

THE SUPREME COURT, FEDERALISM AND METAPHORS OF MODERATION

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Ordinary words convey only what we know already; it is from metaphor that we can best get hold of something fresh.

Aristotle, *Rhetoric*

Metaphorsopenly professe deceit; to admit them into Councell, or Reasoning were manifest folly.

Hobbes, *Leviathan*

At the time of its centenary twenty-five years ago, the Court was commonly described as the umpire of Canadian federalism. This anniversary essay argues that the umpire metaphor, although imperfect, has continuing merit as an ideal for the judicial function in the post-Charter era. Reintroducing the umpire metaphor into constitutional discourse would focus attention on federalism issues. Moreover, its relatively modest scope for judicial power, by comparison to the 'dialogue' metaphor, comports with democratic principles and the Rule of Law. This renders it an attractive ideal for constitutional adjudication beyond the federalism context.

Lors du centenaire de la Cour il y a vingt-cinq ans, elle était décrite généralement comme l'arbitre du fédéralisme canadien. Dans cet article, écrit pour un autre anniversaire, l'auteure soutient que la métaphore de l'arbitre, malgré ses imperfections, continue d'être valable, en tant qu'idéal à atteindre, pour la fonction judiciaire de la Cour en cette époque «post-Charte». Réintroduire la métaphore dans le discours constitutionnel attirerait l'attention sur des questions de fédéralisme. De plus, sa portée relativement modeste en matière de pouvoir judiciaire, comparativement à la métaphore du dialogue, s'accorde bien avec les principes démocratiques et la Règle de droit. Ainsi la métaphore de l'arbitre est un idéal attrayant pour rendre justice en matière constitutionnelle même hors du contexte fédéral.

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I. Introduction

The single-most important constitutional event since the Supreme Court's last anniversary celebration in 1975 has been enactment of the *Constitution Act, 1982*, with its *Charter*, Aboriginal rights, and amending formulae. By almost any measure, decisions about the *Charter* have become preeminent by their number, media attention, perceived importance, effect on governmental powers and scrutiny by critics. Federalism, however, remains the engine of Canadian politics and the blueprint of its constitutional structure. The core tensions that inhere in Canadian federalism – between unity and diversity, Ottawa and Québec City, the centre and the regions – proceed apace and, if anything, have been exacerbated by events and processes since the *Charter* was first proposed in 1980-81. As in the pre-*Charter* era, federalism controversies continue to range from ostensibly mundane interpretative disagreements at the margins of s. 91 and 92 to intensely political conflagrations about the power to amend the constitution. The latter occasionally catapults to centre stage, as with the *Québec Secession Reference*,¹ while the former always percolates in the background. Moreover, federalism questions have dominated constitutional discussions by politicians and the public. Attempts to accommodate unity and diversity have preoccupied constitutional negotiations; for instance, they repose at the very heart of the failed Meech Lake and Charlottetown Accords. Although the challenges have mostly revolved around Québec's place in Canada, other dynamics continue to drive federalism disputes. Witness the headlines about Western alienation during Saskatchewan's bitter fight with Ottawa about agricultural subsidies in 1999-2000.² In short, federalism conflicts have not gone away. They are staples of the Canadian political diet, and in no small measure their resolution affects Canada's future as a nation. Needless to say, the Court continues to be faced with federalism questions.

On the occasion of the Court's 125th anniversary, I suggest that the metaphor of the 'umpire' of Canadian federalism, while admittedly imperfect, ought to be rejuvenated as one ideal of the Court's role in the constitutional structure. It offers a worthy aspiration. It connotes moderation and humility, and implies another metaphor of moderation, that of balance. A good umpire is impartial, aware of traditions, and duty-bound to uphold the honour of the game; a bad umpire displays bias, indifference or conceit. The umpire metaphor captures important aspects of Canadian federalism that other metaphors, now increasingly used to describe constitutional adjudication, do not possess. Moreover, the umpire metaphor aids our understanding of the new features of the constitutional landscape that were added by the *Constitution Act, 1982*. It offers insight about the legitimate scope of judicial review in this post-*Charter* era.

¹ [1998] 2 S.C.R. 217

² P. Adams, "Ill Wind blows return of Western Alienation" *The Globe and Mail* (2 November 1999) A4.

A study of metaphors in constitutional discourse is timely. The metaphor of the 'dialogue' has recently acquired considerable currency in debates about the relationship between courts and legislatures. Popularized in recent *Charter* decisions, this metaphor portrays the Court and Parliament as two participants in a conversation about the compatibility of laws with *Charter* values.³ Not coincidentally, the metaphor of the judiciary as the guardian, trustee or protector of the constitution has also gained prominence, not only in *Charter* decisions but also in cases that have protected and expanded judicial power.⁴ Metaphors about courts frequently appear with metaphors about the constitution, which is variously described as a living organism (usually a tree), pillar, or castle. Many critics of the Supreme Court's *Charter* decisions also deploy metaphor. For instance, several conservative critics derisively dismiss the many national organizations that initiate litigation, or appear in court to defend legislative gains, as the Court Party.⁵ With metaphors flying thick and fast, it is appropriate to explore their potential contribution to constitutional jurisprudence and public debate.

My focus on federalism and its metaphors is not disguised advocacy for a return to pre-*Charter* days. Even if it were possible to turn back the clock to the days when the only serious judicial review was on federalism grounds, doing so would be undesirable. I believe that the idea and practice of human rights are good things; the *Charter's* popularity with people indicates that many citizens agree. This is not surprising, given that one of the most significant social movements since World War II has been the drive for human rights. It is beneficial to both equality and liberty when elected governments justify their actions, both to the electorate at large and to the groups that are especially affected by legislative decisions. Justification is an essential component of the accountability necessary for democratic practice. Courts play an essential part in ensuring accountability, upholding political morality and fostering respect for human dignity.⁶ At the same time courts are not the primary promoters of economic and social justice, or the fundamental Canadian values of equality and inclusion. One lesson from history is that legislators have taken the lead in supporting and advancing principles of political morality. They, not courts, have implemented policies that brought a measure of economic justice, such as trade unionism and medicare; they, not courts, are the primary expositors of

³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Mills* [1999] 3 S.C.R. 668.

⁴ *Vriend*, *ibid.* at paras. 134-35; *Reference Re Remuneration of Judges of the Provincial Court of P.E.I.*, [1997] 3 S.C.R. 3 (hereinafter *Judges' Salaries Reference*) para. 123.

⁵ This metaphor was created and marketed by F.L. Morton and R. Knopf, and its latest appearance is in *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000). For a thorough review of the conservative and left critiques of the Charter and judicial activism, see J. Kelly, *Charter Activism and Canadian Federalism: Rebalancing Liberal Constitutionalism in Canada, 1982-1997* (Ph.D. Thesis, McGill University, 1998) 24-66.

⁶ Or to put the point a different way, the Court correctly decided *R. v. Morgentaler*, [1988] 1 S.C.R. 30, a decision that has become a favourite target of conservative critics.

principle.⁷ Consider two examples from the area many lawyers consider the paradigmatic terrain of principle, human rights. Elected representatives passed laws prohibiting sex-based discrimination long before the judiciary perceived such conduct as presumptively odious and demanding of justification.⁸ Furthermore, provincial legislators passed laws prohibiting discrimination against gay men and lesbians years before the Court's decisions in *Egan*⁹ and *Vriend*.¹⁰ With both examples and I could cite many more, legislators were moved by moral principle, and for their commitment many of them incurred considerable wrath from groups opposed to the laws.¹¹ It is in light of this historical lesson and political reality that one must address the question of the legitimate judicial role in rights protection, and more generally, the constitutional structure. Within that structure, "[T]he *Charter* has neither superseded federalism nor altered its logic and rationale for Canada"¹² and the judiciary will continue to be involved in federalism disputes.

This essay focuses on the umpire metaphor as an ideal about the Supreme Court's function in federalism matters. Part II sketches the function and limitations of metaphors, and describes several metaphors about courts and the constitution. Part III situates the umpire metaphor at the Supreme Court's centenary 25 years ago and describes briefly the events since 1975 that have cast the metaphor into the constitutional shadows. Part IV discusses some advantages and disadvantages of the umpire metaphor for federalism. Part V examines the umpire metaphor as a metaphor of moderation and compares it to the dialogue metaphor. I argue that the umpire metaphor offers insight into the difficult constitutional debates and disruptions caused by the *Constitution Act, 1982*.

⁷ Of course, legislators can advance conservative economic and moral principles, but they have principles nevertheless.

⁸ Beginning in the late 1960s, human rights legislation prohibited discrimination on the basis of sex. By the time the Court ruled that pregnancy discrimination was a form of sex discrimination, in *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, almost all jurisdictions had legislated to this effect.

⁹ *Egan v. Canada*, [1995] 2 S.C.R. 513 (sexual orientation is an analogous ground of discrimination prohibited by s.15 of the *Charter*).

¹⁰ In *Vriend*, *supra* note 3, the Court held that Alberta's human rights law violated s.15 of the *Charter* because the law did not prohibit discrimination on the basis of sexual orientation, and it read 'sexual orientation' into the statute. Most provinces had already prohibited discrimination on this ground, beginning with Québec in the 1970s.

¹¹ For instance, in 1993 when the Saskatchewan Legislative Assembly amended the *Saskatchewan Human Rights Code* to prohibit discrimination on the basis of sexual orientation, many politicians supported the amendment because "it was the right thing to do," not because of any perceived personal gain or to curry favour with a large number of voters. Overall, the governing party lost more votes than it gained, and some politicians who supported the amendment received hate mail and threatening phone calls from individuals opposed to the law. As Chief Commissioner of the Saskatchewan Human Rights Commission in 1993, I garnered this information from personal conversations with elected officials at the time.

¹² J. Hiebert, "The *Charter* and Federalism: Revisiting the Nation-Building Thesis" in D. Brown and J. Hiebert (eds.), *Canada: The State of the Federation, 1994* (Kingston: Institute for Intergovernmental Affairs, 1994) 153 at 156.

