Precedents in Canadian and American Constitutional Culture: A Comparative Essay

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Abstract

This thesis explores the place of constitutional precedents in contemporary Canadian and American constitutional culture. The author identifies four elements that explain the relative indifference in Canada to the problem of stability and change in the interpretation of constitutional rights and freedoms: the lack of a historical constitutional narrative in Canadian constitutional culture, the lack of meaningful "super precedents", the structure of the proportionality analysis under the *Oakes* test and the adherence to a less formalist and more openly political conception of constitutional adjudication. These elements are contrasted with the American experience in which precedents are central to any constitutional discourse. The comparison tries to make explicit how these differences are linked to different assumptions and expectations about the rule of law and the role of the judiciary in adapting the legal traditions of these two Common Law countries to the challenges of written constitutionalism.

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1. Introduction

In contemporary American constitutional law, the status of constitutional precedents is a highly debated topic. In the last three or four decades, the question of constitutional precedents has been foregrounded in academic literature, in the decisions of the Supreme Court, and in political forums. Since Sandra Day O'Connor in 1981, all justices appointed to the United States Supreme Court have been questioned extensively about the place of precedent in their "judicial philosophy" during their hearings before the United States Senate Committee on the Judiciary[1]. In 2005, this outbidding led Senator Arlene Spector, then-Chairman of the Committee, to ask the future Chief Justice John G. Roberts Jr if he believed in "super-precedent" or even in "super-duper-precedent". Roberts wittily replied that he believed *stare decisis* to be a very important doctrine but made sure to dodge the question of "super-precedent"[2]. The same kind of exchange went on again a year later, this time with future Justice Samuel Alito[3]. American constitutional scholar Mark Tushnet has an explanation for why constitutional precedents have become a sufficiently sensitive issue in recent decades to trigger this surprising exchange. He writes that "[l]iberals who formerly admired courts for rejecting restrictive precedents began to see the wisdom of adhering to the beleaguered rulings of the Warren Court, whereas conservatives began to say that it was all right to turn the clock back (and overrule recent decisions) if the clock was telling the wrong time"[4]. However, there is no reason in principle for why this strong focus on the strategic motivations for adhering or not to constitutional precedent should be restricted to the United States Supreme Court.

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[1] Jason J. Czarnecki, William K. Ford & Lori A. Ringhand, "An Empirical Analysis of the Confirmation Hearings of the Justice of the Rehnquist Natural Court", (2007) 24 Const Comment 127.

[2] US, *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the Supreme Court of the United States*, 109th Cong (Washington, DC: United States Government Printing Office, 2005) at 145, [*Roberts Hearing*]. See also, Jeffrey Rosen, "So, Do You Believe in Superprecedent?", *New York Times*, (30 October 2005) online: http://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html.

[3] US, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States*, 109th Cong (Washington, DC: United States Government Printing Office, 2006) at 321.

[4] Mark Tushnet, *Red, White and Blue: A Critical Analysis of the Constitutional Law*, (Cambridge: Harvard University Press, 1988) at 21. This diagnosis is also shared (among others) by Lawrence B. Solum, "The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights", (2006-2007) 9 U Pa J Const L 155.

According to the Supreme Court of Canada, adherence to precedent is "the foundational principle upon which the common law relies"[5]. The principle of *stare decisis*, often described as a defining feature of Common Law systems as compared to civilian ones, makes previous decisions binding on subsequent cases[6]. "The prior case, being directly in point" writes A.L. Goodhart, "is no longer one which may be used as a pattern; it is one which must be followed in the subsequent case. It is more than a model; it has become a fixed and binding rule."[7] Moreover, scholars and judges alike have indeed suggested that a certain level of adherence to precedent is a necessary component for the rule of law in general[8]. But the traditional question of the authority of precedents is amplified when judges are in charge of interpreting not the Common Law or even a statute but a constitutional text[9]. "[I]t is more important that the applicable rule of law be settled than that it be settled right" wrote Justice Louis Brandeis of the United States Supreme Court in 1932[10]. However, as Brandeis himself recognized, this principle does not hold in the case of constitutional adjudication, since the stakes of "getting it right" are increased by the fact that a wrong interpretation cannot be changed by the legislative branch without going through the stringent procedure of constitutional amendment. Moreover, constitutional adjudication involves the interpretation of laconic provisions that refer to vague and highly disputed moral ideas such as freedom and equality[11]. Popular conceptions about such notions are likely to switch over time while the constitutional text is likely to remain unchanged. Should judges keep pace with society? Or are too frequent departures from precedents likely to break the spell of judges who simply apply the law? Would it endanger the rule of law in general? From this perspective, precedents seem both *necessary* for a Court to be perceived as *applying* the Law, but at the same time *problematic*, since the application of outdated precedents might reduce

[5] *Bedford* v. *Canada (Attorney General)*, [2013] 3 S.C.R. 1101, 2013 SCC 72, at para 38, [*Bedford*].

[6] From a comparative law perspective, see the interesting discussion in Jan Komarek, "Reasoning With Previous Decisions: Beyond the Doctrine of Precedent", (2013) 61 Am J Comp L 149.

[7] A.L. Goodhart, *Precedent in English and Continental Law*, (London: Stevens & Sons, 1934) at 9.

[8] On the binding force of precedents as a manifestation of the rule of law rather than as a necessary component of the rule of law, see Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach", (2012) 111 Mich L Rev 1.

[9] For one of the most influential articles on the subject, see Henry Paul Monaghan, "*Stare Decisis* and Constitutional Adjudication", (1988) 88 Colum L Rev 723, [Monaghan, "*Stare Decisis*"].

[10] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932) (Brandeis J, dissenting)

[11] The importance of "getting it right" is higher for morally contentious provisions such as fundamental rights and freedoms than it is for other more procedural provisions. On this question, see David A. Strauss, *The Living Constitution*, (New York: Oxford University Press, 2008) ch. 5.

the institutional legitimacy of the Court if they conflict with contemporary understandings about the requirements of justice. In other words, constitutional precedent is only another *locus* of the tension between form and substance in adjudication[12], a tension that is amplified by the morally sensitive nature of the questions that judges must answer. Surprisingly, this tension has hardly been noticed in Canada.

The Supreme Court of Canada has recently overruled many of its previous decisions under the *Canadian Charter of Rights and Freedoms*[13] regarding sensitive moral issues for the first time since its adoption in 1982 without stirring much controversy. In 2013, in the *Bedford* decision[14], the Supreme Court overruled a decision from 1990[15] and ruled that the criminalization of certain actions associated with prostitution was unconstitutional. In 2015, in the *Carter* decision[16], the Court overruled the highly mediatised 1993 decision of *Rodriguez*[17] and ruled that the criminalization of physician-assisted suicide was unconstitutional. Finally, again in 2015 in *Saskatchewan Federation of Labour*[18], the Court overruled a trilogy of cases from 1987[19] and ruled that the freedom of association protected by the *Charter* includes the right to strike. Interestingly, in all these decisions (as with an earlier decision regarding extradition to face the death penalty in *Burns*[20]) the Court never explicitly overruled its previous decisions but relied instead on narrow technical grounds to avoid revisiting them. In this respect, the Court has relied on a kind of avoidance strategy. In *Carter*, *Bedford* and *Saskatchewan*, the Court examined briefly if the lower courts were allowed not to follow the previous decision of the Supreme

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[12] The expression "form and substance" has become a common place in academic discourse for describing the tension between, roughly speaking, applying pre-existing rules and bringing justice to a particular case. For an in depth discussion see P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, (Oxford: Clarendon Press, 1987) esp. at 9. See also Duncan Kennedy, "Form and Substance in Private Law Adjudication", (1976) 89 Harv L Rev 1685

[13] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, [*Charter*].

[14] *Bedford*, *supra* note 5.

[15] *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, [*Prostitution Reference*].

[16] *Carter* v. *Canada (Attorney General)*, [2015] 1 S.C.R. 331, 2015 SCC 5, [*Carter*].

[17] *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, [*Rodriguez*].

[18] *Saskatchewan Federation of Labour* v. *Saskatchewan*, [2015] 1 S.C.R. 245, 2015 SCC 4, [*Saskatchewan*].

[19] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC* v. *Canada*, [1987] 1 S.C.R. 424, *RWDSU* v. *Saskatchewan*, [1987] 1 S.C.R. 460.

[20] *United States* v. *Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, [*Burns*].

Court. In *Bedford*, the Court identified two elements that could justify a lower Court in revisiting a Supreme Court decision: (1) if the facts have changed so much as to make the previous decision inapplicable or (2) if the legal context or the legal arguments presented have changed so much as to make the previous decision inapplicable. Interestingly, the Court avoided the question of horizontal *stare decisis* by examining only the vertical strength of *stare decisis*, i.e. the doctrine that lower courts are generally strictly bound by the precedents of higher courts in the judicial hierarchy[21]. Moreover, in all cases except in *Saskatchewan Federation of Labour*, the Court was unanimous and the decision was written either by the Chief Justice or *per curiam*. These cases appear to have brushed aside the question of the horizontal strength of *stare decisis* in constitutional law.

Meanwhile, in the United States, the question of precedents has taken center-stage in recent confirmation hearings. In addition, *Citizens United*[22], a decision from 2010 overruling a previous line of cases and striking down important provisions regarding campaign finance and often described as having broadened the influence of money in politics has attracted a lot of attention. Hillary Clinton, the 2016 democratic candidate for the U.S. presidency, has made the overruling of this decision a litmus test for any potential Supreme Court nominee[23]. The difference between the centrality that precedents have had in constitutional theory and constitutional politics in the United States in recent decades with its surprising neglect in Canada during the same period demands a closer analysis.

Why do precedents seem to have been so neglected in Canadian constitutional discourse? Given how sensitive the issue is in the American context, why have Canadian judges encountered such

[21] Despite authors who claim the contrary, I think that horizontal and vertical *stare decisis* are necessarily linked, since no one would be interested in litigating a case all the way to the Supreme Court (and many courts of appeal would probably refuse to grant leave to appeal) if lower courts were strictly bound by the previous decisions of the Supreme Court while only the Supreme Court would be free to overrule them. Interestingly, and this observation has gone largely unnoticed, I think that the horizontal and the vertical strength of *stare decisis* must be somewhat the same. However, the *justification* for each doctrine is different and further research should be conducted to shed light on the justification for, and the links between, vertical and horizontal *stare decisis*. See Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada", (2006) 32 Man LJ 135. See the more recent discussion in Michelle Bloodworth, "A Fact Is A Fact Is A Fact: *Stare Decisis* and The Distinction Between Adjudicative and Social Facts in *Bedford* and *Carter*", (2014) 32 Nat J Const L 193.

[22] *Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010) [*Citizens United*].

[23] Matea Gold & Anne Gearan, "Hillary Clinton's litmus test for Supreme Court nominees: a pledge to overturn Citizens United", *Washington Post* (14 may 2015), online: <https://www.washingtonpost.com/news/post-politics/wp/2015/05/14/hillary-clintons-litmus-test-for-supreme-court-nominees-a-pledge-to-overturn-citizens-united/>.

little difficulty in dealing with what they see as cumbersome precedents, overruling some of them without stirring academic debates or major political outcry? This thesis tries to address this question. It does not attempt to provide a synthesis of Canadian jurisprudence nor a theory of constitutional precedent that befits the Canadian constitutional system. What this thesis provides is an exploration of the reasons that have contributed to the Court's uninhibited approach with regard to constitutional precedents, and the reasons for why the legal and political community is so placid towards this lack of reserve. In other words, my aim is not to attempt to fill a gap in the legal doctrine of precedent or to criticize the Court. The question of whether Canada should have a (better) theory of constitutional precedents is a broader question of judicial philosophy[24] that I do not address.

This thesis seeks to shed light on the use of precedents in the context of a broader constitutional culture. Precedents in part depend on and make up this constitutional culture. This kind of circularity makes it extremely difficult to draw any causal conclusion from the analysis of legal cultures in general and constitutional cultures in particular and I do not try to provide such a causal explanation[25]. My aim is to provide an expository, ethnographic account of the use of constitutional precedent in the form of a "thick description"[26] and to contrast the Canadian experience against the United States experience since the two countries share many commonalities: a written constitution entrenching a bill of rights, a Common Law tradition, federalism, English as their main language and the fact that both are offspring of North American British colonialism. For the purpose of my study, the choice of the United States and Canada is also motivated by the fact that Canada is the first Common Law country of the "new

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[24] On the uselessness of having a comprehensive theory of precedent, see Frank H. Easterbrook, "*Stare Decisis* and Reliability in Judicial Decisions", (1988) 73 Cornell L Rev 422.

[25] Unfortunately, I cannot go here into the details of the problematic relationship between law and society and the search for causal explanations between legal doctrine and legal cultures. The literature on this question is too vast to be cited here. For a good overview of the question and critical reflections about the possibility of disentangling law and society, see Robert W. Gordon, "Critical Legal Histories", (1984) 36 Stan L Rev 57. For a more optimistic though prudent perspective, especially with regard to comparative law, see Tom Ginsburg, "Lawrence M. Friedman's Comparative Law", in Robert W. Gordon & Morton J. Horwitz, *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman*, (Cambridge: Cambridge University Press, 2011) 52.

[26] The expression "thick description" is from cultural anthropologist Clifford Geertz. See Clifford Geertz, *The Interpretation of Cultures*, (New York: Basic Books, 1973). See also Clifford Geertz, *Local Knowledge*, (New York: Basic Books, 1983) ch. 8, [Geertz, *Local Knowledge*]. On the use of "thick descriptions" in the specific context of comparative constitutional studies, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, (New York: Oxford University Press, 2014) ch. 6.

commonwealth model of constitutionalism"[27] to have adopted a written bill of rights and thus the first one that has had to adapt the Common Law doctrine of *stare decisis* to the new constitutional entrenchment of fundamental rights and freedoms, which has also been a longstanding concern for the United States.

On the surface, both countries have a flexible attitude towards precedent and *stare decisis* is no longer regarded as an "inexorable command"[28]. The United States Supreme Court has elaborated a doctrine holding constitutional precedents, because of their nature, to be less strictly binding than other statutory or Common Law precedents. However, recent empirical analysis seems to suggest that, in fact, there is "only a modicum of evidence suggesting that constitutional precedents are more vulnerable to departure"[29] than other types of precedents. The Canadian Supreme Court never adhered to such a distinction[30]. Despite their historical similarities, and the surface resemblance of their doctrine of *stare decisis*, constitutional precedents will be shown to partake in a larger "web of signification"[31] that gives them different meaning in each jurisdiction. My main theoretical assumption is that a constitutional culture *does not determine* the elements constituting this culture (a theory of precedent, a theory of judicial review, etc.) but that it *influences* the way in which certain theories and areas of law are perceived, either as problematic when they seem less reconcilable with the broader constitutional culture or as benign when they "fit" easily with it.

The concept of constitutional culture can be broadly defined as a subset of a general culture that is composed of attitudes and beliefs about the constitutional and legal institutions of a given society, as well as the nature and source of legality within this society[32]. As Reva Siegel

[27] Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism", (2002) 49 Am J Comp L 707.

[28] See, e.g., *Payne* v. *Tennessee*, 501 U.S. 808 (Rehnquist, CJ).

[29] Lee Epstein, William M. Landes & Adam Liptak, "The Decision to Depart (Or Not) From Constitutional Precedent: An Empirical Study Of The Roberts Court", (2015) 90 NYUL Rev 1115, at 1146.

[30] *Ontario (Attorney General)* v. *Fraser*, [2011] 2 S.C.R. 3, 2011 SCC 20 [*Fraser*].

[31] Geertz, *supra* note 26 at 182.

[32] There is a difference, I think, between comparative constitutional culture and "comparative jurisprudence" in terms of the scope of the inquiry and the depth of its philosophical insights. In short, I would say that "comparative constitutional culture" looks at a broader range of actors and tries to flesh out a generally shared and more superficial understanding of the constitutional project. By contrast, I understand comparative jurisprudence as a hermeneutical exploration of the implicit understanding of a given polity, illuminating the nature of legality itself. While comparative constitutional culture is shallow and wide, comparative jurisprudence is narrow and deep. Unfortunately, I cannot fully explore the differences between these approaches here. For the remainder of this thesis

concisely writes, “the term “constitutional culture” […] refers to the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s meaning”[33]. Robert C. Post describes constitutional culture as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution”[34]. Constitutional culture is not limited to the text of the constitution but includes the meaning of constitutional institutions and an understanding of how they function. This constitutional culture is shared by the members of a society even if certain actors in this society necessarily hold positions that give them a more powerful role in its production and reproduction: lawyers, judges but also politicians and media[35]. However, a constitutional culture is necessarily fragmented and contested. Lay persons as much as legal officials have a constitutional culture of their own, even if it may be less sophisticated. My analysis, however, focuses on the official constitutional culture exhibited by the actors who are, because of their very role, most concerned with articulating it: judges and politicians.

Even if there is certainly a strategic component to the use of precedents, this use cannot be completely explained by strategy[36]. As Lee Epstein and Jack Knight write in their study of judicial behavior, “[w]hy would justices feel compelled to invoke precedent especially when many other justifications exist? The answer is clear. The justices' behavior is consistent with a belief that a norm favoring precedent is a fundamental part of the general conception of the function of the Supreme Court in society at large.”[37] As Epstein and Knight explain in their study, there are obviously strategic elements that partly explain why justices resort to precedents

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I will use the expression comparative constitutional culture to mean both, as I think they are contiguous with each other and differ mainly in terms of their level of abstraction. On “comparative jurisprudence”, see William B. Ewald, “Comparative Jurisprudence (I): What Was it Like to Try a Rat?”, (1995) 143 U Pa L Rev 1889; William B. Ewald, “The Jurisprudential Approach to Comparative Law: A Field Guide to Rat”, (1998) 46 Am J Comp L 701.

[33] Reva B. Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA”, (2006) 94 Cal L Rev 1323, at 1325.

