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# Looking for the Good Judge: Merit and Ideology

Allan Hutchinson

*Osgoode Hall Law School of York University*, ahutchinson@osgoode.yorku.ca

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# Looking for the Good Judge: Merit and Ideology

Allan C. Hutchinson

Whenever we move into one of the regular seasons of ‘judicial appointments’ to the Supreme Court of Canada, there is the usual chorus of complaint among the general hubbub. As speculation mounts as to who is to be the next appointee, a predictable appeal goes out from many in the legal community, both academic and practising, that considerations of ‘merit’ should be uppermost in the Prime Minister’s mind. In particular, there is an urgent, almost desperate plea to ensure that issues of ‘ideology’ are treated as having no legitimate place in the selection of Supreme Court judges. For many, therefore, merit and ideology are antithetical notions which must be kept separate and apart if the legitimacy of the new judge and the Supreme Court generally is to be protected and maintained. As Peter Russell put it, the prime consideration is to “prevent ideology from trumping merit in the appointment of judges to our highest court.”<sup>a</sup>

The ambition to appoint judges who are truly meritorious is unquestionable. Nobody would want to have judges on such an important tribunal who did not possess all the technical and professional attributes of a truly competent judge. This much is undeniable. The problems arise when people assume that this can be achieved with indifference to the ideological leanings of any particular candidate. It would be folly to select an out-and-out ideologue, especially if they otherwise lacked (or even had) all the qualities of meritorious judges. Karl Marx and Friedrich Hayek would make for less than ideal judges. However, the assumption that merit and ideology are unrelated notions and that is possible to attend to matters of merit without taking into account ideology is mistaken. No matter how much people may wish that it were so, it simply is not. Merit and ideology walk down much the same street. Any denial to the contrary flaunts both history and analysis. Moreover, how the relation between merit and ideology is understood has profound implications for the whole process of not only appointing judges, but also evaluating their judicial performance.

In this short essay, I will demonstrate that, while merit and ideology do not collapse into each other, it is simply not possible to talk of one without the other. Good judges recognise that the resort to values (and contested ones at that) is an integral and inevitable part of the judicial task. In the first part, I explore what might be involved in being a ‘good judge’. I then proceed to examine how Canadian jurists have sought to explain the resort to values in the adjudicative process. In the third part, I respond to the claim that ‘activism’ is something that judges can and should avoid. Finally, I look at the institutional implication for the judicial selection process of understanding the judicial function as a mix of merit and ideology. Throughout the essay, I will insist that any reasonable appreciation of the judicial function must accept that the sin is not accepting the ideological dimension of adjudication, but trying to hide it.

## What Do Good Judges Do?

When the present American Chief Justice John Roberts was appearing before the

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Senate's Judicial Committee during his confirmation hearing, he confided that he did not have an "all-encompassing approach" to his judicial role or to constitutional interpretation particularly. He went on to say that "judges are like [baseball] umpires – umpires don't make the rules; they apply them." He sealed this modest portrayal of judicial virtue by insisting that "judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath."<sup>b</sup> The not-so-implicit message of Roberts's credo was that being a good judge required restraint and forbearance; judges, even and perhaps especially Supreme Court ones, were not in the justice or politics game in any expansive or direct way.

While this humble depiction of judicial responsibility – "it's my job to call balls and strikes and not to pitch or bat" -- will strike a reassuring chord with some, it fails to understand the history and nature of the judicial role in common law countries generally and Canada in particular. Judges are much more than umpires. Indeed, the whole analogy between judging and umpiring is misleading and inaccurate. As far as their common law duties go in both constitutional and non-constitutional matters, history demonstrates that judges are very much part of the action. It is less about *whether* they change the rules than about *how* they do so. In its last few hundred years' lifespan, the law has changed and judges have been some of the main architects and artisans of that change. Staying with the baseball analogy, while some umpires claim to call balls and strikes "as they see 'em", others assert that "they ain't nothin' 'til I call 'em." People might be fated to play a baseball of the judges' choosing, but the judges are also very much part of the game; they play by as well as change the rules as they go along. In legal terms, what counts as not only 'balls' and 'strikes', but also what counts as 'baseball' changes over time. And it is the judges, for better and worse, who are the purveyors and guardians of these changes.

