

Institutional Legitimacy, Strategic Decision-Making and the Supreme Court of Canada: A Look at the Quebec *Secession Reference*

Paper presented at the annual meetings of the Canadian Political Science Association, May 27 to 29, 2009, Carleton University, Ottawa, ON.

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Increasing excursion of judicial influence into the political sphere highlights legitimacy concerns associated with the exercise of judicial review. This paper presents a new, strategic theory of how courts establish and promote institutional legitimacy. The theory is applied to the Supreme Court of Canada's 1998 Secession Reference case. The analysis shows that the attainment of institutional legitimacy is importantly linked to the strategic sensitivity of judges to factors operating in the external, political environment.

Introduction

With the 1982 introduction of the Charter of Rights and Freedoms, the prominence of the Supreme Court of Canada has sharply increased. Studies suggesting that the Charter has revolutionized Canadian political life, forced justices into a dialogical relationship with lawmakers, and increased policymaking at the Supreme Court abound. Yet, the Court has also managed to effectively safeguard its institutional legitimacy as evident by a high degree of support it enjoys among the Canadian public (Hausegger and Riddell, 2004) which continues to trust the courts more than legislatures (Russell, 1988; Fletcher and Howe, 2000; Nanos, 2007). It appears that in spite of its increased entanglement with politics, the Court is succeeding where traditional political actors have over the past few decades consistently failed; namely, in safeguarding its public support. Indeed, how does the Supreme Court of Canada, and courts everywhere, ensure the attainment and retention of institutional legitimacy? According to Gibson et al., “[u]nderstanding how institutions acquire and spend legitimacy remains one of the most important unanswered questions for those interested in the power and influence of judicial institutions” (2003: 556).

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

The theory is applied to the Supreme Court of Canada's 1998 *Secession Reference* case. The *Secession Reference* was perhaps the most important and politically charged decision ever delivered by the Canadian Supreme Court. Also, “[i]n going where no high court in a constitutional democracy has gone before – namely to the legal rules governing secession – it was also a landmark decision for

* I am grateful to Ran Hirschl, Peter Solomon, Joseph F. Fletcher, Lorne Sossin, Grace Skogstad, David R. Cameron, Phil Triadafilopoulos and Luc Turgeon for helpful comments on an earlier draft.

worldwide constitutionalism” (Russell, 2004: 245). For these reasons the decision merits attention.

The paper advances in two sections. The first section outlines a new, legitimacy cultivation theory of judicial decision-making. The theory builds on comparative literatures on public support for the courts and strategic judicial decision-making to develop a model of judicial behaviour grounded in a set of testable propositions. The second section applies and tests the theory in the context of the *Secession Reference* case. The analysis shows that the *Secession Reference* decision amounts to a stark example of strategic legitimacy cultivation on the part of the Canadian Supreme Court.

The Legitimacy Cultivation Theory of Judicial Decision-Making

Over the last two decades or so, the literature on public support for the courts has identified several factors that exert effects on the levels of legitimacy that courts enjoy (Grosskopf and Mondak, 1998; Caldeira and Gibson, 1992; Gibson et al., 1998; Gibson et al. 2003; Hoekstra, 2003; Fletcher and Howe, 2000). At the same time, the literature on strategic judicial decision-making has pointed to the extent to which judges are sophisticated, rational actors whose actions are importantly constrained by factors operating in the larger political context (see Spiller and Gely, 2008). Building on these two literatures, this section will outline the legitimacy cultivation theory of judicial decision-making and ground it in a set of testable propositions.

According to the public support for the courts literature, institutional legitimacy is of fundamental importance for the effective functioning of judicial institutions. The primary reason for this proposition has to do with the Hamilton’s classic formulation in *Federalist 78* of judiciary as having influence over neither the sword nor the purse, and having to rely ultimately on other branches of government, and on the public, for the enforcement of its judgements. This institutional limitation renders the courts particularly dependent on the goodwill of their constituents for compliance, and in the absence of “institutional legitimacy, courts find it difficult to serve as effective and consequential partners in governance” (Gibson et al., 1998: 343). The second reason for the importance of institutional legitimacy has to do with the fact that in contrast to political institutions, which can re-establish their legitimacy every few years or so via electoral processes, judicial institutions are largely appointed bodies and lack such an automatic way of institutional refreshment.

The comparative literature on public support for the courts is also in agreement about what constitutes institutional legitimacy. Legitimacy is defined through the notion of diffuse support which refers to the presence of durable, general attachments to the courts among the public that persist in spite of specific court decisions that may run counter to the preferences of members of the public (Gibson et al., 2003: 537). One could say, therefore, that the fundamental resource that courts possess which allows them to surmount their particular institutional predicament outlined by Hamilton is institutional legitimacy in the form of a robust “reservoir of favourable attitudes.”

Much of the preoccupation of the public support for the courts literature has been with ascertaining what factors are determinative of diffuse support for courts. As the following discussion illustrates, the literature has provided considerable insights into this question.

The first determinant of diffuse support is the so-called specific support for the courts which is defined as “satisfaction with the immediate outputs of the institution”

(Gibson, 2006: 6). In contrast to the diffuse support, which is identified by measuring durable attachments, specific support is associated with levels of satisfaction among the public with judicial settlements of particular cases and policy dilemmas. A large number of studies have found that specific support has a direct bearing on the levels of diffuse support for a court (for example Gibson et al., 2003; Grosskopf and Mondak, 1998; Fletcher and Howe, 2000; Hoekstra, 2003). What these studies suggest is that a single decision can alter the amount of support a court enjoys among the public.