[34] Robert C. Post, “The Supreme Court 2002 Term – Foreword: Fashioning the Legal Constitution: Culture Courts, and Law”, (2002) 117 Harv L Rev 4, at 8.

[35] On the role of the media in producing constitutional culture, see the book-length analysis and discussion in Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada*, (Vancouver: UBC Press, 2006).

[36] For an “attitudinal” study of the use of precedents by the United States Supreme Court, see Harold J. Spaeth & Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court*, (Cambridge: Cambridge University Press, 2001).

[37] Lee Epstein & Jack Knight, *The Choices Justices Make*, (Washington: QC Press, 1998) at 172.

either in order to justify their decisions or in order to criticize the decisions of their colleagues. However, it is important to consider that even strategic considerations only make sense in a given constitutional culture that presupposes some categorical distinctions and normative evaluations of these distinctions. For example, it is only insofar as the culture recognizes a conceptual distinction between law and politics, as well as a conception of judicial duty that is distinct from political duty, that Justices can understand what kind of actions are strategically beneficial and which ones are not. As Karl Klare puts it, constitutional culture explains "the characteristic rhetorical strategies deployed by participants in a given legal setting […], their repertoire of recurring argumentative moves"[38]. Therefore, a certain conception of constitutional culture is in a sense presupposed by the strategic study and explanation of judicial behavior[39]. As Epstein and Knight recognize, "[i]nvoking precedent will be effective only if the others believe in its importance. This follows from the fact that the strategic use of norms depends on the acceptance of the norm by some segment of a community."[40] Unlike other formal games like chess or sports, the assumptions and, to a large extent, the rules of the "legal game" are implicit, and it is therefore the job of the comparative scholar to articulate and make explicit what those rules are in a given jurisdiction[41].

As my introductory comments suggest, my contention is that overruling previous decisions has been less problematic in Canada in part because the constitutional culture already posits the Supreme Court *as more political* in a very specific sense in Canada than in the United States. The Supreme Court of Canada, I will argue, has built a narrative of its institutional role as one that promotes awareness about rights without impeding self-government and openness for change. The Supreme Court of Canada is engaged in a "symbiotic"[42] relationship with the other branches of the state and this narrative of collaboration, which is also supported by the

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[38] Karl E. Klare, "Legal Culture and Transformative Constitutionalism", (1998) 14 SAJHR 146, at 166.

[39] On the necessity to adapt attitudinal and strategic study of judicial behavior to different cultural settings, especially when comparing Canada and the United States, see Matthew E. Wetstein *et al*., "Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the U.S. and Canadian Supreme Courts", (2009) 42:6 Comp Pol Stud 763. On the theory of strategic decision-making in the United States, see mainly Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges*, (Cambridge: Harvard University Press, 2013).

[40] Epstein & Knight, *supra* note 37 at 177.

[41] Pierre Bourdieu, "La force du droit : Éléments pour une sociologie du champ juridique", (1986) 64 Actes de la Recherche en Sciences Sociales 3, at 11.

[42] Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture*, (Cambridge: Cambridge University Press, 2013) at 139 n 20.

“dialogue” theory embraced by the Court, has positioned the Court as an ally in self-government[43]. The Supreme Court of Canada has represented itself and the constitution as “demos-enabling” rather than “demos-constraining”[44]. By contrast, the United States Supreme Court has represented itself as the neutral arbiter of constitutional disputes, independent from the other branches of government and using its own distinctive set of legal (as opposed to political) reasons for limiting the possibilities of state action. The United States Supreme Court has also relied on constitutional history as an essential component of the meaning of the American constitution and used this history to address and circumvent the problem of constitutional precedents.

Many themes explored in this thesis will overlap with broader comparative constitutional literature on the “postwar paradigm” and American exceptionalism[45]. The main comparative study on precedents has been edited by Neil McCormick and Robert S. Summers in 1997 but it includes, in addition to many European countries, only the New York State courts and does not include Canada at all[46]. Despite all the merits of this study, its emphasis is mainly doctrinal and does not emphasize the specific jurisprudential issue of *constitutional* precedents. Finally, even if many studies of constitutional cultures in general have looked at precedents as one of many elements of the cultures studied, to the best of my knowledge none has done so comparatively and analyzed precedents as their main object of study.

My inquiry concerns the period from 2000 to 2015 - i.e. the McLachlin Court - but stretches further to understand earlier events and developments in the constitutional culture of Canada and the United States that could help explain more recent phenomena. In the United States, this period coincides with the second half of the “natural Rehnquist Court” (1995-2005) and the Roberts Court (2005 -). The two courts contrast one another, for while the U.S. Supreme Court

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[43] See below, section 5.1.

[44] David Schneiderman, *Red, White and Kind of Blue: The Conservatives and the Americanization of Canadian Constitutional Culture*, (Toronto: University of Toronto Press, 2015) at 27-41, [Schneiderman, *Americanization*].

[45] Lorraine E. Weinrib, “The Postwar Paradigm and American Exceptionalism”, in Sujit Choudry, ed, *The Migration of Constitutional Ideas*, (Cambridge: Cambrdige University Press, 2008) 84. See, e.g., Cohen-Eliya & Porat, *supra* note 42.

[46] Neil McCormick & Robert S. Summers, eds, *Interpreting Precedents: A Comparative Study*, (Dartmouth: Ashgate, 1997).

has been highly divided[47], the Canadian Supreme Court has been highly consensual[48]. As we shall see, this has influenced the way in which precedents have been treated by each Court.

My inquiry focuses on the status of constitutional precedents that interpret fundamental rights and freedoms even if the doctrinal issue of constitutional precedents is not limited to such cases. An interpretation of the division of powers also poses questions surrounding the evolution of constitutional doctrine in light of a changing society. For example, the rise of new technologies and new forms of governance challenges the interpretation of the federal division of powers. However, these kind of constitutional changes generally do not carry as much symbolic weight as decisions of fundamental rights and freedoms normally do. In the United States for example, what has been referred to by some authors as the "federalism revolution"[49] in the aftermath of the decision in *Lopez*[50] attracted little media and political attention[51]. Likewise in Canada, except for a few major decisions like the *Secession Reference*[52], the political life is generally punctuated by Supreme Court decisions in cases involving morally sensitive issues of fundamental rights and freedoms rather than federalism disputes[53].

The remainder of this thesis will unfold in four sections as follow. In the second section I explain why Canada lacks a major constitutional narrative and how this might influence the use of previous decisions in constitutional reasoning. I contrast this with what I call the "narrativization" of constitutional reasoning in the United States. In the third section I show how Canada, contrary to the United States, has not developed a body of fixed points of agreement of

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[47] David Paul Kuhn, "The Incredible Polarization and Politicization of the Supreme Court", *The Atlantic* (29 June 2012), online: <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.

[48] See, e.g., Peter McCormick, *The End of the Charter Revolution: Looking Back from the New Normal*, (Toronto: University of Toronto Press, 2015) at 177-187, [McCormick, *Looking Back*]. For an interesting contrast, see Benjamin Alarie & Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada", (2009) 47 SCLR (2d) 475.

[49] Mark Tushnet, *A Court Divided*, (New York: W.W. Norton & Company, 2005) c. 10.

[50] *United States* v. *Lopez*, 514 U.S. 549 (1995)

[51] Mark Tushnet explains how Linda Greenhouse, the *New York Times* Supreme Court correspondent, had a hard time convincing her boss that the decision of the Supreme Court *Lopez* v. *United States* should make the cover of the newspaper. This decision is now described as having initiated the "federalism revolution". Tushnet, *A Court Divided*, *supra* note 49 at 249-250.

[52] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

[53] See, e.g., Sauvageau *et al*, *supra* note 35 ch 1-2.

constitutional law or "super-precedents" and that this has left open the possibilities for change. In the fourth section I explain how the specific design of the "proportionality test" under section 1 of the *Charter* provides a way to minimize the constraining impact of previous decisions. By contrast, I suggest that the more categorical methodology used in U.S. constitutional law in the interpretation of fundamental rights is more stringent and less flexible over time. In the fifth section, I tie this exploration of legal reasoning to the move of the Supreme Court of Canada away from constitutional formalism and contrast this with the American experience. I show how the Supreme Court of Canada, in a series of institutional moves, has repositioned itself so as to blur sharp distinctions between law and politics that are still present in the United States. Seen through this lens, I argue that the Supreme Court of Canada is less formalist than the Supreme Court of the United States and that this has impacted the way in which precedents are conceived and used.

2. Precedents, Constitutional Culture and Narrative

I will argue in this section that the narrativization of constitutional history and its use by judges and other legal officials influences the importance and function of precedents in a given constitutional culture. Constitutional narratives are stories that constitutional actors tell in order to explain and articulate the meaning of their constitutional project. As such, it is one component of a constitutional culture.

2.1 Constitutional Culture and Constitutional Narrative

Scholars have tried to grasp the Canadian identity and constitutional narrative with mitigated success. As sociologist Seymour Martin Lipset writes, "[n]ational identity is the quintessential Canadian issue. Almost alone among modern developed countries, Canada has continued to debate its self-conception to the present day"[54]. In fact, as Charles Taylor puts it in a speech published in 1992, the question that has been haunting Canada since its inception is "what is a country for? That is, what ought to be the basis of unity around which a sovereign political entity can be built? This is a strange question, in a way; it is not one that would likely be asked in many

[54] Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada*, (New York: Routledge, 1991) at 42.

countries. But it arises here because there are alternatives and, therefore, need for justification."[55] Three main tensions articulate this existential question: 1) Should Canadians become Americans? 2) Should Canadians remain British? 3) Should Anglo-Canadians and Quebecers break in two? This uncertainty about the constitutional project itself suggests that Canadians have failed to develop a strong constitutional narrative for explaining and justifying their constitutional institutions. As Samuel V. Laselva states it, "Canadians seem increasingly unable even to live under a common constitution, let alone recognize a constitutional faith"[56].

One possible explanation for this might be that Canadian founders were far less imbued with democratic ideals than their American counterparts[57]. In fact, it seems as if they were mainly concerned with avoiding the American republican model, reassuring the colonial authorities that their project would not be too much democratic and that they would reach a federal agreement acceptable both for the *Canadiens* and the North American British[58]. Opinions regarding the legitimacy and desirability of democratic self-government changed and it is not surprising that, by the middle of the twentieth century[59], a large part of Canada's political elites did not see the constitutional and political project as worth pursuing as such anymore[60]. Moreover, Canadian political institutions only slowly acquired their own voice, independent of London's[61]. The Supreme Court of Canada only became the country's final court of appeal in 1949, and until

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[55] Charles Taylor, "Can Canada Survive the Charter?", (1992) 30:2 Alta L Rev 427, at 427-428.

[56] Samuel V. LaSelva, "Federalism, Pluralism and Constitutional Faith: Canada In Question", (2002) 7 Rev Const Stud 204, at 205.

[57] Peter H. Russell, *Constitutional Odyssey: Can Canadians Become A Sovereign People?*, 2nd ed (Toronto: University of Toronto Press, 1992) at 3-6, [Russell, *Constitutional Odyssey*].

[58] *Ibid* ch. 2 & 3.

[59] See Alan C. Cairns, "The Politics of Constitutional Renewal in Canada", in Alan C. Cairns & Douglas E. Williams, eds, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, (Toronto: McLelland & Stewart, 1991) 66.

[60] See, e.g., Bora Laskin, "Reflections on the Canadian Constitution after the First Century", (1967) 45 Can Bar Rev 395; See also Frank R. Scott, *The Canadian Constitution and Human Rights*, (Toronto: CBC Publication Branch, 1959) esp. ch. 4; Pierre Elliott Trudeau, "We Need a Charter of Rights", *Maclean's*, (8 february 1964) reprinted in Pierre Elliott Trudeau, *À Contre-Courant: Textes Choisis, 1939-1996*, (Montréal: Stanké, 1996) 217. Contrast this with the recurrent description (and appraisal) of the United States Constitution as "divinely inspired" described in Alexander Bickel, *The Supreme Court and the Idea of Progress*, (New Haven: Yale University Press, 1970) at 11-25. Bickel seems to suggest that this view of the Constitution as a divine object slowly faded with the attacks of the legal realists on the old formalist dogma. However, I think that the portrayal of the Constitution as somewhat divine is a pervasive theme in American constitutional discourse and is still present today. See Sanford Levinson, *Constitutional Faith*, (Princeton: Princeton University Press, 1988) at 14-15.

[61] See Russell, *Constitutional Odyssey, supra* note 57 ch. 5.

1975 its institutional role was more oriented towards correcting lower court's errors than it was towards developing the law[62]. This explains in part the relatively insignificant place of history, including symbolic legal figures, in the Canadian constitutional narrative. Furthermore, the sheer fact that Canada's founders were more concerned with federalism than they were with proclaiming broad and inspirational provisions is not likely to stir great political passions, as Pierre Elliott Trudeau himself recognized rather cheerfully early in his career. Writing in 1969, Trudeau captured an essential difference between the Canadian and the American constitutional project.

> […] I am inclined to believe that the authors of the Canadian federation arrived at as wise a compromise and drew up as sensible a constitution as any group of men anywhere would have done. Reading that document today, one is struck by its absence of principles, ideals, or other frills; even the regional safeguards and minority guarantees are pragmatically presented, here and there, rather than proclaimed as a thrilling bill of rights. It has been said that the binding force of the United States of America was the idea of liberty, and certainly none of the relevant constitutional documents let us forget it. By comparison, the Canadian nation seems founded on the common sense of empirical politicians who had wanted to establish some law and order over a disjointed half-continent. If reason be the governing virtue of federalism, it would seem that Canada got off to a good start.[63]

Trudeau came very close to providing Canada with its own constitutional founding moment with the 1982 Patriation of the Constitution and the adoption of the *Charter*[64]. However, the struggle between Ottawa and the Provinces surrounding its adoption[65] and the fact that Quebec never formally "signed" the Patriation[66] makes it seem like a foundationally unstable project. The two

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[62] James Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution*, (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1985) at 238-241. See also, Emmett MacFarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*, (Vancouver: UBC Press, 2013) at 42-43, [McFarlane, *Governing*].

[63] Pierre Elliott Trudeau, *Federalism and the French Canadians*, (Toronto: Macmillan, 1969) at 197.

[64] On the *Charter* as intended primarily for nation-building, see Rainer Knopff & F.L. Morton, *Charter Politics*, (Scarborough: Nelson Canada, 1992) at 73-78.

[65] See, among others, Cairns, *supra* note 59; Roy Romanow, John Whyte, & Howard Leeson, *Canada…Notwithstanding: The Making of the Constitution 1976-1982*, (Toronto: Carswell, 1984) and Frédéric Bastien, *La Bataille de Londres. Dessous, secrets et coulisses du rapatriement constitutionnel*, (Montréal: Boréal, 2013).

[66] The current Quebec Prime Minister, Philippe Couillard, said in 2013 when he became the leader of the Quebec Liberal Party that he hoped Quebec could come back in the Confederation, therefore alluding to a possible symbolic signature of the 1982 Constitution Act for the 150th anniversary of the B.N.A. Act in 2017. He seems to have since then abandoned this project. See Tommy Chouinard, "Constitution: Couillard hanté par ses propos", *La Presse* (17 March 2014), online: <http://www.lapresse.ca/actualites/elections-quebec-2014/201403/17/01-4748601-constitution-couillard-hante-par-ses-propos.php>.

failed rounds of constitutional negotiation surrounding the Meech Lake Accord and the Charlottetown Accord worsened this condition of incompleteness. This helped portray the Constitution as a project worth pursuing but nonetheless perfectible because incomplete, as an unfinished project.

Yet, it is not that Canada has failed to develop *any* constitutional narrative. Some may argue that multiculturalism represents the dominant contemporary constitutional narrative in Canada[67]. For example, the Supreme Court stressed on multiple occasions that multiculturalism is an important Canadian value worth pursuing[68]. However, the multicultural constitutional narrative has two major limitations. First, a large part of the country, especially in Quebec, rejects this narrative. Many intellectuals and scholars in Quebec have been relentlessly suspicious of multiculturalism, condemning it as an attempt to get rid of Quebec nationalism and the compact theory of federalism by diluting Quebec's distinct identity in the multicultural narrative[69]. For example, since the adoption of multiculturalism as an official governmental policy in 1971 by Pierre Elliott Trudeau's Liberal Government, no Quebec Premier, federalist or separatist, ever recognized the doctrine[70]. Second, multiculturalism has a slow impact on Canadian constitutional identity because it is a somewhat recent creation that coincides more or less with the initial steps that led towards the adoption of the *Canadian Charter of Rights and Freedoms*. This makes multiculturalism and the *Charter* two projects of the same generation and even of the same person, i.e. Pierre Elliott Trudeau. Recent attempts by the Conservative Government of Stephen Harper at "rebranding" the Canadian identity should suffice to persuade that multiculturalism is far from universally accepted among the political elites as a core value of Canadian identity[71]. As

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[67] See John W. Berry's comprehensive survey of the study and perception of multiculturalism in Canada. John W. Berry, "Research on Multiculturalism in Canada", (2013) 37 Intl J Intercult Rel 663.

[68] See, e.g., *R.* v. *Keegstra*, [1990] 3 S.C.R. 697. See also *R* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

[69] See, e.g., Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien*, (Québec : Septentrion, 2005); Mathieu Bock-Côté, *Le multiculturalisme comme idéologie politique*, (Montréal : Éditions du Cerf, 2016); Joseph Facal, « Le multiculturalisme et la négation de la nation québécoise » in Louis-André Richard, ed, *La Nation sans la religion? Le défi des ancrages au Québec*, (Ste-Foy : Presses de l'Université Laval, 2008) 155; Joseph Facal, *Quelque chose comme un grand peuple*, (Montréal : Boréal, 2012) ch. 5. See also the discussion in Gérard Bouchard, *L'interculturalisme: Un point de vue québécois*, (Montréal: Boréal, 2012) at 93-107.