Thus, attending to federalism metaphors is an entry point into the larger jurisprudential question about the legitimate functions of the judiciary in a constitutional democracy.

II. Features of Metaphors

First, let us be clear about the functions and importance of metaphors. In their classic text, Lakoff and Johnson describe metaphors simply: "The essence of metaphor is understanding and experiencing one kind of thing in terms of another."¹³ Metaphors provide or enable meaning; we take something complex, about which we know too little, and compare it to something about which we know more. They structure our understanding of something about which we possess only incomplete knowledge. For instance, to apply a sports metaphor to a legal activity – 'the Court is the umpire of Canadian federalism' – is to understand the Court's complex relationship with the governmental units in the federal system partially in terms of our understanding about baseball or other sports games that rely on umpires. As Aristotle first said, good metaphors offer fresh insight. They cannot describe relationships completely or perfectly, but they give some illumination about what the relationships are or ought to become. Law and legal institutions are no exception to the pervasiveness of metaphorical understanding. "In law, metaphors are everywhere."¹⁴ Indeed, Lakoff and Johnson begin their study with the metaphor, 'argument is war,' which structures much of legal practice.¹⁵

The most important feature of metaphors is that people take actions and make decisions on the basis of their metaphorical understandings. The metaphor, 'corporation is person', is a good example. It has not only justified countless legal acts by both the judges and legislators – it has generated them.¹⁶ In

¹³ G. Lakoff and M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) 5.

¹⁴ G. Minda, *Boycott in America: How Imagination and Ideology Shape the Legal Mind* (Carbondale: U. of Southern Illinois Press, 1999) 12.

¹⁵ *Supra* note 13 at 3-6; see also Minda, *ibid.* at 57. Judge Sandra Day O'Connor is a recent convert to exploring alternative metaphorical conceptions of argument: S. Day O'Connor, "Professionalism" (1999) 78 Oregon L.R. 385 at 388. She suggests discourse, while Lakoff and Johnston suggest argument as dance.

¹⁶ When the corporation was emerging as a business structure and lawyers knew little about it or where it fit into their conceptual map, they compared it to what they did know about, namely, persons. We have lived with the consequences of corporate personhood ever since, and its derivative metaphors, such as corporate speech. The assumption of personhood so deeply and pervasively underlies corporate regulation that many lawyers have difficulty thinking about corporations in any other way, and do not even recognize corporate personhood as a metaphor. Indeed the legal lexicon now defines person as including metaphorical persons (in the parlance, 'legal persons') as well as real, human persons. For lawyers, the definition of person was changed to make the metaphorical real. See Minda, *supra* note 14 at 68-73, 82. His examples are compelling, such as the early judicial reaction to labour strikes, where the solitary corporate 'person' was seen as attacked by a large number of workers.

constitutional law as well, metaphors have structured legal decisions, whether adjudicatory or legislative ones. For instance, the metaphor of 'the marketplace of ideas' has guided decisions about freedom of expression.¹⁷ Because metaphors matter, they deserve attention.

The partial understanding presented by metaphors has several consequences. First, as Hobbes warns, metaphors have the power to deceive. Because they describe phenomenon only incompletely, they conceal or suppress what they do not reveal. Their partiality may lead to "distortion and inhumanity,"¹⁸ and they may justify degrading and exclusionary actions. As one example of metaphorical justification for degradation, Lakoff and Johnson give the metaphor of 'labour is a resource.'¹⁹ The imperfect explanatory power of metaphors, and their resultant capacity to deceive, calls for deliberation about the selection of metaphors and vigilance about their dangers.

A second consequence of a metaphor's necessarily limited descriptive and creative power is that understanding a complex activity or relationship needs more than one metaphor. Because metaphors restrict and conceal, "an adequate conceptual system requires alternate, even conflicting metaphors for a single subject, and our daily living requires shifts of metaphors for fullness of thought and action."²⁰ Each metaphor may emphasize a different aspect or ingredient of a complex relationship. Law, as a complex phenomenon, admits of various metaphors, as Milner Ball points out in his extended analysis of the 'law as bulwark' metaphor and his proposed alternative, the metaphor of 'law as medium.'²¹ The Court's relationships with other actors in Canadian federalism certainly qualify as a complex phenomenon, and one can expect that several metaphors will be needed to describe and construct the relationships. Consequently, examining metaphors about the judicial role in the constitutional structure leads simultaneously into metaphors about the constitution and, more generally, the legal system. Metaphors that judges use to describe courts tell us a lot about how they see the constitution, and the reverse is also true; the metaphors used to describe the constitution also tell us about how judges perceive their role.

In federalism jurisprudence over the past 125 years, the two most important metaphors about the constitution have been the 'living tree' and the 'ship of state.' They were articulated in quite different cases and have quite different features. For one thing, they accord different weight to history. As every student

¹⁷ H. Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale: Southern Illinois University Press, 1992) 49-72; for Canadian examples of its use, see *R. v. Keegstra*, [1990] 3 S.C.R. 697, and *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199.

¹⁸ Bosmajian, *ibid.* at 42.

¹⁹ Lakoff and Johnson, *supra* note 13 at 67; S. Sontag, *Illness as Metaphor* (New York: Farrar, Straus and Giroux, 1977) gives the now-classic mapping of the oppressive deployment of metaphors about tuberculosis and cancer in political discourse.

²⁰ M. Ball, *Lying Down Together: Law, Metaphor and Theology* (Madison: University of Wisconsin Press, 1985) 22.

²¹ *Ibid.* at 23-36.

knows, the 'living tree' metaphor first appeared in the justly famous *Persons* case. Lord Sankey interpreted a federal executive appointment power as including the power to appoint men and women to the Senate, writing the most cited passage in Canadian constitutional history: "The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits."²² In describing the constitution as an organism, the metaphor directs interpreters to ensure that the meaning of the constitutional text keeps pace with the times. It speaks against giving too much weight to history, of allowing historical meanings to dictate modern-day understandings. However, while the living tree metaphor implies growth, it is growth with roots, which has the potential to respect the text and precedent. The 'ship of state' metaphor, by contrast, arose in the *Labour Conventions Reference*, a classic contest between federal and provincial legislative powers, where a broad interpretation of federal powers would have diminished provincial autonomy. Lord Atkin offered another metaphorical guide to interpretation: "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."²³ In comparison with the living tree, the 'ship of state' metaphor connotes a human artifact, one that is built once and for all, although it is dynamic and can move over new waters.

These two famous metaphors have been recently joined by a third. In the *Judges' Salaries Reference*, Chief Justice Lamer described the constitution as a castle: "the preamble...serves as the grand entrance hall to the castle of the Constitution."²⁴ Castles are fortresses, built for protection; this metaphor is a variant of a common metaphor to describe law, the law as bulwark.²⁵ Furthermore, the castle metaphor connotes solidity, not dynamism, unlike the 'ship of state' metaphor, which implies that the country moves forward. The castle metaphor seems to resonate less with conventional understandings about the constitution than the other two metaphors. For one thing, it connotes imperialism, which may have partly formed the *British North America Act* in 1867, but has decidedly less cachet as a constitutional ideal now. As a medieval and aristocratic building, a castle does not cohere with the democratic sensibilities of modern times.²⁶

For our purposes, what these metaphors about the constitution entail or reveal about understandings of the judicial function is important. The 'living tree' metaphor coheres with the metaphor of the judiciary as one branch of government, also subject to change and growth. However, it also coheres with an alternative metaphor, the judiciary as the lifeblood of the constitution, which

²² *Edwards v. A.-G. Canada*, [1930] A.C. 114 at 136.

²³ *A.-G. Canada v. A.-G. Ontario (Labour Conventions)*, [1937] A.C. 326 at 354.

²⁴ *Supra* note 4 at para. 109.

²⁵ Ball, *supra* note 20, extensively discusses the 'law as bulwark' metaphor.

²⁶ If one did want to describe a federal constitution in architectural terms, a condominium complex would be a more apt metaphor in the year 2000, with its shared common spaces (the central government) and private apartments (the provinces).

Chief Justice Dickson suggested in *R. v. Beauregard*.²⁷ On this view, the judiciary becomes the essential element of the living tree, which is a very different sense of the importance of judges to the constitutional order. In a similar manner, the castle metaphor generates several alternative images of the judiciary. As one variant of the 'law as bulwark' metaphor,²⁸ it implies the metaphor of judges as trustees or guardians. A trustee is a protector, one charged with guarding another person or object. Judges have used the metaphor of 'trustee' or 'guardian' since the 1970's²⁹ to describe their constitutional responsibilities. Alternatively, a castle connotes a king, and the metaphor casts judges as kings or princes.³⁰ Both the trustee and the prince metaphor imply a hierarchical relationship between judges and legislators, an entailment that fits with the reasoning and explains the result of the *Judges' Salaries Reference* and its progeny.³¹ The ship of state metaphor is more complex. Nothing in the metaphor implies that the judiciary is the captain, rather than passengers or crew.

In several recent *Charter* decisions, the Court has used the metaphor of the 'dialogue' to describe its activity of reviewing legislation for *Charter* violations, as part of an effort to allay concerns about judicial usurpation of legislative power. In *Vriend*, Iacobucci J. explained this conception of the relationship between judicial review and democratic principles:

In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives....By doing this the legislature responds to the courts; hence the dialogue among the branches (references omitted).³²

In a later decision, *R. v. Mills*, the majority opinion explained that the dialogue indicates respect toward Parliament. "Just as Parliament must respect the

²⁷ *R. v. Beauregard*, [1986] 2 S.C.R. 56 at 70. Chief Justice Dickson says that judicial independence is the lifeblood of constitutionalism; this is a more palatable way of saying that judges are the lifeblood.

²⁸ P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 157: "At the heart of the Court's vision is the belief that judges and lawyers are the central pillar in the defense of constitutional government in Canada."

²⁹ See *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576 at 590 for early use of guardian language.