A second factor that can have a significant impact on diffuse support is people's basic political values towards democracy and democratic governance. In their study of the U.S. Supreme Court, Caldeira and Gibson found that bearers of greater commitments to democratic values tend to evince higher levels of diffuse support for the Supreme Court (1992: 648). More recent research conducted in the United States confirms that public support for the Supreme Court "is grounded in broader commitments to democratic institutions and processes, and more generally in knowledge of the role of the judiciary in the American democratic system" (Gibson, 2006: 23). Gibson explains the underlying causal processes (2006: 23):

Citizens who are better educated learn more about the Supreme Court and the democratic theory in which the Court is embedded and sustained. I suspect that the primary content of the learning is to stress that "courts are different." They are relatively non-political, and judges make decisions on the basis of principled criteria, impartiality, without regard to self interest (even the self interest of being reelected or reappointed). This knowledge predisposes people to accept the myth of legality, and especially the viewpoint that courts have a distinctive role in democracy and that the role is not necessarily to mollify the preferences of the majority.

The key to the linkage between political values and diffuse support, therefore, is the *perception* on the part of the public that compared to legislatures and executives, courts are apolitical institutions whose decision-making derives from principled and impartial understanding of internal strictures of the law. As such, moreover, the courts are seen to have a rather unique and necessary role to play in the overall system of government. Where these attitudes are more prevalent among the public, one can expect that the institutional legitimacy of the courts will be stronger.

A third factor that exerts significant effects on diffuse support is the level of judicial activism. As Caldeira and Gibson note in the U.S. context, open embrace of judicial activism may lead to the politicization of the Supreme Court, which in turn risks undermining the Court's reservoir of public support and makes the Court dependent for institutional support on those who directly profit from its policies (1992: 659). Judicial deference, on the other hand, renders the public less likely to view the Court through the lens of their political preferences which is legitimacy-wise a more prudent position for the institution to adopt (Caldeira and Gibson, 1992: 659-660). Hausegger and Riddell's (2004) application of Caldeira and Gibson's framework to the Supreme Court of Canada found that the 1988 activist *Morgentaler* decision on abortion represents a watershed for the nature of the SCC's public support. While prior to that decision diffuse support for the Court was linked to basic value orientations, following the decision the support became more politicized.

It is important to emphasize that Caldeira and Gibson's arguments linking changes in the character of judicial decision-making to changes in diffuse support are importantly conditioned by *public perception*. If changes in the character of judicial decision-making go without notice among the public at large (if they are, so to speak, conducted in 'stealth'), no impact on diffuse support is expected.

If institutional legitimacy and diffuse support are indeed important for the effectiveness of courts, what implications these findings have for the actual decision-making of high court judges? One important avenue for answering this question is suggested by the recent “strategic revolution in judicial politics” (Epstein and Knight, 2000). The key premise of the strategic approach to judicial decision-making is that judges are sophisticated, rational actors who are aware that their decision-making liberty is importantly constrained by the political context in which they operate, and by the preferences and anticipatory reactions of other important players within that context.

The reason for justices to engage in strategic decision-making has to do with a variety of costs that judges, and courts as institutions, can incur as a result of adverse reactions to their decisions, as well as with a variety of benefits that can be acquired through the rendering of strategically tailored decisions. Hence, to note just two examples, judges can engage in strategic decision-making for the sake of increasing their policy-making influence (see Epstein and Knight, 1998) or the institutional position of courts vis-à-vis other major decision-making bodies (see Alter, 2001).

This paper suggests another reason for judges to engage in strategic behavior. In particular, judges can engage in strategic decision-making for the sake of augmenting the institutional legitimacy of courts. If the revolution in strategic decision-making is correct in postulating that much of judicial behavior can be explained in terms of sophisticated strategic choice-making, and if it is true, as argued above, that institutional legitimacy is of fundamental importance for the proper functioning of courts, then one should expect judicial strategic calculations to be importantly informed by public support considerations. In other words, given the importance of institutional legitimacy for the effectiveness of courts, a significant component of the overall strategic behavior of high court justices should have to do with acquiring and retaining respectable levels of public support. As strategic, sophisticated actors with a distinct interest in maintaining or enhancing the institutional legitimacy of their court, justices can be expected to mould their decision-making so as to ensure high levels of public support.

Modeling Judicial Behavior: Towards an Empirical Account of Legitimacy Cultivation

The above discussion suggests three specific premises regarding institutional legitimacy of high courts. First, institutional legitimacy is a fundamental resource of high courts and in its absence the courts would find it extremely difficult, if not impossible, to function in an effective and consequential way. Second, institutional legitimacy can be defined through the notion of diffuse support, which itself refers to a relatively durable reservoir of good will and favourable attitudes that a court enjoys among the public at large. Third, three factors can exert important effects on the level and character of diffuse support: (1) specific support; (2) a perception on the part of the public that courts are “different” kind of institutions whose decision-making is driven by principled, apolitical legal analysis, and that as such the courts have an important role to play in the overall system of government; and (3) the character of judicial decision-making: overt judicial activism risks politicization of the courts and suggests to the public that courts are not different from other political institutions.

