerns. However, despite the attention and controversy that the Mason court often found, the issue of judicial appointments came up rather infrequently, likely thanks to its impressive stability during this period. With the exception of Justice Michael Hudson McHugh's appointment in 1988, the Mason court remained unchanged until Chief Justice Mason's retirement in 1995. Though in the lead up to his retirement there were suggestions that the secrecy surrounding High Court appointments was no longer appropriate for an institution of such power,[354] the real explosion of political criticism did not follow until after Mason's departure and a court decision of exceptional political and historic importance.

The Howard Government (1996-2007)

Emerging from the March 1996 federal election with a sizable majority, the newly installed coalition government of Liberal leader John Howard entered office with no stated plans to reform the appointments process of the federal courts. Not long after taking office, however, the government was faced with mounting political criticism regarding the appointment of High Court judges – a development that can trace its origins to one decision in particular, *Wik Peoples v Queensland*.[355]

The *Wik* case concerned the question of whether the issuing of a pastoral lease automatically extinguished native title, an issue that had not been definitively resolved in *Mabo (No. 2)*, or the consequent Native Title Act. While the lands claimed in the case only included areas over which the Queensland government had granted pastoral and mining leases, the potential political consequences went far beyond the one state: a 1980-1981 analysis of Australian land tenure, for example, had found that 52.6 percent of Australia's total area and 76.4 percent of land held for private use was under leasehold tenure.[356] Thus it was with considerable public interest that the court found, in a 4 to 3

[354] Padraic McGuinness, "New Judge for High Court," *The Sydney Morning Herald*, 27 January 1995.
[355] *Wik Peoples v. Queensland*, 187 CLR 1(1996).
[356] John Holmes, "Land Tenure in the Australian Pestoral Zone: A Critical Appraisal," in *North Australian Research: Some Past Themes and New Directions*, ed. Ian Moffatt and Ann Webb (Casuarina, Darwin, N.T.: North Australia Research Unit, Australian National University, 1991), 44.

decision, that the pastoral leases in question did not confer a right of exclusive possession, and so did not necessarily extinguish all native title rights.[357]

After the legal precedent set by the court's decision in *Mabo (No. 2)*, *Wik*'s outcome could hardly be considered a shocking one. Nonetheless, changes in political positioning since *Mabo (No. 2)* meant that the reaction by many government leaders was considerably more severe. By comparison, whereas Keating's Labor government had immediately accepted the court's ruling in *Mabo (No. 2)*, the *Wik* decision was severely criticized by members of Howard's government, as well as by a number of states.

The criticism launched against the court's decision by Queensland's National Party premier, Robert Borbidge, was especially notable. Arguing the court's decision was an example of extreme judicial activism, Borbidge called for reforms to the judicial appointments process that would make judges more accountable to elected officials. He explained, "[i]f the High Court is taking it upon itself as an unelected and unaccountable body to seize effectively from the parliaments of Australia what has always been accepted as the sovereign rights of those parliaments, then I think it is time for some checks and balances to be debated in the wider community."[358] The reform ideas put forward by Borbidge were both numerous and dramatic, including giving states a veto in the appointment of judges, limiting judges' terms to ten years, and suggesting that voters select and remove judges via referendum.[359] Following a March meeting later that year, the state and territorial leaders jointly called for the federal government to allow for greater input by the states and territories into High Court appointments. In particular, it was recommended that the commonwealth attorney general be obliged to circulate a short list of potential nominees from which the standing committee of attorneys general would recommend a preferred candidate.[360] While Borbidge saw this as a compromised "minimalist position,"[361] it was consistent with previous recommendations by the states on court reform insofar as the proposal focused on increasing their influence without requiring a constitutional amendment.

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[357] In the case of any inconsistency between native title rights and the rights of the pastoralists, however, the rights of the later would prevail.
[358] Scott Emerson, "Borbidge Pushes to Overhaul High Court," *The Australian*, 11 February 1997.
[359] Judy Hughes, "State Urges Elected High Court Judges," ibid., 20 February.
[360] Ewin Hannan, "States Want Say on Judges," ibid., 8 March.
[361] Ibid.

High Court appointments were placed in the spotlight further by deputy prime minister and leader of the National Party of Australia, Tim Fischer, who called for a "capital C Conservative" to replace the chief justice, Sir Gerard Brennan, when he retired the following year.[362] Noting that such a nominee did not necessarily have to be someone affiliated with the Liberal or National parties, Fischer stated he was most interested in someone "somewhat conservative on the matter of judicial activism."[363] During this period, relations between the commonwealth government and the High Court became so stressed that a declaration of principles of judicial independence issued by the country's eight state and territorial chief justices some months later was seen by many as a response to political criticism levied on the High Court.[364]

Facing calls for reform from the states and criticism from the federal opposition for the comments made by Fischer, Attorney General Daryl Williams was somewhat awkwardly placed.[365] He responded, in part, by committing to a more transparent process of consultation, which would include state and territory attorneys-general, federal judges (both former and current), leaders of the legal profession, and parliamentary and ministerial colleagues. This promise, however, was a non-statutory one, with no obligation for future attorneys-general to follow the same process. On the point of further state consultation, however, Williams was quite clear. In a speech given in May of that year he noted that consultations would not, in any way, detract from the responsibility for the selection of High Court justices remaining with the commonwealth. "The High Court," he explained, "is a national court performing national functions. Its membership should be decided by the national government."[366] Further, when interviewed for this research, Williams explained that there was no interest in devolving any additional powers to the states. When asked how seriously the government took calls like those of Premier Borbidge's, Williams explained: "We'd just ignore them. Any change in the

[362] Niki Savva, "Fischer Seeks a More Conservative Court," *The Age*, 5 March 1997.
[363] Ibid.
[364] Janet Fife-Yeomans, "Judges Tell MPs to Stop Meddling," *The Australian*, 14 April 1997.
[365] Gervase Greene, "Attorney Pleads for Peace in Court Row," *The Age*, 1 March 1997. Williams had previously outlined his views on the role of the attorney-general in defending the courts. See Daryl R. Williams, "Who Speaks for the Courts?," in *Courts in a Representative Democracy* (Carlton South, Vic.: Australian Institute of Judicial Administration, Inc., 1994).
[366] "Judicial Independence and the High Court," *University of Western Australia Law Review* 270(1998): 146.

system would involve a constitutional amendment, and these are very hard to get. In any event, at least the Howard government was quite happy having the responsibility of appointments to the High Court."[367]

Indeed it was a responsibility that appeared to be taken very seriously by many members of the Howard government. Following the retirement of Justice John Toohey in 1998, for example, Attorney General Williams was said to have been "rolled"[368] in cabinet when his recommendation for Toohey's replacement was rejected in favour of New South Wales barrister Ian Callinan, a nominee who was known to be the preferred choice of Fischer.[369]

Controversy over judicial appointments continued to follow Williams during his tenure as attorney general (1996-2003). In the midst of coverage concerning the Howard government's appointment to replace retiring Justice Mary Gaudron, it was revealed that the he had been meeting with potential judicial candidates for several years. Defending his choice to speak with nominees as an appropriate part of an extensive consultations process, Williams noted that of those consulted, none had claimed his questions were inappropriate, nor was there any rule against such consultations being undertaken.[370]

By 2002, the High Court's appointments process had been under considerable scrutiny for several years. Both the media[371] and legal academics[372] had criticized what

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[367] "Interview with the Author," (12 April 2011).
[368] "Rolled" is a term used in Australia for having your proposal fail in cabinet.
[369] Helen McCabe, "Fischer Won Battle over New Judge," *Daily Telegraph*, 6 March 1998. The dismissal of Williams's preferred candidate was also confirmed in interviews with two cabinet ministers who served during this time.
[370] Sean Parnell, "Williams Interview for Judge," *The Courier Mail*, 12 December 2002.
[371] Editorial, "Caught in a Time Warp on Judicial Appointments," *The Age*, 22 September 2005; Chris Merrit, "Selection Surrounded by Secrecy," *The Australian*, 21 September 2005; "High Court Appointment Process 'a Nonsense'," *The Australian*, 10 July 2007; Chris Merrit and Elizabeth Colman, "High Court Choices Too Secretive: Judges " *The Australian* 22 September 2005.
[372] Sean Cooney, "Gender and Judicial Selection: Should There Be More Women on the Courts," *Melbourne University Law Review* 20, no. 1 (1993); G. L. Davies, "Why We Should Have a Judicial Appointments Commission" (paper presented at the ABA Forum on Judicial Appointments, Sydney, 27 October 2006); Paul Donegan, "The Role of the Commonwealth Attorney-General in Appointing Judges to the High Court of Australia," *Melbourne Journal of Politics* 29(2003); Simon Evans and John Williams, "Appointing Australian Judges: A New Model," *The Sydney Law Review* 30, no. 2 (2008); Christopher N. Kendall, "Appointing Judges: Australian Judicial Reform Proposals in Light of Recent North American Experience," *Bond Law Review* 9, no. 2 (1997); James McConvill, "The Appointment and Removal of Federal Judges: Time for Reconsideration," *The High Court Quarterly Review* 1, no. 4 (2006); Dominic O'Sullivan, "Gender and Judicial Appointment," *University of Queensland Law Journal* 19(1996-1997); Rodney N. Purvis, "Judiciary and Accountability: The Appointment of Judges," *Australian Journal of Forensic Sciences* 26, no. 2 (1994); Pip Nicholson, "Appointing High Court Judges: Need for Reform?,"

was perceived as an unnecessarily closed process prone to political manipulation. Additionally, the replacement of the court's sole female justice with Justice Dyson Heydon received considerable attention by highlighting the appointments system's unrepresentative outcomes.[373]

Legal associations also began paying closer attention to the appointments process. During Williams' time as attorney general, the Judicial Conference of Australia, made-up of over 600 judges and magistrates, criticized the politicization of court appointments and highlighted the potential benefits of an appointments commission.[374] The Law Council of Australia, representing approximately 56,000 legal practitioners in Australia, published a judicial appointments policy paper in 2001, proposing that a protocol for judicial appointments be created at both the state and federal level. This proposed protocol, however, did not include the High Court. According to the council, it was unnecessary to include the court because of its unique position as the final appellate court and that its appointments were already subject to a statutory requirement of consultation.[375]

The judicial appointments processes at the state level also received greater attention during this period, and in a number of cases, reforms soon followed. Like at the federal level, all state attorneys general select and recommend judicial nominees; however, reforms undertaken in the 2000s have meant that Victoria, New South Wales,

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The Australian Quarterly 68, no. 3 (1996); Ronald Sackville, "Judicial Appointments: A Discussion Paper," *Journal of Judicial Administration* 14, no. 3 (2005); "The Judicial Appointments Process in Australia: Towards Independence and Accountability," *Journal of Judicial Administration* 16, no. 3 (2007); J. W. Shaw, "On the Appointment of Judges," *Australian Law Journal* 74, no. 7 (2000); George Williams, "High Court Appointments: The Need for Reform," *The Sydney Law Review* 30, no. 1 (2008) George Winterton, "Appointment of Federal Judges in Australia," *Melbourne University Law Review* 16(1987). In comparison, very few articles on judicial appointment were written prior to the Mason court. See John Basten, "Judicial Accountability: A Proposal for a Judicial Commission," *The Australian Quarterly* 52, no. 4 (1980).

[373] Rachel Davis and George Williams, "A Century of Appointments but Only One Woman," *Alternative Law Journal* 54, no. 2 (2003); "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia," *Melbourne University Law Review* 27, no. 3 (2003); Louise Milligan and Rebecca Digirolamo, "Men-Only High Court under Fire," *The Australian*, 19 December 2002; Natasha Robinson, "High Court Needs a Woman: Gaudron " *The Australian*, 16 September 2005; Kim Rubenstein, "Why Gender, in This Perfectly Legal World, Really Does Matter " *Canberra Times*, 22 September 2005; George Williams, "The High Court and the Media," *University of Technology of Sydney Law Review* 1(1999). Of course, women's representation on the court had been an issue amongst critics and policymakers prior to Justice Gaudron's appointment. In particular, the discussion paper published by Labor Attorney-General Michael Lavarch in 1993 stimulated dialogue. However, the return of an all-male High Court bench in 2002 did prompt considerable criticism regarding the appointments process.

[374] Bernard Lane, "A Job Not for Judges, Says Kirby," *The Australian*, 8 June 1999.

[375] Law Council of Australia, "Policy Statement: The Process of Judicial Appointments," (Canberra: Law Council of Australia, 2001).

Tasmania, South Australia and the Northern Territory now use advisory panels to assess candidates for lower court appointments.[376] In New South Wales, panels are also employed for the District Court, while in Tasmania, the process is also used for its Supreme Court. In these state examples, judicial vacancies are most often advertised, applications sought, and a set of criteria for evaluating qualifications provided. Like much of the academic and media criticism of the federal court system, criticism of state appointments processes, both reformed and not, have focused on the perception of politicization and the need for greater transparency.[377]

The Labor Government (2007-) and the Limits of an 'Aversive' Trigger

By 2001, the Labor Party had begun referring to judicial appointments in their federal campaign policy, noting the importance of wide consultation and the party's interest in looking beyond "stereotype legal practitioners" in order to consider persons reflecting Australia's diversity.[378] By the time of the 2004 federal election – with Williams' consultations with prospective judicial nominees now well-known – Labor also added a commitment to a more transparent appointments process to its campaign promises.[379]

Following the Liberal Party's third consecutive electoral victory in 2004, Philip Ruddock replaced Williams as the commonwealth attorney general. Notably, Ruddock made a public break from Williams's much maligned approach to consultation, noting that the government would not conduct interviews with candidates under consideration for the High Court.[380] However, questions about the appropriateness of the appointments process continued. On this point, while the appointment of Justice Susan Crennan in 2005 was widely applauded both because of her qualifications and for the return of a woman to

[376] Victoria, "Reviewing the Judicial Appointments Process in Victoria," Department of Justice (Melbourne July 2010), 19.
[377] Liberal Party of NSW and National Party of NSW, "Restoring Faith in Justice: Promoting Transparency in Judicial Appointments in New South Wales," (Sydney March 2008); Bar Association of Queensland, "Letter to the Editor of the Courier Mail - Judicial Appointment in Queensland," (2010).
[378] Australian Labor Party, "Kim Beazley's Plan for Justice," http://pandora.nla.gov.au/pan/22093/20011109-0000/www.alp.org.au/policy/security/justice.html.
[379] "National Platform and Constitution 2004," ALP National Secretary (Canberra 2004), 98.
[380] Philip Ruddock, "Selection and Appointment of Judges," (Sydney University 2005). Although, it should be noted that Williams did not consider his consultations to be interviews, therefore, to what extent Ruddock's statement should be considered a break might be questioned.

the High Court, the opposition Labor Party persisted in criticizing the process. Offering a similar critique to that which had been put forward by Labor Attorney General Michael Lavarch over a decade earlier, Labor shadow Attorney General Nicola Roxon, criticized the appointments process for its opaque nature; a lack of transparency which, she argued, failed to guarantee consideration of the widest possible pool of talent and lent itself to possible politicization. Making a comparison to the appointments process used for Supreme Court justices in the United States, Roxon noted that while the Australian system did not have the same problems of politicization, it missed out on some of the American system's benefits. "In a sense," she explained, "we suffer from a problem at the opposite extreme: where they have too much scrutiny, we have too much secrecy."[381] In a separate editorial she noted, "[t]o date we have been overwhelmingly lucky to have excellent judges in this country despite this flawed process, rather than because of it. But we should be looking at change before our luck runs out."[382] For his part, Ruddock dismissed the idea of reforming the judicial appointments process, noting that it had produced good appointments by both parties.[383]

The critique offered by the Labor Party at this juncture is particularly notable as it differs significantly from criticisms offered by federal opposition parties in the past. While state governments had for several decades pushed for reforms of the appointments system using both principled and instrumental justifications, at the federal level, criticism by both major parties had been limited to particular appointees and had not touched on the process itself. In contrast, while the appointment of Justice Crennan was applauded by Labor, it was the process that was criticized. While over time both parties had permitted the expansion of consultations either formally, with the *High Court Act 1979*, or informally, as undertaken by Williams, the question of whether the process itself should be changed had to that point received limited consideration – the one notable exception being Lavarch's time as attorney general. Importantly, the federal Labor Party's critique of the appointments process stands in contrast to that offered by the states earlier in Howard's prime ministership. Whereas the states' proposed reforms came in reaction to the work of the court, the federal Labor Party was reacting to earlier Howard

[381] Nicola Roxon, "Courting Trouble at Club Judge," *The Age*, 22 September 2005.
[382] "Secrecy Spoils Choice of High Court Judges ".
[383] Ruddock, "Selection and Appointment of Judges."

appointments, but its response was largely a principle-based one. In comparison to our first time period, a merit-based appointment was by itself no longer enough to be considered legitimate. Whereas the selection of an appropriately senior and distinguished nominee would previously have been sufficient to meet general expectations, the closed nature of the appointments system itself was now in question.

With these challenges to the High Court's appointments process at play, the successful election of Labor in 2007 allowed the party, for the first time in over a decade, to guide the process of federal judicial appointments. Newly minted attorney general, Robert McClelland, picked up on the critiques forwarded by Roxon, explaining that the judicial appointments process was ad hoc, leaving the public to "take it on trust" that appointments were made on merit and adequate consultations had occurred.[384] For McClelland, such a perception was problematic for at least two reasons: first, it could detract from the honour of being appointed to judicial office; and second, it could diminish public confidence in the courts and justice system.[385] As such, the selection of judicial nominees could not "properly be discharged without broader consultation and greater transparency."[386] Following from this assessment, McClelland set out three standards that a renewed judicial appointments process must meet: greater transparency and public confidence; appointments based on merit and suitability; and fair consideration of all potential nominees, whether they be barristers, solicitors or academics, and regardless of whether they are known to government.[387] In contrast to the first period where confidence in the process was based on the quality of the appointment made, or the second period where concern focused on consultation with the states *in addition* to merit, in this later period the additional criteria of broad consultations and greater transparency were added to these existing expectations.

For judicial appointments, other than to the High Court, the Labor government began providing a requisite set of qualities for potential judges, placed job advertisements

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[384] Attorney-General for Australia, "Judicial Appointments Forum," Australia, http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_18February2008-JudicialAppointmentsForum.
[385] "Anglo-Australian Lawyers Society Breakfast," http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_ThirdQuarter_12September2008-Anglo-AustralasianLawyersSocietyBreakfast.
[386] "Judicial Appointments Forum".
[387] "Anglo-Australian Lawyers Society Breakfast".

in the national media, and created ad-hoc panels (made up of former and sitting federal court justices and a senior officer of the attorney general's office), to assess and create a short-list of candidates.[388] Additionally, the process and groups consulted were publicly disclosed at the time of each judicial appointment. In May 2010, McClelland formally outlined the process in a published report, establishing it as set government policy.[389] Notably, while the Labor government has committed to wide consultations and consideration of the advice provided by the respective advisory panels,[390] the process itself has not been formally set out in legislation, nor does any part of the process limit the executive's discretion in choosing a judicial nominee.