That being said, if judges are not umpires nor are they godly figures. They have no especial, let alone sacred insight into the meaning of legal texts or the nature of social justice – judgeliness is not next to godliness. In the same way that there is no way to simply read off the meaning of laws, especially constitutions, in an impersonal exercise of professional technique without resort to larger and contested issues of social and political values, there is also no way for judges to negotiate that fraught terrain with a quasi-divine certainty or super-natural wisdom. As Francis Bacon observed,

neither heavenly saints nor sporting officials, who are they? What is involved in judging?

For me, the common law is a dynamic and engaged activity in which how judges deal with rules is considered as vital as the resulting content of the rules and actual decisions made; judges are social artisans of the first order whose impact, although often more subtle and understated than their political counterparts, is undeniable. The common law is better

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understood less as a fixed body of rules and regulations than as a living judicial tradition of dispute-resolution. Because law is a social practice and society is in a constant state of agitated movement, law is always an organic and hands-on practice that is never the complete or finished article; it is always situated inside and within, not outside and beyond, the society in which arises. In short, the common law is a *work-in-progress* -- evanescent, dynamic, productive, tantalizing, untidy and bottom-up: it is more tentative than teleological, more inventive than orchestrated, more fabricated than formulaic, and more pragmatic than perfected.

Having this experimental, catch-as-catch-can, and anything-might-go sense about it, the common law recommends that its judicial personnel must also adopt some of those qualities. While it is clearly a great help to possess an excellent set of technical skills, these will not be enough in and of themselves; they are a necessary, but not sufficient condition of good judging. The battery of adjudicative techniques for rule-application does not amount to a self-contained or self-operating technology: they only make sense as part of a larger understanding of law as a rhetorical and dynamic enterprise. Being a practical activity, adjudication does not consist of a series of formulaic applications in an abstract space. Instead, it is more profitably understood as an organic and judgment-based engagement in real time and in real places; it is less an occasion for logical operations than an exercise in operational logic.

Nonetheless, while the learned knack of using legal materials with adroitness and dexterity is not to be underrated, the effect of such a limited depiction of lawyers' special and distinctive expertise is misleading. It can too easily be used to avoid the democratic responsibility of justifying their power and authority by reference to the real-world pressure of getting the job done. The depiction of the judicial craft as an inward and insular undertaking serves to cut off law and adjudication from the sustaining socio-political context and rich historical resources from which they gain their vigor. Legal artistry demands more than technical proficiency. Especially at the level of a nation's supreme judicial tribunal, judges do not simply reproduce mechanically and mindlessly old arguments and trite analogies; they are those who can rework legal materials in an imaginative and stylish way. A bare legal craft can too easily acquire the elite habits of a Masonic order and fail to meet or sabotage its civic obligations: a job well done is not always its own reward. To be worthy of the highest professional prestige, lawyers and judges must nurture a sense of social justice and a feel for political vision. Without these qualities, they will more likely become only hired hands for vested interests. As one commentator succinctly put it, "technique without ideals is a menace; ideals without technique are a mess."<sup>d</sup>

Adjudication is not carpentry, let alone umpiring. While judges would do well to inculcate the equivalent judicial pride in their work, they also must be designers and innovators who place their professional craft in the service of political values and social ideals. It is true that legal tables will wobble and precedential doors will jam without crafted care and professional attention, but there is a significant difference between the doors and tables of a torture chamber and those of a hospital ward; a hospital bed is not a torture rack, although it can become one. Values and commitments can be hidden, but they cannot be done away with

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<sup>d</sup> Karl Llewellyn, The Adventures of Rollo, 2 U. OF CHI. L. SCH. REC. 3 (1952).