Assuming that judges are strategic, sophisticated actors concerned about cultivating diffuse support as their crucial institutional resource, the question that follows is what these premises imply for judicial decision-making. In fact, the

analysis suggests that judicial decision-making should exhibit four specific tendencies. According to the first tendency, judges are expected to exhibit general sensitivity towards the state of specific support:

Tendency 1: Judicial disposition of individual cases is expected to accord with the state of specific support.

The reason for this, as discussed above, is that public satisfaction with specific court decisions can have a direct bearing on the levels of diffuse support of the court.

Second, given that institutional legitimacy is importantly linked to the courts' capacity to present themselves as a "different" kind of institution that acts in an apolitical and impartial manner, one can anticipate that courts will seek to cultivate that perception among the public at large. Hence:

Tendency 2: Judges are expected to avoid overt clashes and otherwise entanglements with political actors especially over what appear to be manifestly political issues.

The courts will seek to create and sustain the perception that their work remains above the fray of regular politics. Judges will be particularly careful to avoid clashes with important political actors who have the support of public opinion behind them, but also be more likely to rule against political actors if they feel that public opinion might in fact be supportive of such a ruling.

The third tendency that judges are expected to exhibit in their pursuit of legitimacy cultivation is closely related to the second and has to do with the scale of judicial activism. Namely:

Tendency 3: The courts are expected to exhibit a proclivity towards tempering judicial activism.

Judicial activism is here defined as a "judicial vigour in enforcing constitutional limitations" (Russell, 1990: 19). Hence, activism occurs whenever a court enforces particular constitutional limitations to change the status quo in the form of an existing statute, regulation or conduct of public officials. As such, judicial activism is contrasted to judicial deference which refers to instances in which a court does not enforce constitutional limitations and decides to uphold the status quo. Simply put, the more a court is willing change the existing status quo, the more activist is its decision.

The reason for the third tendency, as Caldeira and Gibson argue, has to do with the fact that open embrace of judicial activism leads the citizenry to view the courts "in the same light as other political institutions" with the consequence that the public's policy preferences become determinative of diffuse support (1992: 652). Somewhat ironically, therefore, when courts engage in greater deference to the preferences of dominant political actors and governing majorities, they are more likely to be perceived by the public as being less entangled with politics, and will, therefore, be better able to preserve the perception of separated, different, apolitical bodies. It is manifest clashes with political actors, not greater deference to the regime, that breed the loss of support for the courts.

These insights also carry significant implications for the development of legal doctrine. In particular, if external, non-legal factors in the form of public support concerns affect judicial disposition of cases, then one might also anticipate that judicial doctrines will themselves exhibit sensitivity to such concerns. Legitimacy

cultivation, in other words, will push judges to seek reconciliation of their treatment of judicial doctrines with the external constellation of political and social forces.

Tendency 4: Jurisprudence will be informed by the tenor of the extant political environment.

The opinion of the U.S. Supreme Court in *Planned Parenthood vs. Casey* (1992) is particularly illustrative of how doctrines can be determined by tensions and values present within the larger political context and by judicial concerns about preserving institutional legitimacy. In that case (865), the U.S. Supreme Court stated that “the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.” The clear implication, as Whittington notes, is that “[a]lthough contemporary theory and politics can support a wide range of conflicting constitutional interpretations, there remain limits on what the Court plausibly can claim that the Constitution means before it raises substantial questions about its actions” (2001: 501).

Finally, since the above arguments linking the character of judicial decision-making to the establishment and preservation of diffuse support importantly depend on the visibility of judicial actions to the public at large, the above tendencies are expected to be particularly at work in cases that garner high public visibility. Consequently, we can draw the following hypothesis which forms the empirical backbone of the legitimacy cultivation theory of judicial decision-making presented in this paper:

Legitimacy Cultivation Hypothesis: The courts are expected to be particularly sensitive to the state of specific support, to be eager to avoid clashes with political actors, to be careful to qualify the level of judicial activism, and to be particularly inclined to devise doctrines that reflect the tenor of the extant political environment when dealing with cases that garner a considerable degree of public interest.

In highly visible cases, the public is particularly attentive to the courts’ behavior and judicial dispositions of such cases are expected to have disproportionate effects on diffuse support and, therefore, on institutional legitimacy. This expectation corresponds with the Mondak and Smithey’s finding that the key prerequisite for specific support to exert direct effects on diffuse support is the “availability of information” on the part of the public (Mondak and Smithey, 1997: 1121). In the Canadian context, this finding has been confirmed by Fletcher and Howe who note that “awareness of specific cases can be an important mediating factor [between individual decisions and general attitudes], for the connection between specific and diffuse support is often stronger among those with some awareness of a given ruling” (2001: 49).

It is important to note that in order to assess their impacts on judicial decision-making, these variables have to be examined in their *pre-decision* political environment. The pre-decision focus is of critical importance because of the study’s assumption that it is judicial awareness of these factors that exerts impacts on the consequent disposition of cases. The following section, therefore, starts with a discussion of these variables in the pre-decision political environment of the *Secession Reference* case, before proceeding to analyze judicial outcomes reached in that case.