It is also worth noting that during this same period, the Labor government took steps to open up other executive appointments. Citing a desire to strengthen transparency and merit-based appointments, over 130 senior government positions that were previously filled completely at the discretion of government were now advertised and candidates assessed by the departmental secretary and the public service commissioner.[391] This marked a significant departure from earlier tradition, which had given the prime minister near complete discretion in the appointment of senior public officials – a process that, similar to judicial appointments, had received some criticism during the previous Howard government.[392]

Importantly, for our purposes, while the changes described above apply to the Federal Court of Australia, the Family Court of Australia, and the Federal Magistrates Court, the process for High Court appointments was largely untouched. While the same commitment to wide consultation was applied to the High Court, no appointment criteria are set out, appointments are not publicly advertised, and an advisory panel is not struck. In the policy paper outlining the federal judicial appointments process, these differences

[388] Attorney-General of Australia, "Three New Judges Appointed to the Federal Court," Attorney-General of Australia (Canberra 25 June 2008).
[389] Australia, "Judicial Appointments: Ensuring a Strong and Independent Judiciary Trough a Transparent Process," Attorney-General's Department (Canberra April 2010).
[390] The membership of the advisory panels includes the head of the relevant court (or their nominated representative), a retired judge and a senior official from the Attorney General's department.
[391] Australia and Senator John Faulkner, "New Arrangements for Merit and Transparency in Senior Public Service Appointments," Cabinet Secretary and Special Minister of State (Canberra 5 February 2008).
[392] Richard Mulgan, "Politicisation of Senior Appointments in the Australian Public Service," *Australian Journal of Public Administration* 57, no. 3 (1998); Andrew Podger, "What Really Happens: Department Secretary Appointments, Contracts and Performance Pay in the Australian Public Service," ibid. 66, no. 2 (2007).

in approach are described as appropriate because the High Court, as the "apex of Australia's judicial system," enjoys a different status to other federal courts.[393] This explanation may appear somewhat counter-intuitive – that the High Court, as the country's most important and powerful judicial body, requires fewer, rather than more checks on its appointments process. However, if the rationale for this difference in approach is understood as politically-based, the reasoning becomes quite clear. While Attorney General McClelland was not interviewed for this project, in speaking with former attorneys general Lavarch, Williams, and Ruddock, it is clear that both political parties believe appointments to the High Court are too politically important to allow power to be devolved. In response to the question of why the High Court should be treated differently than other federal courts, Lavarch responded:

> Intellectually, it should be opened up; I understand that. I can't necessarily launch a strong intellectual argument to distinguish the High Court from other courts and, in fact, as you say it could be counter-intuitive, that of all the courts it should be the one that is most robust in terms of the transparency around it. My proposition is that I don't take it from a point of principle or intellect; I take it from an insider's view of how politics and how the cultures and the customs, and the practices of politics work.[394]

Thus, despite much attention during this third time period, formal reforms to the High Court's appointments system were not put forward.

Analysis

In Chapter One, we outlined the Judicial Politics Trigger model, which anticipates that an attempt to formally reform the judicial appointments process of a final court of appeal in an advanced, stable democracy is more likely to occur when the following background factors are present: 1) a series of decisions by the court that attracts the attention of interested political actors, and/or 2) an appointment(s) to the court that garners the attention of interested political actors; and when either an 'aversive' trigger or a 'threat to political stability' trigger is initiated. For informal reform, it is anticipated that the same background factors, triggering mechanisms, and institutional rules that structure

[393] Australia, "Judicial Appointments: Ensuring a Strong and Independent Judiciary Trough a Transparent Process," 3.
[394] Lavarch, "Interview with the Author."

formal reforms remain at play. It is hypothesized that actors will choose informal over formal reforms for two possible (sometimes interacting) reasons: (1) out of an interest to maintain formal control over the appointments process, and/or (2) because institutional rules create great enough barriers that formal reform is impractical. We can now turn to how the JPT model performs in the Australian case.

Taking stock of our first time period (1903-1949) in comparison to our second (1949-1987), an increased interest in the reform of the appointments process of the High Court can be observed over time. In large part, this can be explained by the states' interest in appointments to the High Court that came as a result of a series of judicial decisions that contributed to the expansion of commonwealth powers. The states began to see their participation in the judicial selection process as an important way of combatting this centralizing trend. This desire for greater participation in the appointments of High Court justices was also justified in terms of the strains the status quo placed on confidence in the process. While these more principled tensions (i.e. a federal court without a federalized appointments process) had always existed, it was only when the court began making unfavourable decisions that the issue prompted serious discussions of reform amongst political actors.

Despite interest in reform amongst the states, this second time period did not experience any credible threat of constitutional crisis, and with a constitutional amending formula that does not require the states' approval, there existed little incentive for the commonwealth government to concede powers over appointments to the High Court. Thus the 'threat to political stability' trigger that brought about agreement on judicial appointments reform in Canada did not emerge in Australia. One consequence of Australia's relative federal stability and high threshold for constitutional reform was the states' approach to reform of the High Court's appointments process – mainly, pragmatism. Rather than calling for a complete overhaul of the system, the states' one notable success, the High Court Act 1979, was pursued in terms of what the federal government might be willing to concede, rather than what was ideal.

Even with this pragmatism, however, it is unlikely that the states would have been successful had it not been for the 'aversive' trigger brought about by the Liberal Party's ascension to power in 1975. Notably, this change in government came on the heels of the

controversial appointment of Lionel Murphy to the High Court and ongoing discussions about reform as part of Australia's constitutional conventions. Thus, when the Liberals entered government in 1975, the party did so committed to addressing the complaints of its subnational counterparts.

While the addition of a duty to consult the states to the High Court of Australia Act 1979 was an achievement, it nonetheless relied on the goodwill of the commonwealth government, and as predicted, the limits of the reforms emerging from this 'aversive' trigger are quite apparent. By nearly all accounts these modifications have not resulted in meaningful consultations with the states, and moreover, later unanswered calls to install a more substantive role for the states in High Court appointments illustrate that the commonwealth government, regardless of party, continues to closely guard its power over the appointments process.

In our third time period (1987-2011), decisions by the Mason court clearly brought about an increased interest in reforming the High Court; however, this observation does not uniformly hold. For Labor attorney general, Michael Lavarch, interest in reforming the process of judicial appointments came not as a reaction to the High Court's work; rather, the minister had an established interest in women's representation on the bench. While Lavarch's motivations for seeking reform are atypical when compared to the other political actors of the time, they do fit within our second predicted background factor – that is, judicial appointments. However, for Lavarch, concerns over the appointments process did not arise because of the judges who were being selected, but rather for those who were *not*. Importantly, for political concerns Lavarch's proposed reforms did not extend to the High Court. However, even after this concession, the relative weakness of these background factors meant that Lavarch did not succeed in getting his proposal past cabinet.

In contrast, the work of the Mason court clearly impacted the Howard government's interest in judicial appointments, with at least one cabinet minister articulating his desire for "capital C Conservatives" to be appointed to the bench. In turn, the process's secrecy and vulnerability to political manipulation became a point of concern for the political opposition, academics, legal associations, and media alike. For the Labor Party in particular, the governing coalition's treatment of the judiciary

prompted an 'aversive' reaction, leading to calls for greater transparency and checks in the judicial appointments process. The return of Labor to government in 2007 thus acted as a trigger for judicial appointments reform. However, despite criticism of the Howard government's appointments to the High Court while in opposition, Labor did not extend the same informal reforms it introduced to the appointments system of lower courts to the High Court. Thus, while there was considerable interest in judicial appointments reform for the High Court, in the third period no formal reforms were introduced.

Why did this 'aversive' trigger fail to bring about reform, either formal or informal, of the High Court's judicial appointments system? As already discussed, one scenario in which political elites are anticipated to pursue reforms is when prompted by prior negative political experiences. With this type of 'aversive' political trigger, experiences that occurred while in political opposition should serve to loosen the power-hoarding and executive-mindedness that might otherwise override interest in judicial appointments reform. However, it remains likely that upon gaining political power this party's earlier reform goals will conflict with its future strategic self-interest. In this case, once the Labor Party formed government and was charged with making judicial appointments, the incentives to reform the process decreased considerably. The political context within which the Labor Party was operating both before and after it took power in 2007, then, is important for understanding its approach to judicial appointments reform. Particularly, while many of the Howard government's judicial appointments and the decisions of the Mason court brought attention to the issue of judicial appointments, in later years (post-1996), public criticism of the court's work had receded.[395] Thus, while High Court appointments had been an important enough issue during Labor's time in opposition that the party reformed its own policy on the matter, it was not an exceptionally salient political issue at the time Labor formed government. In the case of Labor, calls for a more transparent and accountable judicial appointments process made while in opposition were far less politically desirable once the party had formed government. That the issue of judicial appointments to the High Court was no longer as politically salient, and no senior members of the party appeared to champion the issue,

[395] George Williams and Andrew Lynch, "The High Court on Constitutional Law: The 2010 Term," *University of New South Wales Law Journal* 34(2011).

likely provided the Labor government the political space it needed to exclude reforms to the High Court without worry of serious political costs.

It is also important to note the role that ideational factors have played in the evolution of the High Court's appointments process. While the commonwealth government's interest in maintaining control over High Court appointments has remained constant, so too has its interest in maintaining public confidence in the appointments process. As has been seen, when normative expectations concerning what constitutes a legitimate appointments process have shifted, the government has generally reacted by making incremental, informal adjustments. A quick review of our three time periods helps to illustrate this point. In the first time period, a general expectation that appointments be founded on merit was observed. This expectation was especially tested by the Labor Party, which at times struggled to limit the appearance of political interests when making appointments. By comparison, in the third time period, controversial decisions by the Mason court and the underrepresentation of women and minorities on the bench brought additional concern to the state of the appointments process. With appointments under increased scrutiny, Howard's coalition government often faced criticism over its High Court appointments. Both the Howard government and later the Labor government responded to these complaints by increasing consultations during the selection process; however, as already noted, no formal reforms were undertaken. Additionally, while normative expectations have clearly played an important role in the evolution of the High Court's appointments system, the impact of these expectations remain constrained by political considerations, as demonstrated by Attorney General Lavarch's failed effort to introduce a more transparent and consultative appointments process in 1993, or the states' efforts throughout much of the second and third periods. Consequently, almost all changes to the judicial appointments system have been informal and have not affected the commonwealth government's ultimate control over judicial selection.

Supreme Court of the United States

Introduction

Unlike most advanced democratic countries that practice common law, the inherently political nature of appointments to the Supreme Court of the United States has long been recognized. Consequently, the body of academic literature concerning judicial selection systems in the U.S., particularly from political scientists, is by far the most extensive and developed. Though scholarly interest in judicial selection has encompassed all levels of the American court system, in terms of the question of why reforms to judicial selection systems occur, research has focused primarily on state courts. Such attention is hardly surprising given the large number of formal reforms that have occurred at the subnational level.[396] For the Supreme Court, attention to its appointments process has increased considerably since the failed nomination of Robert Bork in 1987, which has left many bemoaning the state of the appointments process. In the past thirty years, legal scholars have written a litany of articles decrying (or defending) the increasingly partisan nature of the process and proposing measures to make it more orderly.[397] Senators and even those sitting on the court have also noted problems with the current process.[398] As recently as 2010, current Supreme Court Chief Justice John Roberts took issue with the

[396] Samuel Latham Grimes, "Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges," *North Carolina Law Review* 76(1997-1998); Evan Haynes, *The Selection and Tenure of Judges* (Newark, N.J.: National conference of judicial councils, 1944); James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown, 1950); John M. Roll, "Merit Selection: The Arizona Experience," *Arizona State Law Journal* 22(1990); Charles H. Sheldon and Linda S. Maule, *Choosing Justice: The Recruitment of State and Federal Judges* (Pullman, Wash.: Washington State University Press, 1997); Daniel W. Shuman and Anthony Champagne, "Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries," *Psychology, Public Policy, and Law* 3, no. 2-3 (1997); Harry P. Stumpf and Kevin C. Paul, *American Judicial Politics* (Upper Saddle River, N.J.: Prentice Hall, 1998); Peter D. Webster, "Selection and Retention of Judges: Is There One Best Method?," *Florida State University Law Review* 23(1995-1996); Richard Abernathy Watson and Rondal G. Downing, *The Politics of the Bench and the Bar; Judicial Selection under the Missouri Nonpartisan Court Plan* (New York: Wiley, 1969); Glenn R. Winters, "The Merit Plan for Judicial Selection and Tenure - Its Historical Development," *Duquesne Law Review* 61(1968-1969); Harry L. Witte, "Judicial Selection in the People's Democratic Republic of Pennsylvania: Here the People Rule," *Temple Law Review* 68(1995).

[397] For summaries of proposals to reform the selection system see, Stephen L. Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* (New York: Basic Books, 1994); George Watson and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments* (New York: Harper Collins College Publishers, 1995).

[398] Republican Senator John Coryn, a member of the Senate's Judiciary Committee has been particularly vocal. See John Cornyn, "Justice for the Next Justice " *The Washington Post*, 2 July 2005; "Our Broken Judicial Confirmation Process and the Need for Filibuster Reform," *Harvard Journal of Law and Public Policy* 27, no. 1 (2003); "Restoring Our Broken Judicial Confirmation Process," *Texas Review of Law and Politics* 1(2003-2004).

Senate's confirmation process, arguing that it is contentious and unproductive.[399] Despite what seems to be a general, though by no means unanimous, view that the appointments process for Supreme Court justices requires fixing, there appears little agreement as to what these problems are and how they should be addressed. Nonetheless, while the appointments process over the some two hundred-year history of the Supreme Court has remained formally unchanged, the experience of contemporary court nominees is a very different one from those first selected in 1789. This chapter, then, will explore why formal reforms have failed in the U.S. case and the path that informal changes have followed.

As in the chapters on Canada and Australia, our focus will be on the institutional development of the Supreme Court's judicial appointments process and will pay close attention to the political context and the characteristics of the court over time. Unlike our other case studies, efforts to reform the U.S. Supreme Court's appointments system do not lend themselves to easy demarcation of separate time periods. Thus, this review will be presented from the Supreme Court's beginning in 1789 to 2011, without divisions into separate time periods. A second difference of this chapter is that it does not attempt to cover the entire history of the court's appointments process, but rather focuses on key moments that will serve to provide contrasts to the findings of our other case studies. Accordingly, it relies heavily on the existing literature on the U.S. Supreme Court's appointments system. For the purposes of our analysis, it is also worthwhile to clarify what is considered a *formal* reform, as the institutional components of both the judicial appointments system and system of government more generally do differ in the American case from those of Canada and Australia. For the U.S. case, formal reform includes the passage of constitutional amendments, federal legislation, and Senate rules that specifically address reforms to the judicial appointments system.

As this chapter will show, the initial institutional choices made by America's constitutional founders greatly influenced the development of the appointments system of the Supreme Court. Importantly, the broad constitutional powers outlining the roles for the president and Senate, in combination with a rigid constitutional amending formula

[399] David G. Savage, "Chief Justice Unsettled by Obama's Criticism of Supreme Court," *Los Angeles Times*, 10 March 2010.

and the absence of a catalyzing political trigger, have meant that efforts to formally modify the Supreme Court's appointments process have never come close to succeeding. What attempts there are that have been made to constitutionally modify the appointments process have come overwhelmingly from the House of Representatives, the only elected branch of the federal government not to have a role in judicial appointments. Rather than formal reform, the evolution of the appointments system has been one of incremental informal change. In particular, the ambiguity surrounding how the president and Senate should exercise their roles has provided both bodies considerable discretion, which over time has allowed for the layering on of additional rules and appointment criteria.

Foundations: American Independence and the Supreme Court (1776-1789)

In 1776, the thirteen American colonies declared their independence from the British Empire. While these new states, loosely bound by the Articles of Confederation (1777), quickly began to replace their colonial charters with written constitutions, the system of British common law remained in place. Despite the achievement the Articles represented, its considerable weaknesses quickly became apparent, and with fear of state instability rising, a new constitutional convention was assembled in 1787. After some four months of meetings, the convention eventually proposed an entirely new constitution that provided considerably greater powers to the federal government. Importantly, under this new arrangement neither level of government was vested with supreme authority over the other, and sovereignty instead was placed not in government, but in the people as a whole.[400] Unprecedented at the time, this arrangement made the United States the first example of a modern federation, a model that has come to be emulated by many other democracies, including Australia and Canada.

The records of the constitutional convention indicate that the framers debated at length the form the federal judicial selection process should take. At a number of times throughout the convention, members proposed to delegate appointments to, variously, the states, the entire Congress, the Senate alone, nominations by the Senate with a negative by the president, appointments by the president alone, and nominations by the president

[400] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969).

with a negative by the Senate.[401] Disagreement about the federal judiciary's role and structure reflected larger divisions between delegates, with the majority split between those who advocated for a strong executive, and therefore favoured a process by which the president alone would appoint federal judges, and those who sought to maintain strong state powers, and thus preferred to vest authority over appointments to Congress.[402]

The agreement finally struck was a compromise between the two competing sides. Set out in Article II, section 2 of the new constitution, the judicial selection process provides the president with the power "by and with Advice and Consent of the Senate," to appoint "Judges of the supreme Court." In contrast to the Canadian and Australian systems that place the power over appointments into a single body in a one-stage process, the involvement of two institutional actors in the American system, the president and the Senate, creates the possibility of deadlock. Using its power of 'advice and consent,' the Senate may refuse, perhaps repeatedly, to confirm the president's judicial nominees to the bench. In practice, the division of appointment powers between the president and the Senate has been consequential: whereas a prime minister's nomination of a candidate to the Supreme Court of Canada or the High Court of Australia virtually guarantees his or her appointment, in the United States about one-fifth of the 150 presidential selections made since 1789 have failed to be confirmed.[403]

Article III of the constitution set out the blueprint for the federal court system by vesting "the judicial power of the United States" in the Supreme Court. However, divisions amongst delegates on the status of inferiour federal courts meant that their establishment was left for Congress to decide at a later date.[404] In terms of jurisdiction,

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[401] William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia, S.C.: University of South Carolina Press, 1995), 16.

[402] For a fuller review of these debates, see Matthew D. Marcotte, "Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations," *New York University of Legislation and Public Policy* 5(2001/2002); Adam J. White, "Toward the Framers' Understanding of Advice and Consent: A Historical and Textual Inquiry," *Harvard Journal of Law and Public Policy* 29, no. 1 (2005).

[403] See list at: http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm. This count excludes those nominations on which "no action" was taken.

[404] Article III, section 1 of the constitution states that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good

while Article III, section 2 extended the Supreme Court's oversight to a variety of cases, its powers were qualified, with Congress controlling its jurisdiction over appeals from lower courts. Because cases reaching the Supreme Court directly were likely to be relatively few, Congress's legislative authority over appeals gave it a significant role in deciding the political and legal influence of the new court.[405]

Within the first year of the new constitution's ratification, Congress passed the Judiciary Act of 1789, which set out the structure and powers of the federal judicial branch. The membership of the Supreme Court was set at six, though this number would fluctuate four times before finally stabilizing at nine members in 1869.[406] The act also provided some clarification on the court's jurisdiction. In particular, section 25 gave the Supreme Court the power to reverse or affirm state court decisions addressing the federal constitution, treaties or laws. In terms of appointments, the act did not establish any requirements for the position of Supreme Court justice. Though all justices who have served on the court have been lawyers, there is nothing to stop the president from selecting a non-lawyer or indeed, a non-U.S. citizen.

The act also established thirteen district courts and six circuit courts, corresponding to the number of seats on the Supreme Court at the time. While the district courts would function as trial courts, the circuit courts – sitting as three-judge panels, consisting of two district court judges and one Supreme Court justice – were given both trial and appellate responsibilities. The circuit riding duties proved exceptionally unpopular for the justices of the Supreme Court and they began requesting its elimination as early as the 1790s.[407] Until the end of circuit riding in 1891, however, Supreme Court

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behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

[405] Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton, N.J.; Oxford, U.K.: Princeton University Press, 2012); Robert G. McCloskey and Sanford Levinson, *The American Supreme Court* (Chicago: University of Chicago Press, 2005), 3.