altogether. Judges and jurists cannot so easily evade taking responsibility for the artifacts and outcomes of their crafted performances by taking refuge in matters of technical consistency and internal coherence. In the same way that a block of wood only has whatever shape and symmetry that it happened to pick up at the last turn of the carpenter's lathe, the law possesses only whatever shape and symmetry that it happened to acquire during the last occasion for legal crafting. So while the good judge should have technical skills in abundance (i.e., merit), they also need to possess a socio-political vision within which and on behalf of which they can deploy those technical skills (i.e., ideology).<sup>e</sup>

## Dealing with Values

Few judges and even less jurists subscribe to Justice Roberts' umpiring analogy. In the Twenty-First Century, this seems an almost farcically simplistic account of the judicial role. Although the advocates of such a modest characterisation of adjudication are vocal about the failings of a more so-called activist rendition, they are extremely quiet on how such a mode of judging can be operationalized. What is involved in simply applying established legal norms to new fact situations?

At a very general level, three initial observations come to mind in considering this. First, the ascertainment of legal norms is itself fraught with political contamination and content. 'Established' is simply a way of saying that certain controversial moral or political commitments are now accepted by the legal community as settled; this is less an endorsement of the principles' apolitical nature and more an acknowledgement that general acceptance is a form of political validation. Secondly, the range of established norms is extremely broad and often encompasses competing maxims; there is no neutral or non-political way to select between contradictory norms. Thirdly, even if it is possible to isolate a relevant and exclusive legal norm, it is far from obvious how that general principle can be applied to particular facts in an entirely objective or impartial manner.<sup>f</sup> In short, despite the critic's yearning for a simpler and more professional age, there is no purely technical and non-political way to engage in a principled mode of adjudication. This is especially true of the Charter. Not only is what amounts to 'freedom' or 'equality' the stuff of fierce ideological debate (and how one relates to the other), but how such values are to be enforced within s.1's 'such reasonable limits as can be demonstrably justified in a free and democratic society' merely invites judges to wade even deeper into the political waters. Adjudication necessarily involves political choice.

These challenges have become particularly acute as judges and jurists strive to identify a legitimate mode of judicial decision-making in the Charter Age. Of course, the democratic status of judges has always been suspect. The fragility of their legitimacy arises not so much from their exercise of power, but more from the nagging doubts about the warrant under which they wield

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<sup>f</sup> See A. HUTCHINSON, *EVOLUTION AND THE COMMON LAW* (2005).

such authority. Lawyers must claim to speak and act in a voice other than their own; they must justify themselves by reference to an authority beyond themselves -- LAW. However, as it is no longer possible to simply 'follow the rules' (because the questions of which rule, what it means, and what following it entails remain irresolvably contestable), it is now generally conceded that law is as much a constructive activity as a given thing and that adjudication involves an inescapable dimension of political choice; legal interpretation is not a pseudo-scientific or umpiring practice, but an engaged exercise in value-choices. The mainstream jurist must demonstrate that, even if legal doctrine does not compel definite results, it places sufficient constraints on judges to save them (and the citizens they are supposed to serve) from themselves or, at least, to justify the civic trust placed in them. The democratic challenge is to hit upon a way to act decisively as well as legitimately.

In the last few decades, with the advent of the *Charter of Rights and Freedoms*, judges and jurists began to question the continuing reliance upon the old stand-by of 'liberal legalism' -- sharp public/private distinction, neutral interpretation, and objective balancing -- as a method for legitimizing their decisions and reconciling the courts' role with democracy. This approach was failing to placate either liberal or more radical critics who complained that judicial review was not fulfilling its functions as effectively or as democratically as it might. Not only were the courts' efforts at preserving a sharp distinction between legal analysis and political judgment becoming more transparent and unconvincing, but the substantive political values which animated their decisions were being revealed as increasingly out-dated and unresponsive to contemporary sensibilities. Indeed, 'liberal legalism' was unable to command a sustained consensus even among the judges.<sup>g</sup> As part of their role as judicial helpmates, jurists have offered a number of proposals to move forward on the constitutional front. There are two main trends that have been explored in Canada and elsewhere -- 'pragmatic reasoning' and 'democratic dialogue'. Ironically, these very efforts to bolster democratic legitimacy have managed to reveal even more starkly how thoroughly undemocratic is the judges' involvement in constitutional review. Most significantly, these interventions fail to take seriously that it is the 'who' of adjudication as much as the 'what' of adjudicative activity that matters most in a society that seeks to be strongly democratic.