Legitimacy Cultivation at Work: Explaining the Quebec *Secession Reference*

The Canadian government's reference of three questions concerning the issue of unilateral secession of Quebec from the rest of Canada to the Supreme Court was part of a new strategy for dealing with the question of national unity that the government implemented in the wake of the 1995 Quebec referendum on separation. The separatist forces lost the referendum, which had a 94 percent turnout, by a slim margin of 49.4 percent to 50.6 percent, or a mere 31,000 votes within the pool of 5,086,980 Quebecers who cast their ballots. It is this close encounter with the potential break-up of the country that led the federal government to refer the issue of secession to the country's highest court. On September 26th, 1996 federal Justice Minister Allan Rock announced that the government would refer three questions to the Supreme Court of Canada:

1. Under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Case Visibility

From the outset, Canadians expressed an enormous amount of interest in the *Secession Reference* which was billed as "The Case of the Century" by the media (Chambers, 1998). In fact, in their study of the media coverage of the Supreme Court of Canada, Sauvageau et al. note that "[i]n terms of the numbers of stories alone, coverage of the hearing and decision dwarfed all the other cases" (2006: 91). The gravity of the case is perhaps most dramatically illustrated by the fact that even the Canadian dollar fell in advance of the decision (Little, 1998).

The Supreme Court of Canada and its justices could not have possibly been insulated from the magnitude of the political moment they were facing. During the hearing, which took place from February 16th to 19th, 1998, the separatist movement organized successive protests of over 1,000 demonstrators on the steps of the Supreme Court building (Wills, 1998c). In short, as the justices grappled with the bundle of legal and political issues contained in the *Secession Reference*, they could not ignore the extreme amount of attention the case was garnering among the Canadian public and among political actors.

Political Actors

The two key political stakeholders involved in the *Secession Reference* case were the federal government of Canada and the Quebec separatist movement which, at the time, was most prominently represented by the provincial government of Quebec. The federal government reasoned that since the constitution is silent on the question of secession it would be beneficial to let the courts draw out some rules regarding the process of secession, rather than letting the process play itself out solely in the political arena. Facing a separatist government in Quebec that was bent on calling another referendum as soon as the 'winning conditions' for the 'Yes' side

materialized, Ottawa preferred that the aftermath of a possible 'Yes' side victory "be governed by the rule of law rather than force" (Russell, 2004: 241).

The Quebec government, for its part, abhorred any meddling by the federal government, or the Supreme Court, with the will of the people of Quebec to determine their political future for themselves. Quebec Premier Lucien Bouchard was adamant in proclaiming that Quebecers have a "sacred right to determine their own destiny" (Bryden, 1998), while his minister of intergovernmental affairs, Jacques Brassard, stated that "no decree, no federal law, no decision from any court whatsoever can call into question or discredit this right of Quebecers to decide their future" (Young, 1998: 14-15). The Quebec government, in fact, formally boycotted the case and refused an opportunity to defend the secessionist cause during the proceedings, focusing its energies instead on provoking "a mounting wave of public indignation against the Supreme Court for taking on the case and the federal government for initiating it" (Bauch, 1998). This strategy peaked during the hearings, with the leader of the federal separatist party, Gilles Duceppe, organizing daily protests at the Supreme Court building (Bryden, 1998).

The Quebec political class was particularly outraged with the process which, as Premier Bouchard suggested, allowed "federally appointed justices, based on a constitution Quebec has never accepted, to put a padlock on Quebecers' right to self-determination" (Bryden, 1998). The long-standing charge that when dealing with federal-provincial relations the Supreme Court of Canada is like the Leaning Tower of Pisa (i.e. always leaning in the direction of the federal government) was resuscitated. This depiction was used by the Parti Québécois' (PQ) in newspaper advertisements (Young, 1998: 15), as well as by the organizers of the protests at the Supreme Court who distributed pins portraying the famous tower (Authier, 1998a).

The Court's intention to appoint an *amicus curiae* to argue the secessionist case in the absence of the Quebec government was also fiercely opposed. As Bienvenu notes, representatives of the Quebec government branded "in advance any member of the Quebec bar who would dare to accept the mandate to act as amicus as an 'imposter', a 'false spokesman' who would be embarking on a 'risky venture'" (1999-2000: 22). The eventual appointment of André Joli-Coeur, a well-known sovereigntist and a member of the Quebec bar, was greeted with "deep disappointment" by the Quebec government (Bienvenu, 1999-2000: 22).

It is also important to stress that the whole political class of Quebec, federalists and separatists alike, supported the Quebec government's position. Leaders of all major Quebec parties, including Jean Charest, leader of the Conservative Party of Canada, joined the Quebec government in condemning the federal government's reference of the issue of secession to the Supreme Court (Thompson, 1998). One journalist assessed that "Quebec's French-speaking political class is probably as close to unanimous as it will ever get in opposing the federal initiative" (Macpherson, 1998).

Specific Support

The population of Quebec was in agreement with its political class. A poll conducted a week prior to the onset of hearings showed that 88.3 percent of Quebecers believed that "a democratically cast vote should have precedence over a Supreme Court ruling" (Authier, 1998b). Another poll conducted in May of 1997, more than a year before the decision was delivered, showed that "[e]ven among those who indicated that they

would vote “No” in a further referendum, 43 percent were in disagreement with the Supreme Court reference” (MacLauchlan, 1997: 163).

In case that they were not reading newspapers or following newscasts, the justices were made directly aware of the state of public opinion. In fact, *amicus curiae* filed an opinion by Claude Ryan, a former Quebec Liberal Party leader, who warned the Court that the consensus opinion in Quebec was that the future of the province should be decided by the will of the Quebec people (Bienvenu, 1999-2000: 27-28).