[406] While changes to the number of justices on the court's bench do not affect the appointments process directly, very often these early changes were an effort to either facilitate or inhibit the opportunities of the president to appoint new members to the court. For example, before losing both the presidency and Congress in 1800, the Federalists pushed through the Judiciary Act of 1801, which provided that the next Supreme Court vacancy should not be filled; however, this legislation was promptly appealed by the new majority in Congress.

[407] Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*, 55.

justices would also serve as circuit court judges, with the general expectation that each would reside in the circuit he served.[408]

It is also worth making early mention of the amending process set out in Article V of the new constitution. During the constitutional convention, delegates quickly acknowledged that the Articles of Confederation's ineffectiveness came in part from the inflexibility created by the unanimity required for its reform. However, while delegates did not want a frozen constitution, nor did they want one susceptible to the will of passing majorities.[409] The process finally chosen – and the one that remains in place today – requires that for a proposed amendment to become part of the constitution, it must be passed by Congress with a two-thirds vote of each house (the House of Representatives and the Senate) and further, ratified by a minimum of three-fourths of the state legislatures.[410] Despite the successful use of the amending formula early on to install the Bill of Rights, over time the process has proven a challenging one to conquer: over 10,000 constitutional amendments have been proposed, but to date only twenty-seven have been successfully ratified, ten of those in 1791.[411]

With the court's constitutional founding and formal appointments process set out, we can now turn to the topic of judicial appointments to the court.

The Evolution of the Supreme Court (1789-2011)

In the months leading up to the passage of the Judiciary Act 1789, personal correspondence from the United States' first president, George Washington (1789-1797), suggests that he gave considerable thought to who should sit on the country's highest court, noting that he "considered the first arrangement of the judicial department as essential to the happiness of [the] country and the stability of its political system."[412] The

[408] The Judiciary Act of 1802 explicitly refers to justices of the Supreme Court residing in their circuit.
[409] Richard B. Bernstein and Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (New York: Times Books, 1993), 15.
[410] Alternatively, Article V provides that the constitution may be amended by convention, though this method has never been employed.
[411] Bernstein and Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?*, 169.
[412] Quoted in Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, and Company, 1926), 31-32.

six men eventually selected to the bench were generally well received.[413] All but two had previous judicial experience and all had played instrumental parts in the ratification of the new constitution.[414] However, despite the selection of what was by all accounts a strong first bench, the court began its work slowly, deciding only about fifty cases and making few notable decisions between 1790 and 1799.[415] John Jay, the first chief justice of the court, so thoroughly disliked the job that he spent nearly a sixth of his tenure on a diplomatic mission in England and ran for governor of New York twice. It was by his view an institution of little work, dissatisfied personnel, and one lacking popular esteem and understanding.[416]

The Supreme Court's position improved considerably under the leadership of Chief Justice John Marshall, who served from 1801 to 1835. While a detailed account of the Marshall court is beyond the scope of this chapter, it has been credited with at least three enduring legacies: judicial supremacy, national supremacy, and a broad interpretation of the scope of national power.[417] Most famously, Marshall wrote the opinion for the court in *Marbury v. Madison* (1803),[418] which was the first case to exercise judicial review.

The period immediately following the War of 1812 proved consequential both for the Supreme Court and the process by which its justices were appointed. While in its first few years the Supreme Court was tentative in its approach to judicial review, in the aftermath of the war it came to more aggressively assert its defence of a strong national union.[419] The awakening of a 'nationalist spirit' provided the Marshall court the opportunity to maximize the protection of property rights, as well as the idea of nationalism.[420] Such decisions, however, aroused strong resentment and even unsuccessful efforts on the part of members of Congress to curb the powers of the

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[413] John Jay was selected as chief justice. The five associate justices included: John Rutledge, James Wilson, William Cushing, Robert H. Harrison, and John Blair.
[414] Warren, *The Supreme Court in United States History*, 45-44.
[415] Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*.
[416] Henry Julian Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II* (Lanham: Rowman & Littlefield Publishers, 2008), 67.
[417] Jeffrey Allan Segal, Harold J. Spaeth, and Sara Catherine Benesh, *The Supreme Court in the American Legal System* (Cambridge; New York: Cambridge University Press, 2005).
[418] *Marbury v. Madison*, 5 U.S. 137 (1803).
[419] Important decisions that expanded national powers during this period included, *McCulloch v. Maryland*, 17 U.S. 316(1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824). Notably, private property rights were protected in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).
[420] McCloskey and Levinson, *The American Supreme Court*, 36-37.

court.[421] At least two proposals for constitutional amendment of the judicial appointments process were put forward during this early period. In 1808, Senator James Hillhouse of Connecticut proposed that the House of Representatives be given an equal voice to that of the Senate in the appointing process, and in 1818, Congressman Lewis of Virginia proposed that the power of judicial appointment be vested with the two legislative houses alone.[422] While none of these proposals to either limit the court's jurisdiction or formally reform its appointments process gained meaningful support, they do show that in these early years there was some disquiet over what the role of the Supreme Court should be.

The Senate Judiciary Committee

While there was little movement in these early years to formally reform the Supreme Court's appointments process, the gradual transformation of the role of the Senate's Judiciary Committee had an important impact on how appointments were made. Those familiar with contemporary appointments to the Supreme Court are already well aware of the prominent role the Senate Judiciary Committee plays in the judicial appointments process. This, however, has not always been the case, and in the court's early years, the Judiciary Committee played only a bit part. For its first twenty-seven years, in fact, the Senate operated without a formal committee system and considered most of its work as a 'committee of the whole.' In contrast to the weeks of committee meetings that are now the standard greeting for any Supreme Court nominee, on September 26, 1789, the upper house confirmed the first six Supreme Court justices just two days after their nominations were introduced.[423]

It was the increasing workload of reviewing presidential nominations, and the pressing needs of national defense during the War of 1812, that made the need for Senate standing committees increasingly apparent. By the end of the war in 1815, the Senate was considering the creation of its own committee system, and in December 1816, it established the Judiciary Committee as one of its original standing committees. While the

[421] Warren, *The Supreme Court in United States History*, 653-63.
[422] Herman V. Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History (1897)," in *Proposed Amendments to the U.S. Constitution, 1787-2001*, ed. John R. Vile (Clark, N.J.: Lawbook Exchange, 2003), 154.
[423] Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*, 54.

Judiciary Committee did not immediately take over the task of vetting judicial candidates (during the presidency of James Monroe (1817-1825), the Senate referred only one of twenty-one lower court nominations to the committee),[424] as the work of the Senate increased, the committee system became a practical necessity: between 1816 and 1868, two-thirds of judicial nominees were referred to the Judiciary Committee.[425] Further changes to the Senate's committee system contributed to the Judiciary Committee's increasing importance in the judicial appointments process. In 1868, the Senate adopted a rule that automatically referred all nominations to the relevant standing committee. This move proved an important one for the Judiciary Committee's role in Supreme Court appointments: since this change it has vetted eighty-eight of ninety-five Supreme Court nominations.[426]

While the Supreme Court's national prestige continued to grow under the leadership of both chief justices Marshall and Roger Taney (1836-1864), during this same time period the southern states' protection of slavery was an issue of mounting political tension, and by the 1850s, had brought the U.S. to the brink of civil war. The Supreme Court entered into the political fray in 1856 with the case of *Dred Scott v. Sanford*.[427] The case pivoted on the question of whether Scott, who had been born into slavery in Louisiana, had become a free person while living in states and territories that forbade slavery. In what has been referred to as "the most disastrous opinion the Supreme Court has ever issued,"[428] a six-judge majority denied the right of citizenship to slaves, as well as the right of Congress to control slavery in the territories. The decision has not only been credited with accelerating the country's descent into civil war (1861-1865), but also with causing a rapid loss of prestige for the Supreme Court itself.[429]

The court's waning support and the intense political cleavages coming out of the Civil War had an observable impact on the court's appointments, particularly with

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[424] Mitchel A. Sollenberger, *Judicial Appointments and Democratic Controls* (Durham: Carolina Academic Press, 2011), 104.
[425] Denis Steven Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," in *CRS Report* (Washington: Congressional Research Service, The Library of Congress, 2010), 17-18.
[426] Ibid.
[427] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[428] McCloskey and Levinson, *The American Supreme Court*, 62.
[429] Richard D. Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," *Cardozo Law Review* 5, no. 1 (1983): 6.

regards to the Senate's role in the process. By Friedman's account, in the fallout of the *Dred Scott* decision the court was no longer protected from the 'hurly-burly' of partisan and factional politics, and significant senatorial participation in judicial appointments came to be more accepted.[430] In the years that immediately followed the Civil War, senators demanded that nominees hold orthodox views on issues relating to Reconstruction,[431] and those nominated were very often well-known partisans.[432]

During these Reconstruction years, the attachment of Supreme Court seats to regions continued and came to underscore the political nature of the court.[433] However, as the workload of the court shifted – nearly tripling between 1870 and 1890 – Congress was persuaded to eliminate the justices' circuit riding duties in 1891.[434] With the formal attachment of justices to certain circuits gone, the expectation for regional representation on the bench was considerably weakened.[435]

As the U.S. entered into the Progressive Era (1890s-1920s) – a period that featured a strong push to reduce political corruption and entrench powers in the executive – a number of reforms were undertaken that helped to shape the Supreme Court's appointments process.[436] In 1913, the seventeenth constitutional amendment, which changed the responsibility of senatorial selection from each state's legislature to popular election, was adopted. While at the time of its passage there seemed to be little thought given to the possible effects the amendment would have on judicial appointments (or on federalism more generally),[437] its impact on the Supreme Court process was quickly felt. Democratic President Woodrow Wilson's (1913-1921) nomination of Justice Louis

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[430] "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," *Cardozo Law Review* 5, no. 1 (1983): 35.
[431] The Reconstruction Era covers the period immediately following the Civil War, 1865-1877.
[432] Three of the four nominees rejected during the Reconstruction Era, for example, were former attorneys general, and the fourth had exercised similar powers as a special counsel. See Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," 27-28.
[433] "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," 30.
[434] Felix Frankfurter and James McCauley Landis, *Business of the Supreme Court; a Study in the Federal Judicial System* (New York: Macmillan, 1928), 104-06.
[435] Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," 50.
[436] For an historical review of the Progressive Era, see Lewis L. Gould, *America in the Progressive Era, 1890-1914* (Harlow, England; New York: Longman, 2001).
[437] David R. Stras, "Understanding the New Politics of Judicial Appointments," *Texas Law Review* 86(2007-2008): 1060.

Brandeis to the Supreme Court in 1916 has been described as the "most bitter and most intensely fought in the history of the Court."[438] The contentiousness of Brandeis's appointment can be attributed, at least in part, to the lobbying undertaken by financial, legal, and political communities who opposed his nomination. Notably, it was the first time that the American Bar Association (ABA) sought to influence the confirmation process, though it did so through informal means. While Brandeis's nomination did ultimately succeed, passing the Senate by a vote of 47 to 22, the experience was a signal that elected senators – with their focus now shifting to constituents rather than to state legislatures – could be the effective targets of lobbying efforts.[439] Indeed, in the ensuing decades, interest groups have secured an important and influential role in the vetting process,[440] with some groups now willing to spend tens of millions of dollars to support or oppose a Supreme Court nominee.[441] Additional structural changes in the Senate also increased the accountability of senators to both special interest groups and the electorate. In 1929, it adopted Senate Rule XXXI, which opened all sessions on the debate of presidential nominees to the public and required a roll-call vote for all nominations, thus ensuring that a paper record existed for the votes of each senator on judicial appointments.[442]

While these changes to the Senate did not target the judicial appointments process directly, efforts to formally modify the Supreme Court's appointments system were also part of the 'progressive' spirit of this time. Progressives – believing that appointments based on merit could not be made by congressmen because of the dominance of patronage politics – sought to weaken the legislative branch by such measures as direct primaries, popular election of senators, referenda, and recalls in an effort to strengthen

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[438] Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, 141.
[439] Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times*, Hoover Studies in Politics, Economics, and Society (Lanham, Md.: Rowman & Littlefield, 2006), 48.
[440] Gregory A. Caldeira and John R. Wright, "Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate," *American Journal of Political Science* 42, no. 2 (1998). Although see Martin Shapiro, "Interest Groups and Supreme Court Appointments," *Northwestern University Law Review* 84(1989-1990).
[441] Jeffrey Rosen, "So What's the 'Right' Pick?," *The New York Times*, 3 July 2005; David E. Rosenbaum, Lynette Clemetson, and David D. Kirkpatrick, "In Fight to Confirm New Justice, Two Field Generals Rally Their Troops Again," ibid.
[442] Joseph Pratt Harris, *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate* (Berkeley: University of California Press, 1953), 252-55.

the president's powers. To this end, thirteen constitutional amendments were introduced in Congress from 1889 to 1926 calling for the popular election of Supreme Court justices. If proposals for the election of all federal court judges are counted during this period, the number rises to thirty-two.[443] Notably, of these thirty-two, twenty-nine (91%) were presented by Democrats and all but three were presented by members of the House of Representatives. Despite this interest, no large-scale movement to reform the court's appointments system took hold and no legislation reforming the judicial appointments system passed during the Progressive Era.[444]

It should be asked whether these failed attempts at reform fit within the Judicial Politics Trigger model. As predicted by the model, these calls for reform came on the heels of a number of controversial appointments to the Supreme Court. However, the interest in reforming the selection methods of government officials clearly extended beyond the judiciary. This episode, like the period of mega constitutional politics in Canada, illustrates that the motivations behind reform proposals must include, but can also extend beyond, our two predicted background factors. However, without a catalyzing trigger, these proposals were not endorsed by either the Senate or president.

At the same time that Senate rule changes were helping to make the appointments process an increasingly visible one, the Supreme Court was also entering a period of especially successful appointment outcomes. Whereas during the nineteenth century the Senate rejected one out of every four Supreme Court nominees, often on strictly partisan grounds,[445] between 1894 and 1968, only one candidate in forty-six was rejected.[446] Friedman, for one, attributes this change over the first several decades to the growing influence of formalism in politics, which placed value on neutral and objective scientific methods. In the case of judicial appointments this meant that overtly political interference in the process by senators was generally scorned.[447] The success of judicial nominees during these decades, however, does not mean that this was a quiet time for the court.

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[443] These numbers were compiled using John R. Vile, ed. *Proposed Amendments to the U.S. Constitution, 1787-2001*, 3 vols. (Clark, N.J.: Lawbook Exchange, 2003).
[444] Sollenberger, *Judicial Appointments and Democratic Controls*, 176-77.
[445] Henry Julian Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1985), 39-43.
[446] In 1930, the nomination of John Parker was defeated by one vote in the Senate.
[447] Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," 44-47.

The 1930s, in particular, saw the court face some of the most well-known and important efforts to reform it.

One episode is worthy of special note. In his first term of office, Democratic President Franklin Roosevelt (1933-1945) introduced a series of legislation, known as the New Deal, which was intended to counteract the Depression and jump-start the economy. The Supreme Court, however, proved unfriendly to the New Deal program and struck down key pieces of its legislation. Concluding that the court's decisions had to be reversed, Roosevelt began formulating strategies for court reform as early as 1935.[448] After a major re-election victory in November 1936, Roosevelt presented to Congress what became known as his 'court-packing plan,' which would have enabled the president to appoint a new judge to supplement any judge over seventy who failed to retire, up to a maximum total of fifteen. Most importantly for Roosevelt's political ambitions, the plan would have allowed the president to quickly nominate several new justices, thus helping to ensure the protection of the New Deal program. The court-packing proposal, however, never received the necessary congressional approval and was not implemented.

While the reasons for the failure of Roosevelt's court-packing plan continue to be debated,[449] for our purposes it is worth considering why judicial appointments reform in particular was not proposed. Certainly this was a moment when one of our predicted background factors, a series of controversial court decisions, was present. However, in this situation, where Roosevelt was dealing with the immediate threat that the court's decisions posed to his policy interests, the reforms proposed were designed to address very short-term concerns: upholding the New Deal program. Reforms to how Supreme Court justices were appointed would not have addressed this issue. With a Democratic majority in the Senate, Roosevelt could be relatively confident that any seat on the court eventually vacated could be filled with someone believed to be sympathetic to his views. However, with lifetime tenure, there was no guarantee that a justice would have retired in the near future. Consequently, judicial appointments reform would have offered no political advantage and it is therefore unsurprising that it was not proposed at this time.

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[448] J.L. Carson and B.A. Kleinerman, "A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan," *Public Choice* 113, no. 3 (2002).

[449] For a summary of these debates, see Stephen M. Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power* (Cambridge; New York: Cambridge University Press, 2011), 263-64.

The Warren Court (1953-1969)

There appear a number of good reasons to view the Warren court as a turning point for the Supreme Court's appointments process. Whether for better or worse, Republican President Dwight Eisenhower's selection of Earl Warren to the position of chief justice (1953-1969) is recognized as a critical moment in the history of the Supreme Court. Amongst its accomplishments, the Warren court eventually extended most of the rights contained in the Bill of Rights to the states through the incorporation of the fourteenth amendment's due process clause, in addition to giving strong support to the civil rights movement, expanding protection for freedom of speech and the press, and creating a new constitutional right to privacy.

The tenor of the Warren court's decision-making was set just two months after its chief justice's confirmation: in one of the Supreme Court's most important decisions, *Brown v. Board of Education of Topeka I* (1954),[450] it declared that state laws protecting separate public schools based on race were unconstitutional. The *Brown* decision, in addition to a number of later controversial decisions on electoral reapportionment schemes, civil liberties, obscenity laws, criminals' rights, school prayer, and sexual privacy, helped to generate a growing coalition of members of Congress hostile to the Warren court.[451]

Importantly, the *Brown* decision marked the end of a streak of successful Supreme Court appointments that had begun in the 1890s. By the early 1900s, the Senate Judiciary Committee had already begun showing interest in taking a more active role in the screening of Supreme Court nominees. As noted earlier, in 1916 Louise Brandeis was the first nominee to have a Senate hearing on his nomination. Not long after in 1925, nominee Harlan Fiske Stone became the first to appear before the committee, though it was at the request of the candidate himself.[452] Notwithstanding Stone's appearance, the Judiciary Committee over the next thirty years usually declined to invite Supreme Court nominees to testify before it.[453] However, beginning with John M. Harlan in 1955, the

[450] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[451] *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power*, 336.
[452] Lee Epstein and Jeffrey Allan Segal, *Advice and Consent the Politics of Judicial Appointments* (Oxford; New York: Oxford University Press, 2005), 88.
[453] A total of four nominees appeared before the Senate Judiciary Committee pre-*Brown* (1954).

first post-*Brown* nominee, every successful Supreme Court nominee has appeared before the Senate Judiciary Committee. The focus of committee members also began to shift post-*Brown*: in the several years after the decision, Supreme Court nominees faced questions from conservative southern Democrats on the nature of the constitution (fixed or evolving), and in particular, the nominees' thoughts on the Supreme Court's decision.[454] Thus in the thirty years between the nominations of Stone and Harlan a considerable shift in the practice of the Senate's role of 'advice and consent' can be observed.