The first response has involved a much greater candour and willingness to treat legal reasoning as being a substantially pragmatic enterprise. By this, it is meant that judges ought to worry less about abstract legitimacy and more about practical usefulness. In doing this, they do not abandon the idea of legal reasoning having some distinctive character and they do not treat it as being entirely unprincipled: they view it as being a more modest engagement which is about social consequences, not conceptual properties. Because there is no single algorithm for decision-making, there are only a potpourri of tried-and-tested techniques that are more akin to riding a bike than solving a mathematical equation. While this pragmatic approach undoubtedly improves upon more traditional understandings of legal reasoning, it still presents it as a lot less contingent and a little more final than other normative vocabularies. Rather than accept law as one more way of coping, legal pragmatists cannot resist the temptation to press practical

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reasoning into service in the analytical workhouse and to make it into more of a method than the experiential make-do that it is. Although championed as a practical and socially-situated endeavour, judicial performance remains centred on textual, doctrinal, and argumentational matters: there is little attention to the actual social context in which disputes arise or to the political consequences of judicial decisions.

The second trend has been a turn to ‘dialogue theory’ as an alternative justification for judicial review. Accepting that some reliance upon contested political commitments is not only inevitable, the primary concern has been less with politicization itself and more with “the degree to which judges are free to read their own preferences into law.”<sup>h</sup> Cautioning that judges are not free to go wherever their personal political preferences direct them, the dialogic approach still claims to insist upon the existence of a workable distinction between legitimate legal analysis and illegitimate political decision-making. It is argued that this crucial differentiation is much fuzzier, that the domain of law is much more expansive, and that the boundary between law and politics is much less breached than traditionalists maintained. However, these dialogists do concede that there is a point at which the judges can be said to be no longer doing law; they will have wandered off into other parts of the constitutional and political domain. In some important sense, law is to exist separately from its judicial spokesperson such that law places some non-trivial constraints on what judges can do and say. While legal principles are more open and sensitive to political context, law is not only reduced to the contingent political preferences of the judiciary.

The general thrust of the dialogue theory is that courts and legislatures will engage in an institutional conversation about the Charter and its requirements on particular and pressing issues of the day: the courts and the legislators have complementary roles that enable legislation to be carefully tailored to meet the government’s political agenda and to respect Charter values as well. Judicial advocates of a dialogic approach insist that ‘judicial review on Charter grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches’. Of course, in establishing a ‘dialogic balance’ and ‘retaining a forum for dialogue’ between the different branches of government, the courts are urged to tread a thin, but vital line between deferential subservience and robust activism.<sup>i</sup> Nevertheless, done with institutional sensitivity and pragmatic responsibility, the courts and legislatures can be dialogic partners in an institutional conversation to advance shared democratic goals. The problem is, of course, that, under the cover of dialogue and accommodation, the judges might be simply indulging in an overtly political performance; it

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<sup>h</sup> KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 106 (2001). See also Peter Hogg, Allison Bushnell Thornton, and Wade Wright, *Charter Dialogue Revisited -- Or ‘Much Ado About Metaphors’*, 45 *OSGOODE HALL L.J.* 1 (2007).

<sup>i</sup> *Bell Express Vu Limited Partnership v R.*, [2002] 2 SCR 559 at 65-66 per Iacobucci J. See also *Vriend v Alberta*, [1998] 1 SCR 493 and *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203. This effort to ground ‘democratic dialogue’ is facilitated by the fact that legislatures possess the final word on Charter matters by virtue of their (almost never-used) s.33 override power and that courts can engage in a more overt balancing of political values under the s.1 ‘reasonable limits’ provision.

might be that they have simply given up the ghost rather than exorcised the wraith of judicial activism.