³⁰ R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 407, does not hide this metaphorical basis of his theory: "The courts are the capitals of law's empire and judges are its princes."

³¹ *Judges' Salaries Reference*, *supra* note 4; its progeny have protected the judiciary from changes to its practices; *Rice v. New Brunswick* (1999), 181 D.L.R. (4th) 643 (N.B.C.A.) (provincial legislation cannot eliminate supernumerary status); *Reference Re: Territorial Court Act* (1997), 152 D.L.R. (4th) 132 (N.W.T.S.C.) (impermissible to appoint judges for fixed terms); *Ontario v. O.P.S.E.U.* (1999), 180 D.L.R. (4th) 549 (Ont. Div. Ct.) (independence of judiciary precludes unionization of judges' secretaries).

³² *Vriend*, *supra* note 3 at para. 138.

Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist upon slavish conformity would belie the mutual respect that underpins the relationship between the courts and the legislature that is so essential to our constitutional democracy".³³

With respect to judicial function, the dialogue metaphor connotes a relationship of equality between courts and legislators. By itself, it does not generate a new or unique metaphor about the constitution. However, the Court uses the dialogue metaphor with another one, that of courts as the trustee or guardian of the constitution. According to the Court, when elected representatives enacted the *Charter* "as part of a redefinition of our democracy," a necessary part of this design was for the courts to be "trustees of these rights insofar as disputes arose concerning their interpretation."³⁴ Thus it is because the courts are trustees of the constitution that they engage in a dialogue with legislatures. The trustee metaphor is critical to the success or force of the dialogue metaphor, but it introduces a paradox. A dialogue implies equality between participants, while the trustee metaphor implies a hierarchical relationship – the courts are superior to legislatures because they are entrusted with guarding the constitution as a whole.

It is against this background that I turn to the umpire metaphor in federalism. But first, let me make one methodological point. For the most part, when I speak of the judiciary I refer to a court rather than individual judges. In doing so, I am speaking metaphorically.³⁵ To say further that a court serves as an umpire or engages in dialogue is to pile metaphor on metaphor. However, the word 'court' reminds us that the decisions from judges are not merely decisions of individuals. Their opinions are shaped by the fact that they write as justices of a particular court, participants in an institution with traditions, purposes and values. In other words, the Supreme Court is not a haphazard collection of nine individuals, free to pursue their own policy convictions. Decisions result from the interplay of a judge's personal beliefs with many institutional factors.³⁶

³³ *Mills*, *supra* note 3 at para. 55.

³⁴ *Vriend*, *supra* note 3 at paras. 134-35.

³⁵ Like any metaphor, it presents dangers. Bosmajian, *supra* note 17 at 43, states that calling a judge by the tropological language of 'court' and 'bench' is "freeing the human being sitting in judgement from prejudice, emotion and bias."

³⁶ I. Greene et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer and Co., 1998) at 199, lists four critical factors in appellate decisions: the law; judges' personal values; the court's procedures; and interpersonal judicial relations in the court. For American perspectives on judicial values, institutional structures and other variables, see C. Clayton and H. Gillman (eds.), *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999).

III. *The Current Constitutional Context of Federalism*

Twenty-five years ago, on the occasion of the Court's 100th anniversary, the most common metaphor to describe the Court's relationship with other governmental actors came from the sports world: the Court as the umpire of Canadian federalism. It described the way in which politicians and the public had come to understand the Court. "Both in the popular imagination and in the view of most Canadian statesmen, the primary role of the national Supreme Court is to act as the final arbiter of the Constitution or the 'umpire of the federal system'."³⁷ The metaphor was used by judges, such as Chief Justice Laskin,³⁸ and by writers who were generally supportive of the Court's jurisprudence, such as Bill Lederman³⁹ and Peter Russell.⁴⁰ It was also the preferred choice of the Court's critics, of which the most provocative was the law professor, Paul Weiler, the constitutional *enfant terrible* of his time. In Weiler's wide-ranging study of the Supreme Court, which he released in 1974, he titled his chapter on constitutional matters, "The Umpire of Canadian Federalism," arguing that the Court had been a poor umpire to date and, moreover, that the federalism 'game' did not need one.⁴¹ Occasionally in scholarly discussions the umpire became the arbiter. Either variant portrayed the Court as a dispassionate and disinterested adjudicator of disputes between opposing governments.

At the time, critics lamented the under-development of theoretical understandings of judicial review. In 1970, in a masterly study of the Privy Council's federalism decisions, the political scientist Alan Cairns had lambasted the pre-1949 critics for ignoring theoretical questions about the legitimate tasks for a court. In summarizing the critics' arguments, he concluded: "Their chief weakness lies...in their failure to produce a consistent, comprehensive definition of what can legitimately be expected from a particular institution, a definition necessarily related to the specific task of that institution in the complex of institutions which make up the political system as a whole."⁴² Weiler's anniversary essay, written a year after the release of his book, applied the same conclusion to his contemporaries. He chastised legal academics for giving insufficient attention to theoretical issues and, consequently, insufficient aid to

³⁷ P. Russell, "Constitutional Reform of the Canadian Judiciary" (1969) 7 Alta.L.R. 103 at 123.

³⁸ Laskin J.'s description of the Court as "the umpire of the Canadian constitutional system—the only umpire" is quoted in S. Clarkson and C. McCall, *Trudeau and Our Times: A Magnificent Obsession* (Toronto: McClelland and Stewart, 1990) 350.

³⁹ W.L. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 C.B.R. 597 at 615.

⁴⁰ Russell, *supra* note 37.

⁴¹ P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) at 155-85.

⁴² A. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. Journal of Pol. Sc. 301 at 342.

the judiciary in its grappling with complex issues.⁴³ He admitted that in his book he had recommended abolition of judicial review, not because he thought it would happen, but to prod scholars and judges into thinking seriously about theoretical questions, namely, the Court's place in the larger constitutional structure.⁴⁴

One lawyer who took up the challenge of developing a theory for the judicial function of umpire was Bill Lederman. In composing his centenary essay on the Court's role in the Canadian political structure, he responded to the political scientist, Alan Cairns, and the law professor, Paul Weiler.⁴⁵ Bearing the title, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation," his essay elaborated upon the Court's function as the federalism umpire and offered a theoretical justification. The subtitle accurately reflected Lederman's view of the court's role in the constitutional structure. An unabashed fan of federalism, he appreciated the democratic advantages of divided powers.⁴⁶ His understanding of the "essential operating jurisprudence" of Canadian federalism revolved around restrained and moderate interpretations of the scope of any one particular head of power, especially the federal general power, 'peace, order and good government.' He appreciated the critical contribution that a reasonably stable jurisprudence made to the ongoing challenge of balancing unity and diversity. Lederman was convinced that a workable federal system, one that would reconcile unity with diversity, required an umpire to "hold the definitions of federal and provincial categories of powers to a meaningful level of specific identity and particularity."⁴⁷ He expressed his profound disagreement with Weiler's view that Canadian federalism did not need an umpire but would better manage conflict by continual federal-provincial bargaining and political compromises.⁴⁸ To the contrary, Lederman argued that the delicate balance between unity and diversity – in his words, "honouring the values of pluralism...as well as the need for a certain amount of unity" – required "sophisticated and socially sensitive interpretation of the power-conferring rules and phrases by impartial courts."⁴⁹

⁴³ P. Weiler, "Of Judges and Scholars: Reflections in a Centennial Year" (1975) 53 C.B.R. 563: "The deficiencies in Canadian judicial performance are, in large measure, a product of the failure of Canadian legal theory."

⁴⁴ *Ibid.* at 573.

⁴⁵ *Supra* note 39 at 598. After quoting Cairns' conclusion, Lederman said he was "writing as a critic who has been both chastened and challenged by what Professor Cairns has said." He later turned to Weiler's critique.

⁴⁶ *Ibid.* at 619: "I prefer federal systems to unitary ones because I believe in countervailing power among human institutions. I like to see our federal government having to compromise with provincial governments and *vice versa*. I feel more secure as a citizen when the system requires this."

⁴⁷ *Ibid.*

⁴⁸ Weiler, *supra* note 41 at 172-79, argued that the Court should restrict itself to questions of paramountcy; however, recognizing that judicial review on other grounds would not be abolished, he also advocated severe restrictions on standing.

⁴⁹ Lederman, *supra* note 39 at 619. This method of interpretation required the Court to pay close attention to the social and economic context in which powers operated.

From a federalist perspective, the year of the Court's 100th anniversary was a fitting moment to call for meditation on deeper questions about judicial legitimacy. Only 25 years had passed since abolition of appeals to the Privy Council. Metaphorically speaking, the Supreme Court was barely out of its teens. But the time for calm reflection was short.

To say that the next twenty-five years saw considerable change is, to put it mildly, an understatement. At the Court, a flurry of federalism litigation appeared because of the tumultuous events of the Trudeau era. The Court heard more federalism cases between 1975-1982 than it had from 1949-1974.⁵⁰ The style of federalism decisions also changed dramatically, beginning the very next year with the *Anti-Inflation Act Reference*.⁵¹ The Court endorsed so-called extrinsic evidence and it began actively and consistently to discuss policies, principles and social context, which both Lederman and Weiler, amongst many others, had argued were essential for sophisticated constitutional adjudication. As part of the move away from formalism, it began to pay far greater attention to academic writings and legislative history. In 1975 a Supreme Court judgment differed little in style or sources from those of the Judicial Committee of the Privy Council. Twenty-five years later, judges routinely and openly consider contextual matters, discuss policy, examine legislative history, and peruse academic commentary. During this time the Court became a noticeably public institution, with televised proceedings that began with release of its opinions in the *Patriation Reference*.⁵²

No one can dispute that the most important change was enactment of the *Constitution Act, 1982*. The Court's increased visibility and more contextual policy-oriented style have been largely due to the *Charter's* impact. *Charter* cases have become the most significant single category of cases heard by the Court, eclipsing federalism cases in terms not only of numbers but public attention. Occasionally, litigation about intergovernmental obligations or the division of powers returns to the headlines, of which the most recent example is the *Québec Secession Reference*.⁵³ But, for the most part, when the Court now addresses federalism questions, it toils in relative obscurity. And, it toils less often. The first rush of *Charter* cases before the Court in the late 1980s corresponded to a marked decrease in federalism cases throughout the 1990s.⁵⁴

⁵⁰ P. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources" (1985) 11 Can. Public Policy 161 at 162: "Over half (80 out of 158) of all the Supreme Court's constitutional decisions since it became Canada's final court of appeal have been reported in the last eight years, 1975-1982." All of them, Russell tells us, concerned the division of powers except for three cases about entrenched language rights.