[70] Bouchard, *supra* note 69 at 93

[71] See Ian McKay & Jamie Swift, *Warrior Nations: Rebranding Canada in an Age of Anxiety*, (Toronto: Between the Lines, 2012) at 269-271; Raymond B Blake, "A New Canadian Dynamism? From Multiculturalism and Diversity to History and Core Values", (2013) 26:1 Brit J Can Stud 79; Yasmeen Abu-Laban, "Reforms by Stealth: the Harper Conservatives and Canadian Multiculturalism", in Jack Jedwab, ed, *The Multiculturalism Question:*

such, multiculturalism lacks the kind of multi-generational and transhistorical character that, for example, the Reconstruction Amendments have acquired in the American constitutional narrative, which were adopted after the American Civil War. The Amendments are situated in a broader constitutional narrative that generally starts with the Declaration of Independence and continues to today. What's more, they are adhered to by all political elites who regard them as foundational regardless of their political allegiance.

Put in a broader historical context, even the Patriation and the adoption of the *Charter* seem more like the culmination of a project of constitutional self-government empowering Canada to amend its own constitution than as a historical moment epitomizing a tradition of protection of minorities. Since 1982, scholars and judges alike have used the "dialogue" theory to advance an understanding of the Charter as a *tool* of self-government rather than a as *program* or an *ideal* to be reached in and of itself[72]. However, dialogue theory seems to exist more as a phenomenon of high legal culture than as a popular attachment to the whole constitutional project. As Stéphane Bernatchez explains, the adoption of this narrative of dialogue seems more like a response to critics of judicial activism than a real explanation of the constitutional project itself[73], i.e. dialogue theory provides neither the *reason* nor the *explanation* for the adoption of the *Charter* in the dominant constitutional narrative but rather the *justification* for the countermajoritarian function of the Supreme Court under the *Charter*[74]. I will come back to the dialogue metaphor below[75].

Debating Identity in 21st-Century Canada, (Montréal-Kingston: McGill-Queens University Press, 2014) 149. However, it is noteworthy that even if the Conservatives have changed the meaning and importance of multiculturalism, especially in their conception of citizenship, they never repudiated the term itself. This may be seen as a slow shift to the political mainstream when considering the propositions put forward by the former Reform party (of which Stephen Harper and Immigration Minister Jason Kenney were members) to abolish multiculturalism. As Garth Stevenson notes, "[a]lthough occasional grumbling is still heard in the media, there is no longer any politically significant opposition to the word [multiculturalism] in Anglophone Canada". Garth Stevenson, *Building Nations from Diversity: Canadian and American Experience Compared*, (Montréal-Kingston: McGill-Queen's University Press, 2014) at 223.

[72] For the first formulation and the main exposition of the dialogue theory, see Peter Hogg & Alison Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing After All)", (1997) 35:1 Osgoode Hall LJ 75; Kent Roach, *The Supreme Court on Trial: Judicial Activism of Democratic Dialogue*, (Toronto: Irwin Law, 2001), [Roach, *Trial*]. See also *Vriend* v. *Alberta*, [1998] 1 R.C.S. 493, [*Vriend*].

[73] See Stéphane Bernatchez, "Les traces du débat sur la légitimité de la justice constitutionnelle dans la jurisprudence de la Cour Suprême du Canada", (2005-06) 36 RDUS 165.

[74] The term "countermajoritarian" was coined in the American debate about the democratic legitimacy of judicial review by Alexander Bickel. Bickel wrote in the 1960s about the "countermajoritarian difficulty" as, roughly speaking, the idea that in a democracy with judicial review of legislative and executive acts, the unelected Supreme Court is there to temper unbridled majoritarianism by imposing limits on what the popular will can achieve through

In addition to the "dialogue" metaphor that the Supreme Court itself started to use in the *Vriend* case[76], the Court has used extensively the notion of the constitution as a "living tree". When looked at in its historical context, the use of Viscount Sankey's vivid metaphor in the famous *Persons* case[77] in early *Charter* jurisprudence is far from insignificant[78]. In the early 1980s, a time when "intentionalism" and "originalism" were gaining support in American constitutional theory both in academia and on the bench[79], the Canadian justices had to assertively state that they would not be bound by the "drafters" of the *Charter*[80]. But, in addition to the tactical rejection of originalism, the living tree doctrine helped create and, in a way, participated in a certain constitutional narrative about the Canadian constitutional project - a narrative of openness to change.

This openness is not simply composed of interpretive metaphors but also supported by constitutional institutions that enable strong self-government, which is a distinctively Canadian constitutional value when compared to the American constitutional system and the strong anti-statists feelings it is associated with[81]. As David Schneiderman puts it, the Canadian constitutional structure is easier to navigate than its American counterpart, which is designed to limit the possibilities of political change[82]. Schneiderman argues that the constitutional institutions of Canada, especially parliamentarianism and cabinet government, are easy to manoeuvre and to set in motion. According to Schneiderman, mixed government, i.e. a system in

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the other elected branches of the state. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (New Haven: Yale University Press, 1962).

[75] See below, section 5.

[76] *Vriend*, *supra* note 72.

[77] *Edwards* v. *A.G. Canada*, [1930] A.C. 124.

[78] I come back to the place of the *Persons* case in Canadian constitutional culture below, section 2.2.

[79] Justice Antonin Scalia, undoubtedly one the most prominent proponent of originalism in the United States, was appointed to the Supreme Court of the United States in 1986. Moreover, a series of speeches by then-Attorney General Edwin Meese promoting originalism in 1985 helped attracting wider public attention. On the beginnings of originalism as a mainstream doctrine of constitutional interpretation, see Steven G. Calabresi, *Originalism: A Quarter-Century of Debate*, (Washington: Regnery Publishing, 2007) introduction.

[80] On the use of the *Persons* case in early charter jurisprudence and the rejection of originalism, see Bradley W. Miller, "Origin Myth: The Persons Case, The Living Tree and the New Originalism", in Grant Huscroft & Bradley W. Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation*, (Cambridge: Cambridge University Press, 2013) 120.

[81] See, in general, the discussion in Schneiderman, *Americanization*, *supra* note 44 at 27-41. On anti-statism as a distinctively American cultural trait, see Lipset, *supra* note 54 at 20-22.

[82] Schneiderman, *Americanization*, *supra* note 44 at 67.

which executive, legislative and judicial powers are intermingled rather than strictly separated like in the United States, and where monarchic, aristocratic and democratic elements must cooperate provides the necessary "flexibility" and "muscularity" for adequate self-government. Similarly, in the context of judicial review of legislative acts, Kent Roach emphasizes how parliamentarianism and cabinet government make the Canadian constitutional system very different from the American one. According to Roach, this difference is so important that the use of American criticism of judicial review because of its anti-democratic character in the Canadian context simply fails to capture the more harmonious and collaborative relation between the branches and the easiness with which the government and Parliament can answer to most Supreme Court rulings in Canada[83].

Hugo Cyr also suggests that the dominant constitutional narrative in Canada has been one of openness to change, though in a slightly different vein[84]. For Cyr, the Canadian constitutional project is not so much a project of openness to change as it is an incomplete project, i.e. the idea that the Canadian constitution is still to be made. Cyr states:

> The narrative of unfinishedness is taken to mean that some agents must be involved in the making of the Constitution. The Constitution is thus not only found, it is not a mere object of knowledge, it is also made – it is the product of some ongoing process. Respecting the Constitution thus implies not only following it, but may also imply helping it move towards its destination.[85]

Cyr explains that, given this narrative, courts and especially the Supreme Court have relied heavily on a series of metaphors - in particular the "living tree" metaphor - to illustrate their own perception of their institutional role in helping the Constitution progress towards more completeness.

Both in Cyr's and in Schneiderman's account, the Canadian constitutional project is not seen as a coherent becoming or as a slowly unfolding story. Instead, it is seen as something that is open to the future. The constitutional project is underdetermined by the constitution. To continue with the living tree metaphor, the Canadian constitutional project has "shallow roots", making it open

[83] In this respect, Kent Roach also heavily relies on the "notwithstanding clause" of the *Charter* (section 33) as the ultimate tool of the dialogue between the judiciary and the legislative. See, in particular, Roach, *Trial*, *supra* note 72 ch. 2 & 5.

[84] Hugo Cyr, "Conceptual Metaphors for an Unfinished Constitution", (2014) 19 Rev Const Stud 1.

[85] *Ibid* at 7.

for change. In effect, Canadians lack the kind of talk that represents certain beliefs or attitudes as "uncanadian", a rhetoric that is recurrent in the United States[86]. In fact, what is striking is the lack of a *historical* constitutional narrative in Canada, i.e. of a narrative that explains how the *historical events* of the constitutional history can be understood as a slow unfolding of the true meaning of the constitutional project. Putting historical events in a close narrative that ties them with the meaning of the constitution and the constitutional project as a whole is something that makes the American constitutional culture different from Canada's. As I will argue below, this narrativization of constitutional history has influenced the way in which precedents are conceived and used in both jurisdictions.

In the United States, the fate of the nation seems to be tied to its constitutional history. As historian Hans Kohn writes, the United States Constitution is "so intimately welded with the national existence itself that the two have become inseparable"[87]. First, the very creation of the American nation was the product of a symbolic act of severance of the legal ties from England, with the Declaration of Independence. Second, the ratification of the Constitution of 1787 constituted Americans as a people. In other words, the constitution is not only the symbol of the American People but also the very act by which Americans became a people[88]. Moreover, the ratification of the proposed constitution by the states in the years between 1787 and 1790 still makes this original moment a landmark achievement in terms of democratic self-government in the constitution-making process, even by today's standards[89]. As Paul Kahn writes of the American people, "[l]ife under the rule of law is a way of imagining history, the state, and the self – their changes and continuities. The rule of law may be our deepest political myth. It is the foundation of our beliefs about our community as a single people with a unique history, as well as our view of our individual obligations to the state."[90] Given the strong symbolism of the

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[86] On this question and the distinctive "Americanness" talk in U.S. politics, see Samuel Huntington, *American Politics: The Promise of Disharmony*, (Cambridge: Harvard University Press, 1983) at 25. See also, Lipset, *supra* note 54 at 19. Pierre Elliott Trudeau, for example, wrote in 1972 that there is "no such thing as a model or ideal Canadian". Pierre Elliott Trudeau, *Conversation with Canadians*, (Toronto: University of Toronto Press, 1972) at 33.

[87] Hans Kohn, *American Nationalism: An Interpretive Essay*, (New York: Macmillan, 1957) at 8.

[88] Levinson, *supra* note 60 at 11.

[89] See Zachary Elkins, Tom Ginsburg & Justin Blount, "The Citizen as Founder: Public Participation In Constitutional Approval", (2008) 81:2 Temple L Rev 361.

[90] Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America*, (New Haven: Yale University Press, 1997) at xi.

American constitution, it is not surprising that referring to the drafters or the early expounders of the constitution is a very useful and recurrent argumentative tool. Contemporary constitutional decisions are replete with references to early constitutional decisions, the *Federalist Papers*, or great justices like John Marshall[91]. In doing so, contemporary Justices place themselves as the heirs of a tradition that they must interpret and that transcends them, a tradition that they must carry but that they do not create.

I will call the "narrativization of constitutional reasoning" the way of articulating the development of the constitutional project as something that is intimately linked to history. This kind of narrativization has four effects that are of interest for the study of constitutional precedents. First and foremost, it gives historical arguments a preeminent place in constitutional argumentation[92]. Second, it produces fixed points of agreement that are not open for revision and that provide the resources for arguing about present cases. I will discuss this point in the next section when I talk about super precedents. Third, it portrays current decisions as if they were necessary, i.e. as if they were the ineluctable next step of a constitutional process in which the judges simply recognize the pre-existing law, having no (or only a minimal) role in its creation. In other words, narrativization makes the end or the outcome of a decision seem necessary and determined by the previous history[93]. Finally, it influences the way in which constitutional

[91] See, for example, the striking concurrence of Justice Stevens in *Roper* v. *Simmons* where the Court adopted a decisively "evolutionary" reading of the protection against "cruel and unusual punishment", US Const amend IV. Stevens filed a concurring opinion of one paragraph only to celebrate this evolutionary approach but he could not help but conclude by referring to two founding fathers and early expounders of the constitution. He writes: "In the best tradition of the common law, the pace of [the] evolution [of the law] is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day - Alexander Hamilton, for example - were sitting with us today, I would expect them to join Justice Kennedy's opinion for the Court. In all events, I do so without hesitation." *Roper* v. *Simmons*, 543 U.S. 551 (2005) (Stevens J, concurring) [*Roper*].

[92] Mark Tushnet refers to the historical modality of interpretation as the most important in constitutional interpretation in the United States. Mark Tushnet, "The United States: Eclectism in the Service of Pragmatism" in Jeffrey Goldsworthy, ed, *Interpreting Constitutions*, (Oxford: Oxford University Press, 2006) 7. See also the discussion in Fernanda Pirie, *The Anthropology of Law*, (Oxford: Oxford University Press, 2013) at 125. Basing her thoughts on M. I. Finley, Pirie states, "the American argument from the ancestral past had to differ from the Athenian and common law arguments because history was too well documented: selective quotation had to replace forgery as the operational device. But, as in the other cases, the past was personalized, while even those who stressed rational and moral arguments during political debates could not resist adding an appeal to the ancestry of the constitution." See M. I. Finley, *The Use and Abuse of History*, (London: The Hogarth Press, 1971) at 43. See the concurrence of Justice Stevens in *Roper*, *supra* note 91 (Stevens J, concurring).

[93] As I will argue below in the fifth section with regard to formalism in adjudication, narrativization also portrays decisions as necessary rather than contingent and plays down the role of the judge in reaching his or her decision. These two elements distinguish greatly the Canadian and the American constitutional culture.

change is understood; change is seen as a way of going back to the correct interpretation, as *recovering* the true meaning of the constitutional project rather than as the creation out-of-the-blue of new constitutional meaning. Let me illustrate these last two points.

2.2 Constitutional Narrative and Necessity

Narrativization of constitutional thought makes contemporary decisions look as if they were *determined* by the constitutional history. As French philosopher Paul Ricoeur puts it:

> The paradox of emplotment [or narrativization] is that it inverts the effect of contingency, in the sense of that which could have happened differently or which might not have happened at all, by incorporating it in some way into the effect of necessity or probability exerted by the configuring act. The inversion of the effect of contingency into an effect of necessity is produced at the very core of the event: as a mere occurrence, the latter is confined to thwarting the expectations created by the prior course of events; it is quite simply the unexpected, the surprising. It only becomes an integral part of the story when understood after the fact, once it is transfigured by the so-to-speak retrograde necessity which proceeds from the temporal totality carried to its term. This necessity is a narrative necessity whose meaning comes from the configurating act as such […][94]

As the excerpts from Paul Ricoeur here suggests, "emplotment" or narrativization emphasizes the character of necessity of a given decision. Once a decision is embedded in an historical narrative, the framing of the narrative in terms of events, direction and process makes the decision seem like the necessary next step of this becoming. When a Court places itself in a constitutional narrative, the Court conceives of itself not as creating the meaning of the constitutional provisions but rather as finding it, already there, in the historical record that they interpret. The Court's decision then appears as the necessary next step of the slow jurisprudential

[94] Paul Ricoeur, *Oneself as Another*, translated by Kathleen Balmey (Chicago: University of Chicago Press, 1992) at 142. The original reads thus: « Le paradoxe de la mise en intrigue est qu'elle inverse l'effet de contingence, au sens de ce qui aurait pu arriver autrement ou ne pas arriver du tout, en l'incorporant en quelque façon à l'effet de nécessité ou de probabilité, exercé par l'acte configurant. L'inversion de l'effet de contingence en effet de nécessité se produit au cœur même de l'évènement : en tant que simple occurrence, ce dernier se borne à mettre en défaut les attentes créées par le cours antérieur des évènements; il est simplement l'inattendu, le surprenant, il ne devient partie intégrante de l'histoire que compris après coup, une fois transfiguré par la nécessité en quelque sorte rétrograde qui procède de la totalité temporelle menée à son terme. Or cette nécessité est une nécessité narrative dont l'effet de sens procède de l'acte configurant en tant que tel […] » Paul Ricoeur, *Soi-même comme un autre*, (Paris: Seuil, 1990) at 170.

unfolding of the deep meaning of the constitutional project[95]; a becoming that is independent of the individual justices who carry it forward.

In *Parents Involved in Community Schools* v. *Seattle School District No. 1*[96], the U.S. Supreme Court was asked to examine the constitutionality of two programs set up by school boards that classified students in racial categories in order to ensure that schools would be racially diverse. The debate ultimately revolved around the meaning to be given to *Brown* v. *Board of Education*[97]. Writing for the majority, Chief Justice Roberts stated,

> [W]hen it comes to using race to assign children to schools, history will be heard. […] Before Brown, schoolchildren were told where they could and could not go based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again – even for very different reasons. […] The way to stop discrimination on the basis of race is to stop discrimination on the basis of race.[98] (Emphasis added)

Justice Breyer dissented and he argued forcefully that the decision of the majority was in fact corrupting the legacy of *Brown*. He states that the majority opinion:

> distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality.[99] (Emphasis added)

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[95] Perhaps the most sophisticated version of this idea – i.e. that narrativization leads to necessity - is to be found in Ronald Dworkin's works *Taking Rights Seriously* and *Law's Empire*. In Dworkin's famous theory, the idealized judge Hercules has to find the best possible answer compatible with all the material of his legal system available to him. According to Dworkin, Hercules, who must act as a kind of chain novelist, will reach one correct answer. Although Dworkin's theory is much more complex and nuanced than I can show here, I think that it is a good example of Ricoeur's point that narrativization makes what would seem to be an underdetermined choice appear necessary and pre-determined. See mainly Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1977), [Dworkin, *Taking Rights Seriously*]; Ronald Dworkin, *Law's Empire*, (London: Fontana Press, 1986).

[96] *Parents Involved In Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), [*Parents Involved*].