Accordingly, with its apparent rejection of judicial objectivity, lack of normative content and vague invocations of democracy, these most recent rationalizations actually serve to undermine further the project of justifying constitutional adjudication's democratic legitimacy. Although both dialogic theory and pragmatic reasoning (often combined and mutually-reinforcing) are intended to calm fears that the courts are undisciplined and unlimited in their powers, it manages to reinforce the perception that courts are not only at the centre of the crucial process through which political discourse and values are shaped and sustained, but also that courts get to determine the role and contribution of the other branches of government. The 'degree to which judges are free to read their own preferences into law' seems to be reducible to the rather oxymoronic conclusion that they will be as 'free to read their own preferences into the law' as 'their own preferences' allow. There is a huge gap between the rhetoric of democratic dialogue and the reality of judicial performance. Presenting judicial review as part and parcel of a democratic dialogue merely underlines the extent to which democracy has become a pathetic caricature of itself. An elite and stilted conversation between the judicial and legislative or executive branches of government is an entirely impoverished performance of democracy; it is an empty echo of what should be a more resounding hubbub.

'Activism'. It sounds as if it is something positive -- healthy, vital and purposeful. But, when it used in connection with courts, many hear it only as having disturbing negative resonances -- uppity, illegitimate and uncontrolled. For them, courts that do the least are courts that do the best. Of course, the concern that courts are interfering too much in the political process is a valid one. In a democracy, the role of the judges is said to be a modest one of applying the laws which duly-elected politicians enact. It is most definitely not part of the judicial responsibility to impose their own values and ideas on the country in the name of judicial review. Moreover, because courts can now more easily strike down government action, the need for judicial restraint is thought to be even more fundamental. Judges are expected to tread a sharp line between appropriate legal interpretation and inappropriate political intervention, between countermending legislation in the name of constitutional values and trespassing onto illegitimate ideological terrain.

While these exhortations to 'stick to the law' are seductive, they offer little suggestion of how such a seemingly prosaic practice can be achieved. The fact is that, whether we like it or not, judges cannot avoid making political choices. The line that they are expected to tread is so thin as to be non-existent. Indeed, the drawing of the line is itself contested and political. It is not a matter of whether to make choices, but only a question of which choices to make and how. As I have argued, there is no way to interpret the Charter or any other constitutional provision without resorting to contested political values. Adjudication is choice, plain and simple.

When it is accepted that there is no one right or exclusive way to apply the Constitution,

the charge of being political and activist loses much of its force. The only thing left to debate is whether a particular ruling is better or worse, not correct or incorrect, in its informing political ideals and commitments. And that is exactly what the critics try to avoid: they want to occupy the neutral territory of formal constitutional technique rather than contested turf of substantive political alignment. But such ground does not exist. If you look a little more closely at those occasions on which the critics raise the spectre of activism and those on which they do not, it will be seen that the difference is a blunt ideological one. Those decisions that do not fit their political agenda are condemned as activist and those that do fit are defended as appropriate. The constitutional line is one of their own political making. Although claimed to be made in the name of merit and neutrality, there is a definite ideological cast to these condemnations.

In general, those decisions which promote greater equality (e.g., gay rights, aboriginal land claims, etc.) are dismissed as activist and illegitimate, whereas those which defend greater liberty (e.g., election spending, male property rights, etc.) are showcased as valid exercises of judicial authority. Yet, in terms of their fit with the opaque constitutional text and legal doctrine, there is nothing to choose between them. It is only that some substantive values are preferred over others. Accordingly, the claim of ‘activism’ is simply a veiled criticism that the courts are being too progressive and making decisions that do not reflect desirable conservative values. Any court that stands by and lets constitutional values be ignored or belittled is at fault. But there is no technical or purely legal way to decide what those values are -- law is politics by other means. The Charter is a site for debate, not a definitive contribution to it.