⁵¹ [1976] 2 S.C.R. 373.

⁵² [1981] 1 S.C.R. 753.

⁵³ *Supra* note 1.

⁵⁴ For instance, in the past term, 1998-99, the Court rendered three non-*Charter* constitutional decisions. One was the *Québec Secession Reference*, hardly a run-of-the-mill case; another was *Re Eurig Estate*, [1998] 2 S.C.R. 565, which involved s.53 of the *Constitution Act, 1867*; the third was *Consortium Developments (Clearwater) Ltd. v. Sarnia*, [1998] 3 S.C.R. 3. In 1997-98, it rendered only two decisions; in 1996-97 only one. Of course, the *Charter* alone may not account for the decline.

In the past eight years, from 1992-1999, the Court heard only 30 federalism cases, a number that includes its opinions about 'separation of powers'.⁵⁵ Occasionally the Court discusses federalism concerns in *Charter* decisions.⁵⁶ It has been careful to ensure that the *Charter's* application does not erase parts of the original Confederation bargain,⁵⁷ or completely eliminate the policy diversity that is the hallmark of federalism.⁵⁸ However, if one turns aside from the blinding headlights of the *Québec Secession Reference*, federalism issues do not occupy a privileged position within the constellation of cases heard by the Court. This is not merely because of a decline in the number of federalism cases, a trend that by itself would not be worrisome.⁵⁹ The Court has denied leave in a number of appeals that raised unresolved federalism questions and rendered one-paragraph decisions in some cases, leading several commentators to surmise that the judges "appear to have become bored by the prospect" of dealing with division of powers doctrine.⁶⁰ For every *Hydro-Québec*,⁶¹ which explores questions of division of powers at length, there is at least one *M. & D. Farms* in which an important issue is dismissed in several unsatisfactory paragraphs.⁶²

In sum, consideration of federalism questions has diminished as a daily and definitional part of the Supreme Court's obligations and its self-identity. This is not altogether surprising. The diminution of federalism concerns may be evidence that the *Charter* is achieving the purposes that its framers, or at least some of them, had in mind. In the disputed history of the *Charter's* passage, there is no doubt that one of its political purposes was to act as an instrument of national unity. However, even if this is the case, federalism is the grid for Canadian politics and its issues need serious attention and a theoretical framework. They continue to appear in several related contexts: unalloyed federalism disputes about the allocation of legislative powers; *Charter* challenges that implicate federalism concerns; and separation of powers cases.

Federalism also demands theoretical attention because, as with the *Charter*, it involves questions of fundamental values. While federalism may be an

⁵⁵ These 30 cases represent 3.64% of the Court's caseload for the eight-year period.

⁵⁶ Most recently in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.

⁵⁷ *Re Bill 30*, [1987] 1 S.C.R. 1148; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929.

⁵⁸ *R. v. S.(S.)*, [1990] 2 S.C.R. 254; *Haig v. Canada*, [1993] 2 S.C.R. 995.

⁵⁹ Perhaps federalism cases are reverting to a 'normal' rate after the aberration of 1975-1985. As well, the *Charter* presents more possibilities to private parties, such as individuals and corporations, for challenging laws than federalism. This may raise the amount of litigation overall but also absorbs some litigation that previously would have been federalism challenges.

⁶⁰ H. Lessard et al., "Developments in Constitutional Law: The 1994-95 Term" (1996) 7 (2d) S.C.L.R. 81 at 86-87.

⁶¹ *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

⁶² *M. & D. Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, paras. 39-42.

arrangement of instrumental value, implemented in an effort to achieve the efficiencies of decentralization or local control, Canadian political philosophers also discuss "federal justice."⁶³ They argue that federalism has a moral theory and is defensible on moral grounds as a desired form of political arrangement.⁶⁴ Federalism is supported by a theory of justice, although, unlike liberalism, "[M]odern federal theory, one might say, awaits its Rawls."⁶⁵ In the Canadian context, federalism was selected not because of the efficiencies of decentralization but more because of the practical necessity and moral imperative of protecting cultural diversity.⁶⁶ These considerations may not be visible in the garden-variety federalism case, but they are critical in the big cases, such as the *Québec Secession Reference*, that involve the nature of Canada and its federal institutions.

With respect to recent federalism scholarship, in this context one can echo Weiler's remarks about a paucity of theory. Perusing the academic legal literature does not offer much enlightenment on federalism questions, other than with respect to controversies that implicate national unity directly, such as the *Québec Secession Reference*.⁶⁷ For the most part, one finds occasional articles and case comments on major decisions, such as *Hydro-Québec*.⁶⁸ The last major manuscript devoted to Canadian federalism by a legal academic was Katherine Swinton's book in 1990.⁶⁹ Academics (and I include myself) have focussed on the *Charter*. This imbalance is understandable and indeed was essential in the chaotic and anxious years immediately following the *Charter's* passage. However, the scholarship from political scientists on the relationship between the *Charter* and federalism is becoming quite rich and diverse, from the early deliberations of Alan Cairns⁷⁰ to the recent insightful study by James Kelly of the *Charter's* impact on federalism and the executive branch of government.⁷¹ To be sure, significant work remains.

⁶³ W. Norman, "Towards A Philosophy of Federalism" in Judith Baker (ed.), *Group Rights* (Toronto: U. of T. Press, 1994) 79 at 83; D. Weinstock, "Toward a Normative Theory of Federalism" (online at www.ciff.on.ca/c-papers-weinstock).

⁶⁴ S. Dion, now a politician but still a philosopher, makes these arguments in his speeches: *Straight Talk: Speeches and Writings on Canadian Unity* (Montreal & Kingston: McGill-Queen's University Press, 1999).

⁶⁵ Norman, *supra* note 63 at 97 n.6.

⁶⁶ S. LaSelle, *The Moral Foundations of Canadian Federalism* (Montreal & Kingston: McGill-Queen's University Press, 1996).

⁶⁷ The thick literature on the *Québec Secession Reference* includes a special issue of the *National Journal of Constitutional Law*: (1999) 11 N.J.C.L. 1-168. A sampling of opinion can be found in D. Schneiderman (ed.), *The Québec Decision* (Toronto; James Lorimer Ltd., 1999).

⁶⁸ There are exceptions; e.g., B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308.

⁶⁹ K. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990).

⁷⁰ His 1987 essays are collected in Alan Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston; McGill-Queen's University Press, 1992).

⁷¹ Kelly, *supra* note 5.

"The discipline of political science requires an alternative approach that breaks through conventional strictures and considers more carefully the diversity of influences that work from the 'bottom up' to affect federalism/constitutionalism in Canada."⁷²

The Court's last explicit reference to the umpire function was Chief Justice Dickson's description of judicial functions in *Beauregard*⁷³ almost 15 years ago. This case was not only the last mention of the umpire metaphor; it also began a period of sustained activism by judges about their function. In both *Charter* cases and decisions about the separation of powers, including litigation initiated by judges themselves, the Supreme Court has developed a different conception of the judicial role. Generally, it has portrayed itself as a player in the constitutional process, not as an umpire in a game. Writing at the end of the Dickson era in 1990, Jacques Frémont identified a trend in the decisions toward a bicephalous and hierarchical vision of governmental institutions. The courts are on one side, the legislative and executive powers on the other, with the two sides not equal but the latter subservient to the judicial characterization of appropriate constitutional roles.⁷⁴ In the past decade, decisions from the Lamer court, such as the *Judges' Salaries Reference*, have given added cogency to Frémont's diagnosis. The dialogue metaphor from *Charter* cases is also consistent with this understanding.

IV. *The Umpire of Canadian Federalism*

If it remains true that "the jurisprudential problem then is to achieve a balance between carefully defined unities and carefully defined diversities,"⁷⁵ the umpire metaphor offers instruction about adjudication of federalism disputes. An umpire is disinterested between parties but loyal to the game, devoid of hubris and possessed of humility. The metaphor is consistent with the expectations of governments and reminds courts about the importance of the constitutional text. It captures an ideal of impartiality and balance. It places courts in an essential but not preeminent role, and would help dispel charges of an imperial judiciary. However, the metaphor also has limitations. It mistakenly portrays federalism as a game, and not even a specifically Canadian one. It conceals both the judicial power to make up part of the 'rulebook' and the federal executive's exclusive power to select the umpires. I will describe these limitations before turning to the advantages. Overall, however, the umpire metaphor suits Canadian constitutionalism because it is an "ideal and method of moderation", and is consistent with the general themes of Canadian constitutionalism. In the often-tense Canadian federation, moderation is usually prudent counsel.

⁷² A. Dobrowolsky, "The Charter and Mainstream Political Science" in D. Schneiderman and K. Sutherland (eds.), *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 303 at 327.

⁷³ *Beauregard*, *supra* note 27.

⁷⁴ J. Frémont, "The Dickson Court, The Courts, and the Constitutional Balance of Power in the Canadian System of Government" (1990) 20 Man. L.J. 451.