[97] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), [*Brown*]. This is a point explored by Mark Tushnet in his Jerome Hall Lecture at Maurer School of Law at Indiana University. Mark Tushnet, "*Parents Involved* and the Struggle for Historical Memory", (Jerome Hall Lecture delivered at the Maurer School of Law, Indiana University Bloomington, 25 September 2014), online: <https://www.youtube.com/watch?v=ONbVjdxQIJw>. The presentation I give here of this decision is highly influenced by Tushnet's analysis.

[98] *Parents Involved, supra* note 96 (Roberts, CJ).

[99] *Ibid* (Breyer, J, dissenting).

Interestingly, the majority and the minority do not disagree about what *Brown decided*, they disagree about what *Brown meant*, or, as Justice Breyer writes, what *Brown* "promised". Their disagreement is not about the *ratio decidendi* or the holding of *Brown* (in fact, the facts of the two cases are pretty dissimilar) but rather about the meaning that *Brown* gives to the constitutional project as a whole. However, in order to have an idea of what a decision means one must have an understanding of the broader narrative this decision is part of. In other words, judicial decisions are not meaningful in and of themselves but they come to acquire a meaning once they are integrated in a broader constitutional narrative they are said to partake.

This specific form of precedent lacks in Canadian constitutional culture. Even if some precedents have acquired a strong doctrinal status because of their entrenchment in the Canadian legal fabric, none of them (at least regarding constitutional rights) has acquired such a "semantic" status, i.e. a decision giving meaning to the Canadian constitutional project as a whole. Again, I think that it is possible for a decision to acquire this kind of stature only insofar as it is entrenched and included in a broader constitutional narrative.

There are no such decisions like *Brown* v. *Board of Education* in Canada. Even if some decisions have indeed acquired a certain moral weight such as the *Persons* case[100], in which the Judicial Committee of the Privy Council held that women are "persons" for the purpose of section 24 of the B.N.A. Act and that they could thus be appointed to the Canadian Senate, no decision has achieved this status in Canada. Even for the *Persons* case, as Robert Sharpe and Patricia MacMahon highlight, "it was not until the revival of the feminist movement in the 1970s […] that the Canadians renewed their interest in the case and its legacy". Obviously, the citation of Viscount Sankey's "living tree" metaphor discussed above also helped reviving the decision in the early 1980s[101]. However, regardless of the symbolic status that the case may have in today's legal circles, its historical importance has hardly influenced the Canadian constitutional narrative. After all, women had had the right to vote since 1918 and they could run for office in the House of Commons since 1919, with Agnes Macphail becoming the first woman to be

[100] *Edwards* v. *A.G. Canada*, [1930] A.C. 124.

[101] As Robert J. Sharpe and Patricia I. MacMahon write: "The broader constitutional legacy of the *Persons* case, like its cultural legacy, is of relatively recent origin." Robert J. Sharpe and Patricia I. MacMahon, *The Persons Case: The Origin and Legacy of the Fight for Legal Personhood*, (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2007) at 202

elected to the House of Commons in 1921[102]. Interpreting the meaning of "persons" in the B.N.A. Act of 1867 in a way that allows women to be appointed to the Senate in 1929 seems more like the *consequence* of an evolutionary process towards full political participation of women than its *cause*.

When compared to American precedents like *Brown* v. *Board of Education*, the *Persons* case seems more like the judicial confirmation of a process that had already been underway than the imposition of a judicial understanding of the constitutional requirements of a certain narrative pushing history forward[103]. Actually, it is difficult to see in the Canadian constitutional history any decision that has stirred as much political controversy and moved the national political *status quo* as *Brown* v. *Board of Education*[104], *Dred Scott*[105] or *Roe* v. *Wade*[106] have in the United States[107].

2.3 Constitutional Narrative and the Justification for Change

The second effect of the narrativization of constitutional reasoning and the faith associated with its project is the way in which change is justified. Sanford Levinson discusses the faith of Americans in their constitutional project, stating:

> Justification is found in existing materials rather than in claims of new revelation, but change (or what Marshall in McCulloch v. Maryland termed "adaptation") occurs regardless. Significantly, such adaptation is almost always justified by reference to its non-deviation from the genuine

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[102] Tabita Marshal & David A. Cruickshank, "Persons Case", in *The Canadian Encyclopedia* (16 October 2015), online: <http://www.thecanadianencyclopedia.ca/en/article/persons-case/>.

[103] This is obviously a very controversial thesis. Michael Klarman, for example, argues that Brown was already a product of the growing civil rights movement rather than one of its causes. Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolution", (1996) 82 Va L Rev 19; Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis", (1995) 81 J Am Hist 81.

[104] *Brown*, *supra* note 97.

[105] *Scott* v. *Sandford*, 60 U.S. 393 (1857).

[106] *Roe* v. *Wade*, 410 U.S. 113 (1973).

[107] See, generally, Lucas A. Powe Jr, *The Warren Court and American Politics*, (Cambridge: Harvard University Press, 2000). The thesis that judicial decisions have initiated political change is very controversial. Many claim that the major U.S. Supreme Court decisions arrived only at a moment when the national ruling elite or a majority of the population were ready to welcome them. See, e.g., Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker", (1957) 6 J Pub L 279; Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, (Chicago: Chicago University Press, 1991); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced The Supreme Court and Changed The Meaning of The Constitution*, (New York: Farrar, Strauss & Giroux, 2009).

> foundation or true essence of the faith community and, indeed, the utility of any changes to preserving what is most central to the faith community.[108]

What Levinson shows is that, in a given community of faith, the justification for change is to be found *in the past*, not in the future. This kind of historical justification for change as a return to a more genuine understanding of the constitutional project is typical of American constitutional reasoning. Some decisions are overruled because they were "wrong the day they were decided", the second most frequently offered reason by the Supreme Court of the United States for overruling a previous decision[109]. The Supreme Court of Canada has never adopted such an attitude towards its own previous decisions in *Charter* cases; previous decisions are either overruled *sub silentio* or they are carefully distinguished[110]. By doing so, the Supreme Court of Canada has been able to make the constitutional project move forward while avoiding the constraining nature of constitutional precedents, laying out a constitutional narrative of openness to change discussed above. By contrast, the narrativization of American constitutional culture manifests itself in the way that precedents are discussed even when they are overruled. One of the best examples illustrating the impact of historical narrative on the way that precedents are overruled is *Lawrence* v. *Texas*[111].

In *Lawrence* v. *Texas*[112], the Supreme Court was asked to revisit its 1986 decision in *Bowers* v. *Hardwick*[113] that upheld a Georgia criminal statute prohibiting sodomy (both heterosexual and homosexual). In this latter decision, the concurring opinion of the Chief Justice Warren Burger relied on the history of Western moral thought in order to interpret whether or not the "right to sodomy" was protected as an unenumerated right of the Fourteenth Amendment. In his brief opinion, Chief Justice Burger cites such authorities as Roman law, the English eighteenth century treatise writer William Blackstone, and the Bible. He concludes his concurrence by stating that

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[108] Levinson, *supra* note 60 at 152.

[109] See Michael J. Gerhardt, *The Power of Precedent*, (New York: Oxford University Press, 2008) at 19, [Gerhardt, *Power*]. Gerhardt's analysis is not focused exclusively on constitutional law cases. However, this approach towards overruling previous decisions, i.e. as "wrong the day they were decided", is also used in constitutional law cases. See the discussion in *Planned Parenthood of Southeastern Pa*. v. *Casey*, 505 U.S. 833 (1992) [*Casey*] and *Lawrence* v. *Texas*, 539 U.S. 558 (2003) [*Lawrence*].

[110] See, e.g., *Burns*, *supra* note 20.

[111] *Lawrence*, *supra* note 109.

[112] *Ibid*.

[113] *Bowers* v. *Hardwick*, 478 U.S. 186 (1986).

homosexuality cannot be protected as an unenumerated right of the Fourteenth Amendment because it has never been recognized as a right in Western civilization. Justice Stevens filed a dissenting opinion as did Justice Blackmun and both were joined by Justice Marshall.

In *Lawrence*, a Texas criminal law that prohibited homosexual sodomy was challenged. Writing for the majority in *Lawrence*, Justice Kennedy reviewed the arguments put forth by Justice Stevens in *Bowers* and writes that "Justice Stevens' analysis […] should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled."[114] Three elements of Kennedy's opinion shed light on the use of precedents:

1) His opinion reuses the same historical form of argument that Chief Justice Burger used in *Bowers*
2) It explains the different result as a recovery of the genuine constitutional project rather than as its development.
3) It overrules the old decision explicitly

First, Kennedy does not set aside the historical mode of argumentation used by Chief Justice Burger in *Bowers*. Rather he criticizes the historical reconstruction in *Bowers* and proposes an alternative account of Western civilization that is more accepting of homosexuality. His purpose is not to demonstrate that the Court has changed its mind or that it can rely on a different kind of argument in order to reach a different result. Kennedy's argument is directed towards setting the historical record right. In other words, Kennedy, like the majority in *Bowers*, embraces completely the historical mode of reasoning. In fact, Kennedy's approach justifies actual decisions by showing that the old construction of the historical record was erroneous and not by disregarding historical arguments as such. Kennedy proposes a different kind of historical narrative to reach the opposite conclusion. As the above citation of Sanford Levinson suggests, this approach recovers the "genuine foundation" of the constitutional protection for homosexuality.

[114] *Lawrence*, *supra* note 109 at 578.

The second significant element of Kennedy's majority opinion in *Lawrence* is that setting the historical record straight means that the first decision was wrong *the day it was decided*[115]. Kennedy does not try to show how the constitution has evolved during the 17 years spanning from *Bowers* to *Lawrence*. Instead, he wants to show that the old decision had been wrongly decided back then and that the actual decision is, in a way, simply returning to the correct constitutional understanding, thus recovering the genuine constitutional becoming[116].

The third interesting aspect of this decision, somewhat harmless by itself but nevertheless surprising when compared to the Canadian experience, is that Kennedy explicitly overrules the previous decision. As I have said earlier, there is no record of any decision of the Supreme Court of Canada overruling a *Charter* precedent in such an open fashion[117].

However, the dissent of Justice Scalia in the *Lawrence* decision also shows another current in American constitutional law. Scalia accuses Kennedy of lightly overruling *Bowers* v. *Hardwick* and of reading his own political preferences into the Constitution[118], which is an attack that he has repeatedly formulated against the majority in cases that propose a more progressive reading of the constitution[119].

These three dimensions of the *Lawrence* decision enlighten a certain way of relating to the past. As French historian François Hartog calls it, they display a specific "regime of historicity"[120]. The regime of historicity at play in American constitutional culture represents judges as in charge of *uncovering* the genuine meaning of the American constitutional project rather than *making* it.

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[115] *Ibid*.

[116] As constitutional scholar Jack Balkin writes: "our belief that a case was always wrong (or always right) is important because it supports or coheres with other beliefs we have about how to understand our constitutional tradition and how to give meaning to the constitutional project today." Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World*, (Cambridge: Harvard University Press, 2011) at 184. *Lawrence* is not the only decision where the Court said that the early decision was wrong the day it was decided. See also the discussion in *Casey*, *supra* note 109.

[117] I will come back to this element in the fifth section where I distinguish the use of precedents as rules or principles.

[118] *Lawrence*, *supra* note 109 (Scalia J, dissenting) esp. at 602-605

[119] I will come back to this other dimension of constitutional precedents in the last section of this thesis.

[120] Francois Hartog, *Regime of Historicity*: *Presentism and Experience of Time*, translated by Saskia Brown (New York: Columbia University Press, 2015).

Unlike Canada, United States constitutional discourse especially in the Supreme Court uses previous decisions as the starting point for the argument, not only over what cases decided but also over what they meant. Canadian constitutional culture lacks this approach of reasoning from previous decisions. One related aspect pertaining to the lack of a strong historical constitutional narrative is the lack of strong "super precedents", a concept used by American scholars to which I shall now turn.

3. Super Precedents

In American constitutional culture, some decisions have come to constitute fixed points of agreement about the meaning and the legitimacy of the constitutional project. This process of incorporation and entrenchment of certain fundamental constitutional decisions and constitutional values plays out at different levels: doctrinal, political, sociological, etc. I here investigate and contrast the American and Canadian experiences, pointing out the different impact of such a set of fixed points of agreement for the status of precedents in constitutional culture.

Super-precedents are decisions that are so entrenched in the web of constitutional decisions that they are very unlikely to be revisited. Michal Gerhardt, one the most influential theorists of super-precedents defines them thus:

> Super precedents seep into the public consciousness, and become a fixture of the legal framework. Super precedents are the constitutional decisions whose correctness is no longer a viable issue for courts to decide; it is no longer a matter on which courts will expend their limited resources. Super precedents are the clearest instances in which the institutional values promoted by fidelity to precedent—consistency, stability, predictability, and social reliance—have become irredeemably compelling. Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.[121]

Sanford Levinson and Jack Balkin, for their part, write about the "canons" of constitutional law[122]. Though their concept of canon is similar to Gerhardt's notion of super-precedent, their emphasis is more on the sociological rather than on the doctrinal sources of these "canonical"

[121] Michael J. Gerhardt, "Super Precedent", (2006) 90 Minn L Rev 1204, at 1205 and 1217-1218, [Gerhardt, "Super Precedent"].

[122] Sanford Levinson & Jack Balkin, "The Canons of Constitutional Law", (1998) 111 Harv L Rev 963.

decisions. Levinson and Balkin look in particular at how law school curricula help create the fixed points of agreement about the American constitutional system in the legal profession. They stress that the canon might change according to the audience, but they emphasize that legal education as well as political communication provide the means by which the canon is created and recreated. For them, constitutional literacy plays an important role in giving the citizens a way to address the defects of their systems in terms that are compatible with the system as a whole. They state that:

> [C]ultural literacy in constitutional matters is important because it fosters pride in and attachment to the American political community. At least some cases may form part of the canon because they seem to promote an appealing portrait of "America-the-good." Moreover, the desire to engender pride may lead to the omission of certain cases and legal events from the cultural literacy canon because they present a less attractive picture of the rule of law in the United States.[123]

One important reason for the slow creation of super or canonical precedent is efficiency; courts must take some decisions as settled or it would engage them in time-consuming rereadings of their whole case-law; "they are matters on which courts will no longer expend their limited resources"[124]. However, part of the explanation for the rise of constitutional super-precedents in the United States is the peculiar nature of the American confirmation process by which presidential nominees for justiceship at the Supreme Court are first heard by the Senate Committee on the Judiciary, then vetoed by the whole Senate (whose role is to "advise and consent")[125], and finally are appointed to the Supreme Court by the President. During the hearings, the potential justices are being questioned about their experience and their general judicial philosophy. Even if they avoid talking directly about cases that might come before them or previous cases they might have to re-examine, all the justices nominated in the last thirty-five years have been questioned extensively about their adherence to precedents and their general philosophy regarding the principle of *stare decisis*[126]. This has been a way to measure the likelihood that a given candidate overrules specifically sensitive decisions, in particular *Roe* v.

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[123] *Ibid* at 977.

[124] Gerhardt, "Super Precedent", *supra* note 121 at 1205.

[125] US Const art II, § 2, cl 2.

[126] See, Czarnecki *et al*, *supra* note 1.

Wade which gave women a constitutional right to abortion[127]. The other effect of that nomination process is to make sure that justices appointed to the Supreme Court share a certain number of fixed points of agreement, i.e. decisions that are not up for grabs but rather from which they can evaluate the soundness of other decisions[128]. Even if the process has been decried by many scholars as highly dysfunctional[129], others like Paul M. Collins and Lori A. Ringhand have praised this process by which the elected representatives of the people can more or less check the work of the appointed Justices for "we the people"[130].

By contrast, little is known in Canada about the judges' judicial philosophy when they are appointed to the Supreme Court. Even if the Liberals under the Government of Paul Martin and the Conservatives of Stephen Harper from 2004 onwards started to implement a more formal and open process of appointment with public hearing before a House of Commons committee, the hearings were rapidly dropped after the failed nomination of Justice Nadon in 2013[131]. Moreover, even the candidates who were heard by the committee received such mild questions that the hearings never reached the level of politicization that they have reached in the United States in recent decades[132]. In the United States, the Senate has become the organ through which elected representatives, i.e. senators, assess whether potential justices conform with the dominant understanding of the American constitutional culture. The candidates who stray too far away from that culture will likely be rejected. This is what happened with the nomination of Robert H. Bork, an event that has greatly influenced the appointment process since then.

When Ronald Reagan's appointee judge Robert H. Bork of the Federal Court of Appeal for the District of Columbia Circuit was heard by the Senate Committee on the Judiciary he was questioned extensively on his judicial methodology and its impact for certain decisions that had

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[127] *Ibid*. Interestingly, Jason J. Czarnecki *et al* show that the Justices' comments about their adherence to *stare decisis* in the confirmation hearings is weakly correlated to their voting pattern regarding precedents once at the Supreme Court.

[128] See the discussion in Schneiderman, *Americanization*, *supra* note 44 at 252-258.

[129] See the discussion of the critical American academic literature, *Ibid*.

[130] Paul M. Collins & Lori A. Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change*, (Cambridge: Cambridge University Press, 2013) at 225-230.

[131] See the discussion in Schneiderman, *Americanization*, *supra* note 44 ch. 5.

[132] *Ibid* at 266-267.

come to form the consensus of all mainstream politics[133]. Bork was known for his originalist method of interpretation that some Senators and other politicians viewed as too extreme. For example, Bork was questioned about the compatibility of his originalist methodology of constitutional interpretation and the outcome of *Brown* v. *Board of Education*, namely overruling *Plessy* v. *Ferguson*[134] and holding that "separate but equal" facilities in education for blacks and whites is unconstitutional. Even if Bork said over and over that *Brown* had been rightly decided, he nonetheless had a hard time convincing the committee that his originalist methodology was reconcilable with the outcome in *Brown*. Furthermore, Bork outwardly stated that *Griswold*[135] had been wrongly decided. This decision recognizes that married couples have a right to privacy protecting them if they want to buy contraceptives and was instrumental in preparing the way for *Roe* v. *Wade*[136]. Finally, when Senator Hatch a supporter of Bork, asked him a simple question about what had been the most controversial case in American constitutional law (a reference to the infamous *Dred Scott*), Bork candidly answered *Brown* v. *Board of Education*. Then the Senator asked "Or perhaps Dred Scott?", but it was too late[137]… The Senate vetoed Bork's nomination by a 58-42 vote.