While *Brown* was certainly a turning point, it was the failed appointment of Abe Fortas to the position of chief justice in 1968 that seems to fully mark the end of the Senate's relative deference to the president in making Supreme Court appointments. Although the Senate Judiciary Committee did report favourably on the Fortas nomination, a successful filibuster on the Senate floor eventually led Fortas to request that his nomination be withdrawn. Fortas, who had sat as an associate justice on the court since 1965, was firmly part of the liberal contingent on the Warren court, as well as a close friend and advisor to Democratic President Lyndon B. Johnson (1963-1969). Though the work of the Warren court alone cannot account for the failure of Fortas's nomination, it was most certainly an important factor at play during the nomination process.[455]

Interestingly, at the same time that the controversy surrounding Fortas's nomination was unfolding, a notable uptick in proposed constitutional amendments to the Supreme Court's appointments process was also underway. In the several months between President Johnson's announcement of the Fortas nomination in June and his eventual withdrawal in October, there were no less than thirteen constitutional proposals to modify

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[454] Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process*, 65-68; Michael Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees* (Lawrence, Kan.: University Press of Kansas, 2004), 7-12.

[455] Abraham notes no less than six contributing factors. He argues that "cronyism, the timing of the nominations, the political climate, accumulated hostility to the Warren Court, Fortas's posture on some of the more controversial issues in which he participated (and some in which he did not), charges of judicial impropriety by his continuing extrajudicial active counseling of the president, and the revelation that he had accepted a then huge lecture fee ($15,000) to conduct a series of university seminars – evidently arranged by partner Porter of his old law firm – at American University during the summer of 1968 combined ultimately to doom the proposed Fortas promotion and with it the Thornberry nomination." See Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, 227.

the Supreme Court's appointment system presented and altogether a total of seventeen proposals in 1968. A closer look at these proposals reveals that just as with previous efforts, the vast majority (sixteen of the seventeen) came from members of the House of Representatives, with the majority of proposals (65%) calling for the election of justices.[456] Of these sixteen constitutional proposals emerging from the House of Representatives, eleven came from Republican congressmen at a time when the Democratic Party controlled both the Senate and presidency. With the average likelihood of an amendment being added to the constitution standing at less than one in a thousand,[457] this mass of proposals – none of which made it past committee stage – cannot be viewed as serious efforts to amend the judicial appointments system. However, they certainly illustrate dissatisfaction amongst members of Congress with President Johnson's selection of Justice Fortas as chief justice, and more generally, a frustration with the direction of the Warren court. Moreover, this group of failed reforms fits within the Judicial Politics Trigger model.

The controversy surrounding the Supreme Court's decisions also made it a focus of the 1968 presidential election. That election saw Republican candidate Richard Nixon narrowly defeat Democrat Hubert Humphrey in a close three-way race that also included George Wallace (who ran as a candidate for the American Independent Party). During the campaign, both Nixon and Wallace leveraged antipathy toward judicial rulings to mobilize voters.[458] Wallace's platform called for formal reforms to the appointments and retention systems of federal courts, including a requirement that Supreme Court justices be reconfirmed by the Senate at reasonable intervals. In explaining the need for reform, Wallace explained that, "[i]n the period of the past three decades, we have seen the Federal judiciary, primarily the Supreme Court, transgress repeatedly upon the prerogatives of the Congress and exceed its authority by enacting judicial legislation, in the form of decisions based upon political and sociological considerations, which would

[456] The proposals were submitted by either Republicans (69%) or Democratic congressmen representing southern states. These proposed constitutional amendments were compiled using, Vile, *Proposed Amendments to the U.S. Constitution, 1787-2001*.
[457] Bernstein and Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?*, 169.
[458] Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power*, 303.

never have been enacted by the Congress."[459] By contrast, Nixon promised to gain control over judicial appointments, explaining: "We advocate application of the highest standards in making appointments to the courts, and we pledge a determined effort to rebuild and enhance public respect for the Supreme Court and all other courts in the United States."[460]

The differences between the two parties' positions on judicial appointments reform are worth further consideration. While both were unhappy with recent decisions by the court, the response by the Republican Party was not to reform the court, but to mold it. As Stephen Engels explains, the Republicans were careful to distinguish between attacking the court's authority to make a decision versus attacking the decision itself. The need was to change the decision-maker, not the institution, by appointing judges who adhered to "a strict interpretation of the Supreme Court's role."[461] Because Nixon held a reasonable chance at election, there were few incentives to include appointments reform as part of the Republican platform, whereas as a third party candidate, Wallace had little to lose and had the freedom to propose reforms that had virtually no chance at implementation.

Upon entering office, Nixon (1969-1974) quickly had the opportunity to nominate two Supreme Court justices. Nixon's first choice of Warren Burger to replace Earl Warren as chief justice passed through the Senate easily. Burger was confirmed just nineteen days after his nomination and was the only witness at his Senate confirmation hearing, which lasted less than two hours.[462] However, Nixon's efforts to fill the second vacancy proved much more difficult. In quick succession, Nixon nominated Clement Haynsworth and G. Harrold Carswell, with both nominees running into trouble during the Senate vetting process and ultimately failing to be appointed.[463]

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[459] American Independent Party, "American Independent Party Platform 1968," The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=29570.
[460] Republican Party, "Republican Party Platform 1968," The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=25841.
[461] Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power*, 305.
[462] Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*, 89.
[463] Concerns were raised about Haynsworth's insensitivity to a number of financial and conflict-of-interest improprieties and to Carswell's ties to white supremacists, in addition to a perceived weak legal background. See *Seeking Justices: The Judging of Supreme Court Nominees*, 69.

The Failed Nomination of Robert Bork (1987)

Even in the context of increasingly volatile process faced by some Supreme Court nominees, the rejection of Robert Bork in 1987 is generally regarded as a turning point in the history of Supreme Court appointments. Following the retirement of Justice Lewis Powell Jr., Republican President Ronald Reagan (1981-1989) announced the nomination of Bork, who was then a judge on the U.S. Court of Appeals. In contrast to defeated nominees who had preceded Bork, there were no serious charges made against his competence or ethical standards. Instead, opponents focused on Bork's conservative views on issues of civil liberties. The divisiveness stirred by the nomination was apparent almost immediately when within forty-five minutes of Reagan's announcement, Democratic Senator Edward Kennedy stood in the well of the Senate and announced, "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government…."[464]

As with the failed nomination of Fortas in 1968, there were many factors working against Bork. The 1986 congressional election had returned control of the Senate to the Democrats by a 55 to 45 majority, and President Reagan's political fortunes were waning as he approached the end of his second term. Bork's own copious scholarly writings provided significant fodder for interest groups and Senate opponents, and moreover, his appearance before the Judiciary Committee did little to subdue the fears that had been raised early on.[465] In contrast to previous nominees who had appeared before the Senate committee, Bork was questioned extensively on the nature of rights and was asked to defend his opposition to the basic ideas that underlay *Griswold v. Connecticut* (1965),[466] the decision that first recognized a constitutional right to privacy. At the time, *Griswold* served as a cipher for the abortion debate because the Supreme Court's decision in *Roe v. Wade* (1973)[467] – which extended the right to privacy to a woman's choice to have an

[464] As quoted in, Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W.W. Norton, 1989), 98.
[465] Jan Crawford Greenburg, *Supreme Conflict: The inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007), 51.
[466] *Griswold v. Connecticut*, 38 U.S. 479 (1965).
[467] *Roe v. Wade*, 410 U.S. 113 (1973).

abortion – was considered politically too hot to handle. Nonetheless, the relationship between the two decisions and the intent of Senators was clear and Bork is generally viewed as the first nominee to have been tested on *Roe v. Wade*, which came to replace *Brown* as the case of greatest interest for committee members. Ultimately, Bork's nomination was defeated in the Senate by a historically large margin, 42 to 58.

Bork himself has noted that his nomination received an unprecedented level of political attack,[468] and empirical studies have indeed illustrated that aspects of the appointments process and the attention surrounding judicial appointments have shifted post-Bork. To mention just a few examples, analysis by Epstein *et al.* indicates that while senators considered the political ideology of Supreme Court nominees as early as the 1950s, a senator's willingness to vote in favour of a nominee viewed as ideologically distant from his or her own preferences has decreased considerably post-Bork.[469] In their review of confirmation hearings, Martinek, Kemper, and Van Winkle have found that subsequent to the Bork nomination, the number of days from nomination to confirmation has more than tripled (from 42 to 143) for candidates to the U.S. Courts of Appeals,[470] and Davis has noted that following the failed Bork appointment, media coverage of Supreme Court nominations increased by 38%.[471]

While no other Supreme Court nominees have been defeated by the Senate since Bork, a number have faced considerable and very public opposition in their journey to the country's highest court. Notably, in 1991 Clearance Thomas's nomination to the Supreme Court passed through the Senate by an especially narrow margin – 52 to 48. Concerns over Thomas's nomination ranged from his political conservatism and comparatively light legal qualifications, to allegations of sexual harassment by one of Thomas's former work colleagues.

The most recent nominations to the Supreme Court's bench have continued under this atmosphere of heightened public attention and partisan division. When the retirement

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[468] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York; London: Free Press; Collier Macmillan, 1990).
[469] Lee Epstein *et al.*, "The Changing Dynamics of Senate Voting on Supreme Court Nominees," *The Journal of Politics* 68, no. 2 (2006).
[470] Wendy L. Martinek, Mark Kemper, and Steven R. Van Winkle, "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998," *The Journal of Politics* 64, no. 2 (2002).
[471] Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (Oxford; New York: Oxford University Press, 2005), 98.

of Justice Sandra Day O'Connor in July 2005 and the death of Chief Justice William Rehnquist a few months later broke an eleven-year period that had seen no vacancies on the court, Republican President George W. Bush (2001-2009) had the unique opportunity to appoint two members to the bench in quick succession. His first nominee for chief justice, John Roberts, was confirmed in September 2006 by a vote of 78 to 22, with the nays all coming from the liberal wing of the Democratic Party. His legal qualifications undisputed, Roberts nonetheless faced considerable scrutiny from members of the Judiciary Committee. In comparison to the Senate confirmation hearing of Warren Burger, which lasted two hours, Roberts's hearing lasted four days.[472]

The president's second nominee, Harriet Miers – who was Bush's White House counsel and former personal lawyer – did not experience the same success. While Miers boasted an impressive legal career, she had no experience above the trial court level and no background in constitutional law. This was not the resume typically associated with recent Supreme Court nominees, and concerns about Miers's qualifications came from both sides of the political spectrum. More problematic, however, appeared to be the fact that many Republican senators were skeptical of Miers's conservative credentials and feared she would prove too moderate. Despite a Republican majority in the Senate, the likelihood of her nomination's ratification soon became doubtful, and less than four weeks after President Bush announced his selection, Miers withdrew her nomination.

On the heels of Miers's withdrawal, Bush's third choice was Circuit Court Judge Samuel Alito. Unlike Miers, Alito was a proven conservative on key constitutional issues and had over fifteen years of judicial experience at the time of his nomination. While Alito's conservative credentials certainly passed muster for Republican senators, unsurprisingly, they raised concerns for Democratic members on the Judiciary Committee, who focused on his possible opposition to abortion and affirmative action, as well as civil rights and liberties more generally.[473] With the Republicans holding fifty-five of the hundred seats in the Senate, Alito's confirmation was never in serious doubt; however, Democratic members marked their reservations clearly, with all eight of the

[472] Denis Steven Rutkus and Marureen Bearden, "Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President " in *CRS Report* (Washington: Congressional Research Service, The Library of Congress, 2009), 39.
[473] Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, 321.

party's members on the Judiciary Committee voting against Alito's nomination and by making an unsuccessful filibuster attempt on the Senate floor. Finally, three months after his nomination, the Senate confirmed Alito's nomination 58 to 42.

Miers's experience illustrates that despite the partisan nature of appointments to the Supreme Court, qualifications do remain a significant consideration in the choices senators make.[474] Nonetheless, both Roberts and Alito received more negative votes from senators than would have once been expected given the absence of serious questions about their personal characters or qualifications. This has continued with the latest appointments made to the bench by Democratic President Barak Obama (2009-present), with justices Sonia Sotomayor (2009) and Elena Kagan (2010) each receiving over thirty negative votes on their confirmation, all from Republicans. Thus it appears that while legal qualifications remain a critical criterion for nominees to the Supreme Court, legal ideology has come to play a determining role in the appointments process.

Notably, the ABA's participation in Supreme Court appointments via its Standing Committee on the Federal Judiciary has been the focus of informal reforms during these most recent appointments. Starting in 1953 with the administration of Republican President Dwight Eisenhower (1953-1961), presidents began to seek the views of the ABA on potential federal judicial nominees. The committee's role has traditionally been to evaluate a short list of possible candidates to the Supreme Court, providing an assessment of the level of qualification of the jurist to the president. While presidents' approaches to Supreme Court nominations have followed different procedures, the ABA was consistently consulted from Eisenhower to Democratic President Bill Clinton (1992-2000). This changed, however, with George W. Bush, who announced early on in his administration that the ABA's role in judicial nominee review would be discontinued. Arguing that the ABA "takes public positions on divisive political, legal, and social issues that come before the courts," the Bush administration concluded that allowing the ABA a "preferential, quasi-official role" in judicial evaluation was "particularly inappropriate."[475]

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[474] Lee Epstein *et al.*, "The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court," *Florida State University Law Review* 32, no. 4 (2005).

[475] Alberto R. Gonzales, "Letter to the ABA from Al Gonzales," The White House, http://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010322-5.html.

What helps to explain this informal reform undertaken by the Bush administration? Bush was not the first Republican to criticize the ABA's review process, and indeed in recent years the ABA's most aggressive opponents have been conservatives.[476] While some research has indicated that the ABA is more likely to rate a Democratic judicial nominee as 'qualified,' at the time of President Bush's decision to drop the ABA screening, there already existed a general view amongst conservatives that the ABA had a liberal bias.[477] The JPT model anticipates that informal reform will be triggered by one of two background factors: a series of controversial judicial appointments or a series of controversial judicial decisions. In this case, we can see that it was a component of the appointments process that became a point of controversy. For the Bush administration, which appeared to view the ABA's review as having a liberal bias, the incentives to simply drop the process were relatively straightforward. However, the informal nature of the ABA's status meant that while it was easy for President Bush to simply announce the process would be dropped, it was just as easy for the current President Barak Obama (2009-), to resume using the ABA committee to help evaluate potential judicial nominees following his election.

As we come to the end of this historical review of the Supreme Court's appointments system, it is useful to take note of other political considerations, beyond those of legal qualifications and judicial philosophy, which are taken into account during the selection process and how these may have changed over time. For the president, the power to choose remains formally unaltered, but considerations on how to put forward a successful nominee have evolved considerably. While interests in maintaining a 'representative bench' can be identified early on in the court's history, views on what constitutes 'representative' have changed over time. As was already noted, prior to 1891 and the elimination of circuit riding, there was an expectation of regional representation on the bench. While region is no longer a major consideration for presidents in choosing Supreme Court nominees, other criteria such as religion, gender, and ethnicity continue to

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[476] Laura E. Little, "The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give up on the Lawyers?," *William & Mary Bill of Rights Journal* 10, no. 1 (2001): 44.
The Federalist Society undertakes a yearly 'ABA watch' that documents alleged biases by the ABA in reviewing judicial nominees, see: http://www.fed-soc.org/publications/page/aba-watch

[477] James Lindgren, "Examining the American Bar Association's Ratings of Nominces to the US Courts of Appeals for Political Bias, 1989-2000," *Journal of Law & Politics* 17, no. 1 (2001).

be points of interest. The court, for example, has had a long history of a "Roman Catholic seat" and a "Jewish seat."[478] More recently, representation on grounds other than religion appear to have become more influential, with the notion of a "black seat" and a "woman's seat(s)" appearing as stronger political criteria.[479] While the president is ultimately free to nominate whomever he or she may wish, the required ratification by the Senate means that the president must be sensitive to these evolving informal criteria, lest the nominee be rejected.

Analysis

In contrast to Canada and Australia, attempts to formally reform the appointments system of the U.S.'s final court of appeal have never come close to succeeding. Considering the gallons of ink that have been spilled arguing that reform is needed, this might appear a bit surprising. The historical analysis included in this chapter serves to provide a clearer understanding of why this might be the case.

As already outlined, the theory tested here anticipates that an attempt to reform the judicial appointments process is more likely to occur when the following background factors are present: 1) a series of decisions by the court that attracts the attention of a set of political actors, and/or 2) an appointment(s) to the court that garners the attention of a set of political actors; and when either an 'aversive' trigger or a 'threat to political stability' trigger is initiated. For informal reform, it is anticipated that the same background factors, triggering mechanisms, and institutional rules that structure formal reforms remain at play. It is hypothesized that actors will choose informal over formal reforms for two possible (sometimes interacting) reasons: (1) out of an interest to maintain formal control over the appointments process, and/or (2) because institutional rules create great enough barriers that formal reform is impractical. We can now turn to how the JPT performs in the U.S. case.

Certainly, the American case has numerous historical examples featuring our specified background factors, and these did indeed lead to increased interest in reforms to

[478] With the exception of a seven-year period (1949-1956), the "Roman Catholic seat" has been maintained since 1894. See Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 63-65.
[479] *Justices and Presidents: A Political History of Appointments to the Supreme Court*.

the Supreme Court's appointments process. However, in comparison to the Canadian and Australian cases, a catalyzing political trigger strong enough to bring about formal reform did not emerge. While it is certainly the case that the U.S. has experienced moments where its political stability has come under threat – most obviously, the discord leading to the American Civil War – the Supreme Court's appointments or jurisprudence were not a defining part of this dispute (the *Dred Scott* case notwithstanding). Had the outcome of the war been different, it seems almost certain that substantive modifications to federal institutions would have been undertaken; however, this remains merely a hypothetical.

Despite the absence of constitutional reform, efforts to modify the Supreme Court's appointments system have been made. Two periods illustrate these efforts well. First, during the Progressive Era, at least thirteen proposals calling for the popular election of Supreme Court justices were proposed by members of the House of Representatives. Later on in 1968 – the year of Abe Fortas's failed nomination to the position of chief justice – seventeen proposals to constitutionally modify the Supreme Court's appointments process were presented, with sixteen of these coming from members of the House of Representatives. In total, of the sixty constitutional proposals calling for the reform of the federal courts appointments system identified from 1787 to 2001, 93% came from the House of Representatives, the legislative chamber that holds no formal role in the selection of federal court judges.[480] In both of these examples, a clear partisan divide was present, with most proposals coming from members of the political party not holding the presidency or the Senate majority. Thus, calls for constitutional reform emerging from Congress have most often come from representatives whose position offers them no formal part in the appointments process and whose party did not have a controlling hold over judicial selection or ratification. These examples, then, do hold to the background factors anticipated to be present when reforms are attempted. While the reforms proposed during the Progressive Era were not prompted by a particular set of judicial appointments *per se*, but rather were part of a larger initiative to remove all appointments from Congress, the broader interests that prompted these reform initiatives do still fit within the hypothesized background factor of an 'appointment(s) that garners attention.' The reforms proposed in 1968, during a period in which both concerns were

[480] These numbers were compiled using Vile, *Proposed Amendments to the U.S. Constitution, 1787-2001*.

voiced over decisions by the Warren Court and the selection of Abe Fortas as chief justice, also have the hypothesized background factors. Nonetheless institutional rules made the likelihood of success for such efforts exceptionally slight. While congressmen do have the power to propose constitutional amendments, any proposal must gain the support of two-thirds of the members in both houses of Congress, in addition to ratification by three-fourths of the state legislatures. For any proposal this is a very difficult threshold to meet; however, on the issue of judicial appointments, the challenge appears all the greater given that there is no obvious incentive for senators to dilute their own influence over the judicial appointments process. With the Senate positioned to veto any constitutional proposal, this institutional fragmentation has meant that despite demonstrated interest amongst members of the House of Representatives to reform the Supreme Court's appointments process, the likelihood of a political trigger emerging strong enough to bring about constitutional reform appears exceptionally slight. Altogether, the lack of formal reform can hardly be considered surprising; however, these efforts do illustrate that the United States is not simply a case where formal reform of the Supreme Court's appointments process has not been attempted. While the predicted background factors have indeed led to interest in reform, the lack of a catalyzing trigger has meant that formal reform has never come close to implementation.