A. *The Metaphor's Limitations*

No one can deny that the umpire metaphor has serious limitations as an ideal for judicial participation in federalism. Let me clear the decks by articulating its difficulties. First, the metaphor misrepresents constitutional relationships as games, when they are serious matters with widespread effects on collectivities. An umpire's decision about a player's actions has no effect and generates little interest off the field. The Court's federalism decisions, however, make a difference. In 1974, Weiler could argue that the Court's decisions did not have a great impact on federal-provincial relations. Indeed, his call for an end to federalism review was based in part on the irrelevancy of the Court's decisions.⁷⁶ In the following decade, however, intergovernmental conflict produced a flood of litigation, including many cases that involved heated controversies, with long-term results that still reverberate throughout regional memory.⁷⁷ For instance, the Court's decisions in the *Patriation Reference*⁷⁸ and the *Québec Veto Reference*⁷⁹ continue to echo rather loudly in Québec politics.⁸⁰ Other regions also have enduring memories of losses.⁸¹ To analogize constitutional relations to sports games trivializes the importance of the constitutional struggles.

Moreover, this particular game metaphor is culturally inappropriate. Umpires are primarily associated with baseball, the quintessential American sport. A more distinctly Canadian metaphor would involve the referee of hockey games. In any event, both baseball and hockey are men's games, invented by men and played, for the most part, by them. Women watch hockey, they sometimes play, but they almost never referee, a realization that will give little comfort to female judges pondering their institutional role.⁸²

Second, the umpire metaphor conceals the Court's power to create many of the 'rules' of federalism, not merely apply them as baseball umpires mainly do. While umpires have considerable discretion about the application and violation of rules, they do not create them – the baseball commissioners jealously guard that responsibility. In contrast, no one doubts any longer that judges make law.

⁷⁵ Lederman, *supra* note 39 at 619.

⁷⁶ Weiler, *supra* note 41 at 172-79.

⁷⁷ If governments are able to effect their goals in other ways, the political impact of a decision may be short-term, although the decision changes the political status quo and requires the parties to change their negotiating positions. Monahan, *supra* note 28 at 221-44, has an instructive discussion.

⁷⁸ *Supra* note 52.

⁷⁹ [1982] 2 S.C.R. 793.

⁸⁰ See generally G. LaForest, *Trudeau and the End of a Canadian Dream* (Montréal and Kingston: McGill-Queen's University Press, 1995).

⁸¹ In Saskatchewan the decision is *Can. Industrial Gas and Oil Ltd. (CIGOL) v. Sask.*, [1978] 2 S.C.R. 545; in Newfoundland it is *Re Continental Shelf Offshore Nfld.*, [1984] 1 S.C.R. 86.

⁸² See generally E. Thornburg, "Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System" (1995) 10 Wisc. Women's L.J. 225. For a specific discussion of baseball metaphors, see C. Oldfather, "The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions" (1994) 27 Conn. L.R. 17.

Supreme Court judges have said so since Bora-Laskin's time as Chief Justice.⁸³ Recognition of the Court's law-making role puts an end to the metaphors of the Court as 'finder' or 'interpreter,' where judges found or applied the law as the dutiful servants of the Constitution, mechanically interpreting the written text. These metaphors had always been difficult to apply in constitutional law, with its many judge-made doctrines of importance to governments' public policy choices; interjurisdictional immunity and paramountcy are but two examples. The question is the extent to which, or the *basis* upon which, not whether, the Court makes law when it decides federalism cases.

Third, the umpire metaphor masks a serious institutional problem: one 'team' has the exclusive power to select the umpires. As every constitutional student knows, the *Constitution Act, 1867*, gives the Governor in Council – in practice the Prime Minister – the exclusive power to appoint judges to the Supreme Court.⁸⁴ No confirmation hearings by either the House of Commons or the Senate facilitate input by parliamentarians, who would represent different interests. Neither do provinces have a formal voice in appointments, an omission about which they have complained for many decades.⁸⁵ The lack of any effective regional input into Court appointments, either by the provinces or by a national institution with effective regional representation, has been a recurring sore point in federal-provincial relations. According to Guy Tremblay, this omission has placed the Court in a defensive position because it has been denied "the crucial element of its political legitimacy,"⁸⁶ namely, acceptance of its appointments by both orders of government. Moreover, the federal executive's control over appointments has contributed to the suspicions of many provincial governments about a centralist tilt in the Court's decisions.⁸⁷

⁸³ B. Laskin, "The Role and Function of Final Appellate Courts: The Supreme Court of Canada" (1975) 53 Can. Bar Rev. 468 at 477: "Controversy has now ceased on the law-making role of judges, especially of judges of a final appellate court. Laymen may beg the question by consoling the dissenting judges of a divided court with the remark, "too bad the law was against you", but judges and lawyers know better." See also G. LaForest, "Judicial Lawmaking, Creativity and the Constraints" in Johnson et al (eds.), G. LaForest at the Supreme Court of Canada (Winnipeg: Canadian Legal History Project, 2000) 3: "I take it for granted that judges make law, that it is necessary for them to do so, and that this has been the case since earliest times."

⁸⁴ *Constitution Act, 1867*, s. 96.

⁸⁵ For example, from 1945-1985, Québec's constitutional proposals consistently raised this point. See A. Lajoie et al., "Political Ideas in Québec and the Evolution of Canadian Constitutional Law, 1945-1985" in I. Bernier and A. Lajoie (coords.), *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: U. of T. Press, 1986) 1 at 23, 49, 68.

⁸⁶ See G. Tremblay, "The Supreme Court of Canada: Final Arbiter of Political Disputes" in Bernier and Lajoie, *ibid.* at 200.

⁸⁷ The federal appointment power has permitted the provinces to reject or discount centralizing decisions. The public also dislikes this appointment power, but it prefers Parliamentary control rather than provincial input: J. Fletcher and P. Howe, "Public Opinion and the Courts" (2000) 6:3 Choices 4 at 22-25.

Not surprisingly, for many decades provinces have sought input into appointments. In the ill-fated Meech Lake accord, for instance, the Prime Minister would have selected a judge from a list of names compiled by the provinces. A similar system was included in the Charlottetown Accord.⁸⁸

B. *The Metaphor's Benefits*

The umpire metaphor also possesses features that render it attractive as a partial description and ideal of moderation. First, it fits the parties' ideal and expectations of the Court. Governments expect the Court to act as an umpire, sometimes in extremely controversial political matters. Even more telling is that they ask it to do so, and in circumstances where the Court's opinion will have far-reaching effect. While the number of references has never been great,⁸⁹ the reference procedure "has had incalculable consequences for Canadian federalism."⁹⁰ The two great modern day cases – the *Patriation* and *Québec Secession* opinions – are both references. The subject matter of references is always significant, typically involving the most heated and controversial questions of public policy. Some reference questions are of interest to citizens throughout the country, while others relate to matters of much pressing concern in one region. Almost invariably, they raise constitutional issues. A roll call of recent references reads like chapters in the narrative of Canadian history.⁹¹ The availability of the reference procedure enhances the power of the 'umpire' metaphor – the players are in a dispute about the scope and meaning of the 'rules,' and one side calls upon the umpire for a ruling. Politicians also send reference questions to the Court for strategic purposes: they may wish to avoid giving an answer themselves,⁹² forestall private litigation,⁹³ placate angry

⁸⁸ For a discussion of the Meech and Charlottetown provisions, and a defense of confirmation hearings, see G. Mitchell, "Say 'Yes' to Advice and Consent: A Reply to Bryan Williams" (1992) 50 *The Advocate* 891.

⁸⁹ From the 1990-91 term to the 1999-2000 term, the Court heard ten references, all of which involved constitutional questions except the *Milgaard Reference*, [1992] 1 S.C.R. 866.

⁹⁰ D.E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) at 7.

⁹¹ From the *Anti-Inflation Act Reference*, *supra* note 51, to the *Firearms Act Reference*, released on 15 June 2000. The only surprising feature of a list is the absence of a *Free Trade Reference*.

⁹² Sometimes the executive refers questions to the courts because it wants to avoid debate in the legislature; one widely reputed example is the Saskatchewan government's reference of a backbencher's restrictive bill about abortions to the provincial Court of Appeal: *Re: Bill 53*, [1986] Sask.D.5010-01 (Sask.C.A.).

⁹³ One example of a reference initiated by the federal executive to forestall litigation by private parties is the *Québec Sales Tax Reference*, [1994] 2 S.C.R. 715. Ottawa and Québec City supported the constitutionality of Québec's integrated sales tax, and the Court appointed amicus to present contrary arguments.

voters,⁹⁴ or gain an advantage in intergovernmental negotiations.⁹⁵ The important point is that they go to the Court for a ruling and comply with the opinions.⁹⁶ Moreover, the frequent use of references by provincial governments does not render insincere the provincial concern with the appointment process. Rather, their reliance on references shows the provincial need for, and belief in, the umpire role, even in spite of the umpire's legitimacy problems. Even an umpire picked by one side is better than none.

Second, the umpire metaphor assumes that the 'game' has 'rules', whether written in a rulebook or customarily accepted by the players, and that the umpire's job is to apply them. The complementary metaphor about the constitution is the rulebook. It may have missing pages and ambiguous provisions, which require umpires to exercise considerable judgment and create some rules, but they cannot throw it away and make up every rule as the game goes on. In the constitutional context, this aspect of the metaphor reminds us of the importance of the written documents, precedent and customary practice. It calls for a relatively restrained use of unwritten principles and other sources that lend themselves more readily to imaginative excursions. Because this feature of the metaphor directs attention to history, it acquires added cogency as a metaphor for the judicial function. Judges often make law and develop doctrine, but they are not merely social engineers with their eyes firmly fixed on the future, free to design policies without regard to what has gone on before. In evaluating metaphors, one need not resolve the often-fierce debates about the relationship between rules and principles, or law and policy, nor take a position on whether all law is politics by another name. The simple point is that any metaphor for the judicial function must contain or imply respect for textual provisions and precedent. A metaphor that accorded *no* role to history – whether the history of what legislatures have done, recorded in their laws, or the history of what other judges have done, called precedent – is not a metaphor of the judicial function.⁹⁷

The rulebook feature of the umpire metaphor brings into play a fundamental aspect of Canadian democratic structure, namely the Rule of Law. One reason for federalism is to protect smaller units by giving them entrenched autonomy in particular areas. Written constitutional provisions seek to ensure that the central government does not use its considerable clout to trample any province, and that richer and bigger provinces do not trample smaller ones. In a country

⁹⁴ For instance, the Alberta executive referred the constitutionality of the federal GST law (*Reference re: Goods and Services Tax*, [1992] 2 S.C.R. 445), not because of a serious question of constitutionality but because the hostility of Alberta voters to the tax.