Linda Greenhouse, a commentator on the United States Supreme Court and long time correspondent for the New York Times, provides the following explanation: "The moment passed quickly, but it's worth unpacking that deeply revealing exchange. As Senator Hatch immediately grasped, the nominee had violated a cardinal rule of modern judicial confirmation hearings, which is that *Brown* v. *Board of Education* is beyond debate."[138] Michael J. Gerhardt provides a complementary explanation. He writes that "Robert Bork's nomination to the Court foundered in part because of his candid criticism of *Brown*."[139] But Gerhardt also adds, "[a]mong the reasons Robert Bork's nomination to the Supreme Court failed was his candid declaration

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[133] US, *Nomination of Robert H. Bork To Be Associate Justice Of The Supreme Court Of The United States*, 100th Cong, (Washington, DC: United States Government Printing Office, 1989) [*Bork Hearing*].

[134] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[135] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[136] *Bork Hearing*, *supra* note 133 at 117-118.

[137] *Bork Hearing*, *supra* note 133 at 186.

[138] Linda Greehouse, "Robert Bork's Tragedy", *The New York Times Opiniator* (9 January 2013), online: <http://opinionator.blogs.nytimes.com/2013/01/09/robert-borks-tragedy/>.

[139] Gerhardt, *Power*, *supra* note 109 at 184.

that *Griswold* was wrongly decided, reinforcing the impression he may have lacked a sufficient regard for precedent generally."[140] Bork's comments not only questioned some decisions of constitutional law, but the very decisions that (according to most) give meaning to the American constitutional project as a whole, i.e. to fixed points of agreement in the dominant constitutional culture.

The confirmation process is important in securing a commitment to core constitutional values embedded in previous judicial decisions[141]. Future Justices are heard by the Senate committee on the judiciary who channels the concerns of the American electorate through a dialogue in which the American constitutional culture and the judges make sure that each other understand what is expected and acceptable as judicial behavior and what is not. Moreover, the discussion of specific constitutional decisions secure a commitment to some core decisions that the public in general or the Senators in particular[142] have come to consider as non-negotiable and beyond reconsideration. It is difficult to determine what effect a fully-fledged American-style confirmation hearing process would have on Canadian constitutional culture. However, it is highly plausible that this would change the status of certain kinds of precedents and shield them from overruling.

In another vein, many scholars have emphasized how the televised confirmation hearings have portrayed judicial decision-making in a very specific way. To begin with, broadcasting hearings greatly increased the length and the level of engagement of Senators in the confirmation hearings since the appointment of Sandra Day O'Connor in 1981[143]. Moreover, despite the inherently political nature of the confirmation process, judges strive to present themselves as neutral arbiters that are distinct from political actors. They stress repeatedly how their work is to be

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[140] *Ibid* at 186. See also the discussion in Schneiderman, *Americanization, supra* note 44 at 252-258. Compare Robert H. Bork's comments on *Griswold* with the future Chief Justice John G. Roberts Jr.'s comments about the entrenchment of this decision in the settled core of American constitutional law, see *Roberts Hearing*, *supra* note 2 at 261-263.

[141] The point is underscored by Gerhardt, *Power*, *supra* note 109 at 191-198 but also by Collins & Ringhand, *supra* note 130 at 264-266.

[142] *Ibid* ch. 3.

[143] Dion Farganis & Justin Wedeking, *Supreme Court Confirmation Hearings in the U.S. Senate: Reconsidering the Charade*, (Ann Arbor: University of Michigan Press, 2014) at 80.

understood through a legal frame, not a political one[144]. They portray judicial decision-making as highly formalistic in order to secure the institutional legitimacy of the Supreme Court in general in public opinion. I will come back to the importance of formalism in American constitutional culture in the fifth section below.

At this stage, I would like to clarify the following: it is not true that Canada lacks *any* kind of super-precedent, at least not if one follows Michael J. Gerhardt's understanding and typology of super-precedents[145]. Some decisions are so connected with a web of related decisions and have become so interwoven in the fabric of Law that they have become fixed elements of the legal system. Arguably, Canada does have such precedents even in *Charter* cases. It is not true that *all Charter* decisions are up for reconsideration. Some decisions, especially in criminal law, have so deeply modified the criminal justice system that it is very unlikely that they will ever be overruled[146]. However, procedural matters of criminal justice are generally not "meaningful" precedent in the sense that other morally charged decisions are. In fact, setting new requirements to enhance the fairness of criminal trials more closely resembles a natural extension of the Court's actions under traditional Common Law in criminal matters than it resembles placing new milestones of the constitutional project. Moreover, as Harry Arthurs suggests, when the *Charter* was adopted Canadians already had the sense that they had procedural rights in criminal cases, at least through their exposure to U.S. criminal justice T.V. shows and American culture more

[144] See the discussion in Schneiderman, *Americanization*, *supra* note 44 at 257-258. Gibson and Caldeira, analyzing public support for the Supreme Court during the Alito confirmation hearings, find that the framing effect of "judiciousness" rather than party affiliation or ideology, is a difficult one to replace. They state: "The job of the opposition to a nominee is to try to substitute an alternative frame through which the debate can be conducted. That frame of course focuses on ideology, issues, and partisanship. We have seen, however, just how difficult it is for substitute frames to be effective. We attribute this to the wellspring of legitimacy enjoyed by the Supreme Court, and the consequence of this legitimacy, which is the belief that judges are different from ordinary politicians, and that therefore nominees ought to be evaluated on the basis of legal, not political, criteria. As long as the Supreme Court maintains its reservoir of goodwill – and if presidents are cagey enough to nominate candidates for whom an easy prima facie case for judiciousness can be made – it seems unlikely that political forces can be effectively mobilized to deny presidents their choices." James L. Gibson & Gregory A. Caldeira, *Citizens, Courts and Confirmations: Positivity Theory And The Judgments Of The American People*, (Princeton: Princeton University Press, 2009) at 94-95.

[145] Michael Gerhardt distinguishes three types of super-precedents: precedents establishing a doctrine, precedents establishing a practice and foundational precedents or precedents that settle an important constitutional dispute and are accepted by the public and the other branches. Gerhardt, *Power*, *supra* note 109 ch. 6. See also, Gerhardt, "Super-Precedent", *supra* note 121.

[146] See, for example, *R* v. *Stinchcombe*, [1993] 3 S.C.R. 326 which requires that crown prosecutors communicate all relevant information to the defense counsel before trial or *R* v. *Collins*, [1987] 1 S.C.R. 265 on the exclusion of unconstitutionally obtained evidence or *Hunther* v. *Southam*, [1984] 2 S.C.R. 145 on the requirement that searches and seizures be authorized by somebody capable of acting judicially.

broadly[147]. This further illustrates that the *Charter* seems to have simply caught up with public opinion rather than pushed it forward.

Perhaps the paramount example of these "doctrinal" super-precedents is *Oakes*[148]. Since it was decided in 1986, the case obviously suffered many judicial discussions that changed the original formulation of the *Oakes* test[149]. However, the *Oakes* test was mostly instrumental in determining the type of judicial reasoning that would have to be applied in subsequent analysis of the justification for the limitation of a given constitutional right[150] - this would be a proportionality analysis[151]. Even if the decision does not have the "meaningful" status that I have discussed earlier in American decisions such as *Brown* v. *Board of Education*, it has nonetheless had a great impact on Canadian constitutional law. The adoption of this "mode" of constitutional reasoning - i.e. proportionality analysis - and its impact on the application of constitutional *stare decisis* is what I now turn to.

4. Proportionality

The decision *R* v. *Oakes*[152] is one of the most important constitutional cases of the Supreme Court of Canada. It establishes a standard test for applying the general limitation clause of section 1 of the *Charter*, which states that limitation of rights must be "demonstrably justified in a free and democratic society". Even if it has arguably become a super-precedent (it would be very surprising if Canada were to move to another kind of analysis under section 1 that does not involve proportionality analysis), I want to explore the decision not as a super-precedent. I want

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[147] See Harry Arthurs, "Constitutional Courage", (2003) 49 McGill LJ 1. See also the discussion in Schneiderman, *Americanization*, *supra* note 44 at 18-19.

[148] *R* v. *Oakes*, [1986] 1 S.C.R. 103, [*Oakes*].

[149] See, e.g., *Alberta* v. *Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37.

[150] Aharon Barak and Robert Sharpe & Kent Roach all suggest that the approach adopted by Chief Justice Dickson in *Oakes* was somewhat inspired by the European Court of Human Rights. See Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey*, (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2005) at 334; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge: Cambridge University Press, 2013) at 188-190. See also, Beverley McLachlin, "Symons Lecture 2008", (Symons Lecture delivered at Charlottetown, 21 October 2008), online: <http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2008-10-21-eng.aspx>. See also *Canada (Attorney General)* v. *JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30, at para 36.

[151] The Court had already pointed out that the analysis under section 1 would involve "a certain form of proportionality test" in *R* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, at para 139, [*Big M*]

[152] *Oakes*, *supra* note 148.

to analyze here how the proportionality mode of reasoning influences the doctrinal weight given to constitutional precedents when it is used to evaluate if a piece of legislation is constitutional[153].

In *Oakes*, then-Chief Justice Brian Dickson created a jurisprudential framework that could prove flexible enough to adapt to the general architecture of the *Charter*. The *Oakes* test set out that a limitation of a constitutional right must be prescribed by law and that:

1) The objective of the measure must be important enough to warrant overriding a *Charter* right;
2) There must be a rational connection between the limit on the *Charter* right and the legislative objective;
3) The limit should impair the *Charter* right as little as possible;
4) There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.[154]

It is noteworthy that, unlike other constitutional Bills of Rights adopted since World War II, the *Charter* has as its very first provision a general limitation clause[155]. Moreover, it avoids the stark proclamation of seemingly absolute rights that scholars have identified as an important feature of American constitutional culture. According to comparative constitutional scholar Mary Ann Glendon, this is an important difference between the Canadian and the American "rights-talk"[156]. The American constitution has no general limitation clause and few internal limitations to the

[153] Other scholars have already pointed out that proportionality in general moves constitutional adjudication towards a more context-sensitive, case-by-case analysis. See, e.g. Bernhard Schlink, "Proportionality in Constitutional Law: Why Everywhere but Here?", (2012) 22 Duke J Comp & Intl L 291, at 302. However, I want to explore here how three of the specific steps of the proportionality analysis as set out in the *Oakes* test directly influence the authoritative weight given to previous decisions.

[154] This is not the exact formulation of the test as set out in *Oakes* itself. However, as the Court repeatedly recognized, there is no canonical formulation of the test. I use here the version of the test formulated in Kent Roach & Robert J. Sharpe, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 69.

[155] For example, the German Basic Law and the European Convention on Human Rights, two of the most influential Bills of Rights, have only specific limitations of each right.

[156] See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, (New York: Free Press, 1989) at 165-167. Emmett MacFarlane has suggested that in fact, media portrayal of the Canadian *Charter* is not different from the way in which Glendon portrays the United States "rights-talk". Emmett MacFarlane, "Terms of Entitlement: Is There a Distinctly Canadian "Rights-Talk"?", (2008) 41:2 Can J Pol Sci 303.

specific provisions of its various amendments[157]. Some of the more substantive protections of the U.S. constitution, such as the First Amendment and the Fourteenth Amendment have no such limitations. For example, the First Amendment to the U.S. Constitution provides that "Congress shall make no law […] abridging the freedom of speech" and Justice Hugo Black used to say that "no law means no law". This does not mean that judges have interpreted the rights as being absolute or that there is no inherent limit to their constitutional rights. As Justice Oliver Wendell Holmes famously wrote about the First Amendment, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"[158]. However, it is generally agreed that in addition to its stark language, the American methodology in constitutional adjudication is generally more categorical or definitional compared to the "proportionality" method of Canada and other jurisdictions[159]. This section will demonstrate that the distinction between the "definitional" or more "categorical" approach in U.S. constitutional interpretation and the Canadian use of a proportionality test makes the latter less hostile to constitutional change and innovation. Unfortunately, I do not have the space here to discuss the American model in depth. I will, for the purpose of my analysis, say briefly that the American method of "tiers of scrutiny" does not really distinguish between the scope of a right and the justification for its limitation. It is therefore difficult to disentangle variation across time of the necessity to reassess *the justification of the limitation* of a right from the necessity to provide a *new interpretation* of the right. Every new decision will look like a new interpretation of the *content* of the right and not of the appropriateness or justification of its *limitation*. As Vicki Jackson summarizes it, "[i]n the United States, courts often blend the two ideas-which personal interests a right protects, and how the government may legitimately act to limit freedom- and articulate a "right" only after internally accounting for limitations deemed warranted by the government interests"[160]. By contrast, the proportionality analysis embraced by the Supreme Court of Canada distinguishes between the scope of a right (i.e. whether a right has been limited

[157] Exception to this include, for example, the protection against "*unreasonable* searches and seizure", US Const amend IV.

[158] *Schenck* v. *United States*, 249 U.S. 47 (1919).

[159] The literature on this topic is vast and too long to cite. See mainly Cohen-Eliya & Porat, *supra* note 42; Schlink, *supra* note 153; Barak, *supra*, note 150; Vicki Jackson, "Constitutional Law in an Age of Proportionality", (2015) 124 Yale LJ 3094. For a more sceptical account of this contrast, see Stephen Gardbaum, "The Myth and Reality of American Constitutional Exceptionalism", (2008-09) 107 Mich L Rev 391.

[160] Jackson, *supra* note 158 at 3125.

or not) and the justification for this limitation (i.e. whether the limitation is "demonstrably justified")[161]. These two questions are approached in two analytically distinct steps and the most important part of the *Oakes* analysis occurs at the second step.

Three elements of the second step of the "proportionality analysis" set out in *Oakes* make it possible for the Court to work around previous decisions without overruling them[162]. First, the analysis of the purpose of the limitation of a right in a given case must be assessed not only at the time of its enactment but also over time as the context evolves. Second, the fact that a limitation is the least restrictive way to achieve a legislative objective may change as the experience in other jurisdictions proves otherwise. In other words, what seemed necessary at one moment in time may prove unnecessary later in time. Third, a distinction between the interpretation of the scope of the right and the justification for its limitation enables new assessment of the proportionality *stricto sensu* of the limitation across time without changing the interpretation (or content) of the scope of the right itself.

4.1 The Pressing and Substantial Interest Test

The first component of proportionality analysis that makes it flexible across time is the identification of the purpose of the legislation, or the "pressing and substantial interest" part of the *Oakes* test[163]. At this stage, the Court must ask itself whether the provisions were enacted for legitimate reasons, i.e. for reasons "that warrant overriding a charter right"[164]. The kind of purposes may vary in time and a secondary purpose may become the main reason for why legislatures are interested in keeping a piece of legislation. For example, in *R.* v. *Big M Drug*

[161] Contrast *R* v. *Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 in which the Supreme Court found that the accused, Mr Sharpe, had a right to freedom of expression that encompasses child pornography but that this right was limited in a way that was justified under the section 1 analysis with *New York* v. *Ferber*, 458 U.S. 747 (1982) in which the Supreme Court of the United States "recogniz[ed] and classif[ied] child pornography as a category of material outside the protection of the First Amendment" *ibid* (White, J) at 763.

[162] In fact, scholars like David Beatty have even advanced the controversial position that constitutional precedents are simply unnecessary and that proportionality should be the only guiding principle of judges in constitutional adjudication. See David Beatty, *The Ultimate Rule of Law*, (Cambridge: Cambridge University Press, 2004) at 88-92. However, this controversial position is not limited to the "proportionality" analysis. For a sceptical account of *stare decisis* in the American context, see mainly Monaghan, "*Stare Decisis*", *supra* note 9.

[163] The Court seems to have softened its high standard. See, e.g., *Alberta* v. *Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37.

[164] Roach & Sharpe, *supra* note 154, at 69. See also Barak, *supra* note 150 ch. 9 especially for his critical discussion of Peter Hogg's position on this issue.

Mart[165], the Court examined the constitutionality of the *Lord's Day Act*[166]. This statute was passed in 1906 to provide a weekly day of recreation for workers and to secure respect for Sunday holiday in conformity with the Christian tradition. Even if the religious purpose was not the reason why the state still supported the Act, its labour-oriented reason was still persuasive[167]. However, the Supreme Court ruled that there could be no changing purposes, i.e. the Court must examine whether the *original* reasons for adopting a piece of legislation were for a "pressing and substantial interest" and not whether the contemporary reasons are. Thus, the Court struck down the impugned provision[168].

Even if the Court prohibits changing purposes, it does not mean that the seriousness of a purpose cannot be complemented and substantiated *ex post facto*. For example in *Irwin Toy Limited*, the Court said

> Where the basis for its legislation is not obvious, the government must bring forward cogent and persuasive evidence demonstrating that the provisions in issue are justified having regard to the constituent elements of the s. 1 […] inquiry […] In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert ex post facto a purpose which did not animate the legislation in the first place (see *Big M Drug Mart*, […]). However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective […]. It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.[169] (Footnotes omitted, emphasis added)

Even if the Court is generally reluctant to strike down a piece of legislation at this stage of the proportionality analysis under the *Oakes* test[170], the above citation points to a scenario worth

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[165] *Big M*, *supra* note 151. The sequel is in *R* v. *Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713.

[166] *Lord's Day Act*, (1970) R.S.C. L-13.

[167] See the discussion in Roach, *Trial*, *supra* note 72 at 156-160.