Despite the constitutional rigidity of the appointments system, the actual process of appointing a Supreme Court justice today is in practice a very different one from that followed in 1789. The institutional evolution of the Senate's role of 'advice and consent' over time is especially notable. With its constitutional jurisdiction over judicial selection broadly defined, the Senate was vested with powers expansive enough that they could be exercised largely at its own discretion. While the Senate itself has undergone formal reforms, Senate changes impacting on the Supreme Court's appointments process have not been directed specifically at court appointments. Following the War of 1812, the creation of the committee system provided the potential for a more focused venue for the Senate to take on its role of 'advice and consent.' The importance of the Judiciary Committee was further solidified in 1868 when a Senate rule was adopted that automatically referred all nominations to their relevant standing committees. The Progressive Era also brought changes to the court's appointments process. The adoption

of the seventeenth amendment in 1913, the requirement for a roll-call vote for all judicial nominations, and the opening of all sessions on the debate of judicial nominees to the public, both in 1929, increased senators' accountability to both special interest groups and voters.

The Supreme Court's own standing and the political conditions of the time also impacted on the Senate's approach to Supreme Court appointments. The court's waning support and the intense political cleavages coming out of the Civil War meant that the court was less protected from the 'hurly-burly' of partisan politics, and significant senatorial participation in judicial appointments came to be more accepted. By contrast, the rise of formalism in American politics in the 1890s meant that senators' political interference in the appointments process was generally scorned. The convention of a Supreme Court nominee appearing before the Judiciary Committee became firmly established following the politically divisive decision in *Brown* (1954), which also led to a new focus for committee members on the nature of the constitution, and in particular, the nominees' thoughts on the decision. In the decades since, the decision of *Roe v. Wade* (1973) has become the new focus of committee members, as highlighted by the Bork nomination. Altogether, as the court has become more politically important, the attention paid to judicial appointments has risen and has contributed to a more formalized and detailed role of 'advice and consent' for the Senate.

Altogether, the ambiguity surrounding how the president and Senate should exercise their roles has provided both bodies with considerable discretion, which over time has allowed for the layering on of additional rules and appointment criteria. As anticipated, interest in reforms came as reactions to decisions by or appointments to the court and the stringency of institutional rules made formal changes impractical. Thus, informal changes have dominated the appointments process of the Supreme Court. While the addition of informal rules has also been an important part of the institutional development of the final courts of appeal in both Canada and Australia, in these two countries, many of these changes have come in an effort by governments of all political stripes to maintain public confidence in the appointments process. Consequently, the overt display of partisanship in the selection of judicial appointees has been considerably more limited. By contrast, in the U.S. the division of the appointments power between

two branches of government has meant that strategic political interests have very often overridden the objective of maintaining public confidence in the appointments process. Though all three countries have politically powerful final courts of appeal, it is only in the U.S. that political interests have come to publically dominate the criteria of merit in making judicial appointments. This development has not been without consequence and has been pointed to as a reason for the U.S.'s more overtly ideological bench.[481]

[481] Ostberg and Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada*; Weiden, "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia"; Matthew E. Wetstein *et al.*, "Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the U.S. And Canadian Supreme Courts," *Comparative Political Studies* 42, no. 6 (2009).

Chapter 6

Conclusion

This dissertation set out to understand why reforms to the judicial appointments systems of final courts of appeal occur in advanced, stable democracies. Using the Supreme Court of Canada, the High Court of Australia, and the Supreme Court of the United States as case studies, this dissertation proposed and tested a theory of judicial appointments reform termed the Judicial Politics Trigger (JPT) model.

Chapter one outlined the JPT model, which anticipates that formal attempts to reform the judicial appointments process of a final court of appeal in an advanced, stable democracy are more likely to occur when the following background factors are present: 1) a series of decisions by the court that garners the attention of a set of political actors and/or 2) an appointment(s) to the court that garners the attention of a set of political actors; and when either an 'aversive' trigger or a 'threat to political stability' trigger is initiated. The model anticipated that the same background factors, triggering mechanisms, and institutional rules structuring formal reforms would also be at play for informal reforms. I hypothesized that actors choose informal over formal reforms for two possible (sometimes interacting) reasons: (1) out of an interest to maintain formal control over the appointments process, and/or (2) because institutional rules are such that formal reform is rendered impractical. The case studies analyzed here indicate that the JPT approach is a useful way for conceptualizing judicial appointments reform.

Findings

Formal Reform

The reform attempts during the respective second time periods of Canada (1949-1992) and Australia (1949-1987) illustrate how different political triggers and institutional rules influence formal reform of judicial appointments systems. Both countries experienced a series of decisions by their respective courts that consistently favoured their federal governments, alerting subnational governments to the growing importance of the judicial appointments process. These frustrations with the courts ran in tandem with subnational governments' more general frustrations with ongoing centralization. It is important to note, however, that the Canadian and Australian case studies display significant differences in the state of their intergovernmental relations.

Unlike Australia, federal politicians in Canada had credible reasons to believe that the constitutional status quo would result in continued federal-provincial discord and, more worrisome, the possible secession of Quebec. Under this 'threat to political stability,' there were several strategic actions undertaken: the government initiated constitutional discussions in an effort to bring about intergovernmental stability. As anticipated by the JPT model, the federal government was willing to relinquish some of its power over the selection of Supreme Court justices in order to increase the likelihood of a stable federation in the longer term. However, while mega constitutional politics provided the opportunity for substantive reforms to the Supreme Court's appointments system, the onerous institutional rules required for their ratification meant that despite the provinces' strong desire to formalize their participation in the selection process of the court's justices, all attempts to reform the Supreme Court's appointments process via constitutional amendment ended in failure. While reforms to the Supreme Court were comparatively well received during all constitutional rounds, they were part of a modification process requiring an exceptionally high threshold for success.

In contrast, the Australian commonwealth government was not faced with the same potential for constitutional crisis, and because of the country's amending formula, was not obliged to negotiate with the states in order to achieve constitutional reform. Thus the 'threat to political stability' trigger that brought about agreement on judicial appointments reform in Canada did not exist in Australia. As a result, there existed little incentive for the commonwealth government to concede powers over appointments to the High Court. Facing a high threshold for constitutional reform, the Australian states chose to take a pragmatic approach to reforms of the High Court's appointments system. Even with this pragmatism, however, it seems unlikely that the states would have succeeded had it not been for the 'aversive' trigger brought about by the federal Liberal Party's ascension to power in 1975. While the addition to the High Court of Australia Act of a duty to consult was an achievement for the states, it nonetheless relied on the goodwill of the commonwealth government, and as anticipated with reforms via an 'aversive' trigger, its practical impact has been limited.

Unlike in both Australia and Canada, formal reform of the Supreme Court of the United States' appointments system has never come close to succeeding, despite the

efforts of many members of Congress. Of the three cases reviewed here, the U.S. arguably illustrates most starkly the impact that institutional rules can have on reform. While some sixty constitutional proposals calling for the reform of the federal courts appointments system from 1787-2001 were identified, the institutional rules required for such reforms made the likelihood of their success exceptionally slight. With the Senate positioned to veto any constitutional proposal, this institutional fragmentation has meant that a political trigger strong enough to bring about constitutional reform has never emerged despite demonstrated interest among members of the House of Representatives to reform the Supreme Court's appointments process.

Informal Reform

With institutional rules and the general disincentives for power holders to modify their authority over judicial appointments creating strong barriers to reform, the histories of these three final courts of appeal tell stories that are largely dominated by incremental, informal changes. As anticipated, the same background factors and triggering mechanisms that initiated attempts at formal reform were at play with informal reforms. While specific judicial appointments, on occasion, prompted an 'aversive' trigger leading to informal reform, over time, other concerns such as participation by subnational governments, representation, and process transparency emerged as salient issues, creating interest in judicial appointments reforms among various parties including opposition parties, subnational governments, the media, legal associations, and academics. To address such shifts in normative expectations, additional components were often layered onto the appointments processes. Importantly, however, these relatively small changes did not displace the systems' formal rules or power structures.

In the case of the appointments process of the Supreme Court of Canada, which has never been formally modified, informal changes have allowed it to adapt to evolving norms and expectations. A number of these informal changes were triggered by scandals related to judicial appointments. After the alleged misdeeds of two Liberal-appointed judges brought unprecedented public attention to, and criticism of, patronage appointments in 1963, for example, the Liberal government expanded the pre-appointment consultation process to include, among others, the Canadian Bar

Association, which had long advocated for its participation in the process. More recently, after a decade of sustained criticism of the Supreme Court's appointments process by federal opposition parties, the provinces, the media, and academics, both the Martin and Harper governments made informal changes to the system intended to expand consultations and publicize the appointments process. The political circumstances of these two examples of 'aversive' triggers are useful for understanding differences in the development of informal reforms of judicial appointments systems. In the case of the reforms initiated in the 1960s, the Liberal government was responding to a specific political event that had led to criticism of both the government and the appointments process. In contrast, the changes undertaken by the Martin and Harper governments were not a response to a specific judicial appointment or court decision, but rather were responding to the fact that the nature of the Supreme Court's decision-making post-Charter of Rights and Freedoms had changed the court's role. This type of sustained, but diffuse, interest in reform does not put the same strong pressure on a government to act. Indeed, the Liberals under Jean Chrétien were able to brush off calls for reform for his entire tenure as prime minister. In such instances where calls for reform are not focused on specific cases or appointments, but rather on the state of the court's work or judicial appointments writ large, incumbents have fewer immediate pressures to initiate reforms. It is therefore unsurprising that a serious review of the Supreme Court's appointments process did not take place until after a change in government leadership.

A similar story is found in Australia where the commonwealth government's interest in maintaining control over both High Court appointments and public confidence in the appointments process has remained constant. When normative expectations concerning what constituted a legitimate appointments process shifted, the government was found to generally react by making incremental, informal adjustments. In the first time period reviewed (1903-1949), this expectation was especially tested by the Labor Party, which at times struggled to limit the appearance of political interests when making appointments. By comparison, in the third time period (1987-2011), controversial decisions by the Mason court and the underrepresentation of women and minorities on the bench brought additional concern to the state of the appointments process. With appointments under increased scrutiny, John Howard's coalition government often faced

criticism over its High Court appointments. Both the Howard government and later the Labor government responded to these complaints by increasing consultations during the selection process; however, no formal reforms were undertaken. While normative expectations have clearly played an important role in the evolution of the High Court's appointments system, as anticipated, the impact of these expectations remained constrained by political interests, as demonstrated by Attorney General Lavarch's failed effort to introduce a more transparent and consultative appointments process in 1993, or the states' efforts throughout much of the second and third periods.

For the Supreme Court of the United States, the ambiguity surrounding how the president and Senate should exercise their roles has provided both bodies considerable discretion, which over time allowed for additional informal rules and appointment criteria to be layered onto the formal procedures. The institutional evolution of the Senate's role of 'advice and consent' is especially notable and, as anticipated, the Supreme Court's standing, via court decisions and judicial appointments, has influenced the Senate's approach to Supreme Court appointments. The convention that a Supreme Court nominee appears before the Judiciary Committee became firmly established following the politically divisive decision in *Brown* (1954). Two decades later, the court's decision in *Roe v. Wade* (1973) would replace *Brown* as the central object of Congressional concern during appointments to the Supreme Court, as highlighted by the Bork nomination. Altogether, as the court became more politically important, the attention paid to judicial appointments rose and contributed to a more comprehensive role of 'advice and consent' for the Senate. The president's power to choose judicial nominees has likewise remained formally unaltered, but interest in putting forward a successful nominee has meant that informal criteria for evaluating candidates continued to evolve.

Contributions

In addition to explaining the cases in question, by developing a general theory concerning reforms to judicial appointments systems, the findings described above hold a number of theoretical implications for comparative studies of judicial politics and institutional reform.

First, this dissertation is able to address, in part, the relative explanatory value of ideas for understanding institutional change. As chapter one discussed, many of the major works in the judicial politics literature employ a rational choice approach. While this project found clear explanatory value in using this approach – indeed, for most of the attempts at formal and informal reform explored here, the actions of political actors do fit the rational-strategic model – it also worked to account for the role of ideational variables. The data gathered here illustrate that, at times, actors are motivated to seek reforms for reasons that fall outside the limits of the rational choice paradigm. In Canada, Paul Martin's interest in reforming the judicial appointments process was rooted in his personal views regarding the Charter of Rights and Freedoms' notwithstanding clause (section 33). In Australia, Michael Lavarch's attempt to foster a more representative bench via appointments reform was motivated by a standing concern regarding the underrepresentation of women in public office. It is worth noting, however, that in these two examples, where politicians sought to implement reforms they believed to be just, both were constrained by their parties because their proposals were viewed as politically imprudent. Such political constraints naturally lead to the question of how far political actors can operate outside the principles of the rational choice paradigm and still be successful. These two examples support the point made by Vivien Schmidt, noted in the first chapter, that the rational choice approach offers the background information for what one normally expects, given structural constraints.[482] That is, while incentive-based structures are always at play, there are moments when these structures can be overcome, and when the unexpected occurs, the role of ideas may be better for understanding why. It is critical, then, that scholars take ideas into account and not discount the possibility that structural constraints can be and sometimes are overcome.

Second, by examining both formal and informal reforms of judicial appointments processes, this research follows the lead of recent scholarship that looks to move beyond the common dualist view, which separates institutional stability from change.[483] Change

[482] Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse; "Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth "New Institutionalism"."

[483] Mahoney and Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power*; Kathleen Thelen, "How Institutions Evolve," in *Comparative Historical Analysis in the Social Sciences*, ed. James Mahoney and Dietrich Rueschemeyer (Cambridge, U.K.; New York: Cambridge University Press, 2003).

to the judicial appointments systems in these three cases was found to be largely continuous, occurring in incremental ways over time. As has been noted many times throughout this dissertation, while the judicial appointments systems considered here experienced almost no formal reforms, the processes themselves have changed markedly over time. By taking an historical approach, this project was able to highlight the importance of gradually accumulating small changes. This is not to call into question the explanatory value of understanding change through the lens of critical junctures or path dependency. For example, had constitutional reform of the Supreme Court of Canada's appointments system been successful, this is almost certainly how it would be understood. It is not a question of whether one explanation of institutional change is inherently better than the other; rather, the issue is an empirical one concerning what approach is more applicable for any given case.

Third, this study illustrates the importance that institutional rules play in structuring the opportunities for and outcomes of reforms. In all three of the cases considered here, the political actors who controlled judicial selection and appointments held a veto over formal reform and had few incentives to devolve powers to others. Moreover, even when sufficient incentives to devolve powers did exist, institutional rules often prevented formal reforms, as was illustrated several times in the Canadian case. Altogether, the initial institutional choices made by the countries' respective constitutional framers strongly influenced the development of the judicial appointments system in each country. Rules establish important constraints on actions and this project has illustrated that a developed understanding of judicial reform requires a clear account of the institutional rules at play.

Finally, this research illustrates an important consequence of the global expansion of judicial power. It confirms that there is a strong correlation between the perception of increased judicial empowerment and calls for judicial appointments reform. Court decisions that were viewed as politically important were often followed by calls for reforms to the appointments process. Conversely, a return to a "quieter" court appeared to lessen interests in judicial appointments reform in the case of Australia once the controversy surrounding the jurisprudence of the Mason court eventually receded. In contrast, because of the stability of the Supreme Court of Canada's increased powers and

profile post-Charter of Rights and Freedoms, calls for reform in recent decades have been fairly consistent. Consequently, it is reasonable to anticipate that as the judicial branches of various countries continue to gain political power and influence, interest in and attempts to reform the judicial selection processes of these courts are likely to continue, making research of such reform all the more pertinent.

Suggestions for Future Research

This dissertation has developed a theory of judicial appointments reform and tested it using the final courts of appeal of Australia, Canada, and the United States. While this project was limited to three countries, the applicability of the Judicial Politics Trigger theory is not intended to be limited to this narrow universe of cases, but rather to provide insight into judicial appointments reforms in advanced, stable democracies more generally. Nor is it meant exclusively for final courts of appeal, but rather should hold broad applicability for lower courts as well, which are widely acknowledged to be understudied in the judicial politics literature.[484] In Canada, for example, the past forty years have seen all provinces and territories modify their provincial and territorial courts' appointments systems at least once. To date, however, these reforms have been the subject of almost no comprehensive study,[485] despite the fact that judicial appointments reform continues to be an important issue for these lower courts. In 2010, for example, a former Quebec minister of justice alleged that he had been forced to name three judges to the bench at the behest of Quebec Liberal Party organizers and fundraisers. These allegations eventually led the Liberal government to make formal changes to the provincial judicial appointments process intended to minimize the discretion government has in provincial judicial selection.[486]

[484] While the United States has a comparatively deep body of literature on judicial appointments at the lower court level, this is exceptional.
[485] The notable exception to this has been the work of Peter McCormick. See Peter McCormick, "Judicial Councils for Provincial Judges in Canada," *Windsor Yearbook of Access to Justice* 6(1986); "Selecting Trial Court Judges: A Comparison of Contemporary Practices," (Quebec City: Commission of Inquiry into the Appointment Process for Judges in Quebec, 2010).
[486] Kevin Dougherty, "New Rules for Appointing Judges Unveiled; 'Good System'; Bastarache Inquiry Leads to Changes," *The Montreal Gazette* 23 September 2011.

Final Words

So long as the judiciary plays an important role in politics and governance, there can be little doubt that questions concerning who sits on the bench and how he or she got there will continue to be of interest. This research illustrates that such concerns are not new and seem to have important commonalities across cases. The nature of judicial power, judicial independence, and judicial decision-making are all topics that have over the last few of decades received considerable comparative study by judicial politics scholars and our understanding of the courts is undoubtedly stronger thanks to these contributions. By developing the Judicial Politics Trigger theory, this project has contributed to what will hopefully develop into a more informed and productive debate on the nature of judicial appointments reform. Given its importance, the topic deserves nothing less.

REFERENCES

Abraham, Henry Julian. *Justices and Presidents: A Political History of Appointments to the Supreme Court*. New York: Oxford University Press, 1985.

———. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, 2008.

Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd, 28 CLR 129 (1920).

American Independent Party. "American Independent Party Platform 1968." The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=29570.

Ames, Herman V. "The Proposed Amendments to the Constitution of the United States During the First Century of Its History (1897)." In *Proposed Amendments to the U.S. Constitution, 1787-2001*, edited by John R. Vile. Clark, N.J.: Lawbook Exchange, 2003.

Angus, William H. "Judicial Selection in Canada: The Historical Perspective." *Canadian Legal Studies* (1967): 220-51.

———. "Wanted - a New Method of Appointing Judges." *Chitty's Law Journal* 13, no. 9 (1965): 249-60.

Aroney, Nicholas. *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*. Cambridge, UK; New York: Cambridge University Press, 2009.

Attorney-General for Australia. "Anglo-Australian Lawyers Society Breakfast." http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_ThirdQuarter_12September2008-Anglo-AustralasianLawyersSocietyBreakfast.

———. "Judicial Appointments Forum." http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_18February2008-JudicialAppointmentsForum

Attorney-General of Australia. "Three New Judges Appointed to the Federal Court." edited by Attorney-General of Australia. Canberra, 25 June 2008.