⁹⁵ Besides the obvious example of the *Québec Secession Reference*, *Supra* note 1, see *Off-shore Nfld.*, *supra* note 81; the federal executive sent questions to the Supreme Court despite the fact that the Newfoundland Court of Appeal was addressing the issues.

⁹⁶ Only rarely has a province rejected the Court's legitimacy to answer a particular question, most recently with the Québec government's refusal to participate in the Québec Secession Reference.

⁹⁷ Similarly, a metaphor that accords no role to the judge's law-making power, such as the discredited 'judge as finder,' is also not a metaphor of the judicial function.

that takes its federal constitution seriously, 'might' does not make 'right'. Umpires assist in upholding the rules, which is part of the moral wisdom of the Rule of Law. Of course, rules alone have never guaranteed justice or diversity. Indeed, they may mask and legitimate power, or prevent its dispersal or diminution to better satisfy the demands of justice. Rules protect the weak if they were designed for that purpose in the first place, but in the Canadian context, that is the point of federalism rules. Protecting federalism, or call it provincial autonomy if you will, protects minorities.

Third, the umpire metaphor captures the ideal of impartiality. Umpires must view the entire field and not have blocked or partial vision. In a like manner, the Court ought to be impartial in adjudicating federalism matters. Impartiality as a feature of the umpire follows from recognizing that the rulebook, even if quite extensive, leaves room for considerable discretion and raises the question about how a judge ought to exercise that discretion. For an individual judge, impartiality requires taking the entire picture into account during the deliberations: the constitutional text, precedent, economic circumstance, history and other considerations. It means weighing all considerations and being open to persuasion. In Bill Lederman's words, judges "must have a capacity to discount their own prejudices with due humility."⁹⁸ An individual judge will attract the charge of bias if her personal preferences with respect to federalism issues coincide persistently with her opinions in controversial cases where reasonable people can disagree about the result. This is why many provincialists stamped Chief Justice Laskin's opinions with the bias label. An unrelenting centralist throughout his legal career, he rarely encountered an unconstitutional federal statute, and when he did find in favour of the provinces the stakes were low.⁹⁹ Katherine Swinton, an erudite and gracious student of the Court's federalism jurisprudence, is uncharacteristically harsh. "He was willing to depart from the political community's expectations about the division of powers and to do what he could to shift power to the federal government without an examination of the legitimacy of so doing or consideration of provincial or regional interests."¹⁰⁰

In the federalism context, allegations of partiality are most often applied to the Court as a whole. In the federalism fights of the 1970s, for instance, many provinces complained of a centralizing bias in the Court's decisions. Assessing the merit of these complaints is a complex task. The studies done at the time are generally crude, involving little more than adding the number of wins and losses. As Guy Tremblay concludes in his 1984 study, "it is impossible to evaluate the Court's performance simply by calculating the results that are favourable or unfavourable to either level of government."¹⁰¹ To look only at

⁹⁸ *Supra* note 39 at 620.

⁹⁹ Swinton, *supra* note 69 at 248.

¹⁰⁰ *Ibid.* at 254.

¹⁰¹ Tremblay, *supra* note 86 at 192.

results in assessing the question of bias would be equivalent to concluding that references have had little effect on Canadian constitutionalism because their number is small; the logic is fallacious. The centralizing tendency of *Hydro-Québec's*¹⁰² interpretation of the criminal law power, for instance, is not offset by the minor victory for the provinces in *Global Security Corp.*¹⁰³ Provinces can quite reasonably perceive a centralizing Court when they lose too many of the big and sticky cases. The umpire metaphor legitimizes asking the question of bias. When judges serve as umpires, it is appropriate to ask whether they have consistently exercised their discretion or applied the rules in favour or against one level of government.

Fourth, the umpire metaphor entails another metaphor, that of balance. The idea of balance is also metaphorical, or at least rhetorical. It implies the existence of a 'normal' state that must be returned to, or maintained, implying that the current arrangements are unbalanced and, therefore, dysfunctional. Balance is often used as a shorthand or guise for more or less decentralization, or for a change in the existing distribution of powers. Preston King's warning or disparagement of the metaphor for political theorists is apposite: "The fact is that talk of balance is a rhetorical device, too often difficult to resist. If one seeks either greater centralization or greater decentralization, it is tempting to do so in such a way as to suggest that what one seeks is not novel, but normal; not absurd, but sound; and one might invoke the metaphor of 'balance' to achieve that effect."¹⁰⁴ For courts, however, the 'balance' metaphor reminds judges that federations work better if the parties believe that the umpire is taking a balanced approach.¹⁰⁵ It also admits the possibilities of a re-balancing; if the pendulum has swung too much in one direction, it can swing back. Nothing is forever fixed. The metaphor of balance, therefore, comports well with the reality of the Canadian constitution as an on-going enterprise. It accords with the adaptability and flexibility that Stéphane Dion has called the "federal spirit."¹⁰⁶

Balance has been a consistent undercurrent or theme with many judges. For instance, it was central to Chief Justice Dickson's philosophy. Katherine Swinton, in her lengthy analysis of federalism decisions from 1974-1990, describes Dickson as 'an adept balancer, weighing the interests of federal and provincial governments in each case. He believed in concurrent powers and was reluctant to tell either level of government that it could not legislate in a

¹⁰² *Supra* note 61.

¹⁰³ *Global Securities Corp. v. B.C.*, [2000] S.C.J. No. 5 (provincial law authorizing security commission to order registrant to produce records for another jurisdiction is *intra vires*).

¹⁰⁴ P. King, *Federalism and Federation* (London: Croon Helm, 1982) 44.

¹⁰⁵ Assessing balance presents similar challenges as measuring bias. It is not accomplished by totting up the bottom lines in cases, but requires examining interpretations of substantive provisions to determine whether power has shifted significantly between the central and provincial governments over a period of time.

¹⁰⁶ Dion, *supra* note 64 at 34.

particular area; "rather, he welcomed a large area of overlap between federal and provincial powers."¹⁰⁷ The Court's great decisions also engage in balancing. The majority opinion on conventions in the *Patriation Reference* did so with law and convention, and the *Secession Reference* does so by ruling out the extreme positions on either side of the secession debate. Perhaps the Court's most respected and accepted judgments are those that consciously pay attention to balance, such as the *Québec Secession Reference*.¹⁰⁸ Moreover, successful balancing may cover or compensate for other flaws, such as institutional partiality and excessive reliance on unwritten principles.¹⁰⁹

When one moves past specific decisions and individual judges, the overall 'balance' in the federal system appears in a different light. In the past 25 years judicial interpretation has expanded the powers of the central government. The Court has permitted use of federal emergency power for non-wartime circumstances,¹¹⁰ and energized the 'national dimensions' branch of the POGG power¹¹¹ and the general branch of trade and commerce.¹¹² It has expanded the federal criminal law power.¹¹³ It has widened the immunity for federal works and undertakings from provincial laws,¹¹⁴ and the test for paramountcy.¹¹⁵ It has given Ottawa exhaustive jurisdiction over all aspects of telecommunications.¹¹⁶ The provinces have seen restrictions in their power to organize their administrative frameworks. Their power to conduct public inquiries has diminished,¹¹⁷ and they have less scope to establish innovative

¹⁰⁷ Swinton, *supra* note 69 at 293. She notes the concern of Justice Beetz and other francophones with this approach. Balancing interests in each case, especially with wide concurrent powers, may inevitably expand federal powers, and overall, balance may be better attained and preserved by Beetz J.'s classical federalism, with its exclusive spheres of power (at 316, 359-91).

¹⁰⁸ Compare the largely favourable reception of the *Québec Secession Reference*, *supra* note 1 to the almost universal condemnation of the *Judges' Salaries Reference*, *supra* note 4 which has even attracted overseas condemnation: see J. Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11 Const. Forum 60. Goldsworthy, an Australian scholar, has written the definitive legal history of the origins of Parliamentary sovereignty: *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999).

¹⁰⁹ The *Québec Secession Reference*, *supra* note 1 is an example. Its shaky legal foundation did not prevent applause from both sovereigntist and federalist leaders. See P. Monahan, "The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*" (1999) 11 N. J. C.L. 65.

¹¹⁰ *Anti-Inflation Act Reference*, *supra* note 51.

¹¹¹ *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

¹¹² *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641.

¹¹³ *Hydro-Québec*, *supra* note 61.

¹¹⁴ *Ontario Hydro v. Ontario*, [1993] 3 S.C.R. 327.

¹¹⁵ *Bank of Montréal v. Hall*, [1990] 1 S.C.R. 121; *M. & D. Farms*, *supra* note 62.

¹¹⁶ *Téléphone Guévremont Inc. v. Québec*, [1994] 1 S.C.R. 878, was the culmination of 25 years of expanding federal jurisdiction.

¹¹⁷ *Starr v. Houlden*, [1990] 1 S.C.R. 1366. Note that *Clearwater*, *supra* note 54, gives a bit more provincial scope.

¹¹⁸ *Re: Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, and its progeny.

tribunals and other regulatory adjudicatory mechanisms,¹¹⁸ organize the provincial court system¹¹⁹ or establish rules for judicial processes.¹²⁰ Some decisions have limited federal powers,¹²¹ but the general direction is unmistakable.