With the Quebec government whipping up frenzies against the Court and threatening a snap election call in the aftermath of an unfavourable decision (Bryden, 1998); with pundits outside and interveners inside the Court proclaiming that nothing less than “the life or death of a nation is at stake” (Coyne, 1998); and with pollsters working hard to bring the views of the public into the political discourse, the Court was bracing itself to deliver one of the most important decisions in its history. At the same time, the Court was warned well in advance, and in an unequivocal fashion, of the importance of the decision it was about to deliver and of the amount of attention the case has amassed. The Court had every opportunity to ponder the consequences of its actions for the many audiences eagerly awaiting the decision. The confluence of these factors, in turn, suggests that judicial sensitivities for legitimacy cultivation would be in a state of heightened alert. It should also be noted that in light of the claims made against the Court by the Quebec political class, and in light of the attitudes of the Quebec public, much of the legitimacy challenge the Court faced in the *Secession Reference* had to do with avoiding the perception that it is simply an arm of the national government. Attaining legitimacy for the Court meant establishing itself as an unbiased arbiter of Quebec-Canada relations.

Disposition Summary

That justices were aware of the importance of the case was made plain in the first sentence of their decision (para 1): “This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government.” Their sensitivity to the political moment was also illustrated by the fact that the opinion was signed collectively by “The Court,” and by the fact that the Court nowhere provided simple ‘yes’ or ‘no’ answers to the questions posed. According to Bienvenu, who was the co-counsel for the federal government, this suggests that the Court wanted to “guard itself against quick, superficial assessments of its opinions and convey the message that its decision was to be found in the totality of its reasons” (1999-2000: 41).

The Court ultimately did decide that Quebec does not have a right to unilaterally secede from Canada either under Canadian constitutional law (Question 1) or under international law (Question 2).¹ The most important, analyzed, and reported aspect of the decision, however, dealt with issues beyond the question of unilateral secession. As Monahan notes, “rather than focus on whether Quebec had a unilateral right to secede from Canada, [the Court] turned the Reference into an extended analysis of the federal government’s constitutional obligations in the event that the Quebec government is able to obtain a clear mandate in favour of a secession in a future referendum” (1999: 66). Following this analytical path, the Court arrived

¹ The Court proclaimed that there was no need to consider Question 3, as it found no conflict between domestic and international law regarding unilateral secession.

at the crux of its decision, the so-called duty to negotiate. In the Court's words, "a decision of a clear majority of the population of Quebec on a clear question to pursue secession" establishes, on the part of federal and other provincial governments, a duty to negotiate requisite "constitutional changes to respond to that desire" (paras. 88, 93). The Court extrapolated this duty to negotiate from its extensive analysis of four "fundamental and organizing principles" of the Canadian constitutional order: democracy, federalism, the rule of law, and minority rights. The Court rejected two absolutist views, that secession is "an absolute legal entitlement" and that a clear "expression of self-determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government" (paras. 91 and 92, emphasis in the original). It ruled instead that requisite constitutional changes are to be arrived at through a good-faith negotiation process informed by the four fundamental principles.

The Court garnished the duty to negotiate, the centerpiece of its judgment, with a number of other pronouncements. Perhaps most importantly in this regard, the Court ruled itself out of having any sort of "supervisory role over the political aspects of constitutional negotiations" that may ensue pursuant to the duty to negotiate (para. 100). The justices specified that the political and, therefore, non-justiciable aspects of negotiations cover practically the entirety of the negotiating process, including the triggering mechanism (i.e. what constitutes "a clear majority" and "a clear question"), the sensibility of "the different negotiating positions of the parties," and what would happen should negotiations reach a stalemate (paras. 100-101). The Court also failed to adjudicate on what would occur should one of the parties breach the duty to negotiate, what parties have a right to participate in negotiations, and what would be the status of the borders of an independent Quebec.

So, how helpful is the legitimacy cultivation theory in shedding light on the Court's reasoning? As it turns out, the theory is rather dramatically substantiated in the highly visible context of the *Secession Reference*.

Duty to Negotiate

By focusing their judgment on the duty to negotiate, the justices surprised many close observers of the Court who did not expect it to go beyond assessing the question of unilateral declaration of independence (Cairns, 1998; Monahan, 1999; Choudhry, 2008). The Court's extensive reliance on the duty to negotiate was particularly surprising given that the concept was not argued by any of the parties before the Court (Monahan, 1999: 103). Yet, even if the focus on negotiations had not been emphasized by any of the parties before the Court, and even if it had no precursor in the Canadian constitutional law as a formula for dealing with constitutional change, it did have one distinctive feature: in the pre-decision political environment, the government of Canada and the Quebec separatist movement, as the two key political stakeholders involved, as well as the Canadian public both inside and outside of Quebec, were all in agreement that good faith negotiations should be a central part of any process effecting the secession of Quebec from Canada.

This point has recently been made by Penney (2005) in his application of Bruce Ackerman's theory of constitutional moments to the *Secession Reference* case. According to Penney, the *Secession Reference*, being part of the larger constitutional moment occurring in Canada at the time, "involved a 'switch in time' by the Supreme Court of Canada, wherein the Court began a reconstruction of doctrine to accommodate a new constitutional commitment largely defined by political parties

and popular forces” (2005: 220-221). Particularly interesting for the purposes of this paper is Penney’s empirical finding that a “definable consensus” regarding a commitment to good-faith negotiations had crystallized in the pre-decision environment of the *Secession Reference* (2005: 245).