[168] The same happened with regard to freedom of speech in *R* v. *Zundel*, [1992] 2 S.C.R. 731. Compare, however, with *R* v. *Butler*, [1992] 1 S.C.R. 452. The American position on this issue recognizes to a greater extent the permissibility of changing objects of legislation. In the context of the First Amendment, see *Maryland* v. *McGowan*, 366 U.S. 420 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Super Market of Massachussets Inc.*, 366 U.S. 617 (1961); *Two-Guys from Harrison-Allentown Inc.* v. *McGinley*, 366 U.S. 582 (1961).

[169] *Irwin Toy Limited* v. *Québec (Attorney General)*, [1989] 1 S.C.R. 927, at 984.

[170] On the initial struggle to find the appropriate level of deference with regard to the "pressing and substantial interest" requirement, see Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review*, (Montréal-Kingston: McGill-Queen's Univeristy Press, 1996) at 72-76.

considering. Imagine that a legislature adopts a legislative scheme and the scheme is being struck down because, in addition to limiting a constitutional right, the state failed to prove that the piece of legislation had been adopted in pursuance of a "pressing and substantial interest". Imagine further that, in response to the Court's ruling, the legislature makes sure to gather all the data suggesting that there is indeed a problem to be solved or simply that the situation has changed enough to transform the once hypothetical problem into a genuine one. In these circumstances, a subsequent challenge to the new piece of legislation will not succeed automatically simply because the Court would be bound by its previous decision on the legislation in question. The Court would have to go through the same context-sensitive analysis and might decide that, in light of the new evidence or the new context, the limitation now seems to be proceeding from a "pressing and substantial interest". This very concrete, context-sensitive analysis of the impugned provision seems to weaken the binding force of previous constitutional precedents.

4.2 The Minimal Impairment Test

The second component of the *Oakes* test that loosens the grip of constitutional *stare decisis* in constitutional rights adjudication is the minimal impairment test. Under this prong of the *Oakes* framework, the Court examines whether there are less intrusive ways of achieving the legislative goal[171]. Often times, the attorney general justifies the infringement of a liberty by considering the hypothetical scenario of what would happen if there were no legislation in place. For example, to justify the prohibition on physician-assisted suicide, the state invoked the fact that this was necessary to prevent slippages and protect vulnerable persons[172]. However, the success of this form of counter-factual argument is based on the fact that the worse scenario remains hypothetical. In other words, as long as the counter-factual scenario invoked by the state does not occur, it is difficult for the Court to deem the limitation unnecessary. However, as the situation evolves in other jurisdictions, what might have seemed necessary in one case at one point in time may not seem necessary in a later case. Other countries that had similar legislation to Canada's might have changed their legislation without the hypothetically catastrophic scenario actually occurring. The experience of other jurisdictions might show that the limitation of a right is actually not necessary to achieve the legislative purpose. The *Carter* decision on physician

[171] *Alberta* v. *Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37.

[172] *Rodriguez*, *supra* note 17 at 558-561 and at 613-614.

assisted-suicide is the best example of such a new assessment of the justification for the limitation of a right in light of the legislation of foreign jurisdictions[173].

In 1993, with a 5-4 decision in *Rodriguez*[174], the Court upheld the criminal prohibition of physician assisted-suicide on the basis that it was necessary to prevent slippages and protect vulnerable persons. The majority criticized the dissent for adopting a position that "recognizes a constitutional right to legally assisted suicide beyond that of any country in the western world, beyond any serious proposal for reform in the western world and beyond the claim made in this very case"[175].

When the Supreme Court was asked in 2015 to revisit this decision in *Carter*[176], the situation had changed. The first instance Judge Lynn Smith of the British Columbia Supreme Court began by distinguishing between adjudicative facts on the one hand and legislative and societal facts on the other hand. Regarding adjudicative facts, what she describes as "who, what, when, and where", the situation in *Carter* was very similar to *Rodriguez*[177]. Judge Smith explains, on the other hand, why the societal facts were so different:

> The most notable difference between the records in this case and in *Rodriguez* is that the record in this case includes: evidence pertaining to the experience with legal physician-assisted death in Oregon, Washington, Belgium, Luxembourg and the Netherlands and with assisted death in Switzerland; opinion evidence of medical ethicists and practitioners informed by the experience in jurisdictions with legalized assisted death; specific evidence pertaining to current palliative care and palliative or terminal sedation practices; and evidence regarding prosecution policies in British Columbia and the United Kingdom formulated since *Rodriguez*.
>
> The evidence regarding the experience in jurisdictions permitting physician-assisted death was available neither at the time *Rodriguez* was decided, nor when *Wakeford* was considered.[178]

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[173] *Carter*, *supra* note 16.

[174] *Rodriguez*, *supra* note 17.

[175] *Ibid* at 582.

[176] *Carter*, *supra* note 16.

[177] On the distinction between adjudicative and societal facts, see Bloodworth, *supra* note 21. See also Adryan Toth, "Clarirfying the Role of Precedent and the Doctrine of Stare Decisis in Trial and Intermediate Appellate Level *Charter* Analysis", (2013) 22 Dal J Leg Stud 34. See also the critical discussion in Danielle Pinard, "La promesse brisée de *Oakes*", in Luc B. Tremblay & Grégoire C.N. Weber, eds, *La Limitation des droits de la Charte : Essais critiques sur l'arrêt R c. Oakes*, (Montréal : Thémis, 2009) 131.

[178] *Carter* v. *Canada (Attorney General)*, 2012 BCSC 886, at para 944-945.

The Supreme Court relied heavily on the assessment made by the first instance judge in determining the necessity to prohibit all forms of physician-assisted suicide for the sake of preventing slippery slope scenarios and protecting vulnerable persons[179]. The Supreme Court found that, in light of the practice that had emerged in foreign jurisdictions over the last twenty years, the prohibition on physician-assisted suicide did not seem necessary anymore since there were examples where, even with a legalized right to obtain a physician-assisted suicide, vulnerable people were still protected and the slippery slope scenario actually never materialized.

What this shows is that a legal requirement often seems necessary only when compared to other hypothetical scenarios. As long as the Supreme Court is willing to look at other jurisdictions, it will be possible to reassess whether a given legislative scheme is still "necessary" to vindicate a specific legislative purpose and whether the once hypothetical scenario actually occurred or not elsewhere[180]. Therefore, the weight of constitutional precedents will be weakened as the situation changes in other jurisdictions regarding the right at stake.

4.3 Proportionality *Stricto Sensu*

The third element in the *Oakes* test that weakens the precedential authority of previous constitutional decisions is its last step: the proportionality analysis *stricto sensu*. As Chief Justice Dickson puts it in *Oakes*, "there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance""[181] (emphasis in original).

At this balancing stage, the Court achieves something similar to an impact analysis - it must weigh the advantages of achieving the goal pursued by the impugned provision with the impact of the limitation on the rights-bearer. If the circumstances change and the severity of the

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[179] *Carter*, *supra* note 16 para 117.

[180] It is very interesting to note, in this respect, that the United States Supreme Court rejects both the type of proportionality analysis used by the Supreme Court of Canada and other courts around the world and the reference to foreign decisions. I think that these two elements are somewhat linked but, unfortunately, I cannot explore this question in full depth here. See, Weinrib, *supra* note 45.

[181] *Oakes*, *supra* note 148 at para 70. There has been a rereading of this requirement in *Dagenais* v. *Radio-Canada* where Chief Justice Lamer, for the majority, held that the essence of the *Oakes* test was to ensure that the effect of the limitation should be outweighed not by the *objective* itself but by the *effect* of the legislation in trying to achieve this objective. *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, at 887-888 (Lamer, CJ). For a critical discussion of the proportionality analysis *stricto sensu*, see Peter Hogg, *Constitutional Law of Canada*, 2015 student ed (Toronto: Carswell, 2015) at 38-43 - 38-47.

limitation of the right increases, the Court can reassess if the benefits of the legislation outweigh the effects of the limitation. The Court can thus re-examine its previous decisions when the circumstances that prompted it to uphold the limitation of a right have changed significantly since the prior assessment of the constitutionality of that limitation. As mentioned above, this balancing analysis resembles an impact analysis, and the context in which the limitation takes place has an influence on the Court's analysis. An example will make this clear.

When the Court dealt with the challenge launched by Terri Jean Bedford, a brothel owner who attacked certain provisions of the *Criminal Code* that regulated the sale of sex services[182], the Court thereby had to revisit its 1990 decision on roughly the same question. In the *Prostitution Reference*[183], the Court had held that these impugned provisions of the *Criminal Code* were constitutional. Before 2013, the *Criminal Code* forbade public solicitation for the purpose of selling sex services, to keep a common bawdy-house and to live on the avails of prostitution. On the one hand, the Court, relying on an older analytical approach to section 7 of the *Charter* which protects "life, liberty and security of the person", had decided then that the prohibitions were constitutional in that they did not infringe on the sex workers' right to liberty. On the other hand, the Court had concluded that even though the provisions limited the sex workers' freedom of expression the limitation was justified under section 1. When the *Bedford* case made its way up to the Supreme Court, however, new arguments based on the protection of the "security of the person" of section 7 of the *Charter* were presented. In short, Terri Jean Bedford and the other plaintiffs argued that the impugned provisions of the *Criminal Code* forced them to exercise their otherwise legal job (i.e. selling sex services) in a dangerous environment.

The Court did not directly address the question of horizontal *stare decisis*. Since the analytical framework for evaluating the constitutionality of infringements on section 7 rights had changed since 1990, the Court thought it was correct to set aside the holding of the *Prostitution Reference* on this question. Moreover, the Court emphasized that the first instance judge was correct in reconsidering the conclusion of the *Prostitution Reference* for two reasons. First, the question of "security of the person" had not been addressed; only the protection of "liberty" had been analyzed. Second, new evidence that was not available in 1990 was presented to the first instance

[182] *Bedford, supra* note 5.

[183] *Prostitution Reference, supra* note 15.

judge. Since the Supreme Court found that the provisions infringed on the right to security of the person and that these limitations were not justified under section 1, it did not reconsider its 1990 holding with regard to the limitation of freedom of expression.

Many elements in the analysis of the Court in *Bedford* are not very different from the traditional way of "distinguishing" a precedent[184]. For example, under traditional Common Law reasoning, a previous decision is not necessarily overruled simply because a new test or framework has been substituted by the Court to the old one, bearing on the case for the analysis of certain provisions or certain rights. However, the Court also pointed to a very important element: when new social science evidence "that fundamentally shifts the parameters of the debate"[185] is gathered and presented to the Court, the conclusion of the previous decision should be re-examined.

This means that if a decision at time A examines the balance between public interest and the limitation on the right, its conclusion should be reassessed at time B if new evidence gathered since then seems to suggest that the balance has been upset. For example, new evidence might conclude that a provision which looked benign when it was adopted actually ends up having unintended consequences or a greater impact on the rights at stake than was the case when the provision was first upheld by the Court. The Court would then be authorized to re-examine the question anew. As the context changes and the balance is upset or simply as new evidence is gathered about that balance, the Court will have to revisit its previous decisions in a context-sensitive fashion.

In the interpretation of the section 1 framework, the Supreme Court of Canada has been less formalist than its American counterpart with its tiers of scrutiny review[186]. Instead of focusing its analysis on drawing clearly marked delineations of the scope of each right, the Court has provided a broad and liberal interpretation while recognizing that rights can be limited and that this limitation has to be examined in a context-sensitive fashion. This has led the Court to disregard previous decisions more easily, since the general proportionality test required of the

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[184] See, e.g., Rupert Cross, *Precedent in English Law*, 3rd ed (Oxford: Clarendon Press, 1977) at 127-133.

[185] *Bedford, supra* note 5 at para 42.

[186] For a history of the intellectual origins of the general apprehension towards "balancing" in the United States and the continuous appeal of formalism in American constitutional thought, see Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meaning of the Postwar Legal Discourse*, (Cambridge: Cambrdige University Press, 2013).

Court needs to be done periodically. In other words, proportionality loosens the grip of *stare decisis* in constitutional cases. A case decided under the *Oakes* test, in a certain sense, does not lay down a *rule*, as traditional Common Law adjudication theory suggests, that is, something that is applicable but that can be overruled by a higher rule. Instead, precedents have come to play the role of "principles", i.e. legal elements that fill in the gaps of the law but whose status is unclear[187]. They are more or less authoritative but they are not rules that either apply or not[188]. This leads to a less formalistic account of adjudication; adjudicating a constitutional case is less a matter of applying the rules than of exercising contextual moral judgment and weighing different sources of authority. This in part has led to a decline of formalism in Canadian constitutional adjudication which is the subject of the next section.

5. Precedents and Formalism

I have said in the second section that the narrativization of constitutional thought is somewhat linked to formalism about constitutional precedent because it emphasizes the necessity of a given decision. I have then shown in the third section how constitutional super-precedents constitute a body of fixed points of agreement with regard to the official constitutional narrative that is unfolding and that Canada, unlike the United States, lacks such fixed point of agreements. In the fourth section I have shown how the Canadian and the American modes of reasoning about fundamental rights have been framed differently and how this has impacted the relative bindingness of constitutional precedents on subsequent decisions in Canada. I shall now turn to a claim that I have alluded to before: how narrativization, constitutional super precedents and constitutional methodology all partake in a more formalistic conception of constitutional law in general, and constitutional precedents in particular, in United States than in Canada. I am aware that formalism is a very contentious word and that, especially in the United States, it has acquired both a historical and a technical meaning[189]. In order to avoid any misunderstanding, let me briefly explain what I mean by "formalism".

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[187] On the distinction between rules and principles and especially how the two differ when they conflict, see Dworkin, *Taking Rights Seriously*, *supra* note 95 at 26-27.

[188] Neil Duxbury summarizes well the distinction between a rule-like conception of precedents and a principle-like conception of precedents. See Neil Duxbury, *The Nature and Authority of Precedent*, (Cambridge: Cambridge University Press, 2008) at 23.

[189] For an in depth discussion, see Frederick Schauer, "Formalism", (1988) 97 Yale LJ 509. In the specific context of constitutional law and the problem of *stare decisis*, see Solum, *supra* note 4. For the historical meaning generally

In what follows, "formalism" is a used as a short-hand for a series of characteristics of constitutional adjudication. For the purpose of my analysis, it has three dimensions. First, formalism stresses the *ontological* distinction between law and politics. Whether or not this distinction *actually* exists is beyond the point; formalism simply stresses that legal judgement is distinct from political judgement. Second, formalism holds that there is an *institutional* distinction between legal adjudication and political decision-making. In a formalist view, adjudication is a matter of resolving actual disputes by applying the appropriate legal rules and following the appropriate procedures. Third, formalism has a *methodological* component in that it expresses a preference for rules over standards or principles and holds that these rules have a meaning that can genuinely constrain legal decision-making[190].

Therefore, what I wish to show in this last section is that the United States Supreme Court has adopted a rather more formalist style than its Canadian counterpart in all three dimensions listed above[191]. In terms of the institutional and ontological dimension, the American constitutional culture has been obsessed with the institutional separation of powers and the ontological

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associated with formalism, see Neil Duxbury, *Patterns of American Jurisprudence*, (Oxford: Oxford University Press, 1997); Morton J. Horwitz, *The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870-1960*, (Oxford: Oxford University Press, 1994).

[190] Perhaps one of the most forceful formulation is in Antonin Scalia, "The Rule of Law as the Law of Rules", (1989) 56 U Chi L Rev 1175 and Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (Princeton: Princeton University Press, 1998).

[191] A caveat is necessary here. Mitchel Lasser has claimed forcefully that "formalism" has been seen in a negative way in the United States in recent decades. However, as a comparative project, I here simply refer to formalism in the sense discussed above. I think that formalism is best understood as a spectrum in which all dimensions outlined above play a different role. My aim is not to characterize the American or the Canadian constitutional culture *in abstracto* but simply to identify significant elements that aid in comparing their constitutional cultures and emphasizing their differences. Moreover, Lasser's analysis does not distinguish between private law and constitutional law which, especially in continental Europe, is rather distinct in terms of legal culture. See Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations*, (Oxford: Oxford University Press, 2004) at 6. See Cohen-Eliya & Porat, *supra*, note 42 at 149. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, (Cambridge: Cambridge University Press, 2000) at 32-38. For a discussion of Lasser's thesis and the argument that there is "a strong and recurrent movement in favour of (some of the elements of) formalism [in American legal thought]", see Jacco Bomhoff, "Comparing Judicial Reasoning On A Formalism/Policy Axis: Problematizing And Contextualizing "Formalism" in Mitchell Lasser's Judicial Deliberations", in Nick Huls, Maurice Adams & Jacco Bomhoff, eds, *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond*, (The Hague: T.M.C. Asser Press, 2009) 77.
In the American context, Brian Leiter writes that "[Formalist's] leading theoretical spokesman is Ronald Dworkin, but in different ways, Robert Bork and Justice Scalia are committed to such a picture of adjudication (at least as a normative ideal), as is the popular culture more generally, as any observer of a Supreme Court confirmation hearing can attest (indeed, one might think the popular culture is the last preserve of vulgar formalism!). Judges, of course, continue to write their opinions in sophisticated-formalist manner, presenting the binding rules of law as given by the materials correctly interpreted and as then requiring, as a matter of logic, a particular decision." Brian Leiter, "Legal Formalism and Legal Realism: What is The Issue?", (2010) 16 Leg Theory 111, at 112.

distinction between law and politics. In Canada, both dimensions have been recognized as important but they have never attracted the high level attention or the centrality that they have in the United States. As for the methodological dimension, the adoption of a generally more formalist approach to constitutional adjudication has influenced how precedents are conceived differently in the United States as compared to Canada. In the United States, precedents resemble rules, while in Canada, they resemble principles. I will first briefly analyze the first two dimensions and then turn to precedents and the methodological dimension in the last part of this section.