Aucoin, Peter, and Lori Turnbull. "The Democratic Deficit: Paul Martin and Parliamentary Reform." *Canadian Public Administration* 46, no. 4 (2003): 427-49.

Australia. "Judicial Appointments: Ensuring a Strong and Independent Judiciary Trough a Transparent Process." Canberra: Attorney-General's Department, April 2010.

———. *Judicial Appointments: Procedure and Criteria*. Canberra: Attorney-General's Department, 1993.

———. "New Arrangements for Merit and Transparency in Senior Public Service Appointments." Canberra: Cabinet Secretary and Special Minister of State, 5 February 2008.

———. "Official Record of Debates of the Australian Constitutional Convention held at Parliament House Perth." Perth, 26-28 July 1978.

———. "Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20th January to 17th March, 1898." Melbourne, 1898.

———. "Official Report of the National Australasian Convention Debates Adelaide, March 22 to May 5, 1897." Adelaide, 1897.

Australia. Constitutional Convention. Judicature Sub-Committee. *Second Report to Standing Committee, May 1985* Brisbane: Government Printer for the Convention, 1985.

Australian Capital Television v. Commonwealth, 177 CLR 106 (1992).

Australian Labor Party. "Kim Beazley's Plan for Justice." http://pandora.nla.gov.au/pan/22093/200111090000/www.alp.org.au/policy/security/justice.html.

———. "National Platform and Constitution 2004." Canberra: ALP National Secretary, 2004.

Australian Law Reform Commission. "Equality before the Law: Women's Equality (Report 69)." Canberra, 1994.

Azard, Pierre. "La cour suprême du Canada et l'application du droit civil de la province de Québec." *The Canadian Bar Review* 43, no. 4 (1965): 553-59.

Baier, Gerald. *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada*. Vancouver: UBC Press, 2006.

Baines, Beverley, Karim Benekhlef, Paul L.A.H. Chartrand, and A. Wayne MacKay. "Canadian Association of Law Teachers Report on Supreme Court Appointments." 1-32: Canadian Association of Law Teachers, 2005.

Bar Association of Queensland. "Letter to the Editor of the Courier Mail - Judicial Appointment in Queensland." 2010.

"Bar Opposes High Court Appointments." *The Register News-Pictorial*, 23 December 1930, 3.

Basten, John. "Judicial Accountability: A Proposal for a Judicial Commission." *The Australian Quarterly* 52, no. 4 (1980): 468-85.

Bates, Robert H. "Review: Comparative Politics and Rational Choice: A Review Essay." *The American Political Science Review* 91, no. 3 (1997): 699-704.

Bates, Robert H., Margaret Levi, Jean-Laurent Rosenthal, and Barry R. Weingast. *Analytic Narratives*. Princeton, N.J.: Princeton University Press, 1998.

Bennett, R. B. "Presidential Address." *Canadian Bar Review* 8, no. 8 (1930): 557-60.

Bennett, R. B. House of Commons. *Debates (Hansard)* (17 May 1932, 17th Parliament, 2nd Session): 2999.

Bennett, Andrew, and Colin Elman. "Complex Causal Relations and Case Study Methods: The Example of Path Dependence." *Political Analysis* 14, no. 3 (2006): 250-67.

Berman, Sheri. *The Social Democratic Moment: Ideas and Politics in the Making of Interwar Europe*. Cambridge, Ma.: Harvard University Press, 1998.

Bernard, Malcolm. "Selection of Top-Court Judges Should Be More Open: Experts." *The Gazette*, 2 September 1997.

Bernstein, Richard B., and Jerome Agel. *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* New York: Times Books, 1993.

Black, Edwin R. *Divided Loyalties: Canadian Concepts of Federalism*. Montreal: McGill-Queen's University Press, 1975.

Blunder, Verge. "After Troubled Years, High Court Enters Calmer Waters." *The Sydney Morning Herald*, 9 December 1986, 4.

———. "McHugh Makes High Court at 53." *The Sydney Morning Herald*, 14 December 1988, 7.

Blyth, Mark. *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*. Cambridge; New York: Cambridge University Press, 2002.

Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York; London: Free Press; Collier Macmillan, 1990.

Brace, Paul R., and Melinda Gann Hall. "The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice." *The Journal of Politics* 59, no. 4 (1997): 1206-31.

Brady, Henry E., and David Collier, eds. *Rethinking Social Inquiry Diverse Tools, Shared Standards*. Lanham, Md.: Rowman & Littlefield Publishers, 2010.

Brisson, Jean-Maurice. *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 À 1867*. Montréal: Éditions Thémis, Université de Montréal, 1986.

Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York: W.W. Norton, 1989.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Bushnell, Ian. "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance." *Supreme Court Law Review* 3 (1981): 479-558.

Bzdera, André. "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review." *Canadian Journal of Political Science/Revue canadienne de science politique* 26, no. 1 (1993): 3-29.

Cairns, Alan C. *Charter Versus Federalism: The Dilemmas of Constitutional Reform*. Montreal; Buffalo: McGill-Queen's University Press, 1992.

———. "The Judicial Committee and Its Critics." *Canadian Journal of Political Science/Revue canadienne de science politique* 4, no. 3 (1971): 301-45.

———. "Who Should Judges Be? Canadian Debates About the Composition of the Final Court of Appeal." In *North American and Comparative Federalism: Essays for the 1990s*, edited by Harry N. Scheiber and Martha Derthick. Berkeley, Calif.: University of California, Berkeley, Institute of Governmental Studies Press, 1992.

Cairns, Alan C., and Douglas E. Williams. *Disruptions: Constitutional Struggles from the Charter to Meech Lake*. Toronto, Ont.: McClelland & Stewart, 1991.

Caldeira, Gregory A., and John R. Wright. "Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate." *American Journal of Political Science* 42, no. 2 (1998): 499-523.

Canada. Department of Justice. "Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices (Transcript)." http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32665.html.

———. "Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel." http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32624.html.

———. *A New Judicial Appointments Process*. Ottawa: Communications and Public Affairs, Department of Justice, 1988.

———. "News Release: Minister of Justice Announces Selection Process for the Supreme Court of Canada." http://www.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32258.html.

Canada. House of Commons. Standing Committee on Justice Human Rights Public Safety and Emergency Preparedness. "Evidence." Ottawa: Public Works and Government Services, 2004.

———. "Improving the Supreme Court of Canada Appointments Process." Ottawa: Speaker of the House of Commons, May 2004.

Canada. Minister of Justice. *The Amendment of the Constitution of Canada*. Ottawa: Department of Justice, 1965.

———. *Constitutional Reform: The Supreme Court of Canada*. Ottawa: Canadian Unity Information Office, 1978.

———. "New Supreme Court of Canada Appointments Process Launched." http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31586.html.

———. "Proposal to Reform the Supreme Court of Canada Appointments Process." Ottawa: Department of Justice Canada, April 2005.

Canada. Parliament. Special Joint Committee on a Renewed Canada. *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons*. Ottawa: The Joint Committee: Canada Communication Group - Publishing, 1992.

Canada. Prime Minister. "The Constitution and the People of Canada: An Approach to the Objectives of Confederation [1968]." In *Canada's Constitution Act 1982 & Amendments: A Documentary History*, edited by Anne F. Bayefsky, 78-89. Toronto; London: McGraw-Hill Ryerson, 1989

———. *Federalism for the Future: A Statement of Policy by the Government of Canada*. Ottawa: Queen's Printer, 1968.

———. "Prime Minister Harper Announces Appointment of Thomas Cromwell to Supreme Court of Canada." Ottawa: Office of the Prime Minister, 22 December 2008.

———. "Prime Minister Martin Announces New Government will be Guided by a New Approach." Ottawa: Office of the Prime Minister, 12 December 2003.

———. "A Time for Action: Toward the Renewal of the Canadian Federation." Ottawa: Government of Canada, 1978.

Canada. Privy Council Office. "Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform." Ottawa: Queen's Printer, 2004.

———. *Shaping Canada's Future Together: Proposals*. Ottawa: Supply and Services Canada, 1991.

Canadian Association of Law Teachers. "Democratizing Our Legal System: The Case for Judicial Nominating Councils." In *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord*, edited by Michael D. Behiels, 397-406. Ottawa: University of Ottawa Press, 1989.

Canadian Bar Association. Committee on the Appointment of Judges in Canada. "Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada." Ottawa: Canadian Bar Foundation, 1985.

Canadian Intergovernmental Conference Secretariat. "Proposals on the Constitution, 1971-1978." Ottawa, 1978.

Canadian Press. "La Forest Favours U.S.-Style Public Review for Supreme Court Judges." *The Globe and Mail*, 3 September 1997.

Capoccia, Giovanni, and R. Daniel Kelemen. "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism." *World Politics* 59, no. 3 (2007): 341-69.

Carson, J.L., and B.A. Kleinerman. "A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan." *Public Choice* 113, no. 3 (2002): 301-24.

Carter, Stephen L. *The Confirmation Mess: Cleaning up the Federal Appointments Process*. New York: Basic Books, 1994.

Casto, William R. *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*. Columbia, S.C.: University of South Carolina Press, 1995.

Chavez, Rebecca Bill. "The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System." *Journal of Latin American Studies* 36, no. 3 (2004): 451-78.

Choudry, Sujit "The Supreme Court Appointment Process: Improved Federal-Provincial Relations vs. Democratic Renewal?" In *Democracy and Federalism Series*. Kingston: IIGR, School of Policy Studies, Queen's University, 2005.

Clarke, Jeremy A. "Beyond the Democratic Dialogue, and Towards a Federalist One: Provincial Arguments and Supreme Court Responses in Charter Litigation." *Canadian Journal of Political Science/Revue canadienne de science politique* 39, no. 2 (2006): 293-314.

Cohen, Andrew. *A Deal Undone: The Making and Breaking of the Meech Lake Accord*. Vancouver: Douglas & McIntyre, 1990.

Comeau, Pauline. *Elijah: No Ordinary Hero*. Vancouver: Douglas & McIntyre, 1993.

Comiskey, Michael. *Seeking Justices: The Judging of Supreme Court Nominees*. Lawrence, Kan.: University Press of Kansas, 2004.

"Consensus Report on the Constitution." Charlottetown, 1992.

Conservative Party of Canada. "Stand up for Canada, Federal Election Platform." 2006.

Continuing Committee of Ministers on the Constitution. "Report on the Supreme Court [July 1980]." In *Canada's Constitution Act 1982 & Amendments: A Documentary History*, edited by Anne F. Bayefsky, 633-35. Toronto; London: McGraw-Hill Ryerson, 1989.

Continuing Committee on the Constitution (Group 2). "Progress Report on the Continuing Committee on the Constitution Meetings of April 15-16 and 22-23, 1992." Ottawa, 1992.

Cooney, Sean. "Gender and Judicial Selection: Should There Be More Women on the Courts." *Melbourne University Law Review* 20, no. 1 (1993): 20-44.

Cordon, Sandra. "McLachlin Backs Appointment Process; Tinkering Could Erode Confidence in Supreme Court, Chief Justice Says." *Globe and Mail*, 4 February 2006, A12.

Cornyn, John. "Justice for the Next Justice " *The Washington Post*, 2 July 2005.

———. "Our Broken Judicial Confirmation Process and the Need for Filibuster Reform." *Harvard Journal of Law and Public Policy* 27, no. 1 (2003): 181-230.

———. "Restoring Our Broken Judicial Confirmation Process." *Texas Review of Law and Politics* 1 (2003-2004): 1-40.

Corry, J.A. "Constitutional Trends and Federalism." In *Evolving Canadian Federalism*, edited by Arthur Reginald Marsden Lower and F.R. Scott. Durham: Duke University Press, 1958.

Cotler, Irwin. "The Constitutional Revolution, the Courts, and the Pursuit of Justice." Department of Justice, http://www.justice.gc.ca/eng/news-nouv/spe-disc/2005/doc_31602.html.

———. "The Supreme Court Appointment Process: Chronology, Context and Reform." *University of New Brunswick Law Journal* 58 (2008): 131-46.

Council of the Federation. "Report and Decisions." Council of the Federation, http://www.councilofthefederation.ca/newsroom/newsroom_2004.html.

Crisp, L. F. *Australian National Government*. 5th ed. Melbourne, Australia: Longman Cheshire, 1983.

Crowe, Justin. *Building the Judiciary: Law, Courts, and the Politics of Institutional Development*. Princeton, N.J.; Oxford, U.K.: Princeton University Press, 2012.

Davies, G. L. "Why We Should Have a Judicial Appointments Commission." Paper presented at the ABA Forum on Judicial Appointments, Sydney, 27 October 2006.

Davis, Rachel, and George Williams. "A Century of Appointments but Only One Woman." *Alternative Law Journal* 54, no. 2 (2003): 54-58.

———. "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia." *Melbourne University Law Review* 27, no. 3 (December 2003): 819-63.

Davis, Richard. *Electing Justice: Fixing the Supreme Court Nomination Process*. Oxford; New York: Oxford University Press, 2005.

Diefenbaker, John. House of Commons. *Debates (Hansard)* (25 April 1949, 21st Parliament, 1st Session): 2525.

Dobrowolsky, Alexandra Z. *The Politics of Pragmatism: Women, Representation, and Constitutionalism in Canada*. Don Mills, Ont.: Oxford University Press, 2000.

Donegan, Paul. "The Role of the Commonwealth Attorney-General in Appointing Judges to the High Court of Australia." *Melbourne Journal of Politics* 29 (2003): 40-55.

Dougherty, Kevin. "New Rules for Appointing Judges Unveiled; 'Good System'; Bastarache Inquiry Leads to Changes." *The Montreal Gazette*, 23 September 2011, A7.

Dred Scott v. Sandford, 60 U.S. 393 (1857).

Dubois, Philip L. *From Ballot to Bench: Judicial Elections and the Quest for Accountability*. Austin: University of Texas Press, 1980.

Editorial. "Caught in a Time Warp on Judicial Appointments." *The Age*, 22 September 2005.

———. "The Landreville Case." *The Globe and Mail*, 24 November 1965, 6.

———. "Nice Judge. Too Bad How He Got There " *The Globe and Mail*, 3 October 1997.

———. "Supreme Chance for Ottawa." *The Gazette*, 31 August 1997.

———. "A Supreme Court for a New Age " *The Globe and Mail*, 28 August 1997.

"Editorial Review." *Canadian Law Times* 22, no. 3 (1902): 103-07.

Emerson, Scott. "Borbidge Pushes to Overhaul High Court." *The Australian*, 11 February 1997.

Engel, Stephen M. *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power*. Cambridge; New York: Cambridge University Press, 2011.

English, John. *The Decline of Politics: The Conservatives and the Party System, 1901-20*. Toronto; Buffalo: University of Toronto Press, 1977.

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

Epstein, Lee, Jack Knight and Olga Shvetsova. "Selecting Selection Systems." In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Stephen B. and Barry Friedman Burbank, 193-226. Thousand Oaks: Sage Publications, 2002.

Epstein, Lee, and Jack Knight. "Courts and Judges." In *The Blackwell Companion to Law and Society,* edited by Austin Sarat Malden, MA: Blackwell Pub., 2004. http://www.blackwellreference.com/subscriber/uid=3/book?show=all&id=g9780631228967_9780631228967.

Epstein, Lee, Ren Lindstadt, Jeffrey A. Segal, and Chad Westerland. "The Changing Dynamics of Senate Voting on Supreme Court Nominees." *The Journal of Politics* 68, no. 2 (2006): 296-307.

Epstein, Lee, Jeffrey A. Segal, Nancy Staudt, and Rene Lindstadt. "The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court." *Florida State University Law Review* 32, no. 4 (2005): 1145-74.

Epstein, Lee, and Jeffrey Allan Segal. *Advice and Consent the Politics of Judicial Appointments*. Oxford; New York: Oxford University Press, 2005.

Erdos, David Oliver. *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World*. Oxford; New York, N.Y.: Oxford University Press, 2010.

Evans, Simon, and John Williams. "Appointing Australian Judges: A New Model." *The Sydney Law Review* 30, no. 2 (June 2008): 295-327.

Faulkner, John, and Stuart Macintyre. *True Believers: The Story of the Federal Parliamentary Labor Party*. Crows Nest, NSW: Allen & Unwin, 2001.

Ferejohn, John "Independent Judges, Dependent Judiciary: Explaining Judicial Independence." *Southern California Law Review* 72(1998-1999): 353-84.

Fife-Yeomans, Janet. "Judges Tell Mps to Stop Meddling." *The Australian*, 14 April 1997.

Finkel, Jodi S. *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*. Notre Dame, Ind.; London: University of Notre Dame Press, 2008.

Fleming, Donald Methuen. House of Commons. *Debates (Hansard)* (29 May 1952, 21st Parliament, 6th Session): 2705-6.

Ford v. Quebec (Attorney General), 2 S.C.R. 712 (1988).

Forseth, Paul. House of Commons. *Debates (Hansard)* (8 Febraury 1998, 36th Parliament, 1st Session): 7681-82.

Fox, Paul W., ed. *Politics: Canada*. 4th ed. Toronto; New York: McGraw-Hill Ryerson, 1977.

Frail, Rod. "Keep Mates Off High Court, Labor Advised." *The Sydney Morning Herald*, 8 December 1986, 3.

Frankfurter, Felix, and James McCauley Landis. *Business of the Supreme Court; a Study in the Federal Judicial System*. New York: Macmillan, 1928.

Fraser, Graham. "Bourassa Cracks Smile as Team Cheers." *The Globe and Mail*, 13 December 1985, A10.

———. "Mulroney Willing to Reopen Constitution Talks with PQ." *The Globe and Mail*, 7 August 1984, 5.

Friedland, Martin L. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa: Canadian Judicial Council, 1995.

Friedman, Richard D. "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond." *Cardozo Law Review* 5, no. 1 (1983): 1-96.

Galligan, Brian. *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*. St. Lucia; New York: University of Queensland Press, 1987.

Garson, Stuart S. House of Commons. *Debates (Hansard)* (20 September 1949, 21st Parliament, 1st Session): 69-75.

"General Introduction." In *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord*, edited by Michael D. Behiels, 3-12. Ottawa: University of Ottawa Press, 1989.

George, Alexander L., and Andrew Bennett. *Case Studies and Theory Development in the Social Sciences*. Cambridge, Mass.: MIT Press, 2005.

Gibbons v. Ogden, 22 U.S. 1 (1824).

Gidengil, Elisabeth, André Blais, Joanna Everitt, Patrick Fournier, and Neil Nevitte. "Back to the Future? Making Sense of the 2004 Canadian Election Outside Quebec." *Canadian Journal of Political Science/Revue canadienne de science politique* 39, no. 1 (2006): 1-25.

Gidengil, Elisabeth, Neil Nevitte, André Blais, Joanna Everitt, and Patrick Fournier. *Dominance & Decline: Making Sense of Recent Canadian Elections*. Toronto: University of Toronto Press, 2012.

Ginsburg, Tom. "The Global Spread of Constitutional Review." In *The Oxford Handbook of Law and Politics*, edited by Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira, 81-98. Oxford; New York: Oxford University Press, 2008.

———. *Judicial Review in New Democracies Constitutional Courts in Asian Cases*. Cambridge, UK; New York: Cambridge University Press, 2003.

Girard, Philip. *Bora Laskin: Bringing Law to Life*. Toronto: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2005.

Gonzales, Alberto R. "Letter to the ABA from Al Gonzales." The White House, http://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010322-5.html.

Gould, Lewis L. *America in the Progressive Era, 1890-1914*. Harlow, England; New York: Longman, 2001.