Insistence on negotiations has been part of the Quebec secessionist movement since its emergence. In fact, the idea of engaging in negotiations with Canada following a successful referendum was assumed by the early notion of a ‘sovereignty association’, as well as by the more recent formulation of an ‘economic and political partnership’, which were the two ideas dominating the separatist policy since the 1980s (Penney, 2005: 232). The question on the 1980 referendum on secession, which was the first referendum on Quebec secession, referred to the notion of negotiations three times. The focus on negotiations also featured prominently in specific policy proposals of the separatist movement. For example, the key legislative vehicle through which the Quebec government hoped to bring about separation – Bill 1, *An Act Respecting the Future of Quebec* (1995) – “expressly required negotiations prior to a declaration of sovereignty” (Monahan, 1999: 82). Separatists’ commitment to negotiations was so evident that even journalistic accounts some six months prior to the actual decision were declaring that “[n]o sovereignist party has ever wanted to proclaim sovereignty before going through negotiations” (Chambers, 1998).

While the federal government historically had not been open to negotiations with separatists about the potential break up of the country, its position changed dramatically in the aftermath of the 1995 referendum. Having seen the country come within a whisker of potential dissolution, the federal government started seriously contemplating the possibility of a successful ‘Yes’ vote in Quebec. And it is in this context that the government also started asserting that it would in fact be willing to engage in negotiations should Quebecers express a clear and unambiguous will to separate (Bienvenu, 1999-2000: 60; Penney, 2005: 237). This willingness was explicitly underlined by federal minister of Justice Allan Rock in his announcement in September of 1996 that a reference dealing with the secession issue would be forwarded to the Supreme Court:

I firmly believe that we shall never reach the point of having to deal with the reality of Quebec’s separation. But should such a day ever come, there is no doubt that it could only be achieved through negotiation and agreement. ...
In this respect, we share a commitment to using negotiations and orderly processes to work out differences – something that Canadian individuals and businesses do every day. This commitment is what the international community has come to expect of Canada and to admire (Penney, 2005: 236-237).

Canadian Prime Minister Jean Chrétien confirmed this position in December of 1997. He stated that after a clear majority vote on a clear referendum question the separatists could expect that “there will be negotiation with the federal government. No doubt about it. No doubt about it” (Clark, 1997).

In addition to the federal government and the secessionist movement, the Canadian public, and particularly the public in Quebec, also preferred to see the issue resolved through negotiations. According to a poll released one day after the conclusion of the hearings, and therefore six months prior to the decision, 67 percent of Quebecers expressed the view that “if the Yes side wins a future referendum, Quebec should negotiate the terms of its departure from Canada before leaving” (Penney, 2005: 240). According to the same poll, only 20 percent of Quebecers thought that “Quebec should declare independence unilaterally and negotiate the

details afterward,” while 15 percent were undecided. While no comparable national poll was conducted at the time, one can gauge the Canadian public’s attitudes from an earlier Ipsos-Reid poll conducted in the aftermath of the 1995 referendum. According to that poll, the plurality of Canadians (39 percent) and a majority of those in Quebec (52 percent) preferred seeing the federal government “head to the bargaining table to try to get an agreement on changing the constitution that all provinces, including Quebec, can agree upon” (Penney, 2005: 239).

Therefore, the Court’s formulation of the duty to negotiate doctrine clearly reflected the mainstream public opinion in both Quebec and English Canada, as well as the area of agreement among governments of Quebec and Canada. By reinforcing the existing consensus among the key political actors, the Supreme Court also ensured that its decision had a limited impact on the existing status quo, and that its propensities for judicial activism were, therefore, restrained.

The Court’s Non Decisions

The extent to which the Court was careful to avoid potential clashes with political actors and to restrain its activist propensities is also apparent from the matters the Court chose *not* to decide. Most importantly in this regard, the Court was adamant about proclaiming that it had no role determining what constitutes a clear referendum question and a clear referendum majority, what rules are to govern the conduct and outcome of negotiations, and whether Aboriginal peoples would have any guaranteed rights to participate in negotiations. Yet, in contrast to the general commitment to negotiations, these issues were characterized by profound disagreements between the governments of Quebec and Canada. These were the thorny issues on which middle ground between the parties simply did not exist.

What constitutes a clear referendum question has been a point of long-standing and bitter disagreement between federalists and separatists. Even in December of 1994, some eleven months prior to the 1995 referendum, the federal government denounced the separatist referendum strategy “as undemocratic, manipulative and misleading – in the prime minister’s words, ‘a farce’ ”– because of the issue of the clarity of the referendum question (Young, 1999: 17). The federal government particularly despised PQ attempts to muddy the issue by not posing the question in a clear-cut, ‘in or out of Canada’ manner. In the two previous referendums conducted in 1980 and 1995, the Quebec government relied on notions such as “economic association” and “economic and political partnership” in order to woo hesitant nationalist voters. One day after announcing the reference case to the Supreme Court, federal Justice Minister Rock stated in the House of Commons that the question on any future referendum “will be separation or not, nothing in between, not partnership or any such thing” (Bryden, 1996).