Metaphors that impart notions of balance and impartiality may offset the centralizing tendencies of a final court. In his comparative study, André Bzdera concludes that national courts in federations are centralist and nationalist because of strong institutional factors that link them to the central government.¹²² In the Canadian structure, not only does the federal executive appoint superior and appellate court judges; the superior court system is also unitary, with the national court serving as the final court of appeal for questions of both provincial and federal law. The Court itself has recognized the contribution of the federally selected bench to national unity.¹²³ Perhaps the umpire metaphor will only further conceal and legitimize the "gradual expansion of central legislative jurisdiction" that Bzdera argues is the main political function of a federal high court. However, it may also give pause to judges. Moreover, it provides a standard against which to assess trends in federalism cases.

In addition, metaphors of balance may also counter tendencies toward uniformity that inhere in the *Charter*. Obviously, the *Charter* must impose national standards to some extent, or it would not be an effective constitutional instrument. At the time of its enactment, many commentators expected the *Charter* to have a significant negative impact on provincial diversity. Thus far, the evidence of whether this has happened, or to what extent, is mixed. With the critical exception of Québec's language laws, the *Charter* "has not had the devastating impact on the legislative authority of Québec (and of the other provinces) that some may have feared."¹²⁴ However, the *Charter* may also be reducing diversity because policy makers take *Charter* values into account and homogenize laws at the planning level.¹²⁵ Studies have shown the *Charter's* effect on the federal bureaucracy but not the provincial ones. The Department

¹¹⁹ *Judges' Salaries Reference*, *supra* note 4, and its progeny.

¹²⁰ *Hunt v. T & N*, [1993] 4 S.C.R. 289.

¹²¹ *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (Section 96 bars Parliament from giving exclusive jurisdiction to youth courts).

¹²² A. Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" (1993) 26 Can. J. Pol. Sc. 3.

¹²³ See *Reference Re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 at para. 72, McLachlin J. (as she then was): "The presence of a federally staffed and remunerated bench across the country has served as a unifying force in Canada..."

¹²⁴ Y. de Montigny, "The Impact (Real or Apprehended) of the Canadian *Charter* of Rights and Freedoms on the Legislative Authority of Québec" in Schneiderman and Sutherland, *supra* note 72 at 21. See also Kelly, *supra* note 5, who concludes that the centralizing effect of the Court's *Charter* decisions has been overstated.

¹²⁵ For a comprehensive study of the *Charter's* impact on the federal bureaucracy, see J. Kelly, "Bureaucratic Activism and the *Charter of Rights and Freedoms*: the Department of Justice and its Entry into the Centre of Government" (2000) 42 Can. Public Admin. 476.

of Justice, and consequently lawyers, have assumed much greater power within the policy-making framework of government.¹²⁶ This homogenizing influence of the *Charter* is another long-term consequence of the international trend toward the judicialization of politics,¹²⁷ which in federal states results in increasing uniformity and less sensitivity toward diversity and the needs of local autonomy.¹²⁸ At the same time, in some *Charter* cases the Court has considered federalism values and used them to interpret the substantive rights.¹²⁹ In any event, the *Charter's* potential for excessive uniformity must be kept in mind. Again, the umpire metaphor may lessen, however slightly, this tendency because it promotes an ideal of balance.

Fifth, the umpire metaphor reduces the judicial role in governmental relationships. The umpire is not the most critical person in a game. A good umpire is never noticed; the spotlight is always on the players, not the officials. Moreover, an umpire, or an arbitrator, only has the power that the parties decide to give to it. Its jurisdiction is limited by the traditions of the game or the parties' agreement. In this sense the umpire is dependent on the parties.

This implication of the umpire metaphor may be the most controversial and the largest roadblock to its resurrection in constitutional discourse. Whether or not to classify it as an advantage is itself contentious. As I noted above, in the past decade the Court has developed a strong 'separation of powers' principle. It has cemented an alternative understanding of the relationship between the judiciary and other branches of government, one that sees the Court not as umpire, but as one of the players, if not the most important one. It is as if recognition of the courts as a political institution requires recognition as an equal political institution to the others, which does not necessarily follow. The *Judges' Salaries Reference* is the epitome of an aristocratic conception of the judiciary, with its creation of a salary commission as a virtual fourth branch of government and its potential insulation of judges from any meaningful form of accountability.¹³⁰ There is nothing moderate or modest about the *Judges' Salaries Reference* or its progeny, although it is explicable as part of a broader trend toward solidifying the privileges of the legal elite.¹³¹ The umpire metaphor, if reintroduced, could soften the tendency toward the aristocratic elements in the Court's jurisprudence.

¹²⁶ *Ibid.*

¹²⁷ T. Vallinder, "The Judicialization of Politics – A World-Wide Phenomenon: Introduction" (1994) 15 *Inter. Pol. Sc. Rev.* 91.

¹²⁸ Bzdera, *supra* note 122.

¹²⁹ Haig, *supra* note 58; *Canadian Egg Marketing Agency*, *supra* note 56.

¹³⁰ See G. Mitchell, "Developments in Constitutional Law: The 1997-98 Term – Activism and Accountability" (1999) 10 *Sup. Ct. Law Rev.* 83, 88-120.

¹³¹ R. Hirschl "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions" (2000) *Law and Social Inquiry* 91, 105.

V. Metaphors of Moderation

I contend that the umpire metaphor is a metaphor of moderation. Because it connotes balance, impartiality and attendance to a rulebook, it leans toward a cautious approach to federalism jurisprudence, away from wrenching changes in doctrine and practice. As an ideal, it gives the judiciary an essential but secondary place in the federalism structure, and presents less of a contrast to democratic politics than other visions of the constitutional structure, with their more aristocratic images. Metaphors of moderation permit alternative understandings, promote pluralism, and give room for diversity.

The umpire metaphor fits with the four fundamental principles that the Court articulates in the *Québec Secession Reference*, its latest and most comprehensive word on the overall constitutional structure. First, the umpire metaphor coheres with federalism by recognizing that a federal system needs an impartial umpire. Second, it coheres with democracy, for it gives democratically elected officials the lead role in public policy. As a branch of government, courts are important but not preeminent. Third, the metaphor is consistent with constitutionalism and the Rule of Law because it requires attention to the rules and the rulebook, vague though sometimes those rules might be. Fourth, the metaphor protects minorities. In a multinational state, a balanced federation protects territorial minorities; in the Canadian context, this gives comfort to Francophone Québécois.

Metaphors of moderation have several larger justifications. One reason for adopting them is based on Bickelian reasoning. Judges have neither purse nor army and depend on the people's consent for their moral authority. Moderation in their approach, and a perception by the people that judges are being moderate, assist in maintaining the acceptance necessary for an effective judicial system.¹³² In the Canadian context, however, metaphors of moderation have another justification.

One compelling lesson of historical experience is this: the nation of Canada is an ongoing project. Our federalism is not cast in stone but continues to be the site of tensions, conflicts, accommodations, shifts, obstacles and occasional smooth sailing. No particular conception of Canadian federalism or individual identity has acquired mythological status or monolithic permanence. Canadian federalism is best represented, in Wayne Norman's words, as an overlapping consensus; there is "a moral commitment to social union" but "only limited moral commitment."¹³³ Canadians agree on some matters, but not on a comprehensive political doctrine. People have not been forced to choose a specific identity, a detailed conception of federalism, or a particular set of principles in order to be accepted as members of the political community. This

¹³² A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New Haven: Yale University Press, 1986) and *The Morality of Consent* (New Haven: Yale University Press, 1975).

¹³³ Norman, *supra* note 63 at 87.

loose approach may be essential for a working federation, especially a multinational one.¹³⁴ Indeed, in a pluralistic nation an overlapping consensus may be the most enduring constitutional form. It gives all branches of government the flexibility to accommodate the competing needs of unity and diversity, the tensions between the centre and the regions, and, in the Canadian context, between anglophones and francophones.

The constitutional text, as one part of the overall package of governing structures and processes, has facilitated the on-going project because it can harbour differing views and practices. Ivor Jennings' bland description from 1937 contains one secret of the country's success: "The *British North America Act*, 1867, is a strictly business-like document. It contains no metaphysics, no political philosophy, and no party politics."¹³⁵ From a judicial perspective, recognizing that the constitution reflects only an overlapping consensus means that courts need not expound general principles in every case. Indeed, doing so would be imprudent. Judges may adjudicate a specific dispute and agree on the outcome without agreeing on the general theory or principle that generates or justifies the specific result.¹³⁶

Most importantly, the consensus does not overlap with respect to the fundamental conceptualization of the Confederation moment. On the one hand are those who see Confederation as a pact between two nations, the English and French Canadians. This view runs deep in Québec, appearing as recently as 1991 in political documents of Québec federalists and bearing heavily on questions about Québec's powers as a province.¹³⁷ On the other hand are those who regard Canada as merely a territorial federation, with equal units (provinces), in the same manner as Australia or the United States. There may have been a pact, but provinces made it, not nations. The rallying cry of many Western

¹³⁴Dion, *supra* note 64.

¹³⁵I. Jennings, "Constitutional Interpretation: The Experience of Canada" (1937) 51 Harv. L.R. 1

¹³⁶A constitutional text compatible with an overlapping consensus could be called, to borrow a term from the American pragmatist, Cass Sunstein, an incompletely theorized agreement: C. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996) at 5. The term 'incompletely-theorized agreement' includes agreements on rules, outcomes or policies, by participants who do not agree on the most general theory that accounts for the rule or result. Sunstein argues that incompletely theorized agreements are "an important source of social stability and an important way for people to demonstrate mutual respect, in law especially but also in liberal democracy as a whole." To continue the sports metaphor, one can play a game by the rules without agreeing on the philosophical justification for each rule or the best interpretation of the game as whole. Sunstein's analysis shares features with Bickel's, such as the appreciation of passive virtues, but has one critical difference. Bickel regarded the court as the deliberative forum of principle, while Sunstein insists that the legislature is the principal forum of principle. See C. Sunstein, *One Case at a Time* (Cambridge, Mass. Harvard University Press, 1999) 267n.5.