Grammond, Sébastien. "Transparence et imputabilité dans le processus de nomination des juges de la Cour suprême du Canada." *Revue generale de droit* 36(2006): 739-64.

Greenburg, Jan Crawford. *Supreme Conflict: The inside Story of the Struggle for Control of the United States Supreme Court*. New York: Penguin Press, 2007.

Greene, Gervase. "Attorney Pleads for Peace in Court Row." *The Age*, 1 March 1997.

Grief, Avener, and David D. Laitin. "A Theory of Endogenous Institutional Change." *American Political Science Review* 98, no. 4 (2004): 633-52.

Grimes, Samuel Latham "Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges." *North Carolina Law Review* 76 (1997-1998): 2266-330.

Griswold v. Connecticut, 38 U.S. 479 (1965).

Hall, Melinda Gann. "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform." *American Political Science Review* 95, no. 2 (2001): 315-30.

Hannan, Ewin. "States Want Say on Judges." *The Australian*, 8 March 1997, 4.

Hansell, Ernest George, House of Commons. *Debates (Hansard)* (26 June 1951, 21st Parliament, 4th Session): 4694.

Hanssen, F. Andrew. "Learning About Judicial Independence: Institutional Change in the State Courts." *The Journal of Legal Studies* 33, no. 2 (2004): 431-73.

Hausegger, Lori, Troy Riddell, Matthew Hennigar, and Emmanuelle Richez. "Exploring the Links between Party and Appointment: Canadian Federal Judicial Appointments from 1989 to 2003." *Canadian Journal of Political Science/Revue canadienne de science politique* 43, no. 3 (2010): 633-59.

Haynes, Evan. *The Selection and Tenure of Judges*. Newark, N.J.: National Conference of Judicial Councils, 1944.

Heard, Andrew David. *Canadian Constitutional Conventions: The Marriage of Law and Politics*. Toronto; Oxford: Oxford University Press, 1991.

Herman, Michael John. "Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council." *Ottawa Law Review* 8, no. 1 (1976): 7-31.

Hickey, Harvey. "Harris New Finance Minister; Campney Takes Defense Post." *The Globe and Mail*, 2 July 1954, 1-2.

Hiebert, Janet. *Limiting Rights: The Dilemma of Judicial Review*. Montreal: McGill-Queen's University Press, 1996.

Hilbink, Lisa. "The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment." *Political Research Quarterly* 62, no. 4 (2009): 781-97.

Hirschl, Ran. "The Judicialization of Politics." Chap. 8 In *The Oxford Handbook of Law and Politics*, edited by Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira, 119-41. Oxford; New York: Oxford University Press, 2008.

———. "The Realist Turn in Comparative Constitutional Politics." *Political Research Quarterly* 62, no. 4 (2009): 825-33.

———. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, Mass.; London: Harvard University Press, 2004.

Hocking, Jenny. *Gough: A Moment in History*. Carlton, Vic.: Melbourne University Press, 2008.

Hodgins, Bruce W., J.J Eddy, S.D. Grant, and James Struthers, eds. *Federalism in Canada and Australia: Historical Perspectives, 1920-1988*. Peterborough, Ont: Frost Centre for Canadian Heritage and Development Studies, Trent University, 1989.

Hogg, Peter W. "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada." *Osgoode Hall Law Journal* 44 (2006): 527-38.

———. "Federalism Fights the Charter." In *Federalism and Political Community: Essays in Honour of Donald Smiley*, edited by David P. Shugarman, Reginald Whitaker and Donald V. Smiley, 249-66. Peterborough, Ont.: Broadview Press, 1989.

———. "Is the Supreme Court of Canada Biased in Constitutional Cases?". *The Canadian Bar Review* 57, no. 4 (1979): 721-39.

Holmes, John. "Land Tenure in the Australian Pestoral Zone: A Critical Appraisal." In *North Australian Research: Some Past Themes and New Directions*, edited by Ian Moffatt and Ann Webb. Casuarina, Darwin, N.T.: North Australia Research Unit, Australian National University, 1991.

Hughes, Judy. "State Urges Elected High Court Judges." *The Australian*, 20 February 1997.

Hurst, James Willard. *The Growth of American Law: The Law Makers*. Boston: Little Brown, 1950.

Hyman, Ralph. "Canadian Bar Association Resolution - Role Sought in Judicial Selections." *The Globe and Mail*, 29 August 1966, 4.

———. "Minister Consults Bar on Appointing New Judges." *The Globe and Mail* 5 September 1967, 1.

Ibbitson, John. "What's the Verdict? Grilling Judges Is Innocent." *The Globe and Mail*, 28 February 2006, A1.

Ibbitson, John, and Steven Chase. "Ontario Joins Alberta: Rein in Top Court Give Provinces a Say in Picking Judges, Sterling Asks in Letter to McLellan." *The Globe and Mail*, 25 October 1999.

Johnston, Richard, André Blais, Elisabeth Gidengil, and Neil Nevitt. *The Challenge of Direct Democracy: The 1992 Canadian Referendum*. Montreal: McGill-Queen's University Press, 1996.

Kapiszewski, D. "How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal." *Cultures of Legality: Judicialization and Political Activism in Latin America* (2010): 51.

Kapiszewski, Diana. "How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal." In *Cultures of Legality: Judicialization and Political Activism in Latin America*, edited by Javier Couso, Alexandra Huneeus and Rachel Sieder, 51-75. New York: Cambridge University Press, 2010.

Kelly, James B. *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*. Vancouver: UBC Press, 2005.

———. "Reconciling Rights and Federalism During Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999." *Canadian Journal of Political Science/Revue canadienne de science politique* 34, no. 2 (2001): 321-55.

Kelly, Paul. *The Dismissal: Australia's Most Sensational Power Struggle, the Dramatic Fall of Gough Whitlam*. London; Sydney: Angus & Robertson, 1983.

———. *November 1975: The inside Story of Australia's Greatest Political Crisis*. St Leonards, NSW, Australia: Allen & Unwin, 1995.

Kendall, Christopher N. "Appointing Judges: Australian Judicial Reform Proposals in Light of Recent North American Experience." *Bond Law Review* 9, no. 2 (1997): 175-98.

Kennedy, W. P. M. "The Interpretation of the British North America Act." *The Cambridge Law Journal* 8, no. 2 (1943): 146-60.

Knopff, Rainer. "The Politics of Reforming Judicial Appointments." *University of New Brunswick Law Journal* 58 (2008): 44-51.

Knopff, Rainer, and F. L. Morton. *The Charter Revolution and the Court Party*. Peterborough, Ont.: Broadview Press, 2000.

Koremenos, Barbara, Charles Lipson, and Duncan Snidal. *The Rational Design of International Institutions*. Cambridge, UK; New York: Cambridge University Press, 2004.

Kwavnick, David, ed. *The Tremblay Report*. Toronto: McClelland and Stewart, 1973.

L'Ecuyer, Gilbert. "La Cour suprême du Canada et le partage des compétences 1949-1978." edited by Ministère des affaires intergouvernementales. Québec, 1978.

La Nauze, J. A. *The Making of the Australian Constitution*. Melbourne: Melbourne University Press, 1972.

LaCroix, Wilfrid. House of Commons. *Debates (Hansard)* (4 October 1949, 21st Parliament, 1st Session): 493.

Laforest, Guy. *Trudeau and the End of a Canadian Dream*. Montreal; Buffalo: McGill-Queen's University Press, 1995.

Laghi, Brian, and Kim Lunman. "Justice Minister Defends Process of Nominating Supreme Court Judges Provinces' Advice Sought in Judicial Appointments, Mclellan Says." *The Globe and Mail*, 26 October 1999.

Landes, William M., and Richard A. Posner. "The Independent Judiciary in an Interest-Group Perspective." *Journal of Law and Economics* 18, no. 3 (1975): 875-901.

Lane, Bernard. "A Job Not for Judges, Says Kirby." *The Australian*, 8 June 1999, 6.

LaSelva, Samuel V. *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal; Buffalo: McGill-Queen's University Press, 1996.

Laskin, Bora. ""Peace, Order and Good Government" Re-Examined." *The Canadian Bar Review* 25(1947): 1054-87.

Lavarch, Michael. "Interview with the Author." 25 March 2011.

Law Council of Australia. "Policy Statement: The Process of Judicial Appointments." Canberra: Law Council of Australia, 2001.

Leeson, Howard A. *The Patriation Minutes*. Edmonton: Law Centre, University of Alberta, 2011.

Levy, Ron. "Judicial Selections Reform in Comparative Context." *U.B.C. Law Review* 40, no. 2 (2007): 591-628.

Liberal Party of NSW, and National Party of NSW. "Restoring Faith in Justice: Promoting Transparency in Judicial Appointments in New South Wales." Sydney, March 2008.

Lindgren, James. "Examining the American Bar Association's Ratings of Nominces to the Us Courts of Appeals for Political Bias, 1989-2000." *Journal of Law & Politics* 17, no. 1 (2001): 1-40.

Little, Laura E. "The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to give up on the Lawyers?". *William & Mary Bill of Rights Journal* 10, no. 1 (2001): 37-73.

Livingston, William S. "Abolition of Appeals from Canadian Courts to the Privy Council." *Harvard Law Review* 64, no. 1 (1950): 104-12.

Luman, Kim, and Brian Laghi. "Commons Panel to Accept Judges, but Wants Stronger Vetting Process " *The Globe and Mail*, 26 August 2004, A1.

M. v. H., 2 S.C.R. 3 (1999).

Mabo v. Queensland (No. 2), 175 CLR 1 (1992).

MacInnis, Angus. House of Commons. *Debates (Hansard)* (26 June 1951, 21st Parliament, 4th Session): 4703.

MacKinnon, Frank. "The Establishment of the Supreme Court of Canada." *Canadian Historical Review* 27, no. 3 (1946): 258-74.

MacLean, Andrew D. *R.B. Bennett, Prime Minister of Canada*. Toronto: Excelsior Publishing Company Limited, 1934.

Macklin, Paul Harold. House of Commons. *Debates (Hansard)* (6 May 2003, 37th Parliament, 2nd Session): 5901.

Magalhães, Pedro C. "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics* 32, no. 1 (1999): 43-62.

Mahoney, James, and Kathleen Ann Thelen, eds. *Explaining Institutional Change: Ambiguity, Agency, and Power*. Cambridge; New York: Cambridge University Press, 2010.

Malleson, Kate. "Introduction." In *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, edited by Kate Malleson and Peter H. Russell, 3-12. Toronto; Buffalo: University of Toronto Press, 2006.

Mallory, J. R. "The Five Faces of Federalism." In *The Future of Canadian Federalism. L'avenir Du Fédéralisme Canadien*, edited by Paul-André Crépeau and C. B. Macpherson, 3-15. Toronto: University of Toronto Press, 1965.

Manfredi, Christopher P. "The Case for Vetting the Supremes." *National Post*, 3 July 2003.

———. *Feminsit Activism in the Supreme Court*. Vancouver: UBC Press, 2004.

———. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. 2nd ed. Don Mills, Ont.: Oxford University Press, 2001.

Manning, E. Preston. "A "B" for Prof. Russell." *Policy Options*, April 1999, 15-16.

———. "Interview with the Author." 14 September 2010.

Marbury v. Madison, 5 U.S. 137 (1803).

Marceau, Richard. House of Commons. *Debates (Hansard)* (6 May 2003, 37th Parliament, 2nd Session): 5899.

Marcotte, Matthew D. "Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations." *New York University of Legislation and Public Policy* 5 (2001/2002): 519-62.

Martin, Paul. ""The Democratic Deficit." Speech Given at Osgoode Hall, York University, Toronto, October 21, 2002." *Policy Options* (December 2002 – January 2003): 10-12.

———. "Interview with the Author." 12 October 2010.

Martinek, Wendy L., Mark Kemper, and Steven R. Van Winkle. "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998." *The Journal of Politics* 64, no. 02 (2002): 337-61.

Mason, Sir Anthony. "The Role of the Courts at the Turn of the Century." *Journal of Judicial Administration* 3 (1993): 156-67.

Mathews, Russell L. "Innovations and Developments in Australian Federalism." *Publius: The Journal of Federalism* 7, no. 3 (1977): 9-19.

Mathews, Russell L., and W. R. C. Jay. *Federal Finance: Intergovernmental Financial Relations in Australia since Federation*. Melbourne: Nelson, 1972.

McCabe, Helen. "Fischer Won Battle over New Judge." *Daily Telegraph*, 6 March 1998, 8.

McCann, Michael W. "Interests, Ideas, and Institutions in Comparative Analysis of Judicial Power." *Political Research Quarterly* 62, no. 4 (2009): 834-39.

McCloskey, Robert G., and Sanford Levinson. *The American Supreme Court*. Chicago: University of Chicago Press, 2005.

McConvill, James. "The Appointment and Removal of Federal Judges: Time for Reconsideration." *The High Court Quarterly Review* 1, no. 4 (2006): 199-206.

McCormick, Peter. "Judicial Councils for Provincial Judges in Canada." *Windsor Yearbook of Access to Justice* 6 (1986): 160-93.

———. "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada." *The Journal of Appellate Practice and Process* 7, no. 1 (2005): 1-42.

———. "Selecting Trial Court Judges: A Comparison of Contemporary Practices." Quebec City: Commission of Inquiry into the Appointment Process for Judges in Quebec, 2010.

McCulloch v. Maryland, 17 U.S. 316 (1819).

McGuinness, Padraic. "New Judge for High Court." *The Sydney Morning Herald*, 27 January 1995, 10.

McKnight, David. "A Career of Firsts and Controversy." *The Sydney Morning Herald*, 9 December 1986, 19.

McRoberts, Kenneth. *Quebec: Social Change and Political Crisis*. 3rd ed. Toronto: McClelland and Stewart, 1988.

Merrit, Chris. "High Court Appointment Process 'a Nonsense'." *The Australian*, 10 July 2007.

———. "Judicial Selections 'Open to Corruption'." *The Australian*, 21 October 2005.

———. "Selection Surrounded by Secrecy " *The Australian*, 21 September 2005.

Merrit, Chris, and Elizabeth Colman. "High Court Choices Too Secretive: Judges " *The Australian*, 22 September 2005.

Milligan, Louise, and Rebecca Digirolamo. "Men-Only High Court under Fire." *The Australian*, 19 December 2002.

Monahan, Patrick. *Meech Lake: The inside Story*. Toronto; Buffalo: University of Toronto Press, 1991.

———. "A Very Judicious Process; Requiring Supreme Court Nominees to Appear before a Parliamentary Committee Shines a Much Needed Spotlight, Says Law Dean Patrick Monahan." *The Globe and Mail*, 22 February 2006, A21.

Monahan, Patrick, and Peter W. Hogg. "We Need an Open Parliamentary Review of Court Appointments." *National Post* 24 April 2004, A19.

Morton, F. L. "Judicial Appointments in Post-Charter Canada: A System in Transition." In *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, edited by Kate Malleson and Peter H. Russell, 56-79. Toronto: University of Toronto Press, 2006.

———. "Judicial Recruitment and Selection." In *Law, Politics and the Judicial Process in Canada*, edited by F. L. Morton, 117-33. Calgary, AB: University of Calgary Press, 2002.

———. "To Bring Judicial Appointments out of the Closet." *The Globe and Mail*, 22 September 1997.

Mulgan, Richard. "Politicisation of Senior Appointments in the Australian Public Service." *Australian Journal of Public Administration* 57, no. 3 (1998): 3-14.

Nadan v. The King, 482 AC (1926).

Nadler, Daniel. "An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter." *Constitutional Forum* 15 (2006): 121-34.

New South Wales. "Report of the Select Committee of the Legislative Assembly Upon the Appointment of Judges to the High Court of Australia." Sydney: Government Printer, 1975.

Newfoundland and Labrador, and Clyde K. Wells. "Commentary on the Federal Government's Proposals "Shaping Canada's Future Together" to the Newfoundland and Labrador Committee on the Constitution." St. John's, 1991.

———. *Proposal for a Revised Constitutional Accord*. St. John's: Government of Newfoundland and Labrador, 1990.

Nicholson, Pip. "Appointing High Court Judges: Need for Reform?". *The Australian Quarterly* 68, no. 3 (1996): 68-90.

North, Douglass C., and Barry R. Weingast. "Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England." *The Journal of Economic History* 49, no. 4 (1989): 803-32.

Nunes, Rodrigo M. "Politics without Insurance: Democratic Competition and Judicial Reform in Brazil." *Comparative Politics* 42, no. 3 (2010): 313-31.

O'Hara, John. "Doubts and Fears: The Premiers and the High Court." *The Sydney Morning Herald*, 4 June 1973, 6.

O'Malley, Kady. "Did They Have a Choice? A Look at the Conservatives' Recent Patronage Appointments." http://www.macleans.ca/canada/features/article.jsp?content=20070207_175153_6228.

O'Sullivan, Dominic "Gender and Judicial Appointment." *University of Queensland Law Journal* 19 (1996-1997): 107-24.

Ostberg, C. L., and Matthew E. Wetstein. *Attitudinal Decision Making in the Supreme Court of Canada*. Vancouver: UBC Press, 2007.

Parnell, Sean. "Top Court Threatens to Curtail Services." *The Australian*, 31 January 2011.

———. "Williams Interview for Judge." *The Courier Mail*, 12 December 2002.

Parti liberal du Québec. Commission constitutionnelle. "A Quebec Free to Choose." Québec: Parti liberal du Québec, 1991.

Peach, Ian. "Legitimacy on Trial: The Appointment of Supreme Court Judges in Canada." *Optimum Online: The Journal of Public Sector Management* 35, no. 1 (2005): 26-34. http://www.optimumonline.ca.

Picard, Andre. "Bourassa Leaves Door Open, Warns Current Package Will Be a Hard Sell in Quebec." *The Globe and Mail*, 10 July 1992, A1.

Pierce, Jason L., David L. Weiden, and Rebecca D. Wood. "The Changing Role of the High Court of Australia." Paper presented at the IPSA Bologna, Italy, March 2010.

Podger, Andrew. "What Really Happens: Department Secretary Appointments, Contracts and Performance Pay in the Australian Public Service." *Australian Journal of Public Administration* 66, no. 2 (2007): 131-47.

"Politics and High Court." *The Sydney Morning Herald*, 11 April 1946.

Popova, Maria. *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*. New York: Cambridge University Press, 2012.

Pratt Harris, Joseph. *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate*. Berkeley: University of California Press, 1953.

Preston, Yvonne. "Against the Odds." *The Sydney Morning Herald*, 17 December 1988, 37.

Purvis, Rodney N. "Judiciary and Accountability: The Appointment of Judges." *Australian Journal of Forensic Sciences* 26, no. 2 (1994): 56-65.

Québec Liberal Party. Policy Commission. *Mastering Our Future: Working Paper*. Montreal: Québec Liberal Party, 1985.

Québec. Executive Council. *Québec-Canada, a New Deal: The Québec Government Proposal for a New Partnership between Equals, Sovereignty Association*. Québec: Éditeur officiel, 1979.

R. v. Marshall, 3 S.C.R. 456 (1999).

R. v. Marshall, 3 S.C.R. 533 (1999).

Ramseyer, J. Mark. "The Puzzling (in)Dependence of Courts: A Comparative Approach." *The Journal of Legal Studies* 23, no. 2 (1994): 721-47.

Raney, W. E. . "The Appeal to England." *Canadian Law Review* 2, no. 9 (1903): 561-67.

Ratushny, Ed. "Judicial Appointments: The Lang Legacy." *Advocates' Quarterly* 1 (1977): 2-17.