5.1 American Formalism and the Distinction Between Law and Politics

In the United States, formalism and the quest for politically "neutral principles" of constitutional adjudication have been associated for a long time with judicial restraint[192]. The idea that a strict adherence to precedents is synonymous with judicial restraint is also an idea that, in the United States, goes at least as far back as the *Federalist Papers*. In *Federalist no. 78*, Alexander Hamilton states that "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them"[193] (Emphasis added). This idea is still pervasive in contemporary official constitutional discourse[194]. It is interesting to read Walter F. Murphy in this regard, one of the pioneers of judicial politics in the United States whose writings echo those of Hamilton. In his book *Elements of Judicial Strategy*[195], Murphy identifies three elements that he calls "technical limitations" – that is, limitations which are formal and internal

[192] See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980); Herbert Wechsler, "Toward Neutral Principles of Constitutional Law", (1959) 73:1 Harv L Rev 1; Robert H. Bork, "Neutral Principles and Some First Amendment Problems", (1971) 47:1 Ind LJ 1. On the relationship between "neutral principles" and precedent as a way of taming judicial discretion, see Richard A. Posner, *How Judges Think*, (Cambridge: Harvard University Press, 2008) at 247-248. For a brief discussion of the emergence of the question of "neutral principles" in U.S. constitutional discourse, see Barry Friedman, "Neutral Principles: A Retrospective", (1997) 50 Vand L Rev 503.

[193] Alexander Hamilton, James Madison & John Jay, *The Federalist, with Letters of "Brutus"*, (Cambridge: Cambridge University Press, 2003) at 383.

[194] See the discussion about the confirmation hearings in Gerhardt, *Power*, *supra* note 109 ch. 6.

[195] Walter F. Murphy, *Elements of Judicial Strategy*, (Chicago: University of Chicago Press, 1964) ch. 1.

to the legal system rather than external to it[196] - on the power of the justices of the Supreme Court to promote their policy preferences. These formal limitations are:

1) The inability of the judiciary to initiate a constitutional dispute;
2) The question of justiciability (standing, ripeness, mootness, political question doctrine); and
3) *Stare decisis.*[197]

When viewed in this light, in the broader dimension of the distinction between constitutional law and constitutional politics, small differences in the Canadian and American approach to constitutional precedents take a whole new signification. As Professor Laurence H. Tribe explains, justiciability "involves in an important sense the description of an institutional psychology: an account of how the […] courts, or more accurately the Justices of the Supreme Court, view their own role"[198]. Justiciability (what cases the Court can hear) and standing (who can get his or her case heard) [199] have changed a lot since the adoption of the *Charter* in Canada and other scholars have already pointed out these changes[200] but they have generally failed to link them with the use of precedents.

In the United States, both the question of justiciability and standing have a prudential and a constitutional dimension[201]. Article III of the United States Constitution provides that the

[196] I use the internal/external distinction here roughly in the sense these words have in H.L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961).

[197] Murphy, *supra* note 195 at 21-23.

[198] Laurence H. Tribe, *American Constitutional Law*, 2nd ed (New York: Foundation Press, 1988) at 68. For his part, Henry Paul Monaghan writes that "these "who" and "when" questions embody fundamental assumptions as to the Court's appropriate role in our constitutional scheme." Henry Paul Monagan, "Constitutional Adjudication: The Who and When", (1973) 82 Yale LJ 1363, at 1364.

[199] For this way of presenting the distinction between standing and justiciability, *Ibid*.

[200] Lorne Sossin, for example, in the introduction of his book on the law of justiciability in Canada, writes that "[the] positivist approach […] seems to have fallen out of favour, at least in the Supreme Court of Canada." Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 9. Additionally, numerous Canadian political scientists have noted these changes. See e.g. MacFarlane, *Governing*, *supra* note 62 especially ch. 2. F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party*, (Peterborough: Broadview Press, 2000) at 54-58, [Morton & Knopff, *Charter Revolution*]; Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (New York: Oxford University Press, 2001) at 18-21.

[201] Erwin Chemerinsky, *Constitutional Law: Policies and Principles*, 5th ed (New York: Wolters Kluwer, 2015) at 48.

federal judiciary can only hear cases and controversies[202]. This provision has been interpreted as one that prohibits the Court from giving advisory opinion and requiring a strict separation of the powers between the judiciary, the executive and the legislative[203]. This constitutional dimension is absent in Canada and even the debates about the "prudential" dimension of justiciability have been much milder in Canada than in the United States[204]. Moreover, the Supreme Court of Canada has adhered to a less strict doctrine of justiciability than its United States counterpart. With regard to justiciability, on the one hand the Court rejected the "political question doctrine" quite early in *Charter* jurisprudence in *Operation Dismantle*[205] while the United States Supreme Court still adheres to this doctrine[206]. On the other hand, the approach of the Supreme Court of Canada towards ripeness and mootness has been inconsistent and generally not fully articulated. As Lorne Sossin argues, the Canadian approach to mootness and ripeness has been done in a piecemeal fashion that emphasizes the role of judicial discretion in determining whether or not the Court should hear the case at issue, effectively failing to articulate a fully coherent test to address such questions. By contrast, the American doctrines of ripeness and mootness have been debated and fully articulated in judicial tests and academic discussions. They have also been based on the

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[202] US Const art III, §2, cl 1.

[203] Chemerinsky, *supra* note 201 at 51-58. See also Tribe, *supra* note 198 at 67-69.

[204] Lorne Sossin, in the second edition of his book-length analysis on the question of justiciability in Canada repeats *ad nauseam* that Canada, contrary to the United States, has not developed a complete and coherent theory of justiciability. He contrasts all elements of justiciability with American doctrine and finds invariably that the articulation of the doctrine is more coherent and deeper in the United States than in Canada. His book is an attempt to fill in this gap in the Canadian literature. See Sossin, *supra* note 200 at 8, 30, 32-35, 107-110, 293-295. In the United States, especially with the work of Alexander Bickel on the "passive virtues" of the Court, the question of justiciability has been of quasi-constant interest in the last fifty years or so. See Alexander Bickel, "The Supreme Court 1960 Term - Foreword: The Passive Virtues", (1960) 75 Harv L Rev 40. See also, Bickel, *supra* note 74.

[205] See in particular the opinion of Justice Wilson in *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441.

[206] In the United States, the classical modern statement is in *Baker* v. *Carr*, 369 U.S. 186 (1962). D. Geoffrey Cowper & Lorne Sossin have argued that despite the decision in *Operation Dismantle*, Canada does have a political question doctrine except by name. According to them, even if Canadian constitutional law does not recognize a political questions doctrine expressly, it recognizes many central features of the American model and needs simply to be fully articulated in a coherent fashion. D. Geoffrey Cowper & Lorne Sossin, "Does Canada Need a Political Questions Doctrine", (2002) 16 SCLR (2d) 343. See also, Sossin, *supra* note 199 ch. 4. However, Peter Hogg is of a different opinion. According to him "it is clear that there is no political questions doctrine in Canada". Hogg, *supra* note 181 at 36.6.
Putting aside these doctrinal debates, I think it is reasonable to say that the political question doctrine has been more center-stage in the United States than in Canada where "it has yet to find a coherent voice to articulate [it]". D. Geoffrey Cowper & Lorne Sossin, "Does Canada Need a Political Questions Doctrine", (2002) 16 SCLR (2d) 343, at 345.

constitutional requirement that the federal judiciary only hears "cases or controversies"[207] and Sossin writes that "[a]s a result of this [constitutional] limitation, justiciability is viewed in the U.S. as a central dynamic of constitutional adjudication"[208]. The same is hardly true for Canada. Finally, the Supreme Court of Canada has extended public interest standing in *Charter* cases to public interest groups that would not pass muster in the United States where standing is always a stringent test[209]. Even if one could argue that, in substance, the concrete application of these doctrines in each jurisdiction does not differ greatly (something that, unfortunately, I cannot explore in full depth here) it seems at least clear that the centrality of justiciability and standing in constitutional reasoning and its detailed articulation in the United States is in sharp contrast with the piecemeal and rather informal and discretionary treatment these doctrines have received in Canada[210]. In the United States, all of these elements partake of a general concern for an institutional distinction between law and politics and express the American concern "both of keeping the power exercised by the judicial branch within the proper bounds and of preventing its intrusion on the prerogatives of the coordinate branches"[211].

To this list of institutional features I would add that the Supreme Court of Canada also plays a different institutional role in the constitutional structure, since it can give advisory legal opinions in the form of answers to reference questions from the cabinet[212]. This form of abstract judicial review would most likely be seen as anathema in the United States in part because of their more rigid conception of the separation of powers discussed above[213]. Likewise, the citation of foreign

[207] See Sossin, *supra* note 200 at 8, 30, 32-35, 107-110, 293-295.

[208] *Ibid* at 25. By contrast, he writes of Canada that "[i]n attempting to define justiciability, Canadian courts have rarely expressed broader concerns for the nature of judicial review". *Ibid*, at 8.

[209] See, e.g., *Canada (Attorney General)* v. *Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524. Compare with *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138, 568 U.S. ____ (2013).

[210] On the idea that mootness and ripeness have become completely discretionary doctrines, see, e.g. Morton & Knopff, *Charter Revolution*, *supra* note 200 at 54-55.

[211] Tribe, *supra* note 198 at 67.

[212] *Supreme Court Act*, RSC 1985, c S-26, s 53.

[213] I must add an important caveat here. The Supreme Court of the United States has indeed used a kind of abstract review in facial challenges for example to statutes limiting freedom of expression. However, the executive or Congress cannot refer the question to the Supreme Court. This, moreover, is an exception and cannot be compared to the power of the Supreme Court of Canada to give advisory opinions on such different constitutional matters as, for example, same-sex marriage (*Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79), the composition of the Senate (*Reference re Senate Reform*, [2014] 1 S.C.R. 704, 2014 SCC 32), freedom of association

constitutional precedents, not unusual in Canadian constitutional interpretation[214], is still seen as rather problematic in the United States[215]. As Kent Roach points out, this openness to a multiplicity of voices in the interpretation of constitutional requirements is characterized by

> an openness to outside influence and a focus on the persuasive force of law rather than its pedigree or its binding nature. Dialogue is also characterized by an interaction of multiple sources of authority. It can usefully be contrasted with a more monological and positivistic conception of authority and with judicial supremacy in enforcing constitutional rights and remedies.[216]

Moreover, as Roach points out, the Supreme Court of Canada has been more flexible and cooperative than its American counterpart in crafting remedies in *Charter* cases, for example by issuing such remedies as "suspended declarations of invalidity"[217]. Justice McLachlin (as she then was), for example, wrote that the Canadian approach to constitutional remedies started a "tradition of cooperation instead of conflict, which, if we can follow it, promises a more harmonious relationship between the judiciary and other branches of government than that which has historically prevailed in the United States."[218] The differences in the approach of each jurisdiction to constitutional remedies highlight the stronger concern in American constitutional culture that judges do not overstep their role and intermingle with political affairs. For example, the United States Supreme Court prefers as-applied constitutional challenges to facial ones – i.e. challenges to the constitutionality of the *application* of a specific provision rather than the provision itself, *in abstracto*. The U.S. Supreme Court said that "as-applied challenges are the

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and the right to strike (*Reference re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313), prostitution (*Prostitution Reference*, *supra* note 15), judicial independence (*Reference re Remuneration of Judges of the Prov. Court of P.E.I., Reference re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3), etc. The role of the Supreme Court of Canada in the constitutional structure is in this respect very different from that of the Supreme Court of the United States.

[214] See, e.g., Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study", (2009) 47 Osgoode Hall LJ 83. See also the complementary and nuanced account in Peter McCormick, "Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations", (2012) 41:2 Ottawa L Rev 209.

[215] For a good overview, see Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Court*, (New Haven: Yale University Press, 2008). See also the discussion between Justice Scalia and Justice Breyer in Normand Dorsen, "The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer", (2005) 3:4 Intl J Const L 519

[216] Kent Roach, "Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience", (2005) 40 Tex Intl LJ 537, at 539, [Roach, "Dialogues"].

[217] See, e.g., *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, *Bedford*, *supra* note 5.

[218] Beverley McLachlin, "The Charter: A New Role for the Judiciary?", (1991) 29 Atla L Rev 540, at 553.

basic building blocks of constitutional adjudication"[219]. Meanwhile, the Supreme Court of Canada has expressed its reluctance to granting constitutional exemptions for unconstitutional applications of otherwise constitutional statutes except in very specific and narrow circumstances[220]. Moreover, while the remedy of "leveling up" (what in Canada is called "reading in") has been denied in many contexts in the United States[221] and used only for Equal Protection Clause challenges[222], in Canada the Supreme Court has "read in" not only in equality cases[223] but for example also in cases regarding the presumption of innocence[224] or the protection of freedom of speech[225]. This highlights how the Supreme Court of Canada has represented itself as having a more active role in assisting or complementing the legislative's role in fulfilling its duty of compliance with the constitution. By contrast, Eric S. Fish summarizes the American situation thus:

> The American doctrine of constitutional remedies embodies a[n] […] illusory self-constraint. Judges sometimes pretend as though they face certain restrictions on account of their role. They cannot add language to a statute to make it constitutional. They cannot entertain a facial challenge when an as applied remedy is available. They must adopt an avoidance reading rather than invalidate a statute. But none of these constraints actually exist—there is no deep justification for them, and judges commonly break them in practice.[226]

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[219] *Gonzales* v. *Carhart*, 550 U.S 124 (2007) (Kennedy, J) citing Richard H. Fallon Jr. However, commentators have shown that even if the Court has portrayed itself as preferring as-applied to facial challenges, the contrary might be closer to the truth. See Michael C. Dorf, "Facial Challenges to State and Federal Statutes", (1994) 46 Stan L Rev 235. In any event, what I wish to highlight here is not the actual practice of the Court but rather the way in which the Court portrays its institutional role and its links with political institutions. See Richard H. Fallon Jr., "As-Applied and Facial Challenges and Third-Party Standing", (2000) 113 Harv L Rev 1321.

[220] See *R.* v. *Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6. In fact, as Peter Hogg writes, "The decision is limited to minimum sentences, and does not necessarily foreclose the granting of a constitutional exemption in some other kind of case. However, the reasons do not leave much room for constitutional exemptions of any kind, and the Chief Justice did not repeat what she had said in Seaboyer that a constitutional exemption "may be appropriate in some other case"". Hogg, *supra* note 181 at 40-22.

[221] See, e.g., *Virginia* v. *American Booksellers Association*, 484 U.S. 383 (1988). See in general the discussion about the U.S. Supreme Court approach to constitutional remedies in Eric S. Fish, "Choosing Constitutional Remedies", (2016) 63 UCLA L Rev 322.

[222] See, e.g., *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Weinberg* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Califano* v. *Westcott*, 443 U.S. 76 (1979).

[223] See, e.g., *Vriend*, *supra* note 72.

[224] *R* v. *Laba*, [1994] 3 S.C.R. 965.

[225] *R* v. *Sharpe*, [2001] 1 S.C.R. 45.

[226] Fish, *supra* note 221 at 386.

Regardless of what each Court actually does in practice, the way in which they represent their role is different in many respects but it follows a recognizable pattern. It accentuates concerns with limiting the political role of the judiciary in the United States while in Canada it accentuates the flexibility of the judiciary to enable the political branches to dialogue with the Court. We could say that the United States Supreme Court has been more concerned with delineating the political and judicial institutional role to avoid overlap while in Canada such overlap is understood as an indispensable intersection where the legal and the political branches can meet and dialogue.

Finally, the role of the identity of judges is more openly acknowledged in Canada. In addition to the regional representation that has always been an important consideration in the choice of appointees to the Supreme Court, justices themselves have come to acknowledge how some elements of their identity besides their legal background might influence the way in which they deal with cases. Both in their opinions and in their extra-judicial writings[227], some justices of the Supreme Court of Canada but also other legal actors have acknowledged that the identity of judges plays an important and valuable role in decision-making[228]. This candid recognition of the role of identity in judicial decision-making is markedly different in the United States where the relationship between judicial competence and identity (especially racial and gender identity) has frequently been seen as more problematic. A recent revealing example makes this even clearer.

When Justice Sonia Sotomayor appeared before the Senate Committee on the Judiciary before her appointment to the Supreme Court, she was questioned extensively about comments she had made a couple of years earlier during a speech at Boalt Hall Law School at Berkeley University. In that speech, later published in the *Berkeley La Raza Law Journal* she said that she "would hope that a wise Latina woman with the richness of her experiences would more often than not

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[227] Bertha Wilson, "Will Women Judges Really Make a Difference?", (1990) 28:3 Osgoode Hall LJ 507; Law Society of Upper Canada, "Bilinguisme et diversité vus par Claire L'Heureux-Dubé", *Gazette* (13 February 2015), online: <http://www.lawsocietygazette.ca/francais/bilinguisme-et-diversite-vus-par-claire-lheureux-dube/>. See also, Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?", (2000) 38:3 Osgoode Hall LJ 495, at 511-512.

[228] See the discussion about the evolution of judicial education and the transformation of Canadian judicial culture since the adoption of the *Charter* in Rosemary Cairns Way, "Contradictory or Complementary? Reconciling Judicial Independence with Judicial Social Context Education", in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context*, (Toronto: Irwin Law, 2010) 220.

reach a better conclusion than a white male"[229]. Sotomayor's comments haunted her confirmation hearing and she had to repudiate them[230]. In light of this revealing example, commentators have highlighted how the confirmation process reproduces the strong political myth in the United States that impartiality is synonymous with colour and gender-blindness[231].

It is striking that in Canada the Supreme Court acknowledges to a certain extent that identity is a genuine requirement even in their judicial rulings. For example, the traditional rationale for reserving three seats on the Supreme Court to Quebec judges is that this would ensure that a majority of civil-trained lawyers can hear appeals from Quebec in civil law matters[232]. However, the Court exceeded this rationale in the *Nadon Reference*, in which the majority wrote that Quebec judges are necessary for ensuring that Quebec's "social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada"[233] (Emphasis added). In writing this, the majority not only emphasizes that Quebec judges have a special training but also that they can represent the special "social values" of Quebec in the Court, values which their fellow

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[229] Sonia Sotomayor, "A Latina Judge's Voice", (2002) 13:1 Berkeley La Raza LJ 87, at 92.