Of course, we need to be vigilant about what the courts are doing. Any court that tramples too often on the policy-making prerogative of Parliament and legislatures is asking for trouble. Judges need to recognise that they are part of democracy’s supporting cast, not its star-performers. But that democratic watch should itself be open and honest. It is what the courts are being active about which is the key. It is no more or less political to maintain the status quo than it is to subvert it; conservatism is as ideological as progressivism. It hardly advances the democratic cause to deploy subterfuge and to pass off political commitments as constitutional mandates. Decisions should be celebrated or condemned for the substantive values that they uphold, not for their vague failure to respect some spurious formal distinction between making and applying law. The fact is that any judge that stands by and lets his or her sense of constitutional values be ignored or belittled is at fault.

If we are to have a genuine debate about what makes a ‘good judge’, let alone a great one, it is essential that we understand and accept that merit and ideology are inseparable companions. For example, in the recent and high-profile case of Chaouli (in which the Supreme Court struck down as unconstitutional certain provisions of the Canada health care system), the judges split along predictable political lines. As they have consistently done in their lengthy judicial careers, Chief Justice McLaughlin and Justice Major emphasized the liberty dimensions of the constitutional compact. In contrast, Justices Binnie and LeBel placed more emphasis on its equality demands. That division of views was not technical or formal, but was clearly and expressly based on disagreements about contested and substantive political commitments.

This critical claim that ‘judging is inescapably political’ should not be taken as

tantamount to suggesting that judges simply legislate their political preferences and camouflage them behind legal doctrine and rhetoric. While the occasional judge might do that, those rogue officials are and should be roundly condemned. The great bulk of judges perform their allotted task with genuine integrity and good faith. But they act no less politically for that. And the middle-of-the-road judge is no less political for that either. Ironically, some of Canada's most celebrated judges are not praised solely for their formal qualities or analytical prowess. Brian Dickson and Bertha Wilson, for example, were justly celebrated for the way that they left their substantive mark on the law and the constitution. It was because of their 'large and liberal' political views that they are remembered, not in spite of them. How they creatively interpreted freedom and equality was a mark of greatness, not a stain on their largely meritorious careers. Their merit as judges was not only indistinguishable from their ideology, but also was in large part reducible to that same ideology.

Of course, judges are rarely ideologues in the sense that they pursue a dogmatic or even consistent line throughout their adjudicative careers. Judges are not only divided among themselves, but within themselves. Their political commitments provide a context or framework within which they approach issues and nudge them in certain directions or justifications. But those deep-seated preferences do not determine in any mechanical manner the cut or content of their decisions. Adjudication is political, but it is not crude or arbitrary for that. Judges play with the law's norms as they work within them. It is not that they are entirely free to do what they want or are fully constrained by the law's

## **Moving Forward**

It should be clear that the upshot of the merit-ideology debate is that, when we select judges, we should pay attention to their values, not try to ignore them. Pretending to do otherwise is not only a mistake, but also a fraud on democracy and the Canadian people. If adjudication is and must be about values and ideals, then we owe it to ourselves to inquire into the values and ideals of those who are or about to be judges. By this, I do not simply mean look for candidates that are more representative of Canada's diversity. This is important, but there is no necessary connection between a person's gender or ethnicity and their particular political views. A diverse judiciary is a necessary component of a strong judiciary, but not a sufficient one.

Because adjudication is inescapably political, it is important that we know more about some of the basic leanings and values of those people whom we continue to entrust some of the most heated and crucial matters in contemporary affairs. This is not to pry or undermine the legitimacy of the legal system. If adjudication is and must be about values and ideals, then we owe it to ourselves to inquire into the values and ideals of those who are judges. This demands a process that allows for and facilitates such inquiries. Mindful of the increasingly potent role of

the Supreme Court in Canadian politics, it is now even more incumbent on those committed to democratic change that they ensure that this opportunity is not lost. Indeed, the Government should be encouraged to have the political courage of its democratic convictions; it should go the whole ten yards in democratizing the courts through the appointment of judges.