Perhaps knowing that the prospect of forming an association or partnership with the rest of Canada generates a substantial increase in the number of Quebecers who are inclined to vote ‘Yes’ (Young, 1999: 74), the separatist leaders have claimed that the right to formulate referendum questions falls exclusively to the Quebec government. They have also consistently expressed a commitment to present the public with an unequivocally clear question. The difference, however, is that in contrast to the federal government the separatists stress that both the 1980 and 1995 referendum questions were clear. In fact, in the immediate aftermath of the decision, the leader of the separatist Bloc Québécois expressed strong satisfaction with the requirement for a clear question stating: “No problem with that – we had clear

questions both times” (Wills, 1998b). Quebec Premier Bouchard likewise stated that the sovereigntist “position on this is known: the 1995 referendum was so clear that 94% of Quebecers, a record of participation, went to the polls to vote on this capital issue” (Bouchard, 1999: 9).

The issue of what constitutes a sufficient or clear majority has similarly been marred by profound disagreement. Separatists have long claimed that 50-percent-plus-one majority would be sufficient to effect the negotiations and potentially even the secession, and they have often pointed to the case of the province of Newfoundland which joined Canada with a 52 percent referendum vote (Bouchard, 1999: 100). For their part, federalists have consistently questioned this claim. Writing a public letter to Quebec Premier Bouchard in August of 1997, for example, federal national unity minister Stéphane Dion dismissed the 50-percent-plus-one rule as a “narrow” or “soft” majority (Dion, 1999: 191), while the PM Chrétien often stated that he would not allow the break-up of Canada on the basis of one vote difference (Bryden, 1995). In fact, within a week of the ruling, Chrétien reiterated the claim he made during the previous election campaign that separatists would require a two-thirds (66.7 percent) majority of ‘Yes’ vote to initiate the process of negotiation (Walker, 1998). Separatists laughed such claims off by insisting that 50 percent plus 1 is enough (Wills, 1998b).

The Court also decided not to adjudicate the issue of whether Aboriginal people, whose secession-related interests were radicalized in the aftermath of the 1995 referendum and in the run-up to the case (Young, 1999: 74), would have a seat at the negotiating table. Aboriginal people, in fact, were forceful supporters of the federal government’s case arguing that if it came to secession the province of Quebec should be partitioned to allow them and their territories to remain in Canada. In October 1995, the Aboriginal people living in Quebec conducted their own referendum in which they “overwhelmingly rejected being separated from Canada” (Bienvenu, 1999-2000: 39). Representatives of Aboriginal people also intervened in the case by, among other things, challenging Quebec government’s claims that the *uti possidetis* principle of international law would protect the territorial integrity of the province of Quebec in the event of secession (Bienvenu, 1999-2000: 39).

In light of the legitimacy cultivation theory, it is not at all surprising that the Supreme Court opted for restraint on these controversial matters. In contrast to the commitment to negotiations that governments of both Quebec and Canada shared in the build-up to the case, none of these issues was characterized by a similar degree of consensus. In fact, they were characterized by profound disagreements. Had the Court opted for legal determination of any of these issues, by determining, for example, what a clear question looks like, or what a clear majority is, it would have almost automatically generated a storm of criticism from one of the two parties. As Young notes, while “the sovereigntists were prepared for a full scale attack on the Court and were ready to undermine its authority,” a similar barrage on the Court could have been expected from English Canada had the Court returned a decision “favourable to some aspects of the sovereigntist position – such as that the required majority was 50 percent plus one” (1998: 15-16). Given the highly visible nature of the case and the severity of political stakes involved, any clashes and otherwise entanglements with political actors could have gravely threatened the Court’s institutional legitimacy. In fact, the Court was so prudent it decided not only to leave these issues unaddressed, but also to fend off any potential role for itself in adjudicating these types of questions in the future (para. 100).

The Court, therefore, went a long way towards shielding itself from deciding the highly charged political issues that would almost inescapably engage it in uncomfortable and legitimacy-threatening clashes with political actors. The first three components of the legitimacy cultivation hypothesis specified above are, therefore, borne out in the *Secession Reference* case: (1) the decision accorded with the state of specific support; (2) it was carefully structured so that the Court would eschew clashes and entanglements with political actors over the highly charged and contested issues; and, (3) justices exhibited a strong proclivity towards tempering judicial activism. To reinforce the final point, one could argue that the Supreme Court exercised utmost restraint in its decision. After all, the Court chose to adjudicate those matters on which there was widespread agreement and in such a way so as to reinforce the status quo while avoiding the adjudication of the more controversial issues. This strategy ensured the Court's success in safeguarding its institutional legitimacy.

According to the final component of the hypothesis, when operating in highly visible political environments courts are also expected to devise doctrines that reflect the tenor of the extant political environment. Cultivating legitimacy, therefore, forces courts to find a way to mesh their sensitivity to public support considerations with their task of providing doctrinally principled decisions. In the *Secession Reference* context, the duty to negotiate, as the most important new doctrine enunciated by the Court, clearly achieved that goal as it had obvious roots in the pre-decision political environment surrounding the case. While from the perspective of the existing Canadian constitutional law the duty to negotiate could be seen as a rather innovative and creative jurisprudential development (Cairns, 1998: 26; Russell, 2004: 244), from the perspective of the existing constellation of political actors and interests the doctrine is much less striking or surprising. It basically entrenches into constitutional law well-accepted features of the political reality.