[230] See, e.g., US, *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be An Associate Justice of the Supreme Court of the United States*, 111th Cong (Washington, DC: United States Government Printing Office, 2010) at 125.

[231] See, e.g., Aaron Hess & Miriam Sobre-Denton, "Setting Aside the "Wise Latina"?: Postracial Myths, Paradoxes, and Performing Enculturation in the Sotomayor Confirmation Hearings", (2014) 65:1 Communication Studies 1. For example, when George H. W. Bush announced his choice of Clarence Thomas, a black Federal Appeal Court judge, to fill in the seat of Thurgood Marshall, the champion of civil rights and long-time lawyer of the NAACP, he said that this had nothing to do with "quotas" and did all he could to dissociate his choice from any consideration of race. The racial component was, however, strategically significant. On this, see Margaret A. Burnham, "The Supreme Court Appointment Process and the Politics of Race and Sex", in Toni Morrison, ed, *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*, (New York : Pantheon Books, 1992) 290. See also, Lori A. Ringhand, "Aliens on the Bench: Lessons in Identity, Race and Politics From the First "Modern" Supreme Court Confirmation Hearing to Today", (2010) Mich St L Rev 795.

[232] See the rationale put forth by the Canadian Minister of Justice in 1949, Stuart Garson, who increased the number of civil law trained justices from two to three. He said: "We knew that when we created the Supreme Court as the court of last resort for Canada we would have to have appointed to the membership of the court enough civilians or judges trained in the civil law so that, in the event of there coming from Quebec a case involving any matters other than criminal law, it would be decided without a stalemate, having one civilian judge on one side and one on the other. That necessitated the appointment of three judges trained in the civil law on that court of last resort." Canada, House of Commons, Debates, 1949, 1st session, 21st Parl., 662-3 cited in Peter H. Russell, *The Supreme Court as a Bilingual and Bicultural Institution*, (Ottawa: Queen's Printer for Canada, 1969) at 60.

[233] *Reference re Supreme Court Act, ss 5 and 6*, [2014] 1 S.C.R. 433, 2014 SCC 21 at para 49. See also the comments made by Bertha Wilson in *R* v. *Lavallée* where she reconceptualised the doctrine of self-defence to take into consideration the women perspective. *R* v. *Lavallée*, [1990] 1 S.C.R. 852.

justices from the rest of Canada might not be as familiar with. This manifests a certain conception of law and adjudication that is different in Canada and the United States where, in the latter, adjudication is portrayed as a more formal and disembodied enterprise in which "[j]udges are like umpires […], [they] simply call balls and strikes"[234].

All these developments show that the Supreme Court of Canada has moved to play a more active and assertive role in policy making, thereby rejecting the more traditional and formalist conception of the judicial function as the mere "neutral" arbiter of actual disputes and the interpreter of the legal material supposed to govern and resolve the case at hand. As I pointed out, all these elements seem to reposition the Supreme Court of Canada in the constitutional structure. Compared to the United States Supreme Court, the Supreme Court of Canada has been less influenced by the quest for a strict distinction between law and politics, both in its ontological, institutional and methodological dimension. The Court has never searched for "neutral principles" of constitutional adjudication and has out-rightly rejected any theory of constitutional interpretation akin to "textualism" or "originalism". Instead of searching for ways to strictly delineate the realm of the legal from the realm of the political, which is a recurrent theme in American constitutional discourse, the Supreme Court of Canada has responded to criticism of its institutional incapacity to adjudicate difficult policy questions[235] by adopting a flexible attitude towards constitutional adjudication. This can be seen in a more open access to courts for constitutional litigants, a blurrier distinction between law and politics, and a collaborative attitude with regard to remedies that leaves open the possibility for the other

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[234] This famous quote is from Chief Justice Roberts during his confirmation hearing. *Roberts Hearing*, *supra* note 2 at 55-56. Benjamin Alarie and Andrew Greene provide an interesting explanation for this difference. They write that "[t]o the extent that justices are clustered in their views on an issue, the addition of a justice, even extreme, to the left or right of that cluster is likely to have little influence on the identity of the median voter – that is, the voter whose vote is pivotal to gaining a majority. However, on the more clearly divided issues, the influence of a more extreme justice may be similar to that in the U.S. – the identity of the leavers and joiners on the Court becomes important in a range of important social issues. Replacing a left-leaning justice with a right-leaning justice can make a considerable difference." Alarie & Green, *supra* note 48 at 505. However, a thorough and genuinely comparative study of the relationship between identity and judicial impartiality in Canadian and American constitutional culture is yet to be done.

[235] This is especially true for the early "left-wing" critic of the Supreme Court's jurisprudence on the *Charter*. See, e.g., Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, (Toronto: Thomson Publishing, 1994); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs*, (Toronto: University of Toronto Press, 1997); Allan C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights*, (Toronto: University of Toronto Press, 1995). See also the collection of essays published in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights*, (Toronto: University of Toronto Press, 2010).

branches to "dialogue" with the Court's rulings[236]. The emphasis on institutional flexibility and collaboration between the branches has even led some scholars to describe the relationship between the Supreme Court of Canada and the other branches as "symbiotic"[237]. As I will now show, constitutional precedents have also had a hand in this repositioning of the Court, as well as its shift to a less formalist approach towards constitutional adjudication.

5.2 Non-Formalism and Constitutional Precedents in Canada

As I have alluded to above, precedents, like other sources of constitutional law (such as the *text* of the *Charter* itself) seem to have lost their weight as formal rules. Instead of regarding precedents as rules that can be either applied or not when there is a superior rule that requires it, the Supreme Court of Canada sees precedents more as "principles", i.e. previous decisions that carry a certain moral weight. Precedents therefore warrant careful reconsideration, but they are not rules that can be either applied or overruled[238]. In contrast with the above discussion above[239] regarding Justice Kennedy's opinion in *Lawrence* v. *Texas*, the Supreme Court of Canada never outwardly said that it was overruling a previous *Charter* case[240]. From a logical point of view, the Court seems to suggest that an older decision and a new decision can be both correct in their own time, but that their validity depends on changing contextual elements. This contextual approach to precedents is far from a traditional conception where, as A.L. Goodhart writes, "[t]he prior case, being directly in point […]has become a fixed and binding rule"[241]. In fact, the decisions in *Charter* cases seem to be so context specific that they have lost the normative status of "fixed and binding rules". Precedents thus participate in a multiplication of voices in the production of constitutional meaning that Kent Roach describes as the "interaction of multiple sources of authority"[242].

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236 See Stéphane Bernatchez, *supra* note 73. For the best exposition of the dialogue theory and its links with constitutional remedies, see Roach, *Trial*, *supra* note 72.

237 Cohen-Eliya & Porat, *supra* note 42 at 139 n 20.

238 On the distinction between rules and principles and the way in which judges can resolve a conflict between them, see Dworkin, *Taking Rights Seriously*, *supra* note 95 at 26-27.

239 See *supra*, section 2.3.

240 Michael J. Gerhardt has compiled all the cases in which the Supreme Court of the United States has overruled a precedent and the language used by the Court to do so. It is striking to realize how often the Court uses the expression "is overruled" or "should be overruled". See Gerhardt, *Power*, *supra* note 109 at 206-245.

241 Goodhart, *supra* note 7 at 9.

242 Roach, "Dialogues", *supra* note 216 at 539.

This explains in part why precedents have not posed a significant problem for the Supreme Court of Canada. In the McLachlin Era the Supreme Court of Canada has been highly consensual[243]. Meanwhile, the United States Supreme Court has been highly divided in recent decades. Thus, in the United States the minority of the Court has often criticized the majority for overruling a constitutional precedent and accused them of implementing their own political preferences[244]. This rhetorical strategy has hardly been used in Canada. In fact, most major decisions that indirectly overruled previous *Charter* rights decisions were unanimous. For example, *Bedford* indirectly overruling the *Prostitution Reference*[245] was a unanimous decision written by Chief Justice McLachlin. Moreover, both the *Carter*[246] decision and the *Burns*[247] decision were not only unanimous but also *per curiam*, a rarely used but useful device in terms of political legitimacy for the Court[248].

In fact, in Canada the only disagreements about the use of precedents by members of the Court have probably been two opinions – one concurring and one dissenting - of Marshall Rothstein in two related labour law cases; *Fraser* v. *Canada*[249] and *Saskatchewan Federation of Labour* v. *Saskatchewan*[250].

In *Fraser*, Justice Rothstein filed a concurring opinion. Even though he agreed with the majority of the Court on the result, he seemed to be compensating for his absence in *Health Services*[251] (he had not been appointed to the Supreme Court yet), a case on which the majority relied.

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[243] See, Macfarlane, *Governing*, *supra* note 62 at 125-130. See also, McCormick, *Looking Back*, *supra* note 48 at 177-187; Donald Songer *et al*, *Law, Ideology and Collegiality: Judicial Behavior in the Supreme Court of Canada*, (Montreal & Kingston: McGill-Queen's University Press, 2012) ch. 8.

[244] This has been a tool used by the more conservative and the more liberal side of the U.S. Supreme Court alike. See, e.g., Justice Scalia's dissent in *Lawrence*, *supra* note 109 (Scalia J, dissent) and Justice Stevens' dissent in *Citizens United*, *supra* note 22 (Stevens J, dissent).

[245] *Prostitution Reference*, *supra* note 15.

[246] *Carter*, *supra* note 16.

[247] *Burns*, *supra* note 20.

[248] See Peter McCormick, "“By The Court”: The Untold Story of a Canadian Judicial Innovation", (2016) 53:3 Osgoode Hall LJ (forthcoming), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775251>. See also Carissima Mathen, "Dissent and Judicial Authority in Charter Cases", (2003) 52 UNBLJ 321, at 322-323.

[249] *Fraser, supra* note 30.

[250] *Saskatchewan*, *supra* note 18.

[251] *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27, [*Health Services*].

Because *Health Services* was a new precedent that seemed to stray away from a trilogy of cases dating back to 1987[252], Rothstein devoted lengthy paragraphs to explaining why, in his opinion, it should be overruled and why the jurisprudence of the Court should be realigned with the Labour law trilogy of 1987. Rothstein identified two competing requirements in the doctrine of *stare decisis*: (1) getting the right decision and (2) the value of predictability and stability in the law. Rothstein invoked many arguments in favour of overruling the *Health Services* decision that, in his view, constitutionalized a specific model of Labour relations: the Wagner model. Despite this criticism, Justice Lebel and Chief Justice McLachlin addressed each of Rothstein's points and assured on behalf of the majority that *Health Services* neither constitutionalized any specific model of labour relations nor the right to strike. However, when confronted with a somewhat similar question four years later, the Court went further, stating that "it [was] time to give this conclusion constitutional benediction."[253]

In *Saskatchewan Federation of Labour* v. *Saskatchewan*, Justice Rothstein launched a somewhat unique attack on the Court's use of precedents, this time joined by his newly appointed colleague Justice Richard Wagner. In *Saskatchewan*, the Court had to determine whether a specific legal regime of labour relations for certain public servants of the province of Saskatchewan that denied them the right to strike was compatible with the protection of freedom of association found in section 2d) of the *Charter*. The majority of the Court decided that the right to strike was a necessary component of the freedom of association and that the limitation in this specific case was not justified. Relying on their previous decisions in *Dunmore*[254], *Health Services*[255], *Fraser*[256] and two other recent labour law cases[257], they decided to overrule *sub silentio* the Labour Law trilogy of 1987, which held that the right to strike was not a component of the freedom of association. Writing for the majority, Justice Abella never fully addressed the question of *stare decisis* and, as in *Bedford* and *Carter*, she simply wrote that the lower court was

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[252] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC* v. *Canada*, [1987] 1 S.C.R. 424, *RWDSU* v. *Saskatchewan*, [1987] 1 S.C.R. 460.

[253] *Saskatchewan*, *supra* note 18 at para 3.

[254] *Dunmore* v. *Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94.

[255] *Health Services*, *supra* note 251.

[256] *Fraser, supra* note 30.

[257] *Meredith* v. *Canada (Attorney General)*, [2015] 1 S.C.R. 125, 2015 SCC 2; *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, [2015] 1 S.C.R. 3, 2015 SCC 1.

correct for not considering the previous decisions in the Labour Law trilogy as binding in light of the more recent jurisprudence of the Supreme Court. This is another instance of the avoidance strategy described above; by discussing only the strength of vertical *stare decisis*, the Supreme Court never addressed the question of the horizontal strength of its previous decisions.

But another element of the *Saskatchewan* decision is worth considering. On behalf of the majority, Justice Abella more or less adopted Chief Justice Brian Dickson's dissent in one of the cases of the 1987 Labour Law trilogy[258]. She explained her position by emphasizing the evolution of international law and norms and its importance for the interpretation of the Canadian *Charter*. As she writes:

> This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2(*d*) has arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement.[259] (Emphasis added)

Abella refers to many international instruments that Canada was part of in 1987 as well as other instruments it has adhered to since then. She also referred to "soft law" such as ILO Committee statements and interpretations[260]. These authorities consider that freedom of association includes the right to strike and Justice Abella argued that this should be taken into consideration when interpreting the protection of freedom of association included in the *Charter*. This represents a significant shift because the majority prefers an informal source of law within their "repertoire of recurring argumentative moves"[261] to an established precedent. This lends credit both to the view of Canadian constitutional law as an open-ended project, but also as a project in which the formal structures of constitutional law-making (constitutional amendments or constitutional precedents) have been replaced by a less formalist and, in a sense less positivist, conception of constitutional adjudication in which the Court dialogues with a plurality of authoritative (but not, strictly

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[258] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

[259] *Saskatchewan*, *supra* note 18 para 75.

[260] *Ibid* at para 67-69.

[261] Klare, *supra* note 38 at 166.

speaking, binding) voices[262]. Precedents are only one of several voices in this on-going discussion.

Rothstein and Wagner's criticism had two components. First, they criticized the majority for constitutionalizing a specific model of labour law which requires a delicate political exercise of balancing between the conflicting interests of unions, employees and employers. Second, Rothstein and Wagner criticized the majority for overturning the Labour law trilogy. They based their opinion on the fact that, even if the doctrinal context had evolved in the application of Section 2*d*) since the Labour law trilogy in 1987, no new social facts like those put forth in *Bedford* have occurred.

It is compelling that the two criticisms levelled by Rothstein and Wagner are linked, i.e. that the fact of lightly disregarding a previous decision on the one hand, and making a decision that involves a *political* balancing of conflicting interests on the other, are in a certain way connected. This kind of criticism that links together the usurpation of the legislative power by judges with the overruling of a previous decision that should be controlling would be more commonplace in an American constitutional decision, though it would probably be delivered with more biting rhetoric[263]. It was, to the best of my knowledge, the first time that such a criticism was being launched against the approach that the Court had taken towards its own precedents by other members of the Court themselves. However, no serious political reactions ensued, and in the end this criticism did little to affect the Canadian constitutional culture.

Only a few months later, Justices Rothstein and Wagner joined a unanimous Court in the *Carter*[264] decision that struck down the criminal prohibition on physician-assisted suicide and overruled *Rodriguez*[265]. The Court expedited the matter quickly by devoting eight short paragraphs to the question of vertical *stare decisis*. Horizontal *stare decisis* was not even mentioned, and the concerns that Justices Rothstein and Wagner had voiced about *stare decisis*

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[262] This is also what the Supreme Court did in *Burns*, *supra* note 40. See the discussion about this specific decision in Roach, "Dialogues", *supra* note 216.

[263] The best example is perhaps Justice Scalia's dissent in *Lawrence*. *Lawrence*, *supra* note 109 (Scalia J, dissenting).

[264] *Carter*, *supra* note 16.

[265] *Rodriguez*, *supra* note 17.

in *Saskatchewan Federation of Labour* had faded. Since nobody dissented (the decision was even *per curiam*), the criticism was *de facto* muted.

It is difficult, if not simply impossible, to predict if such criticism of the practice of *stare decisis* by the Supreme Court will become more frequent as the Court comes to slowly reconsider its early *Charter* decisions. However, this kind of criticism seems to have been, until now, rather marginal and I doubt that constitutional precedents will take center stage without a deeper change in the Canadian constitutional culture. All these elements show that constitutional precedents, like other legal formalities, are stronger in the United States than in Canada - at least this is how they are represented in their respective constitutional culture. Since it already navigates in calmer waters where law and politics gently intermingle, the Supreme Court of Canada has been able to avoid its previous decisions without causing the ire of public opinion or creating a major political backlash against its decisions.

6. Conclusion

In the United States, the narrativization of constitutional reasoning and a stricter adherence to the distinction between law and politics have helped represent constitutional adjudication either as the necessary application of rules or the necessary next step of an historical becoming of the constitution that is entrenched in previous constitutional history and super-precedents. American constitutional culture is rather more formalist than its Canada counterpart. In this picture of constitutional adjudication, constitutional precedents are seen as rules that judges can both easily identify and are obligated to apply unless another higher rule requires them not to. Thus, overruling constitutional precedents is seen both as a politically sensitive act that judges cannot easily commit, as well as a sign to their colleagues and the public that they are applying their own political preferences instead of the law. One of the only ways out of this conundrum is to show that the new decision does not move the constitutional project forward, but rather recovers its original course that was once derailed by an old precedent.

In Canada, a narrative of openness to change, flexibility and collaboration between the different branches of the state has led the Supreme Court to adopt a more flexible attitude towards constitutional precedents. Precedents are not seen as imperative – they are not like rules that must necessarily be applied or overruled - and overruling them does not demand heavy justification. In

fact, the neglect of constitutional precedents simply appears as the last step in the slow institutional repositioning of the Supreme Court of Canada in the constitutional culture, beginning with the adoption of the *Charter,* towards a more openly political role and a less formalist conception of constitutional adjudication. In so doing, the Supreme Court of Canada represents itself as a force that moves the country forwards without being stopped by past constitutional decisions. In Canadian constitutional culture, precedents float freely among other authoritative voices instead of consolidating fixed points of agreement about the constitutional project.

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