One of the better ways to achieve that is by way of judicial appointments through a democratic process. There is an inevitable politics to judicial appointments; there always has been and always will be, even if it masquerades under the dubious label of 'merit'. But the choice is not between a political and a non-political process of judicial appointments. Rather, it is a straightforward choice about whether the politics of the judiciary or the politics of the public at large, as expressed by its elected representatives, should prevail. While many will consider this a weak or even dangerous reform, it is necessitated by the nature and performance of the judicial function in a Twenty-First Century constitutional democracy. Such a politically-informed and politically-charged process will not contribute to a greater politicisation of the judiciary; judges are already and inevitably a thoroughly political group. It will instead bring those politics into public view and render them more available for public scrutiny. After all, the politics of the public has more democratic legitimacy than that of the judges.

The need to ensure judicial independence is not resolved by abandoning all efforts at political accountability. There needs to be a democratic trade-off between independence and accountability. If judicial independence is to mean that judges are left almost unregulated in their activities and behaviour, it is vital that the process by which they are appointed be as democratic as possible. This most certainly does not mean that the legislative branches have no role to play as the present debate seems to suggest. Indeed, it is only with the involvement of these branches of government that the courts can be entrusted to fulfil their adjudicative responsibilities in a meaningful, if strained democratic manner.

While there are more radical measures which might be taken, there are several less extreme steps that could be adopted which would better incorporate the understanding that 'law is politics' and that judicial decision-making requires judges to make contested and controversial political choices. The most important innovation would be to create a more democratic appointments process. This could be achieved by establishing an independent commission. Any such body would need to be as diverse and as representative as possible. Accordingly, it might consist of about 15 members of whom 5 would be appointed from the House of Commons, 5 would be judges, and 5 would be citizens; tenure on the committee would be limited to 3 years and the chair of the commission would be one of the lay members. Confident that no particular constituency (i.e., judicial, political or lay) had a lock on the commission's work or decisions, the commission's task would be to establish appropriate criteria for appointment which took seriously the need for a diverse and talented judiciary.

Candidates could be identified either by application, nomination or search: interviews would be held and candidates would be subject to an intensive vetting. There could be rules to ensure both geographical representation (as presently exist -- 3 each from Quebec and Ontario, 2 from the West and 1 from the East) and diversity in terms of women and visible minorities. Also, threshold rules for eligibility in regard to professional experience and qualification might

be relaxed to ensure that otherwise meritorious candidates are not excluded. Contrary to the received view that 'it is at lower levels of the judiciary that the criteria might need to be re-examined', such innovations are best made at the highest level in order to confirm the sincerity and importance of the commitment to diversity and change. In all its activities, the commission would ensure that diversity was not a secondary consideration, but a primary component of 'merit'.

The recommendations of the commission would be final and direct. The diverse composition and democratic operation of the commission would obviate the need for approval by the Prime Minister or confirmation hearings in Parliament. This is not because such procedures are inconsistent with the move to take the Supreme Court out of the political arena, but because the commission itself will perform such a role more effectively. So structured, it will be less likely to turn the appointments process into a media circus as in the United States. Also, there should be a public register of 'judicial interests' and a tougher set of conflicts rules under a comprehensive Code of Judicial Conduct which could be administered by the appointments commission. Judges should also have a fixed tenure of appointment of no more than 12 years. While the commission would have the power to receive complaints and discipline judges, it would not be able to dismiss judges without formal approval by Parliament.

## **Conclusion**

While this package of reform proposals will not guarantee both the democratic accountability and institutional independence of the judiciary, it will better deal with the realities of judicial authority and power in a constitutional democracy. At a minimum, it will get beyond the simplistic dichotomy of the merit-ideology debate that presently holds the appointment process in its paralysing grip. The fear that exposing judges or their politics to increased democratic scrutiny will undermine their legitimacy is a canard. More, not less information about our rulers is the best route to an improved democratic polity. Better the devil you know than the devil you don't.