Overall, the decision is best understood as a judicial reconciliation of the Canadian constitutional order, represented by the four constitutional principles the Court outlined and discussed in great detail, and the political environment characterized by high stakes politics and profound disagreement (as well as some agreement) about what rules should govern the process of secession. In the process of delivering a highly visible decision that garnered widespread public support, the Court's strategic sensitivity to legitimacy cultivation ensured that its doctrinal formulations, as well as the scope of the rules it identified, internalized much of the external political realities.

Reactions to the Decision

Reactions to the decision confirm that the Court succeeded in meeting the legitimacy challenge. Fletcher and Howe's analysis of Canadian attitudes towards the decision shows that 74 percent of respondents in English Canada agreed with the Court's pronouncement that Quebec does not have a right to unilaterally secede (2000: 44). In Quebec, that issue was more "divisive" with 41 percent of respondents agreeing with the Court and 52 percent disagreeing (Fletcher and Howe, 2000: 44). Regarding the duty to negotiate, on the other hand, a substantial majority of Quebecers (70 percent) and a majority of Canadians living in English Canada (55 percent) were in agreement with the Court that the rest of Canada "had an obligation to negotiate with Quebec after a clear referendum vote for sovereignty" (Fletcher and Howe, 2000: 44). In light of these data, Fletcher and Howe particularly emphasize that the decision

produced “majority agreement with the Court both inside and outside Quebec” (2000: 44).

The key aspects of the Court’s decision were, therefore, well tailored for securing high levels of specific support among the Canadian public, in and out of Quebec, by providing each of the sides with important concessions. The data also unequivocally show that the centerpiece of the judgment, the duty to negotiate, was in accordance with the state of specific support having garnered majority support in both Quebec and English Canada.

The reaction of key political actors was also overwhelmingly positive. In fact, governments of Quebec and Canada both praised the Court’s reasoning and declared victory. Separatists claimed that the Court’s pronouncement of the duty to negotiate has legitimized the sovereignty project whereby a majority referendum vote could no longer be ignored (Séguin, 1998). The federal government, on the other hand, was pleased with the declaration that unilateral secession is unconstitutional, and stressed that the Court’s insistence on a clear question and a clear majority would prevent future separatist attempts to break the country apart through “trickery” (Wills, 1998a).

It is evident, therefore, that the Court’s decision has brought about very positive reactions from the public and from the key political actors involved in the case. Consequently, by delivering a highly nuanced decision, the Court succeeded in meeting the legitimacy challenge posed by the reference and in strengthening its position as an unbiased arbiter of Quebec-Canada relations. Consider the views of Justice Louis LeBel who was appointed to the Supreme Court soon after the case:

The highest court in the land rehabilitated itself in the eyes of Quebecers when it gave its opinion on the Chrétien government’s reference on the secession of Quebec.... Quebecers were able to see the justices’ open-mindedness, and their concern to develop solutions able to take into account the interests of all groups (Sauvageau et al., 2006: 124).

Young is even more to the point: “rather than losing legitimacy, the Court found its political position substantially strengthened in Quebec” (Young, 1998: 16).

Conclusion:

All of this is to suggest that the legitimacy cultivation theory is consistent with the judicial outcomes the Court reached in the *Secession Reference*. In fact, it is hard to gain a complete understanding of the decision without taking into account the extent to which the Supreme Court acted in a strategic fashion to ensure the cultivation of its institutional legitimacy. Between pronouncing that Quebec does not have a unilateral right to secede, that the rest of Canada has a duty to negotiate, that what constitutes a clear question and a clear majority are non-justiciable matters, and that much of the other controversial issues “defy” legal analysis (para. 101), the Court went a long way towards meeting the legitimacy challenge it faced in the *Secession Reference*. Given the importance of institutional legitimacy for the effective functioning of the Supreme Court, that the Court restrained its decision-making to the areas of consensus (among the public and the key political actors) and refused to venture into the areas of disagreement is a testament to its strategic sensitivity to legitimacy cultivation. Doing otherwise would have invited deep controversy, entangled the Court in political matters, and provoked political actors to launch attacks on the Court. In light of the visibility of the decision, the Court was prudent to avoid such outcomes, even though legal scholars stress that there were no legal reasons preventing the Court from

“adjudicating upon both the pre-conditions to, and the process and outcome of, constitutional negotiations” (Choudhry and Howse, 2000: 160).

The necessity of legitimacy cultivation, therefore, compels the courts to keep a very attentive eye on political and social realities from which the cases arise. Consequently, what are ostensibly political and external factors serve to importantly delineate the boundaries of constitutional protection, and understanding judicial decision-making necessitates taking close accounts of the external context and how it affects judicial disposition of individual cases.

This view that courts are sensitive to the larger political environment as they go about their decision-making has in recent times been advanced by none other than the current Chief Justice of the Supreme Court of Canada. According to her:

The idea that there is some law out there that has nothing to do with consequences and how it plays out in the real world is an abstract and inaccurate representation of what the law is. I think it is essential to good judging that the rule be sensitive to consequences, and judges, when they make rulings, give some thought to how their rulings are going to fit into the institutional matrix of society (Alberts, 1999).

The legitimacy cultivation theory presented in this paper can provide important insights into the questions of how and why do external, political factors find inroads into judicial reasoning and judicial disposition of individual cases.

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