¹³⁷LaForest, *supra* note 80 at 46 quotes from an official report of the Liberal Party of Québec in 1991 that refers to Confederation as "a solemn pact between two nations." For a spirited historical defense of this view, see P. Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperiled Confederation* (Toronto: U. of T. Press, 1999).

reformers, 'the equality of the provinces,' is the latest representation of this conception. Believers of this vision of Canada helped defeat the Meech Lake and Charlottetown Accords. Every territorial federation will have tension about the appropriate mix of powers between central and regional governments. However, only multinational federations will engage in wrenching debates about the proper arrangements to promote cultural diversity and protect the autonomy of the minority nation (or nations). In multinational federations, provincial autonomy is another word for cultural survival.

Canadian federalism has involved continuous controversy about whether the country is merely a territorial, or also a multinational, federation. Unanimity ought not to be expected soon, if ever. Canadians will likely always live with competing constitutional visions, with the perennial debates about whether Confederation was and is, to use the old but still apt catch-phrase, a 'pact or an act.' The point to be made here is that these visions are both visions of Canada, and they compete. When the Court grapples with the momentous questions about the nature of Canadian federalism, it ought to be chary of selecting one or another. For instance, in the *Québec Veto Reference*, the Court decided against the two-nations conception, with long-term consequences for Canadian federalism and national unity. It may have been better if Canadians had remained uncertain about the existence of the veto. If selecting between different visions is unavoidable, the Court should exercise caution and humility, recognizing that it does not have answers to every question, and that the answers it does have may be wrong.¹³⁸

Metaphors of moderation do not require agnosticism or indifference from the Court about the future of Canada as a federation. Indeed, the umpire metaphor assumes that the Court's goal is to promote and preserve the nation; it is committed to the game. However, to say that the Court's objective is to promote, or at least, preserve the nation does not say much because the vision of the nation is contested within Canada, and admits of many different constellations of powers. Norman's message is that the federation may only work if the contest remains unresolved, with its attendant diversity, provincial autonomy and decentralization. Maybe "overlapping consensus" is the modern rendition of George-Étienne Cartier's idea of "political nationality."¹³⁹

The umpire metaphor is compatible with this understanding of the overall nature of the Canadian constitution. But so is the dialogue metaphor. It also connotes an on-going dynamic. Like a game, a dialogue continues and is never-ending, and therefore the dialogue metaphor may also be useful to guide

¹³⁸ In his comment on this opinion, A. Petter, "Maître Chez Who? The Québec Veto Reference" (1984) 6 Sup. Ct. Law Rev. 387, argues that the Court misread history, but managed to avoid a result that would have called into question the legitimacy of its newly-patriated constitution.

¹³⁹ "Political nationality" was Cartier's description of how the Canadian union would reconcile unity and diversity. His famous Parliamentary speech is quoted in the *Québec Secession Reference*, *supra* note 1 at para. 43, and discussed at length by LaSelle, *supra* note 66.

federalism decisions. From a federalist perspective, however, the umpire metaphor has several advantages. One major problem of applying the dialogue metaphor to federalism is that the dialogue is at least three-way. When the Court 'talks' in a division of powers case by issuing a decision, the losing party cannot simply reply to the Court. A third party, the other level of government, is involved and it might have a veto. If the loser wishes to achieve its ends, it typically must negotiate with the other level of government. The loser could strike a deal with the winner but by itself, it cannot 'converse' with the court. This three-way relationship is not equivalent to *Charter* dialogue between courts, legislature and the executive within one level of government, because the executive is subject to legislative control. Changing the 'dialogue' to 'conversation' would ameliorate this connotation, since many parties can talk in conversations. While this would capture the on-going cooperative relationships between the federal and provincial governments, however, it would ignore their adversarial relationship, which is exactly the point at which the courts get involved.

The dialogue metaphor has the additional disadvantage of not capturing the Court's authority in adjudicating disputes and interpreting law. It connotes that everything is a matter of discussion and conversation. In the long run, that may be the case. But in the short run, this is more false than true. Governments consider judicial decisions to be binding. Indeed, it is this feature of decisions – their binding nature, the fact that people feel obligated to follow them – that gives judges their authority and calls for modesty and humility on their part. The umpire metaphor implies that the umpire's decision is final; it is the law. To be sure, the parties may play around a decision they don't like, and sometimes courts issue decisions that have only symbolic or expressive force. However, the very reason for an umpire is to have an official that issues binding rulings, at least some of the time.

Another difference between the umpire and dialogue metaphors is that the former recognizes that courts and legislatures do different jobs. Courts are the officials, governments are the players. By itself, the dialogue metaphor does not recognize a division of labour between the courts and legislatures, namely, that a separation of powers doctrine means a separation of labour.

If the umpire metaphor fits Canadian federalism better than the dialogue metaphor, what about the applying it to the *Charter*? With *Charter* litigation, the Court is arbitrating the political tussling between groups who oppose a law and those who support it. In the same manner as federalism, *Charter* adjudication is always about groups, not individuals¹⁴⁰ This point is obvious in some cases, such as *Corbière v. Canada*.¹⁴¹ Many off-reserve band members had tried for years to convince their bands, sometimes successfully, to change the voting requirements. However, their struggle to change the statutory provisions met

¹⁴⁰This point is well-made by B. Baines and C. Greenfield; "Developments in Constitutional Law: The 1995-96 Term" (1997) 8(2d) Sup. Ct. Law Rev. 77, 84-85.

¹⁴¹[1999] 2 S.C.R. 203.

with less success, and they launched an equality action in the courts. *Corbière* is not exceptional. In an identical fashion, every *Charter* challenge to statutes or executive action applies to, and impacts upon, aggregates, not individuals. This reality is submerged because the typical *Charter* claimant is not a group but a defendant in a criminal action. As Beverly Baines and Cheryl Greenwood cogently argue, "understanding *Charter* adjudication means understanding the nature of the collectivity that is benefited or burdened, by the outcome of the decision."¹⁴² The umpire metaphor keeps everyone aware that in *Charter* cases, the courts are not adjudicating abstract rights of individuals but mediating contests between different groups for economic and social power.

Another advantage of the umpire metaphor is that its modesty will lean the Court toward agnosticism about the changing nature of federations in an increasingly global world. Internationally "federalism ranks among the most important issues on the planet today."¹⁴³ Massive changes in technology have produced or accelerated movement toward global economic systems and economic integration, with a resulting diminution of national sovereignty in some areas. Reg Whittaker points out: "Polar opposition of centralization versus decentralization is an increasingly irrelevant axis of federalist controversy in a world in which globalization and regional blocks coexist with the "subsidiarity" principle. Or in which political jurisdictions are largely irrelevant to the pattern of international investment flows."¹⁴⁴ At the same time, however, strong decentralizing trends are emerging around the world, most starkly evident in the kindling of dormant ethnic identification, but also apparent in drives for local control. The two opposing but simultaneous trends are explicable. "As globalization compels interaction among larger and larger entities, people avoid alienation by belonging to smaller groups, which can afford individuals some degree of identity. Moreover, economically the emergent global commercial structures enable local and provincial structures to engage in international business with less dependence on their national governments."¹⁴⁵

These two trends speak to the need for caution in addressing federalism questions that arise from international developments. From the perspective of Canadian constitutionalism, it is too simplistic to conclude that globalization requires more national jurisdiction at the expense of provincial autonomy. A careful assessment of each circumstance is required; for instance, what is the appropriate mix of powers that will respect unity and diversity in implementing the Biodiversity Convention, or fossil fuel emission standards, or human rights documents? The arguments about globalization requiring national jurisdiction replicate arguments made in earlier times about how new problems justified

¹⁴² *Supra* note 139 at 85.

¹⁴³ J. Attanasio, "Foreword: Stages of Federalism?" (1998) 42 St. Louis Univ. L.J. 485.

¹⁴⁴ R. Whittaker, "The Changing Canadian State" in H. Lazar and T. McIntosh (eds.) *Canada: the State of the Federation 1998/99, How Canadians Connect* (Kingston: Institute of Intergovernmental Relations, 1999) at 39-40.

¹⁴⁵ Attanasio, *supra* note 143 at 487.

national control. The lure of this argument is its simplicity. Rather than figure out how to share and divide jurisdiction, which is messy and complex, one can simply let the national government do the job. Every problem can be cast as a national, if not international, one; this makes the need to develop meaningful local or provincial jurisdiction more pressing, more necessary rather than less. For instance, the wholesale delivery of telecommunications jurisdiction to Parliament, which was justified by the technology, in hindsight seems too hasty. Now that satellites compete with cable transmission, avenues of shared and divided jurisdiction become more feasible, but it is too late.

VI. Conclusion

No one can avoid using metaphors. They are central to cognitive processes, and judicial reasoning is no exception. Taking metaphors too far is dangerous, but decisions devoid of metaphor would not only be boring – they would be bereft of humanity. It is not accidental that metaphors were expunged in Orwell's *Newspeak*. When judges use metaphors to justify their decisions, those metaphors are incorporated into the authority that judges exercise and enforce in the name of the Rule of Law. For this reason alone, exploration and questioning of metaphors is desirable.

The umpire metaphor has much to commend it as a description and ideal of the court's role in federalism cases. The social and democratic values of federalism are good ones and ought to be promoted. More democracy is presumptively better than less, and too much centralized power in Ottawa, anywhere on Wellington Street, makes me nervous. Institutional relationships that accommodate unity and diversity remain a political imperative. While the *Charter* gives expression to critical elements of people's identity, federalism does, too, and together the *Charter* and federalism provide recognition to more facets of identity, and to more Canadians, than either one could on its own. The challenge is to construct an approach that supports the *Charter*, federalism and democracy at one and the same time. I do not claim that the umpire metaphor provides the best recipe for that stew, but it does offer a bit of old wisdom for the task.

Federalism is in vogue around the world and people are turning to Canada for instruction. What we can teach them, perhaps, is that one can have both federalism and entrenched rights, both unity and diversity, and entrenched rights need not swallow federalism, or *vice versa*. The way to do this, as Lederman argued in another context 25 years ago, is to promote moderation. Indeed, moderation by judges may be the necessary correlative to the accommodation by politicians and citizens that is the "federal spirit."