Reference Re a Resolution to Amend the Constitution, 1 S.C.R. 753 (1981).

Reference Re Amendment to the Canadian Constitution, 2 S.C.R. 793 (1982).

Reference Re Authority of Parliament in Relation to the Upper House, 1 S.C.R. 54 (1980).

Reference Re Privy Council Appeals, 49 S.C.R. (1940).

Reference Re Secession of Quebec, 2 S.C.R. 217 (1998).

Republican Party. "Republican Party Platform 1968." The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=25841.

Richardson, J. E. "The Australian Constitutional Convention, Sydney, 1973." *The Australian Quarterly* 45, no. 4 (1973): 90-113.

Robinson, Natasha. "High Court Needs a Woman: Gaudron " *The Australian*, 16 September 2005.

Roe v. Wade, 410 U.S. 113 (1973).

Rogers, Norman. "Federal Influences on the Canadian Cabinet." *The Canadian Bar Review* 11, no. 2 (1933): 103-21.

Roll, John M. "Merit Selection: The Arizona Experience." *Arizona State Law Journal* 22 (1990): 837-94.

Romanow, Roy J., Howard A. Leeson, and John D. Whyte. *Canada-- Notwithstanding: The Making of the Constitution 1976-1982*. 25th anniversary ed. Toronto: Thomson Carswell, 2007.

Rosen, Jeffrey. "So What's the 'Right' Pick?". *The New York Times*, 3 July 2005.

Rosenbaum, David E., Lynette Clemetson, and David D. Kirkpatrick. "In Fight to Confirm New Justice, Two Field Generals Rally Their Troops Again." *The New York Times*, 3 July 2005.

Roxon, Nicola. "Courting Trouble at Club Judge." *The Age*, 22 September 2005.

———. "Secrecy Spoils Choice of High Court Judges." *The Advertiser*, 23 September 2005.

Rubenstein, Kim. "Why Gender, in This Perfectly Legal World, Really Does Matter." *Canberra Times*, 22 September 2005.

Ruddock, Philip. "Selection and Appointment of Judges." Sydney University, 2005.

Russell, Peter H. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Third ed. Toronto: University of Toronto Press, 2004.

———. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Second ed. Toronto: University of Toronto Press, 1993.

———. *The Judiciary in Canada: The Third Branch of Government*. Toronto: McGraw-Hill Ryerson, 1987.

———. "Meech Lake and the Supreme Court." In *Competing Constitutional Visions: The Meech Lake Accord*, edited by Katherine E. Swinton and Carol J. Rogerson, 97-112. Toronto: Carswell, 1988.

———. "A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada." Ottawa: Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 2004.

———. *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism*. Toronto; Buffalo: University of Toronto Press, 2005.

———. *The Supreme Court of Canada as a Bilingual and Bicultural Institution*. Ottawa: Queen's Printer, 1969.

———. "The Supreme Court since 1960." In *Politics Canada*, edited by Paul W. Fox, 536-46. Toronto; New York: McGraw-Hill Ryerson, 1977.

———. "The Supreme Court's Interpretation of the Constitution." In *Politics Canada*, edited by Paul W. Fox, 592-620. Toronto; New York: McGraw-Hill Ryerson, 1982.

Russell, Peter H., and David M. O'Brien, eds. *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*. Charlottesville: University Press of Virginia, 2001.

Russell, Peter H., and Jacob S. Ziegel. "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees." *The University of Toronto Law Journal* 41, no. 1 (1991): 4-37.

Rutkus, Denis Steven "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate." In *CRS Report*. Washington: Congressional Research Service, The Library of Congress, 2010.

Rutkus, Denis Steven, and Marureen Bearden. "Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President " In *CRS Report*. Washington: Congressional Research Service, The Library of Congress, 2009.

Sackville, Ronald. "The Judicial Appointments Process in Australia: Towards Independence and Accountability." *Journal of Judicial Administration* 16, no. 3 (February 2007): 125-38.

———. "Judicial Appointments: A Discussion Paper." *Journal of Judicial Administration* 14, no. 3 (February 2005): 117-43.

Savage, David G. "Chief Justice Unsettled by Obama's Criticism of Supreme Court." *Los Angeles Times*, 10 March 2010.

Savoie, Donald J. *Governing from the Centre: The Concentration of Power of Canadian Politics* Toronto University of Toronto Press, 1999.

Savva, Niki. "Fischer Seeks a More Conservative Court." *The Age*, 5 March 1997.

Sawer, Geoffrey. *Australian Federalism in the Courts*. Melbourne: Melbourne University Press, 1967.

Saywell, John T. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. Osgoode Society for Canadian Legal History Series. Toronto; Buffalo: Published for The Osgoode Society for Canadian Legal History by University of Toronto Press, 2002.

Schmidt, Vivien A. "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse." *Annual Review of Political Science* 11 (2008): 303-26.

———. "Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth "New Institutionalism"." *European Political Science Review* 2, no. 1 (2010): 1-25.

Schmitt, Gilbert R. "Canadian Politicians and the Bench." *Saturday Night*, 19 July 1952, 7.

Schratz, Paul. "Public Should Have a Say in Judge Selection: The Bunch We've Got Now Is a Swell Lot and Well Intentioned. Trouble Is . . . They Seem to Think it's Their Job to Right All of Canada's Wrongs." *Calgary Herald*, 4 September 1997.

Scott, F. R. "Our Changing Constitution." In *The Courts and the Canadian Constitution: A Selection of Essays*, edited by William R. Lederman. Toronto: McClelland and Stewart, 1964.

———. "The Privy Council and Minority Rights." *Queen's Quarterly* 37 (1930): 668-78.

———. "The Privy Council and Mr. Bennett's "New Deal" Legislation." *The Canadian Journal of Economics and Political Science/Revue canadienne d'economique et de science politique* 3, no. 2 (1937): 234-41.

Scott, Jeffrey. "Australian Federalism Renewed." In *Australian Federalism: Future Tense*, edited by Allan Patience and Jeffrey Scott, 1-10. Melbourne; New York: Oxford University Press, 1983.

Secrétariat de la commission. *Table analytique des memoires et autres documents consultes par la commission*. Vol. 10, Québec: Commission royale d'enquête sur les problèmes constitutionnels, 1956.

Segal, Jeffrey Allan, Harold J. Spaeth, and Sara Catherine Benesh. *The Supreme Court in the American Legal System*. Cambridge; New York: Cambridge University Press, 2005.

Seguin, Rheal. "Sovereignty Threat Real, Bourassa Warns." *Globe and Mail*, 21 June 1991, A1-A2.

Seguin, Rheal, and Estanislao Oziewicz. "Quebec Panel Gives Canada 18 Months, Members Vote Today on Proposal for 1992 Sovereignty Referendum." *The Globe and Mail*, 21 March 1991, A1.

Shapiro, Martin "Interest Groups and Supreme Court Appointments." *Northwestern University Law Review* 84 (1989-1990): 935-61.

Sharman, Campbell. "Fraser, the States and Federalism." In *Australian Federalism: Future Tense*, edited by Allan Patience and Jeffrey Scott, 188-200. Melbourne; New York: Oxford University Press, 1983.

———. "A Political Science Perspective." In *Australian Federalism*, edited by Brian Galligan, 98-115. Melbourne, Australia: Longman Cheshire, 1989.

Shaw, J. W. "On the Appointment of Judges." *Australian Law Journal* 74, no. 7 (July 2000): 461-4.

Sheldon, Charles H., and Nicholas P. Lovrich Jr. "State Judicial Recruitment." In *The American Courts: A Critical Assessment*, edited by John Boatner Gates and Charles A. Johnson. Washington, D.C.: CQ Press, 1991.

Sheldon, Charles H., and Linda S. Maule. *Choosing Justice: The Recruitment of State and Federal Judges*. Pullman, Wash.: Washington State University Press, 1997.

Shuman, Daniel W., and Anthony Champagne. "Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries." *Psychology, Public Policy, and Law* 3, no. 2-3 (1997): 242-58.

Silver, A. I. *The French-Canadian Idea of Confederation, 1864-1900*. Toronto; Buffalo: University of Toronto Press, 1982.

Simeon, Richard. *Federal-Provincial Diplomacy; the Making of Recent Policy in Canada*. Studies in the Structure of Power: Decision-Making in Canada, 5. Toronto; Buffalo: University of Toronto Press, 1972.

Simpson, Jeffrey. "Needed: A Better Way to Make Supreme Court Appointments " *Globe and Mail*, 29 August 1997.

———. *Spoils of Power: The Politics of Patronage*. Toronto: Collins, 1988.

"Sir William Webb." *Cairns Post*, 13 April 1946.

Slee, John. "Politics and the High Court." *The Sydney Morning Herald*, 9 December 1986, 16.

Smiley, Donald V. "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism." *The Canadian Journal of Economics and Political Science /Revue canadienne d'Economique et de Science politique* 28, no. 1 (1962): 54-69.

Smith, Jennifer. "The Origins of Judicial Review in Canada." *Canadian Journal of Political Science/Revue canadienne de science politique* 16, no. 1 (1983): 115-34.

Snell, James G., and Frederick Vaughan. *The Supreme Court of Canada: History of the Institution*. Toronto; Buffalo: Published for the Osgoode Society by University of Toronto Press, 1985.

Sollenberger, Mitchel A. *Judicial Appointments and Democratic Controls*. Durham: Carolina Academic Press, 2011.

Songer, Donald R. *The Transformation of the Supreme Court of Canada: An Empirical Examination*. Toronto: University of Toronto Press, 2008.

Songer, Donald R., Susan W. Johnson, C.L. Ostberg, and Matthew E. Wetstein. *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada*. Montreal: McGill-Queen's University Press, 2012.

Sossin, Lorne. "Don't Leash Our Judges. Light Needs to Be Thrown on the Process of Appointing the Members of the Supreme Court, but U.S.-Style Hearings Are Not the Answer." *The Globe and Mail* 4 Febraury 2004, A19.

———. "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability." *University of New Brunswick Law Journal* 58 (2008): 11-43.

———. "Picking Canada's Judges Injudiciously." *The Globe and Mail*, 18 October 2011.

South Australia v. Commonwealth, 65 CLR 373 (1942).

Speirs, Rosemary. "Filling Supreme Court Vacancy Fraught with Peril " *The Toronto Star*, 11 September 1997.

Staff. "The High Court Appointments." *The Sydney Morning Herald*, 9 December 1986, 16.

Stein, Michael B. *Canadian Constitutional Renewal, 1968-1981: A Case Study in Integrative Bargaining*. Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1989.

Steketee, Mike. "Gaudron Not a Token, Hawke Says." *The Sydney Morning Herald*, 10 December 1986, 3.

Stephenson, Matthew C. "When the Devil Turns: The Political Foundations of Independent Judicial Review." *The Journal of Legal Studies* 32, no. 1 (2003): 59-89.

Stewart, Gordon T. "Political Patronage under Macdonald and Laurier 1878-1911." In *Canadian Political Party Systems: A Reader*, edited by R.K. Carty, 45-76. Peterborough, ON: Broadview Press, 1992.

Stone, Adrienne. "Implied Constitutional Rights." In *The Oxford Companion to the High Court of Australia*, edited by Michael Coper, George Williams and Anthony Blackshield. Melbourne; Oxford: Oxford University Press, 2007.

Stras, David R. "Understanding the New Politics of Judicial Appointments." *Texas Law Review* 86 (2007-2008): 1033-78.

Strayer, Barry L. *Judicial Review of Legislation in Canada*. Toronto: University of Toronto Press, 1968.

Stumpf, Harry P., and Kevin C. Paul. *American Judicial Politics*. Upper Saddle River, N.J.: Prentice Hall, 1998.

"Supreme Court Changes." *Canada Law Journal* 31 (1895): 525-28.

"The Supreme Court of Canada." *Canada Law Journal* 52 (February 1916): 419-20.

Tabor, Brian. "The Bar, Not Politicians, Should Be Hosting the Meet the Judge Show." *The Globe and Mail*, 24 February 2006, A21.

Tarnopolsky, Walter Surma. *The Canadian Bill of Rights*. Toronto: McClelland and Stewart, 1975.

Tate, C. Neal, and Torbjörn Vallinder, eds. *The Global Expansion of Judicial Power*. New York: New York University Press, 1995.

The Canadian Press. "Quebec Law Group Questions Supreme Court Pick." CTV.ca, http://www.ctv.ca/CTVNews/Canada/20111018/quebec-bar-supreme-court-judges-111018/.

The Newfoundland and Labrador Constitution Committee. "Final Report." St. John's, 1992.

Thelen, Kathleen. "How Institutions Evolve." In *Comparative Historical Analysis in the Social Sciences*, edited by James Mahoney and Dietrich Rueschemeyer, 208-40. Cambridge, U.K.; New York: Cambridge University Press, 2003.

Thompson, Elaine. "The 'Washminster' Mutation." In *Responsible Government in Australia*, edited by Patrick Moray Weller and Dean Jaensch, 32-40. Richmond, Vic.: Drummond Pub. on behalf of the Australasian Political Studies Association, 1980.

Thorsell, William. "What to Look for, and Guard against, in a Supreme Court Judge." *The Globe and Mail*, 20 December 1997, D6.

Tibbetts, Janice. "Vetting of Cromwell on Agenda." *Ottawa Citizen*, 8 November 2008, A5.

Toews, Vic. "Interview with the Author." 27 February 2007.

———. House of Commons. *Debates (Hansard)* (23 Febraury 2004, 37th Parliament, 3rd Session): 1450.

Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

Tyler, Tracey "N.S. Judge Named to Top Court; Harper Nomination Bypasses All-Party Committee Just Two Days Ahead of an Expected Election Call." *Toronto Star*, 6 September 2008, A17.

Valpy, Michael. "The 'Crisis': A Narrative." In *Parliamentary Democracy in Crisis*, edited by Peter H. Russell and Lorne Sossin, 3-18. Toronto; Buffalo: University of Toronto Press, 2009.

Victoria. "Reviewing the Judicial Appointments Process in Victoria." Melbourne: Department of Justice, July 2010.

Victoria v. Commonwealth, 99 CLR 575 (1957).

"Victorian Bar Association Criticises Appointments." *Barrier Miner*, 1930, 1.

Vile, John R., ed. *Proposed Amendments to the U.S. Constitution, 1787-2001*. 3 vols. Clark, N.J.: Lawbook Exchange, 2003.

Waite, Peter B., and Ged Martin. *The Confederation Debates in the Province of Canada, 1865,* Second ed. Montreal and Kingston: McGill-Queen's University Press, 2006.

Warren, Charles. *The Supreme Court in United States History*. Boston: Little, Brown, and Company, 1926.

Warson, Albert. "Lawyer Urges Disclosure of Report on Landreville." *The Globe and Mail*, 20 November 1965, 1.

Waterford, Jack. "The Role of the Chief Justice: A Media View." In *Courts of Final Jurisdiction: The Mason Court in Australia*, edited by Cheryl Saunders, 28-34. Annandale: The Federation Press, 1996.

Watson, George, and John A. Stookey. *Shaping America: The Politics of Supreme Court Appointments*. New York: Harper Collins College Publishers, 1995.

Watson, Richard Abernathy, and Rondal G. Downing. *The Politics of the Bench and the Bar; Judicial Selection under the Missouri Nonpartisan Court Plan*. New York: Wiley, 1969.

Webster, Peter D. "Selection and Retention of Judges: Is There One Best Method?". *Florida State University Law Review* 23 (1995-1996): 1-42.

Weiden, David L. "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia." *Political Research Quarterly* 64, no. 2 (2011): 335-47.

Wells, Clyde K. "Canadians Are Rejecting the Dismantling of Federalism." *The Globe and Mail*, 14 April 1990, D01-D02.

Western Australia v. Chamberlain Industries Pty Ltd., 121 CLR 1 (1970).

Western Australia v. Hamersely Iron Pty. Ltd., 120 CLR 42 (1969).

Wetstein, Matthew E., C.L. Ostberg, Donald R. Songer, and Susan W. Johnson. "Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the U.S. And Canadian Supreme Courts." *Comparative Political Studies* 42, no. 6 (2009): 763-92.

Wheare, K. C. *Federal Government*. New York: Oxford University Press, 1964.

Wheeler, Fiona, and John Williams. "'Restrained Activism' in the High Court of Australia." In *Judicial Activism in Common Law Supreme Courts*, edited by Brice Dickson, 19-67. Oxford: Oxford University Press, 2007.

White, Adam J. "Toward the Framers' Understanding of Advice and Consent: A Historical and Textual Inquiry." *Harvard Journal of Law and Public Policy* 29, no. 1 (2005): 103-48.

Whitlam, Gough. *On Australia's Constitution*. Camberwell, Australia: Widescope, 1977.

———. *The Truth of the Matter*. Harmondsworth; New York: Penguin, 1979.

Wik Peoples v. Queensland, 187 CLR 1 (1996).

Williams, Daryl R. "Interview with the Author." 12 April 2011.

———. "Judicial Independence and the High Court." *University of Western Australia Law Review* 270 (1998): 140-54.

———. "Who Speaks for the Courts?". In *Courts in a Representative Democracy* 183-94. Carlton South, Vic.: Australian Institute of Judicial Administration, Inc., 1994.

Williams, George. "The High Court and the Media." *University of Technology of Sydney Law Review* 1 (1999): 136-46.

———. "High Court Appointments: The Need for Reform." *The Sydney Law Review* 30, no. 1 (March 2008): 163-9.

Williams, George, and Andrew Lynch. "The High Court on Constitutional Law: The 2010 Term." *University of New South Wales Law Journal* 34 (2011): 1006-29.

Winters, Glenn R. "The Merit Plan for Judicial Selection and Tenure - Its Historical Development." *Duquesne Law Review* 61 (1968-1969): 61-79.

Winterton, George. "Appointment of Federal Judges in Australia." *Melbourne University Law Review* 16 (1987): 185-212.

Witte, Harry L. "Judicial Selection in the People's Democratic Republic of Pennsylvania: Here the People Rule." *Temple Law Review* 68 (1995): 1079-150.

Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times*. Hoover Studies in Politics, Economics, and Society. Lanham, Md.: Rowman & Littlefield, 2006.

Wood, Gordon S. *The Creation of the American Republic, 1776-1787*. Chapel Hill: University of North Carolina Press, 1969.

Woods, Patricia J. "The Ideational Foundations of Israel's "Constitutional Revolution"." *Political Research Quarterly* 62, no. 4 (2009): 811-24.

———. *Judicial Power and National Politics: Courts and Gender in the Religious-Secular Conflict in Israel*. Suny Series in Israeli Studies. Albany, N.Y.: Suny Press, 2008.

Woods, Patricia J., and Lisa Hilbink. "Comparative Sources of Judicial Empowerment: Ideas and Interests." *Political Research Quarterly* 62, no. 4 (2009): 745-52.

Ziegel, Jacob S. "Disrobe This Process: Let's Update Our 19th-Century System for Appointing Supreme Court Judges and Make It Transparent." *The Globe and Mail* 27 November 2003.

———. "The Law Is Too Important to Leave to Politicians." University of Toronto, Faculty of Law, http://utorontolaw.typepad.com/faculty_blog/2011/05/prof-jacob-ziegel-the-law-is-too-important-to-leave-to-politicians.html.

———. "Merit Selection and Democratization of Appointments to the Supreme Court of Canada." In *Judicial Power and Canadian Democracy* edited by Paul Howe and Peter H. Russell. Montreal: McGill-Queen's University Press, 2001.

———. "A Supreme Democratic Deficit." *National Post*, 12 August 2002, A14.